IN THE SUPREME COURT OF FLORIDA

WILLIAM FREDERICK HAPP,

Appellant,

v. CASE NO. 74,634

STATE OF FLORIDA,

Appellee.
_____/

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE:

TABLE OF AUTHORITIES

CASES: PAGES:

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

At around 6:00 p.m. on Friday, May 23, 1986, Angela Crowley left her apartment in Fort Lauderdale Lakes to travel to Yankeetown and spend Memorial Day weekend with her friend, Dawn Selders (R 1809, 1828). She was unfamiliar with the route and asked directions from a neighbor (R 1806, 1824). She was to drive to Crystal River and call her friend who would then meet her and show her the way to Yankeetown (R 1836-38). At 12:36 a.m. on May 24, Angela called her friend to let her know she had gotten lost and would be late (R 1840). At approximately 2:40-2:45 a.m., newspaper carriers across from the Cumberland Farms Convenience Store in Crystal River heard a woman scream (R 2254-56). Barbara Messer saw a white male shuffling around a small car. He stooped and picked something up on the passenger side, went around the back of the car where he placed both hands on the trunk, and drove away as the door was closing (R 2257-58).

Angela Crowley's body was found in the cross-Florida barge canal at 3:00-3:30 p.m. the next day (R 1734). Her T-shirt was inside out, there were bruises around her face, bruising and hemorrhaging over 3/4 of her skull, multiple scrapes on her back and right heel, and her pants were tied around her neck (R 1957), 1959, 1963, 1966-68). She had been beaten and raped anally before death (R 1965, 1959). There were ten to twenty extremely hard blows to the head (R 1967). The cause of death was strangulation (R 1969). The medical examiner testified that when a person is strangled, a person usually chokes for two minutes before he loses consciousness, and becomes brain dead after four

or five minutes (R 1969). During the first two minutes, the person is absolutely aware of what is going on (R 1970). Angela was strangled before she was thrown into the water (R 1971). One of her tennis shoes was found near the roadway, indicating she had escaped her captor and tried to run (R 1788). Scuff marks on the other tennis shoe indicated she was caught and dragged back (R 1784). A path to the water showed where she was dragged (R 1784). Her underpants were found near the water near the other shoe (R 1779).

The window on the driver's side of Angela's car was broken out, and glass found at the barge canal and at the Cumberland Farms store was consistent with that from her window (R 1072). The car was recovered from Jones Restaurant on Monday morning (R 1928). An employee at Jones Restaurant first noticed the car on Sunday morning (R 1931). She had not noticed the car on Saturday when she came to work at 3:30 a.m. (R 1931). When the car was there Monday morning and had not been moved, the employee called the police (R 1930).

A shoe print which could have been from a shoe seized from Happ was found in the restaurant parking lot near the driver's side of the car (R 2006, 2118, 2120). Happ's palm print was found on the back window of the car, his left thumb print on the driver's door, and another of his fingerprints was on the passenger door post (R 2170). Happ told Officers Thompson and Burton he had not seen the car before and there was no reason his prints would be on the car (R 2207). A friend of Happ's testified that he last saw Happ Friday night at 11:00 p.m. (R

2086). Happ was walking home down Highway 19 toward the barge canal (R 2087). He saw Happ the next morning around 9:00 a.m. (R 2087). Happ's right hand was swollen, and he said he was mad that his truck was taken away two days earlier and he had to walk home, so he punched a tree (R 2088). Jones Restaurant is on Highway 19 approximately .6 miles from the Cumberland Farms store which is approximately 8.6 miles from the barge canal (R 1857, 1866).

Happ's prior girlfriend, who lived in Pennsylvania, testified that Happ told her he had broken a car window with his fist (R 1984). She broke up with Happ approximately one week before the murder (R 1984). Her senior prom was the night of the murder (R 1987). Happ would call her, and she and her parents would hang up on him (R 1989). Happ was upset about breaking up (R 1989).

Happ told Richard Miller, an inmate housed near him at Citrus County Jail, that he abducted a lady from a parking lot (R 1879). He snuck up on her and choked her, put her in the car she was getting into, and drove to the Florida barge canal (R 1879-80). He had oral and anal intercourse with her, then took an article of clothing and strangled her (R 1880-81). He beat her repeatedly, and repeatedly had sex with her (R 1881). Happ told Miller there was some glass broken, but did not say how it was broken (R 1880). As he was strangling her, the woman was letting off gas and defecating (R 1882). Happ then dropped the body in the canal (R 1882). Dr. Schultze testified that defecating is not uncommon when a person is strangled (R 1971).

Happ left Crystal River on May 30, 1986, to return to Pennsylvania (R 2101, 2276). At the penalty phase, it was revealed that he had committed two armed robberies in California in August, 1984, and the Federal Bureau of Investigation had contacted the Citrus County Sheriff's Department regarding charges of unlawful flight from prosecution (R 2481, 2541). Officer Thompson, a Citrus County Investigator, contacted Happ's aunt, Edna Peckham, three times but Mrs. Peckham did not know where Happ was (R 2347-50). Happ was taken into custody in Pennsylvania and extradited to California (R 1029A-12-15). On October 10, 1986, Officers Thompson and Burton visited him and he told them he knew nothing about the victim's car and there was no reason for his prints to be on the car (R 1005). Happ was indicted on charges of first degree murder, burglary of a conveyance, kidnapping, and sexual battery on December 2, 1986 (R 1-2). On December 3, 1986, Officer Thompson went to California and informed Happ he was under arrest in Florida (R 902). Happ had plead on the California charges of two armed robberies and kidnapping with a firearm on October 10, 1986, but had not been sentenced at the time of the trial on the Florida case (R 2475-76, 2481).

Happ was tried in the Circuit Court for Citrus County before the Honorable Judge Thurman on January 19-25, 1989 (R 712A). The case ended in a mistrial (R 488-89). Judge Thurman filed a citation for direct contempt on the State Attorney, Brad King (R 491). The next day, Judge Thurman dismissed the contempt citation, stating that it was legally debatable as to whether Mr.

King could ask the question which caused the mistrial, the conduct did not rise to the level of direct criminal contempt (R 583). Judge Thurman then recused himself (R 535).

Happ filed a motion to dismiss the indictment on double jeopardy grounds (R 633-638). After hearing argument, Judge Lockett denied the motion, finding that reasonable attorneys and judges could disagree as to the propriety of the question asked, so he could not find the state attorney intentionally engaged in conduct designed to provoke a mistrial or that his conduct rose to the level of gross negligence (R 631, 752-823). Happ waived the right to re-trial within ninety days, and informed the court he intended to apply for a writ of prohibition to the Fifth District Court of Appeal. The Fifth District Court of Appeal denied the writ of prohibition in Happ v. Lockett, 543 So.2d 1281 (Fla. 5th DCA 1989).

Happ's second trial was July 24-31, 1989. He was convicted on all charges (R 1105-1108). At the penalty phase, the state produced evidence of Happ's prior convictions in California (R 2530-2540). The defense presented testimony from an adult education teacher from the jail, who said Happ had at least average intelligence, had the ability to know right from wrong, was not mentally deficient in any way, and helped teaching math to other inmates (R 2542-45). Happ's sister told the jury that he was twenty-four at the time of the murder (R 2547). She described Happ's childhood with a mother who had an alcohol problem, had been married four times, and created a home atmosphere of domestic violence (R 2549). Happ was raised by his

sister who ran with a motorcycle gang (R 2551). He used illegal drugs such as marijuana and PCP, and drank (R 2551). Edna Peckham, Happ's aunt, testified that when he stayed with her, Happ tried to find work and would help with her ailing husband (R 2560-2562).

The jury recommended the death penalty by a vote of 9-3 (R 1380). Before the jury was discharged, Judge Lockett sentenced Happ to death on Count I, and to three consecutive life sentences on the other three counts (R 1387-1393). The life sentences were a departure, for which he stated reasons which were reduced to writing (R 1387-88, 1162-64). The judge filed written findings supporting the death penalty (R 1165-66). The judge found four aggravating circumstances: 1) prior conviction of violent felonies; 2) committed during the commission of sexual battery, kidnapping and burglary; 3) heinous, atrocious, or cruel; 4) cold, calculated, and premeditated. The mitigating circumstances were age, family history, and educational aid to other inmates.

SUMMARY OF ARGUMENT

Point I: Judge Lockett did not err in finding that retrial after a mistrial was not double jeopardy. The first trial judge, Judge Thurman, had found that it was legally debatable whether the prosecutor could ask the question which caused the mistrial. When Judge Lockett, the successor judge, denied the motion to dismiss, Happ filed a writ of prohibition in the Fifth District Court of Appeal. The Fifth District upheld Lockett and found the question was not intentionally designed to provoke a mistrial. Unless the prosecutor intended to provoke a mistrial, double jeopardy does not bar re-trial.

Point II. Happ's statement was admissible because he never invoked his Fifth Amendment right to counsel and his Sixth Amendment right to counsel had not attached to the murder case where no charges had been filed.

Point III: The trial court did not err in advising the jury to rely on their recollection of testimony. It is within the trial court's discretion whether to read back testimony.

Point IV: The trial court did not err in disallowing a public defender's testimony regarding whether a witness had lied about a collateral matter where this testimony was irrelevant and immaterial.

Point V: The state exercised a peremptory challenge on a black juror who was a Catholic psychology teacher. The reasons given by the state for exercising the challenge, that the juror was more liberal than other people and that Catholics are inclined to not impose the death penalty, were racially neutral.

Point VI: It was proper for the trial court to inform the jurors why a witness was unavailable when his deposition would be read to them in lieu of live testimony. There was no specific objection to this procedure.

Point VII: Evidence of plea negotiations is inadmissible. Happ should not be permitted to thwart the rules of evidence by characterizing evidence as mitigating evidence.

Point VIII: The trial court was correct in instructing the jury that counsel's arguments are not evidence when defense counsel commented on facts not in evidence.

Point IX: The trial court was correct in not allowing counsel to refer to witnesses as "snitches" or "squealers." The issue is not preserved for appellate review.

Point X: The trial court's findings that the murder was cold, calculated and heinous, atrocious or cruel were supported by substantial, competent evidence. Happ abducted the victim and drove approximately eight miles. The evidence shows the victim

tried to escape and was dragged back. She was beaten severely in the head, sodomized, and strangled. The victim suffered extreme mental anguish and physical abuse.

Point XI: The death sentence is proportional when compared to other factually similar death cases in which the victim was abducted, sexually abused and strangled. The trial court properly weighed four strong aggravating circumstances against two weak mitigating circumstances.

Point XII: There was no error, cumulative or otherwise, which deprived the appellant of a fair trial. The state presented sufficient evidence and there was no reasonable hypothesis of innocence. The photographs of the victim were relevant and not inflammatory. The prosecutor did not comment on Happ's right to remain silent when he said Ms. Peckham did not explain something. Any issue regarding the prosecutor's comments in closing was not preserved for appellate review, nor were the comments improper.

Point XIII: The Florida capital sentencing statute is constitutional on its face and as applied.

ARGUMENT

POINT I

HAPP'S RETRIAL AFTER A MISTRIAL WAS NOT BARRED BY DOUBLE JEOPARDY.

Happ contends that his second trial placed him in double jeopardy because the prosecutor intentionally caused a mistrial. He also contends that Judge Lockett erred in denying Happ's motion to dismiss the case and the Fifth District Court of Appeal erred in denying his writ of prohibition in Happ v. Lockett, 543 So.2d 1281 (Fla. 5th DCA 1989). He alleges that the Fifth District Court erred in holding that Judge Lockett could revisit Judge Thurman's determination that the state attorney intentionally provoked a mistrial, since Judge Thurman's ruling was a final determination. Happ then points to circumstances which support his theory that the prosecutor gained an advantage through the mistrial: he was not ready for closing argument, a state witness had been devastated on cross examination, he was surprised by the defense presenting Edna Peckham's telephone bill, and the trial was going badly for the state.

Judge Thurman declared a mistrial during the cross-examination of Edna Peckham. Ms. Peckham, Happ's grand-aunt, testified that "Bill didn't -- couldn't do anything like that" when asked whether she was aware Happ had been extradited from California for murder. The state attorney, Mr. King, asked whether she knew Happ had committed armed robbery (R 487-89). Defense counsel objected that Mr. King had brought out the fact that Happ had been convicted of a crime and asked for a

mistrial. Mr. King argued that the witness injected the issue into the cross-examination. Without further questioning or argument, the court stated that "it's clear I think you want a mistrial and you did it deliberate" and declared a mistrial (R 489).

Judge Thurman filed a citation for direct contempt on Mr. King and set the cause for hearing the next day (R 491). Mr. King's attorney filed a motion to disqualify Judge Thurman from conducting the contempt proceedings (R 494-95). At the hearing, Judge Thurman found the motion to disqualify insufficient (R 680). He defined the issue at the contempt proceeding to be whether Mr. King violated the court's order in limine prohibiting questions or other statements concerning the prior criminal record of the defendant in the presence of the jury without the approval of the court (R 681). [1]

Judge Thurman observed that in the heat of argument many things are possible and he would certainly entertain that even as a comparison the Court's own statements may have in effect been in the heat of passion (R 682). After a discussion on whether the judge should recuse himself, the role of intent in a contempt

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[1] The order in limine provided in relevant part:

1. Unless the Defense mentions, refers to or attempts to convey to the jury the following described statements or facts, the State and all witnesses in the case shall not mention, refer to, interrogate concerning or attempt to convey to the jury, in any manner whatsoever, either by testimony, inference, directly or indirectly, any of the following statements or facts without first obtaining permission of the Court, outside of the presence and hearing of the jury:

(b) The Defendant's prior criminal conviction record except for impeachment purposes; (emphasis added). (R 192).

proceeding, and Evidence Rule §90.608, Florida Statutes on impeachment, the court found that counsel was of a differing understanding of the motion in limine and that the issue would be legally debatable, so that Mr. King's vigorous advocacy would not reach to the level of direct criminal contempt (R 683-697; 700-01). The trial court entered an order finding that the orders in limine were legally debatable as to whether Mr. King could have asked the question propounded, and since the matter was legally debatable Mr. King's conduct could not rise to the level of criminal contempt (R 583). The trial court dismissed the citation (R 583).

Happ then filed a motion to dismiss the cause on double jeopardy grounds (R 633-39) and memorandum of law in support of the motion (R 586-91). In the meantime, Judge Thurman recused himself, and Judge Lockett was assigned the case (R 1307). Judge Lockett held a hearing on the motion to dismiss (R 752-823). Mr. King testified that he did not object to the introduction of Ms. Peckham's phone bill because it was not important and did not necessarily prove what the defense believed it would (R 799). The reason he asked Ms. Peckham whether she knew of Happ's armed robbery charges was because he was familiar with the Greenfield [2] case and he felt she had opened the door to his question (R 800). He thought her statement that Happ could not do anything like a murder was a statement as to his character (R 801). He then asked her the question to impeach her knowledge of his reputation (R 801). He had a good faith basis for the question because he

[2] Greenfield v. State, 336 So.2d 1205 (Fla. 4th DCA 1976).

had copies of the judgments and sentences from the California armed robberies (R 802). He did not intend to provoke a mistrial (R 802). He was prepared for closing argument and only asked that they give arguments the next day because if they started at 2:00 p.m., it might mean sequestering the jury overnight (R 803-04). At the time of the mistrial, the state had rebuttal witnesses waiting to testify (R 804).

Judge Lockett denied the motion to dismiss and filed written findings (R 819-20, 631). Happ sought a writ of prohibition in the Fifth District Court of Appeal, which was denied. Happ v. Lockett, 543 So.2d 1281 (Fla. 5th DCA 1989). Happ v. Lockett is now "law of the case" and this issue is no longer open for discussion or consideration by this court. Greene v. Massey, 384 So.2d 24, 28 (Fla. 1980). Under the "law of the case" doctrine whatever is once established between the same parties in the same case as the controlling legal rule on a particular issue continues to control throughout any subsequent proceedings therein. See Greene v. Massey, supra; Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965). Cf. Preston v. State, 444 So.2d 939 (Fla. 1984).

In Oregon v. Kennedy, 456 U.S. 667 (1982), the Court observed that when a defendant requests a mistrial, the Double Jeopardy Clause is not a bar to retrial, with one narrow exception. 456 U.S. at 673. That exception is where the conduct giving rise to the defendant's successful motion for a mistrial "was intended to provoke the defendant into moving for a mistrial". 456 U.S. at 679. The court observed that even though

a mistrial may be justified, retrial is not barred absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. 456 U.S. at 675-76. Florida has followed Kennedy. Duncan v. State, 525 So.2d 938 (Fla. 3rd DCA 1988). In Duncan, the court observed a defendant's motion for mistrial will not ordinarily bar a retrial even where the motion is necessitated by prosecutorial error, unless the mistrial is based on bad faith prosecutorial or trial court misconduct intentionally designed to provoke a mistrial. 525 So.2d at 940-41. In Duncan, the court found that the prosecutor intentionally caused a mistrial and gained a distinct advantage therefrom because he was able to convince the second trial judge to introduce a key piece of evidence. Furthermore, the trial judge did not make a factual finding that the prosecutor did not intend a mistrial. 525 So.2d at 942. In the present case, the state gained no advantage from the mistrial. Although Happ argues that the state had a motive to induce a mistrial in the first trial because Richard Miller was devastated during cross-examination, the same exact testimony was presented at the second trial. Mr. King testified at the hearing with Judge Lockett that he was prepared for closing argument, and was not prejudiced by the admission of the phone bill.

The Fifth District Court of Appeal found that even though the prosecutor's question was not reasonable and the mistrial may have been warranted, the question was not intentionally designed to provoke a mistrial. Happ v. Lockett, 543 So.2d 1281, 1283 (Fla. 5th DCA 1989) (emphasis added). In fact, Judge Thurman

recognized at the contempt proceedings and in his order dismissing the contempt citation that there was a legally debatable issue whether the prosecutor could impeach the witness after she opened the door. The prosecutor testified at the hearing with Judge Lockett that he thought he was allowed the ask the question under Greenfield v. State, 336 So.2d 1205 (Fla. 4th DCA 1976). Judge Lockett found that reasonable judges could disagree as to the propriety of the question and the state attorney did not intentionally provoke a mistrial (R 631). The Fifth District Court of Appeals found that Judge Lockett's findings were supported by the record. Happ v. Lockett, 543 So.2d 1281, 1283 (Fla. 5th DCA 1989).

In Fuente v. State, 549 So.2d 652, 658 (Fla. 1989), the trial court granted a mistrial after the prosecutor asked a witness what led him to become involved in criminal activity, to which he responded "Hector Fuente". This court held that there was no finding of prosecutorial intent and they affirmed the denial of Fuente's motion to dismiss on double jeopardy grounds. In Keen v. State, 504 So.2d 396, 402 n.5 (Fla. 1987), this court found no double jeopardy problem with a retrial after the prosecutor tried to elicit testimony about the defendant killing his prior wife, contrary to the trial court ruling. This court held that the defendant was entitled to a new trial, but the prosecutor's conduct resulted from the heat of trial and was not intentional. In State v. Butler, 528 So.2d 1344 (Fla. 2d DCA 1988), the trial court had ruled inadmissible evidence that the defendant was driving a stolen car when arrested. When the

prosecutor questioned a detective about the defendant's version of his arrest, the detective said the defendant told him he borrowed a stolen car. The trial court declared a mistrial and granted the motion to dismiss the charges on double jeopardy grounds. The appellate court reversed, citing Kennedy. See also, Rutherford v. State, 545 So.2d 853 (Fla. 1989); Johnson v. State, 545 So.2d 411 (Fla. 3rd DCA 1989); State v. Zamora, 538 So.2d 95 (Fla. 3d DCA 1989).

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING HAPP'S MOTION TO SUPPRESS STATEMENTS AND THE FRUITS THEREOF.

Happ contends that the motion to suppress the October 10, 1986, statements made to Investigator Thompson and Agent Burton should have been suppressed since he had invoked his right to counsel and was represented by a lawyer in an unrelated case. After a hearing on December 16, 1988 Judge Thurman denied the motion to suppress (R 984-1015). He found that Happ knowingly, intelligently and voluntarily waived his Miranda [3] rights prior to questioning by Investigators Burton and Thompson, as evidenced by Thompson's testimony and the signed waived of rights form (R 269).

Happ moved the court to rehear the motion to suppress based on Arizona v. Roberson, 108 S.Ct. 2093 (1988), and Michigan v. Jackson, 475 U.S. 625 (1986) (R 393, 1029A-3). After a hearing, Judge Thurman denied the motion (1029A-65, 456-57). In the judge's written order, he found that the statement was freely and

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[3] Miranda v. Arizona, 384 U.S. 436 (1966).

voluntarily given, that Happ waived his Fifth Amendment rights, and that prior to the waiver Happ had not invoked his Fifth Amendment rights (R 456-57). The trial judge found that although Happ was represented by counsel in his California cases which were unrelated to his uncharged Florida cases, the cases cited by the defense did not preclude law enforcement from questioning Happ on the Florida cases after Happ made an informed waiver of his Fifth Amendment rights. He also found that, in light of this ruling, he need not address whether the evidence possibly derived from the statements was admissible (R 457). Judge Lockett adopted Judge Thurman's ruling insofar as the second trial (SR 37-38).

A trial court's denial of a motion to suppress evidence and statements comes to this court clothed with a presumption of correctness. Wasko v. State, 505 So.2d 1314 (Fla. 1987); Medina v. State, 466 So.2d 1046 (Fla. 1985); DeConingh v. State, 433 So.2d 501 (Fla. 1983).

Happ testified at the suppression hearing that he was arrested by the FBI in Pennsylvania (R 1029A-12). He was provided counsel for the purpose of extradition to California (R 1029A-12). The record shows that he had in fact pled to the California charges (Supp. R.). Investigator Thompson and Officer Burton from Florida went to see Happ in California on October 10, 1986 (R 1029A-12). Happ had been in court in California that morning and was represented by an appointed attorney (R 1029A-13). He pled on the California charges that day (R 2475-76, 2481). The lawyers appointed in Pennsylvania and California

had nothing to do with the Florida case (R 1029A-15). At the time Burton and Thompson went to California, Happ had not been charged with the Florida case nor had he asked for an attorney on that case (R 1029A-15).

The state argued that Happ never invoked his Fifth Amendment right and Roberson did not apply (R 1029A-16). The defense then argued that under Jackson, a written waiver was insufficient to justify police-initiated interrogation after request for counsel under the Fifth Amendment or after the request for counsel in a Sixth Amendment analysis (R 1029A-17). The court said that he understood the distinction between the Fifth and Sixth Amendments (R 1029A-19). The state reiterated that Happ never invoked his Fifth Amendment right to counsel (R 1029A-19). Defense counsel asked the court if Happ could take the stand again (R 1029A-19). Happ took the stand again and testified that when he was in Pennsylvania he said he wanted a lawyer and did not want to make any more statements (R 1029A-20). When he was in California, he believed he was read his Miranda rights when he was booked (R 1029A-20). He told the California booking people he wanted his lawyer and did not want to say anything (R 1029A-21). The state attorney argued to the court that Happ did not testify that he invoked his Fifth Amendment rights until after the defense was aware what the standard was and the court indicated he understood the difference between Fifth and Sixth Amendment rights (R 1029A-22). The state then called Karen Combs, a paralegal with the State Attorney's office who testified that she was seated three to four feet behind Mr.

Happ (R 1029A-26). When asked whether she heard any conversation between Happ and his attorney, the court sustained the objection and continued the hearing until Monday (R 1029A-26). The state attorney then questioned Happ about who read him his Miranda rights in Pennsylvania (R 1029A-28). He said there were two agents there, and one was a black male (R 1029A-29). Happ had no idea who read him his rights in California when he was booked on charges of armed robbery and kidnapping (R 1029A-30). Happ also stated that he wasn't sure if he invoked his rights in California, just that after he talked to the FBI agents in Pennsylvania he never again waived his rights (R 1029A-32). He did not remember telling the booking officer in California that he wanted a lawyer and wanted to remain silent (R 1029A-32). Happ admitted that he waived his rights when Burton and Thompson were there (R 1029A-34). When Burton and Thompson returned with the indictment (in December), he then told them he wanted a lawyer and would not answer questions (R 1029A-35).

During the trial, the state proffered the testimony of Agent Pitman, special FBI agent from Pennsylvania, who arrested Happ on August 14, 1986 (R 712A-192). He was assisting Agent Johnson, a black agent. After they arrested Happ, he was transported to the Pittsburgh office and was read his rights while in the car (R 712A-194). Happ said he understood his rights and was willing to talk to the agents (R 712A-195). When they arrived at the Pittsburgh office, they began an interview and read Happ a rights form line-by-line (R 712A-195). Happ then signed a waiver on the original form (R 712A-196). Agent Pittman

was with Agent Johnson at all times the latter was with Happ. Happ never indicated that he wanted a lawyer and was always willing to speak to him (R 712A-198).

In Roberson, the defendant was arrested on a burglary charge and after being advised of his Miranda rights stated that he "wanted a lawyer before answering any questions" which was noted in the investigating officer's report. Three days later, while still in custody, the defendant was interrogated by a different officer, who was unaware of the previous request for counsel. The officer read the defendant his rights and interrogated the defendant on a different burglary for which he obtained an incriminating statement. The Court determined that under the facts of the case, the defendant's Fifth Amendment right to counsel had been violated, extending the "bright line" prophylactic rule of Edwards v. Arizona, 451 U.S. 477 (1981), i.e., that once a defendant asserts his Fifth Amendment right to counsel after Miranda warnings, no reinterrogation may occur unless the defendant himself initiates it.

The Court then went on to note that its decision was not based upon the Sixth Amendment right to counsel. Analyzing its decision in Maine v. Moulton, 474 U.S. 159 (1985), the Court stated:

> . . . Following Massiah v. United States, 377 U.S. 201, 207, 84 S.Ct. 1199, 1203, 1204, 12 L.Ed.2d 246 (1964), we recognized, though, that the continuing investigation of uncharged offenses did not violate the defendant's Sixth Amendment right to the assistance of counsel. Our recognition of that fact, however, surely lends no support

> to petitioner's argument that in the Fifth Amendment context, "statements about different offenses, developed at different times, by different investigators, in the course of two wholly independent investigations, should not be treated the same." Brief for Petitioner 32. This argument overlooks the difference between the Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination. The former arises from the fact that the suspect has been formally charged with a particular crime and thus is facing a State apparatus that has been geared up to prosecute him. The latter is protected by the prophylaxis of having an attorney present to counteract the inherent pressures of custodial interrogation, which arise from the fact of such interrogation and exist regardless of the number of crimes under investigation or whether those crimes have resulted in formal charges.

Roberson, 108 S.Ct. at 2100.

Roberson's import is to protect defendants who have already indicated the need for legal assistance in the face of custodial interrogation for one criminal offense from custodial interrogation upon any other offense since the defendant has already "indicated his inability to cope with the pressures of custodial interrogation" without counsel. Roberson, 108 S.Ct. 2100. As noted by Justice Kennedy in dissent, there is a distinction between the right to counsel under the Fifth and Sixth Amendments. Roberson, 108 S.Ct. at 2104. For instance, in Maine v. Moulton, 474 U.S. 159 (1985), the Court held that the Sixth Amendment right to counsel barred admission of statements elicited from a criminal defendant by a government informant when the statements related to the charge on which the defendant had

been indicted. However, Justice Kennedy observed that the rule would have been otherwise had the statements related to a different charge. In Moulton, the Court held that to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Id. at 180.

As noted in Roberson, "continuing investigation of uncharged offenses" does not violate the Sixth Amendment even where the right to counsel under that provision had already attached for another charge. Id. 108 S.Ct. at 2100.

In Jackson, the Court held that once a defendant had been formally charged with a crime and requested appointment of counsel at arraignment, the Sixth Amendment was violated by interrogation before counsel was made available, unless the accused initiated communications. Happ urges this court to read Jackson and Roberson together, disregarding the distinction between the Fifth and Sixth Amendments.

In the present case, Happ never invoked his Fifth Amendment right to counsel. Although he testified that he invoked that right in Pennsylvania, the Pennsylvania FBI agent said he did not and produced a signed waiver form. Happ's testimony about invoking his rights in California was equivocal, and the court was justified in rejecting that testimony since Happ had previously misrepresented his Pennsylvania invocation. Happ waived his Miranda rights in writing before Thompson and Burton

questioned him. On October 10, Happ's Sixth Amendment right to counsel had not attached on the Florida charges, since he was not charged with those offenses until December 2. Moulton, Jackson, supra; Illinois v. Perkins, 4 F.L.W. Fed. S508 (June 4, 1990); Kight v. State, 512 So.2d 922 (Fla. 1987). Furthermore, Happ had pled guilty on the California charges the morning of the interrogation, so the representation by the California public defender may have ended (R 2476; Supp. Record); See Bouie v. State, 15 FLW S188 (Fla. April 6, 1990); Cal. Penal Code §1237.5.

Although Happ argues Trody v. State, 15 FLW D618 (Fla. 3rd DCA, March 6, 1990), supports his position, it is equivocal. When the officers talked to Mr. Trody, he had invoked his right to counsel three times on burglary charges. He subsequently informed detectives about nineteen additional burglaries. There was no discussion in the case about whether these burglaries were related or whether Trody had invoked his Fifth or Sixth right to counsel. Conversely, in Parham v. State, 522 So.2d 991 (Fla. 3rd DCA 1988), the Third District Court of Appeal held that even though a public defender had been appointed to represent the defendant, questioning on an unrelated robbery was not improper since he had not yet been charged with the robbery. Parham has recently been cited as authority in Rivera v. State, 547 So.2d 140 (Fla. 4th DCA 1989). In Rivera, the defendant was arrested on a failure to appear for a misdemeanor charge. Detectives asked to speak to him regarding the murder of Staci Jazvac and the defendant waived his Miranda rights. The defendant argued that the statements should be suppressed because the detectives

did not contact the attorney he had on his misdemeanor charges. The court observed that the defendant was in custody on unrelated charges, had not been charged with the murder at the time of questioning, and waived his Miranda rights. Id. at 146. Rivera is similar to the present case.

The Supreme Court of Washington recently addressed this situation in State v. Stewart, 780 P.2d 844 (Wash. 1989). The Washington court held that a defendant's invocation of his Sixth Amendment right to counsel on a robbery charge did not bar questioning him later, while he remained in continuous custody, on unrelated burglaries. Arraignment triggers the accused's Sixth Amendment right to counsel and Michigan v. Jackson, 475 U.S. 625 (1986) held that this forbids the police to initiate custodial interrogation relating to that charge after that point. However, the same principle does not apply to questioning on unrelated offenses. In Connecticut v. Barrett, 479 U.S. 523 (1987), the court held that a suspect may invoke one aspect of his right to counsel without necessarily broadly invoking the entire scope of the guarantee. The Stewart court found that Roberson does not mandate a different result. The gist of Roberson is that a request for counsel during custodial interrogation indicates the suspect feels incapable of dealing with the police without legal help. On the other hand, a request for counsel at arraignment arises in a wholly different context devoid of the coercive aspect inherent in custodial interrogation.

Even if the admission of the statement was error it was harmless error. The only statement which was admitted was that Happ told the detectives that there was no reason his fingerprints would be on the car and he'd never seen it before (R 2207). Since the victim lived in Fort Lauderdale and Happ in Crystal River, there was no reason for his fingerprints to be on the car. This is a common sense conclusion. There was no explanation other than Ms. Messer's as to how Happ's palm print could be on the trunk of the car. She had seen the man in the parking lot place his hands on the trunk before he drove away in the victim's car (R 2257-58). The only explanation for his prints being on the passenger side of the car was that he had placed the victim in the car and closed the door then gone to the driver side as Ms. Messer observed. There was no evidence that Happ had any reason to have contact with the car before or after the murder. Happ's statement that he had never seen the car was not an important part of the state's case where there was no logical way he could have been in contact with the car unless he had abducted the victim and committed the murder. The state's case included shoe prints, fingerprints located where Ms. Messer described they would be, testimony by Happ's girlfriend that he had previously punched out a car window with his fist, testimony by Vince Ambrosino as to Happ's proximity to the abduction scene and hurt hand the next day, and testimony that his aunt had taken his car away and girlfriend had broken up with him which supplied the motivation. Additionally, Richard Miller corroborated the details of the crime. Error, if any, was harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADVISING THE JURY THEY SHOULD RELY ON THEIR RECOLLECTION OF TESTIMONY WHEN THE JURY SENT A QUESTION DURING DELIBERATIONS.

Happ complains of two instances in which the trial court advised the jury they should rely on their recollection of the testimony when they sent jury questions during deliberations.

Counsel objected to the court's ruling on the first jury question, regarding whether Miller said he read about Happ in the newspaper or whether the defense attorney said Miller could have read it in the newspaper. Answering this question would involve the court reporter reviewing the testimony of Miller and the closing argument of defense counsel. Although Miller may have said on cross examination that he read about Happ in the newspaper, on re-direct he said he had only read about Happ's extradition (R 1891, 1926). If the judge had explained the various sections, it could be considered a comment on the evidence, since the jury was asking whether Miller had read about Happ and this murder (R 1110). From the testimony, it was not clear whether any newspaper article dealt with details of the murder or simply with the extradition. The second jury question was not objected to. This issue is not fundamental and is not preserved for appeal. Castor v. State, 365 So.2d 701 (Fla. 1978).

Florida Rule of Criminal Procedure 3.410 provides that the trial court may order testimony read back. Appellant recognizes that it is within the trial court's discretion to have the court

reporter read back testimony. De Castro v. State, 360 So.2d 474 (Fla. 1978). The trial court did not abuse its discretion in advising the jury to rely on its recollection, rather than have the court reporter search various sections of testimony and having the court risk making a comment on the evidence. Garcia v. State, 492 So.2d 360 (Fla. 1986); State v. Ratliff, 329 So.2d 285 (Fla. 1976); Jenkins v. State, 317 So.2d 114 (Fla. 3d DCA 1975); Simmons v. State, 334 So.2d 265 (Fla. 3d DCA 1976). Error, if any, was harmless beyond a reasonable doubt where Miller's testimony merely corroborated details of the offense and there was no showing he could have obtained those details from reading the newspaper. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISALLOWING THE TESTIMONY OF A PUBLIC DEFENDER THAT RICHARD MILLER MAY HAVE LIED ON THE STAND ABOUT ASKING FOR AN ATTORNEY BEFORE HE MADE A STATEMENT IN A CASE PENDING AGAINST HIMSELF.

During the trial, Hugh Lee, a public defender, proffered that he received a call from the jail on July 24 (the day the Happ trial began) that Miller wanted to speak to a public defender (R 2195). Miller had pled on a charge a couple years before (R 2195). Miller was worried about whether or not having to testify would bother any appeal he might have pending (R 748). He felt his previous plea was coerced because the prosecutor had promised him he would be jailed in Oklahoma, but he went to Kansas instead (R 2195). Miller indicated that Brad King told

him to say he had not asked for an attorney (R 2196). Brad King cross-examined Hugh Lee, who indicated that Miller was concerned that his testimony in the Happ trial could be used against him in his own cases (R 2197). Miller was trying to get a new trial in his own case and thought the statements in the Happ trial might be used against him in his own trial (R 2197). The court found that whatever was said to Mr. Lee regarding whether perhaps Miller had lied previously about whether he requested an attorney before he spoke to the State Attorney and whether the State Attorney told him to lie about that, was not sufficiently relevant or material to be of any probative value for the jury (R 2198). [4]

The trial court was correct that whether Miller asked for an attorney before speaking to law enforcement was not relevant or material to the Happ issues. Relevancy must be established as a condition precedent to admissibility. §90.401; 90.402, Fla. Stat. Whether Miller asked for an attorney before speaking to the state attorney or defense attorney about Happ's case is irrelevant to any issue. Furthermore, impeachment on a collateral matter is improper. Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981), and any statement by the public defender about what Miller said was hearsay. Miller did not take the stand in the second trial and could not be questioned by the state as to the veracity of what he allegedly told Mr. Lee. Miller talked to the public defender on July 24 (R 2195). He

[4] In Miller's trial testimony, he had stated he did not ask for an attorney before he spoke to law enforcement or the State Attorney (R 1916).

appeared in court on July 25, saying he would not testify because he was physically incapacitated (R 1717). He never mentioned any of the concerns he had allegedly spoken to the public defender about. Once the public defender told him there was little chance he had an appeal pending, Miller seems to have abandoned his concerns (R 2198).

The trial court has broad discretion in the admissibility of evidence. Welty v. State, 402 So.2d 1129 (Fla. 1981); Demps v. State, 395 So.2d 501 (Fla. 1981). Unless an abuse of discretion can be shown, its ruling will not be disturbed. Hardwick v. State, 521 So.2d 1071 (Fla. 1988). No abuse has been shown.

POINT V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO USE A PEREMPTORY CHALLENGE TO EXCUSE A BLACK JUROR.

The state attorney exercised a peremptory challenge against Mr. Jones, a black juror, and defense counsel objected (R 1577). The state attorney stated that Mr. Jones was a psychology teacher at the community college, which he felt made him more liberal than people in other professions (R 1578). Mr. Jones was also Catholic, and the state attorney felt that the Catholic inclination is not to believe in the death penalty (R 1578). This belief is confirmed by appellant (Initial Brief at 63). Recently, the Catholic bishops have publicly reaffirmed the church's opposition to the death penalty (See Appendix A).

In State v. Neil, 457 So.2d 481 (Fla. 1984), this court delineated the procedure a trial court should follow when faced

with a challenge to the use of a peremptory strike on the basis of race alone. The objecting party must show that the challenge was used against a member of a distinct racial group and there was a strong likelihood he was challenged solely because of race. Neil was affirmed in Slappy v. State, 522 So.2d 18 (Fla. 1988), which explained that any doubt as to whether the complaining party met its initial burden should be resolved in that party's favor. Once a trial judge is satisfied that the complaining party's objection was proper and not frivolous, the burden of proof shifts and the other party is obligated to rebut the inference created when the defense met its initial burden of persuasion. This rebuttal must consist of a "clear and reasonably specific" racially neutral explanation of legitimate reasons for the state's use of its peremptory challenges. Id. at 22. Slappy then set out five factors which tended to show the state's reasons were not supported by the record or were an impermissible pretext:

1) alleged group bias not shown to be shared by juror in question;

2) failure to examine the juror or perfunctory examination;

3) singling juror out for special questioning designed to evoke a certain response;

4) prosecutor's reason is unrelated to facts of case; and

5) challenge based on reasons equally applicable to jurors not challenged.

Id. at 22. None of the five factors are present in the present situation.

In Parker v. State, 476 So.2d 134 (Fla. 1985), the state excluded a juror because she cared for an invalid, the state felt she did not like capital punishment, and some of her answers were undecided. The prosecutor had already excused four black jurors. Id. at 138. The defendant in Parker, as here, was unable to demonstrate a "strong likelihood" that the jurors were challenged solely on the basis of race. See also, McCloud v. State, 517 So.2d 56 (Fla. 1st DCA 1987). The trial court evaluated the situation properly. In King v. State, 514 So.2d 354 (Fla. 1987), the state attorney excused a black juror because the state was uncertain about her feelings on the death penalty.

It is not error for the prosecutor to "death qualify" a jury. Tompkins v. State, 502 So.2d 415, 419 (Fla. 1986). In Wainwright v. Witt, 469 U.S. 412, 423-26 (1985), the Supreme Court stated that determinations of jury bias "cannot be reduced to question and answer sessions" and that because of the variability in factors "there will be situations where the trial judge is left with a definite impression that a prospective juror would be unable to faithfully and impartially apply the law... That is why deference must be paid to the trial judge who sees and hears the juror." Witt involved a challenge for cause.

There is no reason to disturb the trial court's ruling or reweigh the factual findings inherent in the ruling. Wasko v. State, 505 So.2d 1314 (Fla. 1987); DeConingh v. State, 433 So.2d 501 (Fla. 1983). The proffered reasons are neutral and supported by the record. Appellant has failed to show an abuse of judicial discretion. See Randolph v. State, 15 F.L.W. S271 (Fla. May 3,

1990). See also, Reynolds v. State, 555 So.2d 918 (Fla. 1st DCA 1990); Adams v. State, 15 F.L.W. D701 (Fla. 3rd DCA Mar. 13, 1990). The trial judge is in the best position to determine whether there is a need for an explanation of challenges on the basis that they are racially motivated. Thomas v. State, 502 So.2d 994, 996 (Fla. 4th DCA). See Batson v. Kentucky, 476 U.S. 79 (1986).

POINT VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN INFORMING THE JURY WHY RICHARD MILLER WAS UNAVAILABLE TO TESTIFY.

Happ takes issue with the trial court allowing Richard Miller's proffered testimony regarding unavailability to be read to the jury. Miller testified at the first trial, but was unavailable to testify at the second trial due to medical and psychological reasons. The trial court ruled his testimony from the first trial could be read into evidence. Defense counsel did not want the proffered testimony regarding the reasons for unavailability read to the jury, but wanted them to be able to draw their own conclusions. The state attorney wanted one of his assistants to be able to testify about unavailability. The court compromised, and allowed Miller's proffered testimony to be read into evidence. Happ contends the proffered testimony was irrelevant, prejudicial, and inflammatory, evoked great sympathy from the jury, and gave undue weight to Miller's testimony. The jury may have also concluded that Happ was responsible for Miller's unavailability.

The state first notes that none of the above arguments were made at trial. Defense counsel objected to "putting on the preamble", but did not specify reasons. Absent a specific and timely objection to the trial court's ruling, a claimed error is not preserved for appellate review. Bertolotti v. Dugger, 514 So.2d 1095, 1096 (Fla. 1987); Tillman v. State, 471 So.2d 32 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Setting the scene for reading into the record the prior testimony was not error. Stano v. State, 473 So.2d 1982, 1986 (Fla. 1985). The trial court has broad discretion in the admissibility of evidence, and its ruling will not be disturbed absent a clear abuse of discretion. Jent v. State, 408 So.2d 1024 (Fla. 1981).

POINT VII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISALLOWING HAPP TO PRESENT EVIDENCE THAT HE REJECTED A PLEA AGREEMENT.

Happ contends that he should have been allowed to present evidence that the state had offered him a plea to four consecutive life terms which he rejected. He contends this was appropriate mitigation evidence which the court should have allowed under Hitchcock v. Dugger, 481 U.S. 393 (1987), Skipper v. South Carolina, 476 U.S. 1 (1986), and Eddings v. Oklahoma, 455 U.S. 104 (1982). Happ analogizes his evidence to evidence of a co-defendant's sentence. He contends that the state's willingness to accept a sentence less than death was a valid consideration for the jury. Evidence of an offer to plead is

inadmissible in any criminal proceeding. Fla. Stat. 90.410. Fla.R.Crim.P. 3.172(h) provides that the plea offer is not admissible against the person who made the offer, in this case the state. The theory propounded by Happ would have a chilling effect on negotiations in murder cases if, as Happ contends, the state's offer could be considered as mitigating evidence. Fla.R.Crim.P. 3.171 "encourages" plea negotiations. Rule 3.172(h) protects the negotiators from repercussion if they do attempt to negotiate an agreement. It could hardly be the legislative intent to allow a defendant to enter into negotiations with the state which makes a good faith attempt to negotiate only to find its efforts used to its disadvantage when a defendant aborts the negotiations.

Although the scope of admissible mitigating evidence has been broadened to the point of no return, case law delineates the scope of nonstatutory mitigating circumstances as "any aspect of a defendant's character or record and any of the circumstances of the offense the defendant proffers as a basis for a sentence less than death." (emphasis added). Lockett v. Ohio, 438 U.S. 586, 604 (1978). Plea negotiations cannot be wedged even into this very broad scope of mitigating evidence. As explained by Justice Scalia in his concurring opinion in Walton v. Arizona, 4 F.L.W. Fed S856, S863 (June 17, 1990), the principle of Woodson v. North Carolina, 428 U.S. 280 (1976) and Lockett, supra, have wrought ridiculous results insofar as allowing all possible mitigating evidence to be presented.

POINT VIII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CLARIFYING A MISREPRESENTATION BY DEFENSE COUNSEL IN CLOSING ARGUMENT.

In closing argument, defense counsel argued that Miller's crimes were strikingly similar to those involved in this case. He then asked the jury "[w]here was Mr. Miller on May 23, 1986"? He then stated "[h]e's over there in Citrus County. He wasn't locked up then". The prosecutor objected that there was no evidence that Miller was in Citrus County. The court then clarified counsels' arguments by instructing the jury that there was no testimony that Miller was in Citrus County in May 1986 (R2412-15). Appellant admits there was no evidence that Miller was in Citrus County in May 1986 (Initial Brief at 77).

It is impermissible to comment on facts not in evidence. Huff v. State, 457 So.2d 1087 (Fla. 1983); Ryan v. State, 457 So.2d 1084, 1089-90 (Fla. 4th DCA 1984); Wheeler v. State, 425 So.2d 109 (Fla. 1st DCA 1982); Johnson v. State, 432 So.2d 583 (Fla. 4th DCA 1983); U.S. v. Gonzalez, 833 F.2d 1464 (11th Cir. 1987); Shorter v. State, 532 So.2d 1110 (Fla. 3d DCA 1988). The trial court was correct in instructing the jury that the comment was not supported by the evidence. The conduct of counsel during the course of a trial is controllable in the discretion of the trial court, and a court's ruling will not be overturned absent a clear abuse of discretion. Robinson v. State, 520 So.2d 1 (Fla. 1988); Hooper v. State, 476 So.2d 1253 (Fla. 1985).

POINT IX

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IS DISALLOWING DEFENSE COUNSEL TO REFER TO WITNESSES AS "SNITCHES" OR "SQUEALERS".

Happ complains that the trial court would not let him call state witnesses "snitches" and "squealers". Rather, the trial court instructed the parties to refer to the witnesses as "informants" or "jailhouse informants". Defense counsel did not object (R 1424).

This issue is not preserved for appellate review. Tillman v. State, 471 So.2d 32 (Fla. 1985); Steinhorst v. State, 412 So.2d 332 (Fla. 1982). The trial court has broad discretion in the admissibility of evidence, and his rulings will not be disturbed absent a showing of abuse of discretion. Welty v. State, 402 So.2d 1159 (Fla. 1981); Hardwick v. State, 521 So.2d 1071 (Fla. 1988). Conduct of counsel is within the discretion of the trial court, and its ruling will not be overturned absent a clear abuse of discretion. Robinson v. State, 520 So.2d 1 (Fla. 1988). The scope and limitation of cross-examination is within the sound discretion of the trial court. Tompkins v. State, 502 So.2d 415 (Fla. 1986). Appellant points to no logical reason he should be allowed to insult state witnesses by calling them derogatory names.

POINT X

THE TRIAL COURT DID NOT ERR IN FINDING THE MURDER HEINOUS, ATROCIOUS OR CRUEL AND IN FINDING THE MURDER COLD, CALCULATED AND PREMEDITATED.

A. Cold, calculated and premeditated

Happ believes that trial court erred in applying the aggravating circumstance of cold, calculated and premeditated and that the court's written findings were inadequate.

The trial court found that the victim died after being abducted, beaten and strangled. Happ abducted the victim to a remote area. The location of the tennis shoes, clothing and drag marks illustrate that she tried to escape but was recaptured. Happ caused bruising and hemorrhaging over 3/4 of the victim's skull, then tied the victim's pants around her neck. The medical examiner testified that the victim was probably conscious for two minutes and became brain dead after four to five minutes. These facts show heightened premeditation. See, Harich v. State, 437 So.2d 1082 (Fla. 1983); Johnson v. State, 465 So.2d 499 (Fla. 1985); Stano v. State, 460 So.2d 890 (Fla. 1984); Smith v. State, 424 So.2d 726 (Fla. 1983); Justus v. State, 438 So.2d 358 (Fla. 1983).

While aggravating factors must be proven beyond a reasonable doubt, evaluating the evidence and resolving factual conflicts are the trial judge's responsibility. When a trial judge, mindful of the applicable standard of proof, finds that an aggravating circumstance has been established, the finding should not be overturned unless there is a lack of competent substantial evidence to support it. Bryan v. State, 533 So.2d 744 (Fla. 1988); Swafford v. State, 533 So.2d 277 (Fla. 1988). In the present case, Happ had time to reflect and plan. He drove approximately eight miles to an isolated area. The evidence supports the scenario that the victim escaped, was caught, and

dragged back. She was brutally beaten, sodomized and strangled. As the medical examiner testified, death from strangulation does not occur rapidly. See Mendyk v. State, 545 So.2d 846 (Fla. 1989).

B. Heinous, atrocious and cruel

The victim was abducted and taken to a remote and isolated area. She was raped anally and beaten severely. There was evidence she tried to escape and was dragged back. She was then strangled and could have been conscious for two minutes. The mental anguish and terror felt by the victim during the ride and immediately precedent to her death is beyond description by the written word and is indistinguishable from the terror and fear felt by the victims in Routly v. State, 440 So.2d 1257 (Fla. 1983), Steinhorst v. State, 412 So.2d 332 (Fla. 1982), Adams v. State, 412 So.2d 850 (Fla. 1982), White v. State, 403 So.2d 331 (Fla. 1981), and Knight v. State, 338 So.2d 201 (Fla. 1976). The aggravating circumstance of heinous, atrocious has consistently been upheld in strangling cases. In Dudley v. State, 545 So.2d 857 (Fla. 1989); the victim was strangled and her throat cut. She apparently struggled for life while being accosted in her own home. Id. at 860. In Hildwin v. State, 531 So.2d 124 (Fla. 1988), the victim was abducted, beaten, raped and strangled. This court stated that it has often found that strangulation murders were heinous, and atrocious. The court also noted that heinous, atrocious is especially applicable when the victim is aware of his impending doom. Id. at 128. In Tompkins v. State, 502 So.2d 415 (Fla. 1986) the court stated that it is permissible

to infer that strangulation perpetrated upon a conscious victim involves foreknowledge of death, extreme anxiety and fear, and this method of killing is one to which the factor of heinousness is applicable. Id. at 421. In Johnson v. State, 465 So.2d 499 (Fla. 1985), the victim escaped but was caught and strangled. See also Mendyk v. State, 545 So.2d 846 (Fla. 1989) (kidnapped, abused and toyed with victim); Johnston v. State, 497 So.2d 863 (Fla. 1986) (strangled and stabbed three times); Deaton v. State, 480 So.2d 1279 (Fla. 1985) (abducted and strangled victim who pleaded for life); Stano v. State, 460 So.2d 890 (Fla. 1984); Doyle v. State, 460 So.2d 357 (Fla. 1984); Adams v. State, 412 So.2d 850 (Fla. 1982); Alvord v. State, 322 So.2d 533 (Fla. 1985); Bundy v. State, 455 So.2d 330 (Fla. 1984); Stevens v. State, 419 So.2d 1058 (Fla. 1982); Smith v. State, 407 So.2d 894 (Fla. 1981).

Appellant cites Rhodes v. State, 547 So.2d 1201 (Fla. 1988), for the theory that heinous, atrocious is inapplicable because the victim may have been unconscious. On the contrary, there is no evidence to support this theory. The medical examiner said the victim was still alive during the beating of 10-20 extremely hard blows. The examiner said the appellant was trying to knock the victim comatose (R 1960-61, 1967-68). There were bruises on her right elbow and left wrist, indicating struggle (R 1964). She was anally raped prior to her death (R 1965). He also testified the victim would have been comatose after the strangling (R 1969). A person would defecate when he just died (R 1971). Miller testified that the victim was forced

to submit to fellatio after they arrived at the barge canal (R 1880) and defecating when strangled (R 1882). In the present case, the victim was not only strangled, but also was abducted and sexually assaulted. See Mendyk v. State, 545 So.2d 846 (Fla. 1989); See also Lightbourne v. State, 438 So.2d 380 (Fla. 1983) regarding being forced to submit to sexual relations while pleading for life. Even if any aggravating factor(s) were stricken, it would not change the sentence where there are four valid aggravating factors weighed against three weak mitigating factors. Rogers v. State, 511 So.2d 526 (Fla. 1987). See Clemons v. Mississippi, 110 S.Ct. 1441 (1990). This crime is clearly one of those for which the death penalty is deserved. State v. Dixon, 283 So.2d 1 (Fla. 1973).

POINT XI

THE SENTENCE OF DEATH IS PROPORTIONATE.

The trial court found four aggravating factors, one statutory mitigating factor (age) and two nonstatutory mitigating factors (family history and educational aid to inmates). The court's factual findings included:

1) The defendant abducted the victim from a deserted parking lot by obtaining control of the victim and her car by force. Thereafter, the defendant drove the victim to a remote location where the defendant sodomized, battered and strangled the victim;

2) The victim was sexually battered immediately prior to her death;

3) The victim died as a result of strangulation; however, death was not immediate. The evidence shows that the victim died after being slowly strangled with her own pants. While being strangled, the victim was conscious for at least two minutes and undoubtedly terrified at the realization she was going to die;

4) Immediately prior to her death the victim was savagely beaten about the head to the extent her brain was bruised. (R 1165).

Happ contends that this court has only two valid aggravating factors to weigh against three mitigating factors, assuming this court will strike two aggravating factors. In actuality, there are four valid aggravating factors weighed against three weak mitigating factors. Happ was twenty-four years of age at the time of the offense. Although the judge considered this in mitigation, the age of twenty-four has little weight. See Johnston v. State, 497 So.2d 863 (Fla. 1986) (twenty-three years old is not a mitigating factor); Garcia v. State, 492 So.2d 360 (Fla. 1986) (twenty years old was not mitigating); Mills v. State, 476 So.2d 172 (Fla. 1985) (twenty-two years old). The other two mitigating factors are also entitled to little weight.

In any case, proportionality review involves considering the totality of the circumstances in a case and comparing the case to other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances. Porter v. State, 15 F.L.W. S353 (Fla. June 14, 1990). Comparing this case to other capital cases, the death sentence is appropriate.

Randolph v. State, 15 F.L.W. S271 (Fla. May 3, 1990); Rivera v. State, 15 F.L.W. S235 (Fla. April 19, 1990); Rutherford v. State, 545 So.2d 853 (Fla. 1989); Swafford v. State, 533 So.2d 270 (Fla. 1988); Adams v. State, 412 So.2d 850 (Fla. 1981); Hildwin v. State, 531 So.2d 124 (Fla. 1988); Johnston v. State, 497 So.2d 863 (Fla. 1986); Deaton v. State, 480 So.2d 1279 (Fla. 1985); Stano v. State, 460 So.2d 890 (Fla. 1984); Stevens v. State, 419 So.2d 1058 (Fla. 1982).

The cases cited by appellant are inapposite. The evidence in Proffitt v. State, 510 So.2d 896 (Fla. 1987) revealed that the defendant, while burglarizing a house, killed an occupant with one stab wound to the chest while the victim was lying in bed. Proffitt had no prior convictions, was nonviolent and happily married. He had been drinking, did not possess a weapon when he entered the premises, and did not injure the victim's wife. He voluntarily surrendered to the authorities after the offense.

Wilson v. State, 493 So.2d 1019 (Fla. 1986), involved a violent domestic dispute during which the defendant killed his cousin with scissors and his father with a gun after his father told his mother to go get the gun. This court found it significant that the murder of the father was the result of a heated domestic confrontation. The murder of the cousin was reduced to second degree because there was insufficient evidence of premeditation.

Ross v. State, 474 So.2d 1170 (Fla. 1985), involved an angry domestic dispute. Ross had drinking problems and no prior history of violence. Caruthers v. State, 465 So.2d 496 (Fla.

1985), involved the murder of a convenience store clerk who jumped the defendant who "just started firing." In Rembert v. State, 445 So.2d 337 (Fla. 1984), the defendant hit the elderly victim over the head with a club and took money from the cash register. This court struck three of four aggravating factors, observed that the defendant introduced substantial mitigation, and found the death penalty unwarranted as compared to other capital cases. In Menendez v. State, 419 So.2d 312 (Fla. 1982), this court had remanded for the trial court to weigh the one remaining aggravating circumstance against the mitigating circumstance of no criminal history. The defense presented additional mitigating evidence at resentencing. This court held that the facts of this felony murder (defendant shot jeweler during robbery) did not call for the death penalty. Welty v. State, 402 So.2d 1159 (Fla. 1981) was a jury override case in which there were nonstatutory mitigating factors on which the jury could base its recommendation of life. In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the defendant murdered the victim as a result of a violent rage after learning the victim had beaten his wife, with whom the defendant had an illicit relationship. The defendant was a highly decorated Green Beret in Vietnam under emotional strain.

The present case is not a domestic case nor were there mitigating factors comparable to those in the cases cited by the appellant. Considering the totality of the circumstances, the present case is one of the most aggravated and least mitigated crimes imaginable. See, State v. Dixon, 283 So.2d 1 (1973).

POINT XII

HAPP WAS NOT DENIED A FAIR TRIAL BECAUSE OF CUMULATIVE ERROR.

A. Motion for judgment of acquittal

Appellant moved for judgment of acquittal on the basis of double jeopardy and because the state had not proved a prima facie case, even including the testimony of Miller (R 2212-13). Happ now argues that this court should ignore the testimony of Miller and find the evidence insufficient. The credibility of the witnesses is for the jury to determine. Jent v. State, 408 So.2d 1024 (Fla. 1981); Alvord v. State, 322 So.2d 533 (Fla. 1975). In Carter v. State, 15 F.L.W. S255 (Fla. April 26, 1990), the court rejected a claim that a co-defendant's testimony was too unbelievable to be reliable, stating that the issue was one of credibility for the jury to determine. Absent a clear showing of error its findings will not be disturbed. Jent, supra. This is not a circumstantial evidence case, but even if it were there is no reasonable hypothesis of innocence. See Heiney v. State, 447 So.2d 210 (Fla. 1984). Even in a circumstantial case, the state is not required to rebut every possible variation of events that could be inferred; rather, it must only introduce evidence which is inconsistent with the defendant's version to overcome a directed verdict motion. State v. Law, 14 F.L.W. 387 (Fla. July 27, 1989); Demurjian v. State, 557 So.2d 642 (Fla. 4th DCA 1990).

There was sufficient evidence to convict Happ. The state introduced evidence of proximity, a shoe print, fingerprints, swollen hand, prior breaking of car window with a fist, and

admissions to Miller. The jury could also infer anger over female dominance since Happ's aunt took his car away shortly before he abducted the victim in her own car, and his girlfriend jilted him.

B. Photographs of victim

The photographs complained of were relevant to the victim's identity and condition. The law is clear that the trial court has discretion, absent abuse, to admit relevant photographic evidence. Thompson v. State, 15 F.L.W. S347 (Fla. 1990); Jackson v. State, 545 So.2d 260, 265 (Fla. 1989); Patterson v. State, 513 So.2d 1257 (Fla. 1987). This court has repeatedly held that photographs are admissible if relevant to any issue involved in the case. Henderson v. State, 463 So.2d 196, 200 (Fla. 1985); Wilson v. State, 436 So.2d 908, 910 (Fla. 1983); Adams v. State, 412 So.2d 850, 853 (Fla. 1982).

The photos were selected from photos which may have been even more gruesome. In fact, the judge did not allow the state to introduce the autopsy photos which he felt were not appropriate (R 1948). The photos were relevant to the nature and extent of the injuries, the manner of death and the nature of force and violence used. Wilson, supra at 910. In Henderson, this court stated:

> ...Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); Straight v. State, 397 So.2d 903 (Fla.), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 417 (1981). Those whose work products are murdered human beings should expect

> to be confronted by photographs of their accomplishments. The photographs were relevant to show the location of the victims' bodies, the amount of time that had passed from when the victims were murdered to when their bodies were found, and the manner in which they were clothed, bound and gagged. It is not to be presumed that gruesome photographs will so inflame the jury that they will find the accused guilty in the absence of evidence of guilt. Rather, we presume that jurors are guided by logic and thus are aware that pictures of the murdered victims do not alone prove the guilt of the accused. We therefore conclude there was no error in allowing the photographs into evidence. Aldridge v. State, 351 So.2d 942 (Fla. 1977), cert. denied, 439 U.S. 882, 99 S.Ct. 220, 58 L.Ed.2d 194 (1978); Jackson v. State, 359 So.2d 1190 (Fla. 1978); cert. denied, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979); Swan v. State, 322 So.2d 485 (Fla. 1975).

Henderson, 463 So.2d at 200.

C. Comment on defendant's right to remain silent

Happ contends that the prosecutor commented on his right to remain silent when he said there was "no explanation why William Happ...." Not only was this not even a complete sentence, but there is no way to infer this was a comment on Happ's silence. We don't even know what the prosecutor was going to say. This comment was not fairly susceptible of being a comment on silence. See State v. Rowell, 476 So.2d 149 (Fla. 1985); Valli v. State, 474 So.2d 796 (Fla. 1985); McKay v. State, 504 So.2d 1280 (Fla. 1st DCA 1986). Even if this could be inferred as a comment on Happ's right to remain silent, it was harmless error. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). In McCain v. State, 480 So.2d 189 (Fla. 2nd DCA 1985), the prosecutor twice referred to the defendant's failure to testify. This was harmless error. In Budd v. State, 477 So.2d 52 (Fla. 2nd DCA 1985), the prosecutor

said the state's case was unrefuted. The court found the remarks not sufficiently direct and egregious to nullify the entire trial. In Knox v. State, 521 So.2d 321 (Fla. 4th DCA 1988), the prosecutor's remark that the jury could consider that nothing contradicted the sheriff's testimony was harmless error. See also, Domberg v. State, 518 So.2d 1360 (Fla. 1st DCA 1988); State v. Lowry, 498 So.2d 427 (Fla. 1986). Reversal of a conviction is warranted only where the error committed was so prejudicial as to vitiate the entire trial. Cobb v. State, 376 So.2d 230, 232 (Fla. 1979); State v. Murray, 443 So.2d 955 (Fla. 1984). The complained of comment in the present case was not a comment on the right to silence and even if it were, any error was harmless.

D. Prosecutorial comments

Happ argues that the prosecutor made improper comments in closing argument. The first instance was when the prosecutor supposedly accused defense counsel of trickery (R 2364-65). There was no objection to this argument and this issue is not preserved for appellate review. Clark v. State, 363 So.2d 331 (Fla. 1978). Furthermore, the argument was a proper comment on the evidence. Wide latitude is permitted in arguing to a jury; logical inferences may be drawn and counsel is allowed to advance all legitimate arguments. Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982).

The other instance of prosecutorial conduct Happ complains of was that the prosecutor misstated a defense argument (R 2426). The court instructed the jury that what the prosecutor said was not evidence (R 2427). Defense counsel did not move for a

mistrial, so the only conclusion is that he felt the instruction cured any error. See Buenoano v. State, 527 So.2d 194, 198 (Fla. 1988). Any right to a mistrial was not preserved. Ferguson v. State, 417 So.2d 639 (Fla. 1982). None of the alleged errors, either alone or cumulatively denied Happ a fair trial.

POINT XIII

THE FLORIDA CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.

This argument is presented virtually word for word in every brief, and consistently rejected by the court. Mendyk v. State, 545 So.2d 846 (Fla. 1989); Stano v. State, 460 So.2d 890 (Fla. 1984). Most of the alleged constitutional infirmities raised on appeal were not raised at the trial court level and are procedurally barred. Ventura v. State, 15 F.L.W. S190 (Fla. April 5, 1990); Swafford v. State, 533 So.2d 270 (Fla. 1988). Trial defense counsel raised the constitutionality of 921.141, alleging that the aggravating circumstances are vague and overbroad, the mitigating circumstances are limited, and the death penalty is unjustified and applied unconstitutionally. (R 134-139, 160-161). Those issues which are not procedurally barred have been rejected. Proffitt v. Florida, 428 U.S. 242 (1976); Lightbourne v. State, 438 So.2d 380 (Fla. 1983); State v. Dixon, 283 So.2d 1 (Fla. 1973).

This court's recent opinions indicate that this court continues to reject constitutionality arguments. Carter v. State, 14 F.L.W. 525 (Fla. Oct. 19, 1989); Bouie v. State, 15 F.L.W. S188 (Fla. April 5, 1990); Ventura v. State, 15 F.L.W.

S190 (Fla. April 5, 1990); Randolph v. State, 15 F.L.W. S271 (Fla. May 3, 1990).

CONCLUSION

Based on the forgoing arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by delivery to Christopher S. Quarles, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 16 day of July, 1990.

Barbara C. Davis

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Of Counsel

IN THE SUPREME COURT OF FLORIDA

WILLIAM FREDERICK HAPP,

Appellant,

v. CASE NO. 74,634

STATE OF FLORIDA,

Appellee.

_____/

APPENDIX

A. Newspaper article Saturday, July 7, 1990, The Orlando Sentinel.

Florida bishops renew their stance against death penalty

ASSOCIATED PRESS

TALLAHASSEE — The Roman Catholic bishops of Florida on Friday renewed their opposition to the death penalty, partly in reaction to the recent botched execution of Jesse Tafero.

The seven bishops, in their fourth statement opposing capital punishment since 1972, said abolition of the death penalty would "break the cycle of violence" in society and show respect for "the unique dignity of every individual."

The 10-point statement said civilization has come too far to put people to death for their crimes, however heinous.

"All murders are violent and shocking; some are savage," the bishops said. "The question is not whether the state has the right to impose the death penalty, but whether or not at this stage in the development of civilization it should impose it.

"Hopefully, that society is sufficiently developed to protect itself in ways other than the death penalty — for example, life or long-term imprisonment in maximum security with no early release," they said.

Tafero's execution May 4 revived debate about use of the electric chair because fire, smoke and sparks leapt from his head as prison officials applied three surges of electricity to kill him. An investigation found that a sponge had caught on fire, but other death row inmates have sued to block further executions in the chair.

The statement was already in the works when Tafero was put to death, said Thomas Horkan, Florida Catholic Conference executive director.

"That execution certainly exacerbated the need for it and was in their minds when it was drafted and when it was approved," he said.

The bishops urged the state to concentrate on preventing crime by addressing its causes, namely poverty, broken families and abuse of alcohol and drugs. They also called for improved gun control laws.

The Catholics' objections to the death penalty include its "disrespect for human dignity and human life," lack of evidence that it is a deterrent, statistics showing that minorities are most often executed and the fact that death means no chance of reform or rehabilitation.

The letter was signed by Archbishop Edward A. McCarthy of Miami and Bishops John J. Snyder of St. Augustine, J. Keith Symons of Palm Beach, John J. Nevins of Venice, John C. Favalora of St. Petersburg, Norbert M. Dorsey of Orlando and Agustin A. Roman of Miami. Roman is an auxiliary bishop.

APPENDIX A