IN THE SUPREME COURT OF FLORIDA

RAYMOND WARFIELD WIKE,

Appellant,

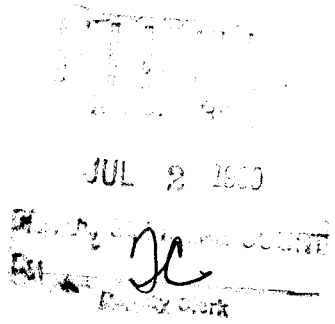
v.

STATE OF FLORIDA,

Appellee.

_____/

Case No.: 74,722



ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the case below, will be referred to in this brief as the state. Appellant, RAYMOND WARFIELD WIKE, the defendant in the case below, will be referred to in this brief as appellant. References to the record on appeal will be noted by the symbol "R" and will be followed by the appropriate page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

The state accepts appellant's statement of the case and facts as reasonably accurate with the following additions:

Jury Selection

The prosecutor and defense counsel posed the following questions to prospective juror Jefferson Miller:

> [Prosecutor]: Mr. Miller, do you believe that you can be a fair and impartial juror in this case?
>
> [Miller]: Yes, I do.
>
> [Prosecutor]: Are you in favor of or opposed to the death penalty?
>
> [Miller]: Favor.
>
> [Prosecutor]: *Do you have at this point in time any fixed opinion or idea as to whether or not you think the death penalty should be imposed on Mr. Wike if he is found guilty?*
>
> [Miller]: *I do not.*
>
> [Prosecutor]: And you are not leaning one way or the other?
>
> [Miller]: No.
>
> * * * *
>
> [Defense counsel]: When you say that you favor the death penalty do you have any preset idea of what kind of case warrants a death penalty in your mind?
>
> [Miller]: *I just believe that there are certain instances where the death penalty should be used and certainly in capital cases, murder cases. But there are always extenuating circumstances that would -- would [a]ffect the decision.*

* * * *

[Defense counsel]: Did you have any kind of thought back then about what should happen to whomever [committed the charged crimes]?

[Miller]: I thought it was a very serious and heinous crime to be quite honest and hoped that the person that was responsible may be found.

[Defense counsel]: How about what kind of punishment should be inflicted if the person that did it was found?

[Miller]: *The first reaction was that they should be seriously punished, anything from life to the death penalty.*

[Defense counsel]: Did you have a preference one way or the other of what it should be?

[Miller]: *Not necessarily because I did not know all of the facts of the crime.*

* * * *

[Defense counsel]: Can you conceive of -- having decided that someone was guilty of say premeditated killing of a child that you can recommend a life sentence for someone like that?

[Miller]: *Depending on the circumstances involved in the case. Sitting here I would probably say no.*

[Defense counsel]: Would there have to be any kind of extraordinary showing to you to justify your recommending life for someone that you had decided had done that?

[Miller]: *I would think so, yes.*

[Defense counsel]: Do you have any idea what it would take to convince you to recommend life under those circumstances?

[Miller]: No.

* * * *

> [Prosecutor]: Mr. Miller, just to make certain that I understand: Is it still your position that you're not leaning one way or the other and you have no inclination as to what penalties should be imposed on Mr. Wike if he was to be found guilty?
>
> [Miller]: *Not at all, not at this point.*

(R 429-36) (emphasis added).

Penalty Phase

Immediately after the jury returned its verdict but before the penalty phase began, the following dialogue took place concerning the shackling of appellant during the penalty phase:

> [Defense counsel]: Mr. Wike [is] feeling that there was nothing to convict him and feeling that the State had done some improper things in getting him charged which have already been fleshed out before the Court regarding some alleged improper misconduct between the prosecutor and the grand jury. And he is upset about what happened here and is upset that nothing has happened about his following the legal procedures and attempting to have his complaint investigated.
>
> And [Wike] has made a comment -- and for clarification's sake I think this can adequately explain it -- and he has made a comment that he intends to see that followed up. And [the prosecutor] would be appropriately taken care of regarding that and it was with regard to the legal aspect of that claim that he made that statement.
>
> So basically what I am saying --
>
> [Court]: What statement are you referring to?

[Defense counsel]: Supposedly that *[the prosecutor's] quote, ass, close quote, was his.*

* * * *

[Prosecutor]: And *[Wike] suggests to them that he was going to, I guess take me to hell with him. And he also told them if they did not believe him to check deeper into his file because they did not know what he could do.*

* * * *

[Wike]: Your Honor, in regards to that statement last night. If I meant . . . any physical harm to [the prosecutor] I had my opportunity when his back was to me.

Whenever I said that his ass was mine, I say it again, it was referring to the reference of the law through the federal authorities. And I am trying to seek it. And nothing is being done which the Court has only added aid to keep it out of the proper hands. I brought up the issue on that.

* * * *

[Court]: In as much as Mr. Wike made reference to it I have -- and which I'll make part of the record, because, another issue that we have to decide is whether or not Mr. Wike will be shackled in front of this jury.

I have a report from Corporal Paul Campbell, corrections officer. And I believe that you have it there on your table --

[Defense counsel]: I don't have it but I have seen it though.

[Court]: All right. But, Mr. Wike, you have offered some explanation as to what was said. And indicated to me that you meant it in the legal sense that you were going to take legal action against [the prosecutor].

That report that I have been furnished by the corporal says that Wike told me that when he went to court tomorrow . . . he was going to take [the prosecutor] out. He also stated that he was going, that

if he was going to hell . . . he was taking [the prosecutor] with him.

Wike made the statement that even if he was cuffed and shackled and no matter how many officers were in the courtroom . . . he was going to get [the prosecutor] and take out at least three officers if they tried to stop him.

[Wike]: That's misquoted.

[Court]: All right. What did you say?

[Wike]: And there [are] a couple of things . . . in there that weren't said.

[Court]: Okay. What was said, Mr. Wike?

[Wike]: I said that I was taking [the prosecutor] to hell with me. If he was going to send me to hell for something that I did not do, then I'll make sure that I take his license and his job for things that he has illegally done, not only to me but to other people in the community.

And he has misrepresented this community for too many years and it is about damn time that was stopped.

And as far as these shackles and cuffs, they are not necessary. If I was going to do anything I would have done it last night. I had my opportunity whenever I walked out of here and his back was to me and I was right beside him. You should know me and I spoke with you in person in chambers. And we have spoke at different times and I've tried to conduct myself as properly as the court.

And everybody expresses anger someway or another and I did not physically take any anger out on anybody last night. And [you] did not have to rack me down or anything. And there was no type of violence whatsoever. And I just expressed a thought; but not totally to complete the words that they have used.

(R 1309-19) (emphasis added).

At this point, the court heard testimony from Corrections Officer Paul Campbell, who related that appellant was upset after the jury verdict about how the prosecutor had lied to the jury in order to convict him (R 1320). Appellant stated that, when he went to court the following day, he was going to "take out" the prosecutor (R 1320); if he was going to hell, he was going to take the prosecutor with him (R 1321); and even if he were handcuffed and shackled, he would still get the prosecutor and some of the corrections officers (R 1321). After this testimony, the prosecutor stated that, as long as appellant had no weapon, he would not urge the court to keep appellant shackled or manacled (R 1325).

The court then held: "With regard to the issue of what sort of precautions need to be taken with regard to the defendant's statements, *the defendant will be bound and will be shackled and the handcuffs will be in front. And they were behind him earlier. And both counsel[s'] table[s] are covered so the jury will not see the shackles.*" (R 1330-31) (emphasis added).

Appellant also moved the trial court to continue the penalty phase of his trial:

> [Defense counsel]: In the course of trying to prepare for this case we made attempts to prepare for a penalty phase proceeding; Mr. Wike's mother is on the verge of a nervous breakdown and required hospitalization. And today happens to be the birthday of Mr. Wike's son. And it is a very disturbing process for them and all of the family members are upset.

And I learned today that a cousin of Mr. Wike's mother is due to arrive in town this evening and may be available to provide information in lieu of Mr. Wike's mother who is unable to participate.

There has been extreme concern by Mr. Wike's family from the early times of our attempts to prepare for the penalty phase of the question of if Mr. Wike was convicted, any stigma attaching to them and their son, whom they have now adopted.

And we also have recently located Mr. Wike's ex-wife -- at least as to where she is; I have not had contact with her although I was informed that she may be able to provide significant information as to Mr. Wike's prior history as to his involvement with drugs and alcohol and some aspect of his marital history.

* * * *

Judge, in the months that we have been preparing for this, Mr. Wike has been reluctant to talk about his background, whereabouts and people that he has had contact with. His schooling, some of those things.

Although I can represent to the Court that in the past couple of days, particularly in the last two days, he has been more forthcoming and understanding of what the process is. And I think it has been maybe a situation where I have not been able to effectively communicate to him the necessity to fully prepare for both parts of the trial.

And I have tried every way that I know of to do that but I don't know that he understood it; considering his view of the evidence, regarding the question of his guilt that we could ever be here. And he did not understand the necessity to assist in helping . . . me to develop information that would be relevant for the jury's recommendation and helping them reach a fair and equitable decision, considering the position we now find ourselves in.

And it is on that basis, Judge, that I request a continuance in this matter. And it is not frivolous and not solely for the purpose of delay. And I believe that with a short amount of time, and the sound discretion of the Court, that we could develop significantly important mitigating factors that this jury should have in rendering a reliable recommendation to you.

And I think that is the basis of our request. And I am familiar that of course, the court calendar is crowded. And I know that we did ask that this be delayed until today from yesterday. And this request is made with the specific request of my client. And with him not seemingly understanding where I am coming from and the importance of presenting whatever we can on his behalf. That's it, Judge.

[Court]: Mr. [prosecutor]?

[Prosecutor]: Your Honor, the State objects to a continuance in the penalty phase and feel that the defense had plenty of time to adequately prepare. And the argument or suggestions by counsel that Mr. Wike had no idea that this would happen to him --

* * * *

They have had nine months. The State made it[s] intentions known early that it would seek the death penalty and it would vigorously advocate for a death conviction. And the fact that Mr. Wike has been uncooperative with his attorneys up to this point in time is his own making, his own choosing, his own fault.

Indeed if anything that he told the correctional officers is accurate last night then a delay could be if anything adverse to him.

* * * *

[T]he jury is here and it sat through a long trial and it has been conscientious. And it is time for them to hear the penalty phase and make their recommendation.

Yesterday when the jury was discharged overnight the defense objected to the failure to sequester, suggesting, particularly Mr. Wike, as he did in chambers that this jury would become contaminated by the feelings in the community. Well, I submit that would be something raised and argued even louder if the jury was allowed to be away from this courtroom for a full week before hearing the evidence concerning penalty.

I . . . believe that [what defense counsel] has said about what potentially could be presented that cannot be presented today is speculative. And who is to say that the aunt [wants] to be involved in [sentencing] either.

And the fact that the defendant's own mother who could be brought into Court by virtue of a subpoena -- that she's reluctant that -- that is unfortunate for Mr. Wike.

* * * *

[Court]: What about [appellant's] mother?

[Defense counsel]: She's unavailable.

[Court]: Why?

[Defense counsel]: Because she's virtually on the verge of a nervous breakdown. And I have been talking to her during the course of the trial and trying to keep her informed of where we were and what was happening and indeed Mr. Ober, and talking to them. And in all candor I can tell the Court as I have information the court previously as --

[Court]: Can she come and talk to the Court?

[Defense counsel]: I don't know if she can, Judge --

[Court]: And I have a representation from you that she's on the verge of a nervous breakdown.

[Defense counsel]: I can tell you in my dealing with her and talking to her

personally and over the telephone about her voice and about how she was handling everything. And I'm aware that she has slept for not more than an hour last night.

[Second defense counsel]: Your Honor, her husband is here and for the Court's consideration I am sure that he can make the same representations to the [Court], as to what his wife was going through as this point. And he spoke to us this morning at length --

[Court]: Do you have any reason to believe that she'll be better tomorrow or the next day?

[Defense counsel]: Well, Judge, I don't know. And I mean, I cannot represent to the Court that she will, but we do have the possibility of other witnesses who may be available. And my point is that this is newly discovered information that may be relevant. And I can't candidly represent to the Court that it will result in anything.

But my point is this: Without the opportunity to verify and determine the existence of potential mitigation there is no way to know.

[Court]: *Okay, Mr. Wike has had a fair opportunity to prepare for the penalty phase [of] this trial.*

So the, the knowledge that you now gain through the cooperation of your client that you did not have previously is not a grounds for continuance in as much as he has had an opportunity to prepare for the trial.

I am concerned about the condition of his mother and her availability to testify. And maybe I would like to have you develop that a little further because that would be something that, that nobody can do anything about. And it is an unavoidable circumstance.

The other circumstances, this knowledge of these new witnesses was avoidable. And Mr. Wike had he decided to cooperate and decided to be diligent in the preparation of his case could have avoided that. So that is not [a] grounds for a delay; but the other may or may not be and that needs to be developed a little further.

And I would like to have her come to the courthouse if it's possible and discuss this before the Court.

* * * *

[Defense counsel]: Judge, we are in a position where she feels considering Mr. Wike's wishes that she [is] unable to assist in this matter. I would proffer for the record what I anticipate some of her --

[Court]: Wait a minute. You said considering Mr. Wike's wishes she is unable to participate?

[Defense counsel]: Yes.

[Court]: Explain that.

[Wike]: Excuse me. *In her condition, Your Honor, I do not want her to have to subject her[self] to a kangaroo situation such as this is.* And it is bad enough as it is but anymore kangaroo like it is; and you have all of these police in here with guns -- And what the heck -- what am I gonna do? If they can't pull a gun and get to me first then something is wrong. Either they don't know their jobs or y'all don't know what the hell is going on.

[Court]: Is it his wish that she not come down here and testify?

[Defense counsel]: Judge, in the context of what it will subject her to, apparently so.

[Court]: Okay. So otherwise she said that she was willing to come?

[Defense counsel]: *She said that she had a chance to pray over this and although she is still extremely upset and crying over the telephone, she said that if he wanted her to that she would.*

[Court]: I understand.

Proffer for us what her testimony would be.

(R 1308-14; 1327-29; 1342-43) (emphasis added).

Defense counsel then proffered the anticipated testimony of appellant's mother: Appellant's father was the primary disciplinarian and he passed away when appellant was eight years old; she suffered a nervous breakdown after her husband's death and had a difficult time taking care of appellant; appellant ran away several times from the school for children of single parents to which his mother sent him; she is aware of appellant's Pennsylvania conviction; appellant's marriage ended in divorce; and appellant's child was born out-of-wedlock (R 1344-45). The prosecutor stipulated to this proposed testimony, "with the addition that" appellant's mother asked him to move out of the house several months prior to the incident due to his refusal to contribute to "the monetary upkeep of the home." (R 1345). Defense counsel in turn stipulated to this proposed testimony (R 1345), and the court concluded:

> *[This] Court determines that first of all . . . the witness is available. And in [deference] to the wishes of the defendant she'll not testify. So that coupled with the fact that the State is prepared to stipulate [as] to the proffer of her testimony, and the defense is prepared to stipulate to the things that I think the State will seek to bring out by her, we'll proceed with the penalty phase.*
>
> *In light of the Court's ruling on the other matters with regard to this possibly newly discovered evidence that you might wish to offer. In light of the fact that the Court determines that you have had a reasonable and fair opportunity to prepare for this trial, as well as the penalty phase, so we'll proceed with the penalty phase today.*

(R 1347) (emphasis added).

SUMMARY OF THE ARGUMENT

As to Issue I: The trial court properly denied appellant motion to suppress, finding that appellant's arrest was based on probable cause and exigent circumstances existed, both of which justified officers' warrantless arrest of appellant. The victim and her mother provided police officers with an accurate detailed description of appellant, which proved correct in each detail. Additionally, officers were in "hot pursuit" of appellant, who was suspected of committing several violent offenses and being armed; had a strong belief that appellant was in his parents' home; and feared that a delay might result in the destruction of essential evidence.

As to Issue II: The trial court did not abuse its discretion in denying defense counsel's challenge for cause of prospective juror Jefferson Miller. As the record clearly reflects, Mr. Miller's responses during voir dire did not indicate that Mr. Miller had preconceived notions concerning the imposition of sentence upon appellant or that Mr. Miller would not have rendered his verdict solely upon the evidence presented.

As to Issue III: The trial court properly denied appellant's motion for a judgment of acquittal on the kidnapping counts. The state presented sufficient evidence below to show that both victims were confined in Santa Rosa County, under the express terms of both the substantive kidnapping and kidnapping venue statutes.

As to Issue IV: The sentencing court did not abuse its discretion in ordering that appellant be shackled during the penalty phase of his trial. The record reflects sufficient justification for this exercise of discretion, and appellant has made no showing that such an exercise of discretion caused him any prejudice during the penalty phase.

As to Issue V: The sentencing court did not abuse its discretion in denying appellant's motion for a continuance of the penalty phase of his trial. Appellant wholly failed to prove that he exercised diligence in locating witnesses; substantially favorable testimony would be forthcoming; the witnesses would be available and willing to testify; and a denial of a continuance would cause him material prejudice.

As to Issue VI: The trial court did not abuse its discretion in permitting the prosecutor to question appellant concerning his lack of remorse about the offenses of which the jury had convicted him. Appellant's responses during direct examination constituted evidence of a nonstatutory mitigating circumstance, i.e., remorse; thus, the prosecutor was entitled to question appellant further during cross examination. Additionally, defense counsel invited questions on this topic, as he opened the door during direct examination. Finally, if this Court determines that the sentencing court erred in permitting the prosecutor's questions, any such error was harmless.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS.

A trial court's ruling on a motion to suppress comes to this Court with a presumption of correctness, and this Court "should interpret the evidence and all reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the trial court's ruling." Wilson v. State, 470 So.2d 1, 2 (Fla. 1st DCA 1984); see also Johnson v. State, 438 So.2d 774 (Fla. 1983). Here, the trial court properly denied appellant's motion to suppress, finding that appellant's arrest was based on sufficient probable cause and exigent circumstances existed, both of which justified officers' warrantless arrest of appellant.

Specifically, the trial court held:

> 1. This Court finds that the Defendant's arrest was based on sufficient probable cause and that exigent circumstances existed which would have justified the entry of the officers from the Santa Rosa County Sheriff's Department into the residence of 654 N. Airport Road to arrest the Defendant on the charge of Murder.
>
> 2. The exigent circumstances that existed in this case includes [sic] the fact that the officers were engaged in the fresh pursuit of a suspect after having recently become involved in the investigation of a serious murder case. The officers had valid concerns that the suspect might flee and because of the vicious acts which involved multiple victims the officers had reasonable grounds to be concerned that other lives

might be endangered. Furthermore, at the time of the arrest the officers had reasonable grounds to believe that there might be other persons in the residence at 654 N. Airport Road whose lives might be endangered if the officers did not act expeditiously.

3. Although this Court finds that exigent circumstances existed for the entry of the officers into the residence, it further finds that the officers did not enter into the residence at 654 N. Airport Road to arrest the Defendant.

4. This Court further finds that the Defendant was not unduly compelled to exit the house where he presented himself to open view and arrest on the carport of the residence at 654 N. Airport Road.

5. This Court finds the Defendant's automobile was searched pursuant to a proper search warrant. That the officers secured the vehicle prior to obtaining a search warrant, however, the automobile was not searched until execution of a search warrant which was properly supported by probable cause and which sufficiently incorporated by reference the description of the premises to be searched and the basis for the probable cause.

6. This Court finds that the Defendant's statements given to Officers Larry Bryant and Steve Collier at the Santa Rosa County Sheriff's Department were given after having been advised of his constitutional rights and after he freely and voluntarily waived his rights and agreed to talk with the officers. This Court finds that on one occasion the Defendant revoked his agreement to speak with the officers and invoked his right to remain silent and to have counsel. However, this Court finds that after doing so the Defendant initiated further conversation and once again freely and voluntarily waived his right to counsel and to remain silent and spoke with the officers.

(R 1531-32). See also (R 1694-98).

Probable Cause to Arrest

"The probable cause standard for a law enforcement officer to make a legal arrest is whether the officer has reasonable grounds to believe the person has committed a felony." Blanco v. State, 452 So.2d 520, 523 (Fla. 1984). Information from a victim may establish the requisite probable cause for an arrest, particularly where, as here, the victim Sayeh Rivazfar identified appellant by name, and described appellant and his vehicle, and police officers soon thereafter discovered a car matching the description and arrested appellant nearby. See **W.R. LaFave, Search & Seizure: A Treatise on the Fourth Amendment** §3.4(a), at 713-14 (2d ed. 1987).

While there is "no verbal formula which can effectively communicate precisely what kind of description by a victim or witness together with what kind of attendant circumstances adds up to probable cause," there are relevant factors which weigh heavily in such a determination. Id. at §3.4(c), at 739. One such factor is the particularity of the description of the offender or the vehicle in which he fled.

In the present case, Officer Larry Bryant arrived at the hospital at approximately 7:00 a.m. on September 22, 1988. At that time, he spoke with the surviving victim Sayeh Rivazfar, who related the following. She and her sister Sara had been taken

from her apartment in Pensacola by a man named "Ray" who was a friend of their mother's. She described Ray as a white male, with brown hair, a beard, and moustache, approximately 30 years of age. She described Ray's vehicle as a "big old green car that had dents on the side of it" (R 1602). She further related that Ray had driven her and her sister around in the car, had penetrated her vagina with his hand and penis (R 1602), and had cut her and her sister's throats in the woods (R 1603).

Sayeh's mother, Patricia, told Officer Bryant that she knew a "Ray" but did not know his last name (R 1605). She gave a general description of Ray, observing that Ray walked with a hump in his back (R 1615), and his vehicle, the first names of Ray's parents, and a general vicinity where she thought Ray lived (R 1605). When a check of that address proved unsuccessful, Officer Bryant again spoke with Patricia Rivazfar, who remembered an address on North Airport Road in Santa Rosa County (R 1606).

When Officer Bryant drove to this address, he spotted an old green Dodge Monaco with a dent on the driver's side (R 1607). The car was parked "just south of the driveway going up to the residence [at 654 North Airport Road] . . . in front of . . . the adjacent house" (R 1608). A computer "run" of the vehicle's tag revealed that Raymond Warfield Wike owned the Monaco and lived at 654 North Airport Road (R 1607). The computer check also revealed that Wike's approximate age was 30 years (R 1608). Officer Bryant approached the vehicle, and observed what he

believed to be blood stains on the front seat of the vehicle. Later, when Wike exited the house at 654 North Airport Road, Officer Bryant observed that he was a white male, approximately 30 years of age, with a beard, moustache, and brown hair, who walked with a hump in his back (R 1615).

Thus, in the present case, the victim Sayeh Rivazfar provided Officer Bryant with an accurate description of both appellant and his vehicle shortly after appellant committed the charged crimes.[1] See Justus v. State, 438 So.2d 358, 363 (Fla. 1983) (description of car fit that of car later found at the scene where the victim's body was discovered); Jennings v. State, 512 So.2d 169 (Fla. 1987) (physical description); see also **LaFave**, at §3.4(c), at 742 ("If a victim or witness is also able to given some description of the vehicle in which the offender or offenders escaped, this substantially increases the chances that probable cause will exist."). Based on the accurate description provided by the victim, the state asserts that the trial court was eminently correct in its determination that sufficient probable cause existed for officers to arrest appellant.

---

[1] Ronnie and Teresa Wright discovered Sayeh around 6:30 a.m. on September 22, 1988, as they drove along a rural road in Santa Rosa County (R 572, 575-77, 580, 585-87, 591). Sayeh arrived at the hospital around 7:00 a.m. (R 1600) and spoke to Officer Bryant. Incidentally, Sayeh told the Wrights that a man named "Ray" had cut her and killed her sister, and that he drove a large green car with a dented fender (R 579-80, 587-89).

Exigent Circumstances

In his argument under this section, appellant relies heavily on Payton v. New York, 445 U.S. 573 (1980), which prohibits a nonconsensual warrantless entry into a home to make a routine felony arrest, absent exigent circumstances. Appellant assumes the applicability of Payton to the instant circumstances in arguing first, that police officers "entered" his home, and second, that his arrest was a routine felony arrest.

In Payton, two days after a murder, police officers broke into Payton's unoccupied apartment, and seized a .30 caliber shell casing which was later admitted into evidence at Payton's murder trial. Because the officers did not obtain an arrest warrant before breaking into Payton's apartment, the Supreme Court reversed the judgment of conviction, holding that "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." Id. at 603.

In Byrd v. State, 481 So.2d 468, 472 (Fla. 1985), this Court discussed Payton and observed: "There is no question that if appellant had been asked to step outside and had complied, the warrantless arrest outside the room would have been proper and Payton would not apply." In the present case, after Officer Bryant had run a check on appellant's vehicle, he radioed his

dispatcher, asking him to telephone the residence at 654 North Airport Road to see if anyone were home. The dispatcher informed Officer Bryant that a 30 year old man named Ray had answered the telephone. Officer Bryant then asked the dispatcher to tell Ray to come outside with his hands on top of his head (R 1613-14). Appellant exited the home and walked out into an open carport, at which point the officers arrested him (R 1615-16). See Koehler v. State, 444 So.2d 1032, 1033 (Fla. 1st DCA 1984) (Payton not violated where the defendant "was on his unenclosed front porch and exposed to public view"). Thus, for the reasons enunciated in Byrd, Payton does not apply in the present case.

Appellant contends that the above factual scenario is replete with coercion, and thus Payton does apply. Specifically, appellant contends he left his home due to "the officers' show of force and the dispatcher's direction." Appellant's Initial Brief at 26. The sum of 11 police officers positioned around the residence at 654 North Airport Road and the dispatcher's request that appellant step outside does not equal coercion. Appellant did not have to leave his home, and could have remained inside, had he so desired, until the officers had obtained an arrest warrant. However, appellant, for whatever reasons, voluntarily chose to leave the confines of his parents' home.

LaFave observed:

> Though some of the cases on outside-the-threshold arrests have not even considered

> how it was that the defendant came to be there rather than inside, others have given specific attention to the police action which caused the arrested person first to leave the interior of the residence. It has been deemed unobjectionable that the defendant came outside at the request of police who did not reveal their intention to arrest, or, indeed, even that the police engaged in some affirmative misrepresentation, such as that they merely wanted to discuss matters with him or that he was viewed by them only as a suspect or a witness. Such ruses have been considered permissible because . . . "in other contexts, courts have considered the police tactic of misinformation and have found no constitutional violation." Here again, however, the warrantless arrest will be illegal if the defendant's presence outside was acquired by coercion or a false claim of authority . . . .

W. LaFave, at §6.1(e), at 593-94 (footnotes omitted).

Appellant relies on Brown v. State, 392 So.2d 280 (Fla. 1st DCA 1981), cert. denied, 454 U.S. 819 (1982), a case readily distinguishable from the instant matter. There, police officers drove into the defendant's enclosed yard at 1:45 a.m. and arrested the defendant when he came out onto his back porch, a part of his house. Thus, the defendant emerged from his house onto the attached porch only as a result of the officers' having driven through the gate and into the premises of his home. The First District observed that "[b]oth the officers and Brown were in a place where Brown, particularly at that time of night at his back door, could expect privacy." Id. at 284.

The First District contrasted Brown's facts with those found in United States v. Santana, 427 U.S. 38 (1976). In Santana, when police officers arrived at Santana's home, she was standing in the doorway of her home. As the officers approached and identified themselves, she retreated into her home, holding a bag which contained heroin. The Supreme Court concluded that Santana "was not in an area where she had any expectation of privacy" because "[s]he was not merely visible to the public but she was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." Id. at 42. Additionally, the officers did not drive into an enclosure on Santana's premises.

Appellant also cites to United States v. Morgan, 743 F.2d 1158 (6th Cir. 1984), cert. denied, 471 U.S. 1061 (1985). There, one police officer drove his car into Morgan's yard while other officers surrounded the home. The officers then flooded the house with spotlights and summoned Morgan from his home with "the blaring call of a bullhorn." Id. at 1161. The Sixth Circuit found that "[n]one of the traditional exceptions justifying abandonment of the warrant procedure" were present. Id. at 1162. Specifically, exigent circumstances did not exist to justify the warrantless intrusion by officer onto Morgan's property. The officers were not in hot pursuit of a fleeing suspect, because they were not responding to an emergency and, in fact, had taken a break at a local coffee shop before arresting Morgan to assess

the situation. Compare United States v. Curzi, 867 F.2d 36 (1st Cir. 1989). Additionally, Morgan did not represent an immediate threat to the arresting officers or the public because "all the proven evidence indicate[d that] Morgan and his friends posed no risk to anyone until the police officers surrounded the Morgan home and flooded it with high-powered spotlights." Id. at 1163. See also United States v. Al-Azzawy, 784 F.2d 890 (9th Cir. 1985), cert. denied, 476 U.S. 1144 (1986) (with weapons drawn, police surrounded the defendant's home and ordered him out by bullhorn).

In contrast to both Brown and Morgan, police officers here did not enter appellant's property before arresting him. Officers rang the doorbell, received no answer, but heard movement in the house. Calls to the residence from the dispatcher revealed that a 30 year old man named Ray was in the house. Upon a request by the dispatcher to exit the house, appellant voluntarily complied, and walked out into a public area. Thus, police officers did not coerce appellant out of his home with spotlights, weapons, and bullhorns. Additionally, exigent circumstances existed, as shown in the following discussion.

Payton by its own terms applies only to routine felony arrests, and the arrest of appellant in this case was not a routine felony arrest. Here, police officers were in "fresh pursuit" of a murder suspect based on information provided by

Sayeh and Patricia Rivazfar (R 1618). As soon as Officer Bryant received a description of appellant and his vehicle, he and other officers acted upon it; in fact, officers arrested appellant within three to four hours after receiving a description from Sayeh and Patricia Rivazfar (R 1600, 1610). See Welsh v. Wisconsin, 466 U.S. 740 (1984) (hot pursuit exception to the warrant requirement requires an "immediate or continuous pursuit of the [defendant] from the scene of the crime."); contrast Payton, 445 U.S. at 577 (the arrest of the defendant occurred at least two days after the murder); Morgan, 743 F.2d at 1163 (Morgan's arrest was a "planned occurrence, rather than the result of an ongoing field investigation.").

If this Court determines that the officers were not in "fresh pursuit," the state points out that

> [e]xigent circumstances do not necessarily involve "hot pursuit" of a fleeing criminal. Factors which indicate exigent circumstances include: (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) a reasonable belief that the suspect is armed; (3) probable cause to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that delay could cause the escape of the suspect or the destruction of essential evidence, or jeopardize the safety of officers or the public.

United States v. Standridge, 810 F.2d 1034, 1037 (11th Cir. 1987), cert. denied, 481 U.S. 1072 (1988).

In the present case, all five of the above factors existed. First, both victims had endured a kidnapping. One victim had been killed by the slitting of her throat to the point that "her head was almost cut off" (R 1603). The other victim had endured a sexual battery and a similar, though less serious, throat cutting. As a result of these incidents, appellant was charged with several very serious offenses by way of indictment, including first degree murder, kidnapping, aggravated child abuse, and sexual battery (R 1450-53). Second, officers had a reasonable belief that appellant was armed with at least a knife (R 1619). Third, as shown in previous argument, the officers had probable cause to believe that appellant had committed the crimes. Fourth, the officers had reasonable belief that appellant was in the premises, based on the telephone calls from the dispatcher to a person named "Ray" in the home.

Fifth and final, officers believed that delay could cause the destruction of essential evidence, such as the knife used and bloody clothing (R 1619), and jeopardize the safety of officers or the public. Officer Bryant rang the doorbell at the front door of 654 North Airport Road, but received no response (R 1612). However, another officer reported that he heard movement in the house (R 1612). Officer Bryant and another officer had spoken with people in the neighborhood and discovered that, in addition to a 30 year old man, an elderly couple and a small child lived at 654 North Airport Road (R 1610-11), and that the couple and child were "in that house 98% of the time" (R 1640).

Neighbors also told the officers that the male of the couple was confined to a wheelchair, and that the couple's vehicle had left earlier that morning, but were unable to say who had been driving the vehicle or how many people were in the vehicle when it left (R 1611). Based on this information, police officers on the scene had legitimate concerns as to the safety and welfare of the other residents of the home (R 1612, 1619). See Lara v. State, 464 So.2d 1173, 1177 (Fla. 1985) ("the exigent circumstance exception applies when police are called to the scene of a homicide and . . . it allows an immediate warrantless search of the area to determine the number and condition of the victims or survivors, to see if the killer is still on the premises, and to preserve the crime scene."); Bottoson v. State, 443 So.2d 962, 965 (Fla. 1983) ("We do not find Payton to be applicable because this was not a routine felony arrest. As far as the officers knew the [victim] was still alive. Hence . . . exigent circumstances [existed] . . . ."). Based on the all of the above recounted facts, the state asserts that the trial court correctly found that exigent circumstances which justified the warrantless arrest of appellant.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENSE COUNSEL'S CHALLENGE FOR CAUSE OF PROSPECTIVE JUROR JEFFERSON MILLER.

"[T]he question of a challenged juror's competency is a mixed question of law and fact and . . . the decision of the trial court should not be disturbed unless the error is manifest." Hill v. State, 477 So.2d 553, 556 (Fla. 1985), cert. denied, 485 U.S. 993 (1986) (citing to Singer v. State, 109 So.2d 7 (Fla. 1959)). See also Wainwright v. Witt, 469 U.S. 412, 426 (1985) ("deference must be paid to the trial judge who sees and hears the juror."). Here, the trial court did not abuse its discretion in denying defense counsel's challenge for cause of prospective juror Jefferson Miller, because Mr. Miller did not indicate any predisposition to punishment in the sentencing phase. The court, "imbued with a fair amount of common sense as well as an understanding of the applicable law, view[ed] the questioning as a whole" and correctly determined that Miller was not biased in favor of imposing the death penalty. Id. at 435.

Mr. Miller indicated unequivocally during voir dire that he had no fixed opinion as to whether appellant should be sentenced to the death penalty if found guilty. He also explained that, while he believed some crimes seemed to warrant death sentences, "extenuating circumstances" affected such a decision. Appellant, however, points solely to Mr. Miller's responses to defense counsel's question: "Can you conceive of -- having decided that

someone was guilty of say premeditated killing of a child that you can recommend a life sentence for someone like that?" (R 434). Based on Miller's answer to that question, appellant contends that Miller had a "fixed opinion that a death sentence should be imposed for a premeditated murder of a child." Appellant's Initial Brief at 434.

Again, Mr. Miller's answer was: "Depending on the circumstances involved in the case. Sitting here I would probably say no." (R 434). Just as appellant claims that such an answer could be construed as a predisposition to sentence, the state asserts that the answer is equally susceptible of being interpreted simply as Mr. Miller could not conceive of circumstances as posed by defense counsel. In either case, however, the answer certainly does not reflect a "fixed opinion."

This Court enunciated the proper test for determining juror competency in Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984), as "whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Thus, "[i]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial[,] he should be excused . . . ." Singer, 109 So.2d at 24.

In Singer, a prospective juror revealed his preconceived notions regarding the guilt of the defendant, and this Court held that such a juror should have been excused for cause. Similarly, in Hill, a prospective juror related that his preconceived opinion that, if the defendant were convicted, he was inclined to recommend the death penalty. This Court observed:

> It is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in the particular case. A juror is not impartial when one side must overcome a preconceived opinion in order to prevail.

477 So.2d at 556. See also O'Connell v. State, 480 So.2d 1284, 1287 (Fla. 1986) (three prospective jurors would have automatically recommended the death penalty for the defendant); Thomas v. State, 403 So.2d 371, 375 (Fla. 1981) (prospective juror admitted that he could not "recommend any mercy" in any required sentencing phase under any circumstances).

Mr. Miller's responses in the present case do not reflect any preconceived notions concerning appellant's sentence, and in fact, reflect no bias or prejudice whatsoever. Viewed in a totality, Mr. Miller's responses reflect his willingness to hear all the facts of the case before making any decision as to punishment. Because appellant simply "has presented no evidence that prospective juror [Miller] would not have rendered his

verdict solely upon the evidence presented," Lusk, 446 So.2d at 1041, the state asserts that the trial court did not abuse its discretion in denying appellant's challenge for cause.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE KIDNAPPING COUNTS.

Before defense counsel began its case-in-chief, he moved for a judgment of acquittal on the kidnapping counts, alleging that the state could not prove that these crimes occurred in Santa Rosa County, the county in which appellant was tried. The state asserts that the trial court properly denied appellant's motion, in that the state below presented sufficient evidence to show that the victims were "confined" in Santa Rosa County, under the express terms of both the substantive kidnapping and kidnapping venue statutes.

Florida's substantive kidnapping statute, Fla. Stat. §787.01 (1989), provides:

> (1)(a) The term "kidnapping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to:
>
> 1. Hold for ransom or reward or as a shield or hostage.
>
> 2. Commit or facilitate commission of any felony.
>
> 3. Inflict bodily harm upon or to terrorize the victim or another person.
>
> 4. Interfere with the performance of any governmental or political function.
>
> (b) Confinement of a child under the age of 13 is against his will within the

> meaning of this subsection if such confinement is without the consent of his parent or legal guardian.

Florida's kidnapping venue statute, Fla. Stat. §910.14 (1989), provides that "[a] person who commits an offense provided for in s. 787.01 or s. 787.02 may be tried in any county in which his victim has been taken or confined during the course of the offense." Compare Fla. Stat. §910.02 (1989) (if an offense is committed while in transit, an accused may be tried in any county through which the vehicle traveled); Fla. Stat. §910.03 (1989) (if the county where the offense was committed is unknown, an accused may be charged in two or more counties); Fla. Stat. §910.04 (1989) (if a person in one county aids in the commission of a crime in another county, he may be tried in either county); Fla. Stat. §910.05 (1989) (if the acts constituting one offense are committed in two or more counties, an accused may be tried in any county in which any of the acts occurred); Fla. Stat. §910.06 (1989) (if a person in one county commits an offense in another county, he may be tried in either county); Fla. Stat. §910.09 (1989) (if the cause of death is inflicted in one county but death occurs in another county, an accused may be tried in either county); Fla. Stat. §910.10 (1989) (a person who obtains property unlawfully may be tried in any county in which he exercises control over the property).

In the present case, appellant abducted both Rivazfar girls from their apartment in Escambia County, and drove them to a

remote location in Santa Rosa County, where he killed Sara Rivazfar, and sexually assaulted Sayeh Rivazfar and attempted to kill her. Appellant contends that, because he completed the kidnappings in Escambia County, any subsequent confinement that took place in Santa Rosa County did not occur during the course of the kidnappings, and cites to Carver v. State, 15 F.L.W. D814 (Fla. 1st DCA 1990), as supporting this argument.

The state submits that appellant did not complete the kidnapping in Escambia County, and points to Fla. Stat. §787.01 (1989), which provides that a kidnapping may be committed by physical force, threat, or "secret" confinement, abduction or imprisonment of another person against that person's will. "The term 'secretly' means that the abduction or confinement is intended by the defendant to isolate or insulate the intended victim from meaningful contact or communication with the public." Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1984). Here, where the victims were unaware of where they were being taken and appellant took them to an area where there was no possibility of contact with the public so that he could commit other crimes, the jury reasonably could have found that appellant committed the kidnappings in Santa Rosa County.

Carver is not persuasive authority in the present case, as it did not involve a venue determination. In Carver, the defendant presented only a double jeopardy argument, contending that he could not be convicted of both kidnapping and aggravated

assault, because he committed the aggravated assault during the subsequent confinement which was an inherent part of the ongoing kidnapping. The First District examined section 787.01(1)(a)(3) and the facts adduced at trial, and concluded that the defendant was properly charged with separate counts of kidnapping and aggravated assault. Specifically, the court found that the defendant completed the kidnapping by forcing the victim into his car at gunpoint and driving off with her; the defendant likewise completed the aggravated assault during the victim's subsequent confinement by pointing his gun at her and threatening to kill her.

Instead, the state directs this Court's attention to Copeland v. State, 457 So.2d 1012 (Fla. 1984). There, the defendant abducted the victim in Wakulla County, only to take her to Leon County, where he and others raped and killed her. The trial court denied the defendant's motion to transfer his case to Leon County, and the defendant appealed this ruling. This Court found no error, observing that "because the robbery and kidnapping occurred in Wakulla County and the rape, continued kidnapping, and murder occurred in Leon County, the cause could have been tried in either county." Id. at 1016 (citing to Fla. Stat. §910.05 (1977), Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 So.2d 892 (1978), and Crittenden v. State, 338 So.2d 1088 (Fla. 1st DCA 1976)). Compare Tucker v. State, 131 So. 327 (Fla. 1931) (defendant liable to indictment in

either county, where larceny began in one county and ended in another); Dixon v. State, 486 So.2d 67 (Fla. 4th DCA 1986) (defendant liable to be charged in Martin County for trafficking and conspiracy to traffic where conspiracy was hatched in Broward County but continued to be furthered in Martin County).

Similarly, in the present case, the kidnapping commenced in Escambia County, when appellant abducted the Rivazfars from their home, only to continue in Santa Rosa County, where appellant deliberately took them to a remote spot so that he could commit the other charged crimes. Thus, based on Copeland and Fla. Stat. §910.14 (1989), the state asserts that appellant could have been tried properly in either Escambia or Santa Rosa Counties.

ISSUE IV

WHETHER THE SENTENCING COURT ABUSED ITS DISCRETION IN ORDERING THAT APPELLANT BE SHACKLED DURING THE PENALTY PHASE OF HIS TRIAL.

The sentencing court did not abuse its discretion in ordering that appellant be shackled during the penalty phase of his trial. The record reflects sufficient justification for this exercise of discretion, and appellant has made no showing that such an exercise of discretion caused him any prejudice during the penalty phase.

The use of physical restraints on a defendant

> may be considered by the trial court in exceptional circumstances where there is a substantial need to protect the safety of the court and its participants, to prevent a threatened escape, to uphold the integrity and orderly decorum of the proceeding, or to respond to any other manifest necessity. The extent to which the security measures are needed should be determined on a case-by-case basis by 'considering the person's record, the crime charged, his physical condition, and other available security measures.'

United States v. Hack, 782 F.2d 862, 867 (10th Cir. 1986), cert. denied, 476 U.S. 1184 (1986) (quoting Harrell v. Israel, 672 F.2d 632, 638 (7th Cir. 1982)). The decision to use physical restraints "lies within the informed discretion of the trial court and will not be disturbed on appeal unless that discretion was clearly abused." Id. See also Dufour v. State, 495 So.2d 154, 162 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987) ("from

the lofty stance of appellate review, we will not second-guess the considered decision of the trial judge.").

In the present case, the sentencing court did not abuse its discretion in ordering appellant to remain shackled during the penalty phase. Appellant was a convicted felon (R 1536), charged with the commission of very serious offenses by a seven count indictment (R 1450-52). The sentencing court knew that it was dealing with a legally guilty man, one with a track record of violence. Despite the opinion of the prosecutor that shackling was unnecessary, the court was wise to take no chances, as even an unsuccessful attack on the prosecutor during the penalty phase could have tainted the jury. In the present case, where a convicted murderer threatened still another murder, the court was well advised to take such a threat seriously "to ensure the security and safety of the proceeding." Stewart v. State, 549 So.2d 171, 174 (Fla. 1989). Violence in the courtroom is a well documented, albeit unfortunate, fact. See e.g., Provenzano v. State, 497 So.2d 1177, 1180 (Fla. 1986), cert. denied, 481 U.S. 1024 (1987).

In any event, "[t]he critical issue in a restraint case is the degree of prejudice caused by the restraint," and appellant simply has not met his burden in proving prejudice. Elledge v. State, 408 So.2d 1021, 1022-23 (Fla. 1981), cert. denied, 459 U.S. 981, reh'g denied, 459 U.S. 1137 (1983). Appellant points to the fact that he behaved himself at trial reasonably well (R

1315, 1326) and had no prior violent incidents in custody while awaiting trial. Appellant's Initial Brief at 38. In response, the state again contends that appellant has not proven any prejudice, and points to Zygadlo v. Wainwright, 720 F.2d 1221, 1223 n.4 (11th Cir. 1983), cert. denied, 466 U.S. 941 (1984) ("We note that other courts have approved the use of physical restraints at trial . . . even though the defendant has conducted himself properly at trial."). Appellant also argues that less restrictive measures could have been used, but does not suggest any such measures.[2]

Appellant finally contends that Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), cert. denied, 485 U.S. 1014 (1988), controls the shackling incident in this case. However, in Elledge, the trial court refused the defendant an opportunity to contest the information which led to the court's decision to shackle him. In the present case, the sentencing court conducted an expansive hearing on the shackling issue and allowed appellant countless opportunities to rebut the information, as shown in the state's statement of the case and facts. Additionally, in Elledge, the state made no showing as to the necessity for the shackling of the defendant. See also Bello v. State, 547 So.2d 914, 918 (Fla. 1989). Here, the state introduced evidence which showed that appellant had made various threats against the

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[2] The state points out that appellant did not present this argument to the sentencing court.

prosecutor's life. "Needless to say, the security and safety of a state's courtrooms is an essential state interest." Elledge, 823 F.2d at 1452.

The sentencing court in the present case "took precautions to ensure that any prejudicial effect of the physical restraint was minimized" by ordering the "draping" of both counsels' tables and the cuffing of appellant's hands in front of him (R 1754). United States v. Apodaca, 843 F.2d 421, 431 (10th Cir. 1988), cert. denied, 109 S.Ct. 325 (1989). See also Correll v. Dugger, 558 So.2d 422, 424 (Fla. 1990) (the trial court placed "something" in front of the counsel table to hide the shackles from the jury); Dufour, 495 So.2d at 162 ("The court did attempt to minimize any prejudice accruing to appellant by granting defense counsel's request to place a table in front of the defense table in order to hide the leg shackles.").

At some point during the penalty phase, appellant adjusted his glasses, thereby voluntarily bringing his cuffed hands into the jury's view (R 1755). However, "a defendant is not necessarily prejudiced by a brief or incidental viewing by the jury of the defendant in handcuffs." Gates v. Zant, 863 F.2d 1492, 1501 (11th Cir. 1989), cert. denied, 110 S.Ct. 353 (1990). Thus, here, where appellant has made no showing or detriment or impairment during the penalty phase of his trial, reversal simply is not warranted.

ISSUE V

WHETHER THE SENTENCING COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR A CONTINUANCE OF THE PENALTY PHASE OF HIS TRIAL.

The general rule regarding continuances is that

> [t]he granting or denial of a motion for continuance is within the discretion of the trial court. Durcan v. State, 350 So.2d 525 (Fla. 3d DCA 1977); Mills v. State, 280 So.2d 35 (Fla. 3d DCA 1973); Douglas v. State, 216 So.2d 82 (Fla. 3d DCA 1968). This principle remains intact even in situations where the death penalty is of issue. See Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). This Court in Cooper announced:
>
> > While death penalty cases command our closest scrutiny, it is still the obligation of an appellate court to review *with caution* the exercise of *experienced discretion* by a trial judge in matters such as a motion for a continuance.
>
> 336 So.2d 1138 (emphasis added).

Williams v. State, 438 So.2d 781, 785 (Fla. 1983). See also Magill v. State, 386 So.2d 1188, 1189 (Fla. 1980), cert. denied, 450 U.S. 927 (1981); Jarvis v. State, 156 So. 310, 312 (Fla. 1934).

In moving for a continuance, appellant assumed the burden of proving that: (1) he exercised due diligence in locating witnesses; (2) substantially favorable testimony would be forthcoming; (3) the witnesses would be available and willing to

testify; and (4) a denial of a continuance would cause material prejudice. United States v. O'Neill, 767 F.2d 780, 784 (11th Cir. 1985). Because appellant failed to meet his burden of proof, the sentencing court did not abuse its discretion in denying appellant's motion to continue the penalty phase of his trial.

As indicated in the state's statement of the case and facts, appellant had approximately nine months to prepare for both phases of his trial. Despite that amount of time, appellant apparently made no efforts to discover whether his relatives, other than his mother, would be available and willing to testify on his behalf at sentencing, and failed to show how their testimony would have been "substantially favorable." In any event, as the sentencing court pointed out, their absence at sentencing was not so "unforeseeable and unavoidable" as to constitute an "exceptional circumstance" within the meaning of Fla. R. Crim. P. 3.191(f). Appellant also failed to prove his mother's unavailability. In fact, a telephone call to his mother revealed that she was willing and able to testify, but that appellant did not want her to testify.

Similarly, in Williams, the defendant

> moved for a continuance at the conclusion of the guilt phase of the trial. The trial judge's decision to deny the motion was *not* made in haste. The decision to deny was rendered subsequent to a two-hour recess -- a period of time sufficient to review the

> relevant circumstances surrounding [the defendant]'s motion. In our review of the record we find that [the defendant]'s counsel had been aware, since his appointment eleven weeks prior, that this was a case in which the death penalty would be sought. Eleven weeks' notice is adequate time to prepare for both the trial and sentencing phases of this litigation. We further find that [the defendant], in presenting his motion for continuance, never offered reasons fro his unpreparedness. Likewise he failed to demonstrate due diligence in locating mitigating witnesses and *never* alleged that the motion was made in good faith and not for delay only. Hence the trial judge acted within his bounds when he refused to grant appellant's motion for continuance.

438 So.2d at 785 (citations omitted) (emphasis in original).

Finally, appellant has failed to show how the denial of a continuance has caused him material prejudice. First, appellant's refusal to cooperate with defense counsel was the real root of the alleged problem necessitating a continuance. Contrast Scull v. State, Case No. 73,687 (Fla. June 28, 1990) (trial court rushed defense counsel, upon her return from vacation, to resentence defendant). As the prosecutor pointed out below, the state was entitled to use the same jury and to conduct expeditiously the penalty phase. This Court emphasized the same notion in Jones v. State, 449 So.2d 253, 258 (Fla. 1984):

> We are prepared to say, however, and do so in order to forewarn future defendants, that both the state and the defendant are entitled to orderly and timely proceedings. Florida's capital punishment law, which has been

> repeatedly upheld, contemplates that the sentencing phase will follow on the guilt phase, using the same jury.

Additionally, defense counsel in the present case admitted to having obtained one continuance, and then indicated that appellant's stepfather was willing to testify as to what appellant's mother would have said. Moreoever, the sentencing court provided defense counsel an opportunity to proffer fully to the jury the gist of the anticipated testimony of appellant's mother (R 1371-72). Under such circumstances, appellant has failed to show this Court how the sentencing court abused its discretion in denying his motion for a continuance of the penalty phase of his trial.

ISSUE VI

WHETHER THE SENTENCING COURT ABUSED ITS DISCRETION IN PERMITTING THE PROSECUTOR TO CROSS-EXAMINE APPELLANT CONCERNING HIS LACK OF REMORSE ABOUT THE OFFENSES OF WHICH THE JURY HAD CONVICTED HIM.

The scope and control of cross-examination is within a trial court's sound discretion, Maggard v. State, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059 (1981), and a decision to admit or exclude testimony will not be disturbed on appeal absent a showing of abuse of discretion. Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982), aff'd, 435 So.2d 809 (Fla. 1983). In the instant appeal, appellant has failed to demonstrate how the sentencing court abused its discretion in permitting the prosecutor to question him about his lack of remorse concerning the crimes he committed.

During direct examination, appellant stated that he was "kind of numb" about having been convicted of "the type of crime that has been committed," one which "was not committed against a stranger, as far as I'm concerned, but someone that I knew and somebody that I car[ed] for and spent a lot of time with." (R 1376). In response to that statement, the prosecutor posed his line of questioning concerning appellant's remorse: "[Y]ou told this jury that this crime did not happen to a stranger[, that] it happened to someone that you cared about and somebody that you knew. . . . [Then,] why don't you tell the jury, Mr. Wike, what your first reaction [was] . . . when the officers told you that one of Pat Rivazfar's daughters had been murdered." (R 1352).

First, appellant's testimony during direct examination was an obvious attempt to evoke sympathy from the jury. In effect, appellant's responses constituted evidence of a nonstatutory mitigating circumstance, i.e., remorse. See Campbell v. State, 15 F.L.W. S342, S344 n.6 (Fla. 1990). As such, the sentencing court properly allowed the prosecutor to question him to discover if indeed a factual basis for such a mitigating circumstance existed.

Appellant contends that the prosecutor's questions were improper, in that they "effectively inserted a nonstatutory aggravating circumstance into the penalty phase of the trial," citing to Pope v. State, 441 So.2d 1073 (Fla. 1983). Appellant's Initial Brief at 44. In Pope, the sentencing court, in finding the murder to be especially heinous, atrocious, and cruel commented that the defendant had not shown any remorse, "'having elected to steadfastly deny his guilt.'" Id. at 1077. Compare McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982) (the sentencing court's written sentencing findings reflected that he had considered appellant's lack of remorse in aggravation). This Court observed that "equat[ing] a defendant's not-guilty plea with lack of remorse" impermissibly constituted an inference regarding "lack of remorse from the exercise of constitutional rights." Id. at 1077-78. Thus, this Court held, based on the 1981 revisions of the Standard Jury Instructions in Criminal Cases, "any consideration of [a] defendant's remorse [is]

extraneous to the question of whether the murder . . . was especially heinous, atrocious or cruel." Id. at 1078.

In the present case, however, the sentencing court made no such observations, and in fact, made no comments concerning remorse whatsoever (R 1437-38, 1541-45). Additionally, although the prosecutor asked appellant about remorse during cross-examination, his motion to impose the death penalty never mentioned appellant's alleged lack of remorse (R 1536-40). Thus, it is evident that the prosecutor did not introduce evidence of appellant's lack of remorse to establish that the murder of Sara Rivazfar was heinous, atrocious, and cruel, but simply posed some questions to appellant based on his responses during direct examination.

Second, defense counsel "opened the door" during direct examination to the prosecutor's line of questioning. Specifically, defense counsel asked appellant: "Are you upset about what has happened in this court relating to your being convicted?" (R 1375-76). Appellant's answer plainly "invited" questions in the same vein from the prosecutor. Thus, the sentencing court properly allowed the prosecutor to follow up on appellant's response to this question.

Finally, if this Court determines that the sentencing court committed error in permitting the prosecutor to question appellant about his lack of remorse, the state alternatively

contends that any such error was harmless. There simply was "insufficient mitigating evidence to offset the aggravating circumstances upon which the jury could have reasonably predicated . . . a recommendation [of life imprisonment]." Jackson v. Dugger, 529 So.2d 1081, 1082 (Fla. 1988). See also Mendyk v. State, 545 So.2d 846 (Fla. 1989), cert. denied, 110 S.Ct. 520 (1990).

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm the convictions and sentences rendered in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to W.C. McLAIN, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 2d day of July, 1990.

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