IN THE SUPREME COURT OF FLORIDA

ROBERT BRYANT, JR.,

Appellant,

v. CASE NO. 75,317

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR TAYLOR COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 300179

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

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF CONTENTS
(Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

STATUTES AND CONSTITUTIONS

OTHER AUTHORITIES

STATEMENT OF THE FACTS

Appellee generally accepts Appellant's statement of the facts, but finds such to be incomplete in certain critical respects. Appellee also respectfully questions whether the focus of the facts of this case should be upon Bryant's life, as opposed to the instant homicide. The State particularly questions the propriety of such statements of "fact" as, "A boy cannot do much with a withered arm, and Bryant had his additional emotional and mental handicaps to deal with." (Initial Brief at 5). Appellee would supplement Bryant's statement of the facts as follows:

The victim in this case, Annie Kennedy, was sixty-seven years old and was five feet tall and weighed only ninety pounds (R 383, 487-488). According to her niece, Lillian Goston, Mrs. Kennedy, while a friendly person by nature, kept her door locked at all times (R 384-385); Mrs. Goston specifically stated that it was unlikely that Mrs. Kennedy would have let Mary Harris or Kat Anderson into her home (R 418-419). Mrs. Goston stated that when she went to see her aunt on the morning of June 4, 1988, she noticed that both the screen and front doors were unlocked, which was unusual (R 388-389). The witness then found her aunt's body on the floor of the living room (R 389). She noted that the body was nude from the waist down, that her aunt's nightgown had been pulled up around her chin and that her legs were wide apart (R 390). The witness stated that the couch had been disarranged and further noticed that both of the victim's purses were lying upon it (R 393-395). Officer Parker of the Perry Police Department,

who was dispatched to the scene, testified that the living room itself was in disarray (R 432), and James Gettemy, who processed the scene, noted that the victim's panties and shorts were on the couch (R 457). Gettemy noted that there were blood stains on a handheld fan and upon a metal box fan (R 457-458), and that a pack of Salem cigarettes lay between the victim's legs (R 466). Although Mrs. Kennedy had received her social security check, in the amount of $419.00, the day before, and had cashed such, no money was found in the house (R 520-521, 530-531, 403). Similarly, although Mrs. Kennedy was known to have a .38 pistol, and to keep such under a pillow on the living room couch, such pistol was not found anywhere (R 386, 411).

The pathologist testified that Annie Kennedy had been shot once in the chest; the firearms expert, who examined the victim's clothing, testified that there was powder residue on her blouse, indicating that the muzzle had been in close proximity when the weapon was fired (R 602). Given the location of the entrance and exit wounds, the pathologist stated that it appeared that the victim had been shot as she lay on the floor (R 497); subsequent investigation led to the recovery of a spent projectile, a .38 special, underneath the floor of the living room (R 604-606, 473). The pathologist, Dr. Wood, also testified that Annie Kennedy had been "badly beaten", observing blunt trauma in the head and face area (R 489-490); he noted that her eyes were swollen and that she had a large bruise on her face (R 489-490). He likewise noted that there were scratches and tears to her vagina, such injuries consistent with nonconsensual sexual

intercourse (R 489, 491). The doctor testified that Mrs. Kennedy would not have died instantaneously after having been shot, in that there had been a certain amount of internal bleeding (R 492-493).

There was extensive forensic and serological testing in this case. Appellant's fingerprints were found on the cigarette pack, lying between the victim's legs, and on a piece of paper, called "important notice", found inside the black purse belonging to the victim (R 821, 828); the witness also stated that he had had fingerprint samples from a number of other individuals, including Kat Anderson, Mary Harris, Cal Lockett and Nathaniel McNeil, and had found no fingerprints belonging to these individuals in the victim's house (R 815-816). Another expert testified that a pubic hair, consistent with Appellant's, was found on the victim's body (R 738). The serologist testified that Bryant had blood type AB, a blood type which only four percent (4%) of the population had (R 669). Subsequently, however, Bryant's blood had been tested for the presence of seven (7) additional enzymes (R 624-625). Based on this profile, the serologist testified that less than one percent, or .44 percent (.44%) of the population, would have had blood which matched that of Bryant in all respects (R 671). The witness stated that blood which matched that of Bryant, as to type and the presence of all enzymes, was found on an apron on the living room coffee table (R 660-661). In certain instances, however, a complete enzyme "matchup" was not possible due to the condition of the sample. The serologist testified, however, that the blood found on a

sheet in the living room matched that of Bryant, in all respects, except that the PGD enzyme reading was inconclusive (R 657). The bloodstain on the victim's shorts was type AB blood and five of the seven enzymes matched those in Bryant's blood, with two being inconclusive (R 658-659). Likewise, the bloodstain on top of the fan matched Bryant's blood in all respects, except that, again, the PGD enzyme reading was inconclusive (R 662). The expert stated that dried blood of the AB type was found under the victim's fingernails, although enzyme testing had proven impossible (R 661-662). The serologist also testified that the vaginal swabs indicated the presence of semen, although no AB type blood was detected (R 686); the serologist stated, however, that Bryant could not be excluded as the source of the semen, because the semen had mixed with vaginal fluid and masking could have occurred (R 646, 697-698). The witness stated that Annie Kennedy was blood type O, whereas Anderson was blood type A, and Mary Harris was blood type B (R 641, 649).

As noted in the Initial Brief, Bryant made several statements to the police. Appellant made his first statement to Officer Parker on June 4, 1988. At such time, Bryant stated that he had mowed the victim's lawn on the morning of the murder and that Annie Kennedy had paid him $10.00 around 2:00 or 2:30 that afternoon; Bryant said that Mrs. Kennedy had not received her social security check until the afternoon (R 436). Bryant stated that he had not entered the victim's house at all that day (R 436). FDLE Agent Clarence Mauge testified as to the statements that Appellant later made to him. Thus, on January 5, 1989,

Bryant repeated his contention that he had mowed the victim's lawn on the morning of the murder, and that he had been paid that afternoon, after the victim had cashed her check; at this juncture, however, Bryant contended that he had, in fact, entered the house that day, and had helped the victim put a container of chitlins in her freezer (R 552-553). Bryant also contended that, at the time of the murder, **i.e.**, the late night hours of June 3 and early morning hours of June 4, 1988, he had been out with a married woman, whose name he did not want to disclose (R 553). Mauge interviewed Bryant again on March 2, 1989. At that time, Bryant stated that he had not, in fact, been out with a married woman, but had been "hanging out all night" at the Seminole Lounge (R 554). At the April 4, 1989, interview, Bryant gave a similar account of his whereabouts at the time of the murder (R 555-557). Bryant also talked about his relationship with Annie Kennedy, stating that he had socialized with her a number of years ago and, at such times, had been inside of her home; Bryant, however, could not recall ever injuring himself in the victim's house, and seemed to say that he had not been inside of it for three years (R 558-560). In his final interview with Mauge, on May 1, 1989, Bryant also stated that he had never had occasion to go into Mrs. Kennedy's purse (R 562).

These statements were particularly relevant in light of Robert Bryant's testimony at trial (R 979-1032). Appellant testified that he was acquainted with the victim and had been in her home on occasion. He stated that he had mowed her lawn on the morning of the murder and had later returned to be paid that

afternoon, after the victim had cashed her social security check (R 1000, 1004-1007); Bryant said that he had helped the victim put some chitlins in her refrigerator at the time (R 1007). Appellant said that he had then gone to the 98 Bar and had had a drink; Bryant then proceeded to a game room and back to the bar, where he bought a bottle (R 1007-1009). Appellant said that the next thing he remembered, he was on the floor of his room at home (R 1010). Bryant testified that the victim had smoked Salem cigarettes, and that she had offered some to him; he also stated that he had picked up her mail on occasion (R 1001-1003). On cross-examination, Bryant stated that he did not recall taking any drugs on the night of the murder (R 1024-1025); he also seemed to say that taking drugs had no effect upon him (R 1025). Bryant also stated that he had no explanation for his blood having been found inside the house (R 1026).

At the sentencing phase, the defense presented the testimony of ten (10) witnesses. One of these witnesses, Eloise Gardner, had counseled Bryant when he was in high school, approximately ten years earlier. She testified that, at such time, Bryant had a very low IQ, 76 on one testing and 81 on another (R 1361). Another witness was Dr. James Mendelson, a clinical psychologist (R 1369-1407). On direct examination, the doctor testified that he had found no evidence that Bryant had organic brain damage or that he had been incompetent to stand trial (R 1379). The witness stated that his testing indicated that Bryant had a verbal IQ of 68, an IQ of 68 as to the second

half of the test and an overall IQ of 66 (R 1380);[1] Dr. Mendelson characterized this result as indicative of mild, mental retardation (R 1380). The witness also said, for the first time, that Bryant was "addicted to cocaine" and revealed that Bryant had been incarcerated for a drug-related offense (R 1381). Dr. Mendelson testified that he felt "reasonably certain", based upon a number of facts, including Bryant's alleged use of cocaine, that the defendant's capacity to conform his conduct to the requirements of the law had been impaired at the time of the murder (R 1385). The witness stated that he felt that Bryant was not an aggressive person, but, on cross-examination, admitted that he had not known that Appellant had a prior conviction for aggravated assault, and stated that such "might" change his opinion (R 1395). On cross-examination, the doctor also unequivocally stated that Bryant was not mentally ill (R 1397). Dr. Mendelson testified that Appellant had denied committing the instant offense and that, partly due to this, he had insufficient evidence to gauge Bryant's sanity at the time of the offense (R 1398); the doctor speculated, however, that Bryant had known right from wrong at the time of the murder (R 1398-1399).

---

[1] Dr. Mendelson testified that the "overall" I.Q. was determined by "putting together" the first two scores (R 1380). The undersigned is respectfully unable to see how one "puts together" two scores of 68 and derives an "overall" score of 66.

SUMMARY OF ARGUMENT

Bryant raises eleven (11) points on appeal, in regard to his convictions of first degree murder, armed burglary with a firearm, attempted armed robbery with a firearm and sexual battery with a firearm, and his sentence of death. Bryant raises three (3) claims in regard to the convictions, six (6) in regard to his sentence of death and two (2) "mixed" claims. Appellant's primary challenge to his convictions is his claim of error involving the exclusion of evidence relating to a statement allegedly made by Mary Harris. The State contends that this claim is not properly presented on appeal, given the fact that a sufficient proffer was not made below; Appellee also contends that Bryant failed to demonstrate not only the required predicate for the admission of the hearsay in question, **i.e.**, the unavailability of the declarant, but also any indicia of trustworthiness or reliability in regard to the statement. The other two claims are not of great moment; it is well established that a jury instruction on circumstantial evidence is no longer required, and Bryant's attack upon the prosecutor's closing argument is largely unpreserved and/or the result of a misreading of the transcript.

The two "mixed" claims presented involve the trial court's denial of defense counsel's cause challenge to eleven of the prospective jurors and a claim of error involving alleged irregularities in the jury's deliberations. Although Bryant contends that he is entitled to a new trial on the basis of such claims, such is not the case; the challenge to the jurors related

only to their ability to follow the court's instructions at the penalty phase and the alleged irregularity in the jury's deliberations did not occur until after they had agreed upon a verdict of guilt. Bryant is, in any event, entitled to no relief. Defense counsel's challenge to the jurors was premature and was properly denied. Additionally, although defense counsel requested additional peremptory challenges, he did not do so due to the court's prior ruling; rather, he simply wished to alter the racial composition of the jury. As to the claim involving the jury's deliberations, Bryant has failed to demonstrate that the judge abused his discretion in denying a mistrial, given the fact that the court interviewed the two jurors allegedly involved and determined that no cause for the motion existed.

Bryant presents six (6) points on appeal in relation to his sentence of death. His claim in regard to the State's cross-examination of the expert, and discussion of such in closing argument, is procedurally barred, in that no contemporaneous objection was interposed. The claim of error in regard to the court's denial of a jury instruction on one of the statutory mitigating circumstances is without merit, in that insufficient evidence was presented to support such instruction and, in any event, the other instructions provided the jury with a more than adequate opportunity to consider and weigh the mitigating evidence presented. Bryant's attack upon the aggravating circumstance in regard to the homicide having been committed for purposes of avoiding arrest is likewise without merit, given the circumstances of this case, and, in any event, any error would be

harmless, due to the presence, **inter alia**, of four other, unchallenged, aggravating circumstances. Bryant policy-based argument, to the effect that execution of the mentally retarded violates the federal and Florida constitutions, is procedurally barred, and, in any event, unconvincing; this Court would seem to have previously rejected this argument. Bryant also contends that his sentence of death must be reversed because the sentencer allegedly ignored "a wealth of mitigating evidence"; the State suggests that, to the contrary, the judge fully complied with his duties under the law.

Bryant's remaining point is that the death sentence is disproportionate. The State disagrees. While there was, indeed, evidence presented to the effect that the defendant is of low intelligence, such matter found in mitigation by the sentencer, that fact does not render this sentence inappropriate; the State disagrees with opposing counsel that, in a proportionality review, one focuses exclusively upon the evidence presented in mitigation. This was a particularly heinous crime. Bryant, who has a prior conviction for a crime of violence, brutally beat and raped the tiny elderly victim in her own home; Bryant, who had previously done yard work for the victim, and who was well known to her, came to her house in the dead of night, knowing that she had just cashed her social security check that day, and, literally, stole every penny that she had. On the basis of this Court's prior precedents, death is the appropriate sentence in this case.

ARGUMENT

POINT I

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE DENIAL OF DEFENSE COUNSEL'S CHALLENGES TO ELEVEN PROSPECTIVE JURORS

As his initial point on appeal, Bryant contends that he is entitled to a new trial because the circuit court denied his challenge for cause to eleven of the prospective jurors. In support of his contention, Bryant relies upon a number of this Court's precedents, including **Hill v. State**, 477 So.2d 553 (Fla. 1985), and **Singer v. State**, 109 So.2d 7 (Fla. 1959). The State respectfully suggests that Bryant's reliance upon these cases is misplaced, and that no basis exists for reversal of Bryant's conviction and sentence. The trial court did not abuse its discretion in denying defense counsel's initial, premature, cause challenge to those prospective jurors. The court did later grant Bryant's renewed cause challenge as to one of these jurors, and, on the basis of all of the voir dire, it is clear that the veniremen were able to follow the law. Further, even if denial of the initial challenge was error, Bryant would still be entitled to no relief, in that, he was not "forced" to accept any less than impartial juror. Although counsel unsuccessfully requested additional peremptory challenges, his request had nothing to do with the prior denial of his challenges to these eleven jurors. Before proceeding to the applicable law, however, it is necessary to discuss in some detail what did, and did not, occur at voir dire **sub judice**.

As Appellant notes in his brief, defense counsel did, indeed, ask members of the first panel of prospective jurors whether one convicted of premeditated murder should automatically receive the death penalty; prospective juror Padgett, Ratliff, J. Taylor, Thomley, Floyd, Kerley, Whitson, Dice and Payne seemed to generally agree with this proposition, whereas prospective juror Byrd did not (R 72-73). Following defense voir dire, the prosecutor asked the same panel whether they understood that the death penalty was not necessarily appropriate in every first degree murder case; all of the prospective jurors indicated that they understood that, and that they could follow the judges instructions regarding the weighing of aggravating and mitigating circumstances before making their sentencing recommendation (R 87-88). Defense counsel then, however, asked the prospective jurors whether the death penalty would automatically be appropriate for a person convicted of first-degree murder, and prospective jurors Floyd, Kerley, Whitson, Dice, Payne, Thomley, J. Taylor, Ratliff and Byrd answered in the affirmative (R 90-91). Defense counsel then moved to challenge prospective jurors Padgett, Presnell, Floyd, Kerley, Whitson, Byrd, Ratliff, J. Taylor, Thomley, Payne and Dice for cause, claiming that all had said that "if they find Robert Bryant guilty of first-degree murder, then they felt that automatically the death penalty was what they were going to recommend or would be appropriate." (R 94-99). The prosecutor pointed out that these prospective jurors had indicated that they would follow the court's instructions, in determining a sentence (R 95-96). Judge Douglas denied the

challenges for cause, stating that he did not think that defense counsel had "inquired far enough to explain to them their options under mitigating circumstances", and concluded that the motion was not well-founded (R 96). Defense counsel then exercised six peremptory (6) challenges, striking prospective jurors Padgett, Floyd, Byrd, Ratliff, Thomley and Dice (R 100; P 147).[2]

Voir dire, of course, did not end at this point, and subsequent events are relevant to the point on appeal. Thus, following defense counsel's exercise of these challenges, nine new prospective jurors were brought in (R 101). These veniremen, as well as those remaining from the previous panel, were questioned closely by defense counsel on this matter; the following exchange took place:

> MR. HARRISON [Defense counsel]: All right. That is the point I am really trying to get at. You see, folks, in other words, just because the Defendant is found guilty of first degree murder does not mean that you just automatically recommend death. You may. You may not. But it depends on certain jury instructions that His Honor will give you as to, as Mr. Phelps mentioned, aggravating circumstances and mitigating circumstances.
>
> And all I am asking is that we not have a jury made up of folks who are going to rubber stamp a death penalty recommendation if my client is found guilty of first degree murder. Do you all see what I am trying to say, maybe in not the most eloquent way possible?
>
> (Whereupon, all prospective jurors indicated affirmatively.)

---

[2] (P ____) represents a citation to the pleadings contained in the first two volumes of the record on appeal.

> MR. HARRISON: Would y'all all agree with Miss Schutte, then, that you are not going to automatically recommend death, assuming that you find my client guilty of first degree murder? Would everybody agree with me or are there some of you on this panel who are just, by gosh, regardless of what His Honor says, you feel so strongly you are just automatically going to recommend the death penalty in the event you find him guilty of first degree murder? Is there anybody like that on this panel?
>
> (No response.)
>
> MR. HARRISON: Can I assume your answer would be no?
>
> (Whereupon all prospective jurors indicated affirmatively.)

(R 142-143).

Subsequently, both counsel, as well as the judge, made numerous attempts to question the prospective jurors as to whether they felt that a sentence of death should be automatic under any circumstance and as to whether they could follow the court's instruction (R 124, 159-163, 173-185). During the course of this questioning, the following occurred:

> MR. PHELPS [Prosecutor]: Would you be able to then weigh all of the aggravating circumstances, then the mitigating circumstances, and only if you find the aggravating circumstances outweighed the mitigating, only under those circumstances would you return a verdict of, recommending the death penalty? Would you follow that?
>
> PROSPECTIVE JUROR KERLEY: I would.
>
> MR. PHELPS: Okay. And under some circumstances do you feel that you might be able to recommend life in prison as opposed to the death penalty?
>
> PROSPECTIVE JUROR KERLEY: It's possible.

MR. PHELPS: All right. Thank you very much. Same type of questions. Would you answer any differently, Mr. Whitson?

PROSPECTIVE JUROR WHITSON: No, sir.

MR. PHELPS: Mr. Payne?

PROSPECTIVE JUROR PAYNE: No.

(R 179-180).

Defense counsel then questioned prospective jurors J. Taylor, Whitson and Kerley individually (R 180-185). At such time, veniremen J. Taylor and Whitson indicated that, in fact, they might have trouble following the judge's instructions (R 181, 184-185); Whitson, while stating that he believed in the death penalty "instantly" for intentional murder, also stated that "there could be first degree murder that would not call for the death penalty because of the situation." (R 184-185). Kerley, on the other hand, disagreed with the contention that he had ever said that the death penalty should be automatically imposed in any first degree murder prosecution and stated affirmatively that he would follow the judge's instructions, even if they conflicted with his own personal feelings (R 181-182). Following this exchange, defense counsel renewed his challenges for cause to prospective jurors J. Taylor and Whitson (R 185). The judge denied the challenges to Whitson, but **granted** it as to Taylor (R 185). Defense counsel then used a peremptory challenge as to Whitson, as well as to venireman Presnell (R 186; P 147).

Voir dire continued, and defense counsel subsequently exercised his last two peremptory challenges on veniremen Morris and McGuire (R 227-228, 252; P 147). Defense counsel had

previously sought to challenge McGuire for cause due to a hearing problem (R 227-228); neither of these prospective jurors had been the object of the earlier cause challenge (R 94-95). Defense counsel then asked the court for ten more peremptory challenges, although he stated, "We will take less." (R 253). Defense counsel was extremely clear as to the reason for his request,

> I would like for the record to note that the Defendant is black. **And so for that reason,** we feel additional peremptory challenges are needed, or that this jury should not be allowed to be sworn in as the jury, because there is this under-representation of black people, the same race as the Defendant.

(R 255) (emphasis supplied).

The judge questioned the timeliness and sufficiency of this objection, but granted the defense an additional peremptory challenge (R 255-256). Defense counsel then used this challenge to strike prospective juror Redding, another venireman who had **not** been included in the original challenge (R 94-95; 256; P 147). After a number of other prospective jurors were examined, defense counsel renewed his request for ten additional peremptory challenges, "for the same reasons that [he] provided earlier." (R 279). At another break in the proceedings, counsel again renewed his request, stating that he wanted additional peremptory challenges "in order to try to effect a racially balanced, representative jury." (R 299); the judge denied the request, observing that, in any event, there were only two black prospective jurors present (R 299-300). Defense counsel later said that he wanted to challenge the entire jury panel, pursuant to Fla.R.Crim.P. 3.290, on the grounds that "black people may

somehow have been excluded from the panel." (R 308); other than this, he stated that he had no challenges (R 310). Defense counsel never renewed his challenge to prospective jurors Kerley and Payne, who did, in fact, serve upon Bryant's jury.

Appellee would initially contend that, even if Bryant were correct that error has been committed in regard to the denial of his cause challenges, he would nevertheless be entitled to no relief. It is clear that, even under **Hill v. State, supra,** Bryant would, at most, be entitled to a new sentencing proceeding, as opposed to the new trial requested; as in **Hill,** the prospective jurors at issue were clearly able to return a fair verdict as to the trial. No new sentencing hearing, however, is merited **sub judice.** Initially, it should be noted that, although Bryant complains, on appeal, of the denial of his challenges for cause as to eleven (11) prospective jurors, one of those challenges **was** granted, when defense counsel renewed his challenge for cause to venireman J. Taylor (R 185). Further, while it is true that defense counsel, after using his last peremptory challenge, unsuccessfully requested additional challenges, such request had **nothing** to do with the prior denial of the challenges for cause. Counsel did **not** request additional peremptory challenges, so as to be able to strike any of the veniremen whom he had unsuccessfully sought to challenge for cause. Rather, counsel simply stated that he wanted more peremptory challenges so that he would be able to "effect a

racially balanced, representative jury."[3] Accordingly, it cannot be said that the trial court's denial of Bryant's challenges for cause, and the denial of Bryant's subsequent unrelated request for additional challenges, constitutes any basis for relief.

This Court has held, under comparable circumstances, that in order to show reversible error, a defendant must demonstrate that all peremptory challenges were exhausted, additional peremptories were requested and refused and that an objectionable juror had to be accepted. **See Pentecost v. State**, 545 So.2d 861, 863, n.1 (Fla. 1989); **Rollins v. State**, 148 So.2d 274 (Fla. 1963). In cases in which this Court has reversed the conviction or sentence at issue, it has been clear that the defendant was entitled to relief, because of the actual presence of an unacceptable juror, whom he had been unable to strike from his jury. **See Reilly v. State**, 557 So.2d 1365 (Fla. 1990) (although defendant struck unacceptable juror with peremptory challenge, he unsuccessfully requested additional peremptory challenges "noting three jurors remaining on the panel as ones he wished to excuse"); **Hamilton v. State**, 547 So.2d 630 (Fla. 1989) (after unsuccessfully challenging juror for cause, defendant later unsuccessfully requested additional peremptory challenge to backstrike that

---

[3] It should be beyond dispute that Bryant had no right to a petit jury which actually mirrored the community, **see Taylor v. Louisiana**, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), and the undersigned would respectfully contend that a defense counsel, in any event, is not authorized to use peremptory challenges in a racially discriminatory manner. **Cf. Kibler v. State**, 546 So.2d 710 (Fla. 1989); **Koenig v. State**, 497 So.2d 875, 879 (Fla. 3rd DCA 1986) ("[**State v.**] **Neil**, [457 So.2d 481 (Fla. 1984)] instructs us that neither the State nor a defendant may exercise peremptory challenges solely on the basis of race.".

particular juror). Appellant **sub judice** has made no such allegation in this case, and the record would not support any finding that he was forced to accept an unacceptable juror.

As noted earlier, defense counsel initially challenged eleven (11) of the prospective jurors for cause (R 94-95). After the denial of these challenges, defense counsel immediately exercised peremptory challenges on six (6) of the veniremen (R 100; P 147). Voir dire, of course, continued, and the remaining five (5) veniremen - Kerley, Whitson, J. Taylor, Payne and Presnell - were subject to examination by both counsel and the court. Defense counsel subsequently renewed his cause challenges to venireman J. Taylor and Whitson (R 168-169). The court denied the challenge as to Whitson, and defense counsel then exercised a peremptory challenge as to him, as well as to another of the original venireman, Presnell (R 185-186). Significantly, defense counsel's renewed challenge for cause as to prospective juror J. Taylor was granted (R 185). Voir dire recommenced, and defense counsel used his two remaining peremptory challenges on prospective jurors Morris and McGuire, who were not part of the original panel challenged (R 227, 252; P 149). Defense counsel, upon request, was given an additional peremptory challenge, which he used to strike prospective juror Redding (R 256; P 147); again, this venireman was not among those unsuccessfully challenged for cause. Defense counsel never renewed his challenge for cause as to venireman Payne and Kerley, nor did he request additional peremptory challenges to strike them. As noted, both of these jurors served on Bryant's jury.

The State suggests that, in order to merit relief, Bryant must demonstrate that he "had" to accept veniremen Payne and Kerley, and that they were not impartial. He cannot make either showing. As argued above, Bryant was not "forced" to accept these two jurors. He certainly could have exercised peremptory challenges on them, as he did to the other eight similarly situated. Also, he could have renewed his challenge for cause, as he did, successfully, in regard to venireman J. Taylor; given his success with Taylor, Bryant certainly cannot argue that he would have regarded such renewal of challenge as "futile". Finally, defense counsel could have requested additional peremptory challenges, so as to backstrike these particular jurors. **Cf. Hamilton, supra.** While he did request additional peremptory challenges, it is clear that such was for an entirely different purpose, **i.e.**, racially balancing the jury. Accordingly, Appellee contends that Bryan has failed to make the threshold showing required under **Hill, Pentecost** and **Rollins.** To the extent necessary, the State also suggests that there has been no showing that these jurors were less than impartial. **Cf. Pentecost; Rollins; Ross v. Oklahoma,** 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). During subsequent examination, both Payne and Kerley indicated that they would follow the judge's instructions and would not automatically vote to impose the death penalty, simply because Bryant might be convicted of premeditated murder (R 88, 142-143). Payne and Kerley were also examined individually. Thus, in response to the prosecutor's questions, both venireman indicated that they would only recommend the death

penalty if they felt that the aggravating circumstances outweighed the mitigating; they each affirmatively indicated that, under certain circumstances, they could vote to recommend life imprisonment (R 179-180). Defense counsel specifically questioned prospective juror Kerley as to whether he could follow the judge's instructions (R 181-182). Kerley stated that he could follow the law, even if such was contrary to his own feelings about the death penalty, and the following exchange took place:

> MR. HARRISON: All right. Please excuse me for being redundant, but I just want to try to explore that a little bit more. You correct me if I am wrong, but you said earlier that you felt that the death penalty should be imposed if a person is convicted of first degree murder. Was that your feeling, or not?
>
> PROSPECTIVE JUROR KERLEY: Not fully.
>
> MR. HARRISON: All right, sir. Then I apologize. I just didn't hear you correctly.

(R 182).

Given this exchange, defense counsel's decision not to renew his cause challenge to venireman Kerley is certainly understandable. While prospective juror Payne was not re-examined in similar detail, the State suggests that no such challenge would have been warranted. Both jurors indicated that they could follow the judge's instructions and, if warranted, could vote to impose a sentence of life imprisonment for anyone convicted of first degree murder. Whatever initial confusion these jurors may be said to have exhibited during defense counsel's early questioning (R 73, 90-91), a reading of all of

their voir dire clearly indicates that neither juror was unsuitable to serve. Cf. **Brown v. State**, 565 So.2d 304, 307 (Fla. 1990); **Pentecost, supra**. It cannot be said that any reasonable doubt exists as to the ability of these jurors to render an impartial verdict as to penalty, **see Singer v. State, supra, Lusk v. State**, 446 So.2d 1038 (Fla. 1984), and it is clear that these two jurors did not merit excusal under the test set forth in **Fitzpatrick v. State**, 437 So.2d 1072, 1076 (Fla. 1983),

> A judge need not excuse such a person unless he or she is irrevocably committed to voting for the death penalty if the defendant is found guilty of murder and is therefore unable to follow the judge's instructions to weigh the aggravating circumstances against the mitigating.

Accordingly, Bryant has failed to demonstrate any basis for relief.

The State also respectfully suggests, to the extent necessary, that Bryant has failed to demonstrate reversible error, in regard to the trial court's denial of his initial challenge for cause as to the eleven (11) prospective jurors. At that time, the judge observed that he did not find that defense counsel had conducted a sufficient inquiry and/or explanation as to the jurors' consideration of mitigating circumstances (R 96). Thus, the judge, in essence, found that the challenge was premature, and the State would contend that such observation was correct. The challenge was made at a very early stage in voir dire, before the prospective jurors had been instructed as to the mechanics of capital sentencing. It is clear, from subsequent questioning, that, when advised of the function of aggravating

and mitigating circumstances, the panel indicated that it could consider both options in sentencing - life imprisonment, as well as the death penalty (R 88, 124, 142-143, 159-163, 173-185). Thus, the case bears great similarity to **Fitzpatrick v. State, supra.** In **Fitzpatrick**, the defendant complained he had been "forced" to use peremptory challenges on jurors who "should" have been excused for cause. This Court found no error, distinguishing **Thomas v. State**, 403 So.2d 371 (Fla. 1981), and noted that, under **Witherspoon v. Illinois**, 391 U.S. 510, 519, 88 S.Ct. 1770, 20 L.Ed.2d 736 (1968), a person who has a tendency to favor the death penalty is still entitled to serve as a juror in capital sentencing. In setting forth the appropriate facts, this Court stated,

> During voir dire two of the venireman stated that the death penalty was appropriate for anyone who committed murder, a third felt death was appropriate if there were eyewitnesses to the murder, and the fourth felt that the death sentence should be imposed any time a police officer is shot in the line of duty. These statements were made in response to defense counsel's questioning the prospective jurors about the general feelings concerning the death penalty. When the prosecuting attorney explained that under Florida law the death penalty is not automatic under any situation and asked if they would be able to follow the court's instructions and weigh the aggravating circumstances against the mitigating circumstances in making their recommendation, they all said they could.

Fitzpatrick, 437 So.2d at 1075.

Further, the State would suggest that defense counsel's question to the venire was not a model of clarity (R 89-91); a prospective juror could certainly feel that the death penalty was

"appropriate" in a first degree murder case, and still be able to vote for life imprisonment, under certain circumstances. In any event, Bryant has failed to demonstrate that Judge Douglas abused his discretion in denying this challenge for cause. It is well established that the trial court's ruling in this regard is particularly entitled to deference, given the fact that the trial judge, who is present during voir dire "is in a far superior position to properly evaluate the responses to the questions proposed to the jurors.", **Cook v. State**, 542 So.2d 964, 969 (Fla. 1989). **See also Lambrix v. State**, 494 So.2d 1143, 1146 (Fla. 1986) (". . . we pay great deference to a trial court's finding in this regard because, unlike a reviewing court, he is in a position to observe the juror's demeanor and credibility."); **Valle v. State**, 474 So.2d 796, 804 (Fla. 1985) (same). This should be particularly true in regard to venireman Presnell, who, it would appear, never indicated any belief that those convicted of first degree murder should automatically receive the death penalty. Again, Bryant has failed to demonstrate any basis for relief.[4]

---

[4] Given the fact that these challenges were premature, the State contends, **inter alia**, that even if erroneous, their denial could not constitute a basis for reversal, and that all subsequent voir dire must be considered. As noted, the veniremen remaining on the panel - Kersey, Payne, Presnell, J. Taylor and Whitson, were examined further as to their views on the death penalty and their ability to follow the court's instructions (R 124, 142-143, 159-163, 173-185). Defense counsel's renewed cause challenge as to venireman J. Taylor was granted (R 185). The State suggests that the subsequent voir dire of the remaining veniremen did not supply a basis for a cause challenge. The State notes, however, that, based upon venireman Whitson's subsequent statements, defense counsel unsuccessfully renewed his cause challenge (R 169, 184-186). Even should the denial of this renewed challenge be regarded as error, such error would be harmless. As argued

In conclusion, the instant conviction of first degree murder and sentence of death should be affirmed. Appellant's initial cause challenge to eleven (11) of the prospective jurors was premature and ill-founded; the judge did not abuse his discretion in denying this challenge. Further, as to those veniremen who were subsequently questioned in more detail, including those who actually sat on Bryant's jury, it is clear that no basis for a cause challenge ever existed. Although Bryant did exhaust his peremptory challenges and unsuccessfully requested more, after receiving and using one additional challenge, his request for additional peremptories had nothing to with the denial of his prior cause challenges. Rather, defense counsel simply claimed that he wanted additional peremptory challenges, so as to arbitrarily manipulate the racial composition of the jury. Bryant has failed to demonstrate that the rulings at issue prejudiced him or that he was forced to accept a less than impartial juror on his jury. Accordingly, no relief is warranted as to this claim.

Footnote 4 (continued)

previously, Bryant never made the required showing of prejudice under **Hill, Pentecost** and **Rollins.** Additionally, Bryant did receive an additional peremptory challenge, thus "cancelling out" the fact that he used one on Whitson. **Cf. Cook v. State,** 542 So.2d 964, 969 (Fla. 1989) (where defendant complained of denial of cause challenges as to two prospective jurors, and where defendant granted one additional peremptory challenge, defendant would have to show that court's ruling as to both jurors was error, in order to merit relief).

POINT II

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO ANY CLAIM INVOLVING MARY HARRIS; THERE WAS NO SUFFICIENT PROFFER OF THIS WITNESS'S TESTIMONY, NO SHOWING OF HER UNAVAILABILITY AND NO ESTABLISHMENT OF CORROBORATION, SO AS TO AUTHORIZE THE ADMISSION OF ANY HEARSAY STATEMENTS ATTRIBUTED TO HER

As his second point on appeal, Bryant contends that his conviction of first degree murder must be reversed because of an alleged exclusion of evidence involving Mary Harris. The Initial Brief, however, contains a number of inaccurate statements as to this claim. For instance, the defense did not, as stated therein, seek to call Agent Mauge as to this matter (Initial Brief at 20), and the State must certainly did **not** fail to contest Harris' unavailability (Initial Brief at 22). Further, in the Initial Brief, appellate counsel "merges" the testimony involving Mary Harris with that involving another individual, "Kat" Anderson (Initial Brief at 22-23). As the trial court correctly recognized, the testimony involving these two individuals was contradictory, and that involving Kat Anderson in no way corroborates that involving Mary Harris. The State suggests that reversible error has not been demonstrated, and would further contend that a close examination of the record is necessary to resolve this claim.

At the conclusion of voir dire on November 20, 1989, defense counsel sought to bring up certain matters to the court (R 323-355); counsel had filed a formal letter with the court that morning (P 144-145). Defense counsel stated that he wanted to introduce testimony concerning Mary Harris and concerning Kat

Anderson, during the defense case in chief, and he wished a clarification as to the admissibility of such testimony, before mentioning it in opening statement. Defense counsel stated that he had studied the "case summary book" prepared by FDLE Agent Mauge and had discovered certain allegedly exculpatory evidence "in two parts." (R 323). Defense counsel stated that Mary Harris was "a noted crackhead and criminal", who was currently incarcerated at River Junction (R 323). Counsel related that when Harris had been incarcerated in the Taylor County jail, she had made certain statements in the presence of Bertha Howard and others (R 324). According to defense counsel Harrison, Harris had allegedly said that she, Nathaniel McNeil and Cal Lockett had been present in the victim's house on the night of the murder; Harris allegedly said that, while in one part of the house, she had heard what sounded like a gunshot, and, upon returning to the living room, had seen McNeil standing over the victim, with his pants down and sexual organ exposed (R 324). Defense counsel also said that Harris had indicated that Bryant was not present (R 324). Defense counsel also stated that he wished to call Maggie Blackshear, who would testify as to the actions of Kat Anderson (R 324). Defense counsel stated that Blackshear would testify that, on the morning of June 4, 1988, she had seen Anderson with a pistol and with blood stains on her clothes. At such time, Anderson had allegedly said, "He made me kill her." (R 325).

Defense counsel stated that these two matters would constitute "our entire defense", inasmuch as the defense could

not rebut the State's "very damaging" serological and fingerprint evidence (R 325). Mr. Harrison affirmatively stated that he had subpoenaed both Harris and Anderson, although he was concerned they might invoke the Fifth Amendment; Harrison stated that if such occurred, he would use Bertha Howard, to bring in Harris' statements, and Maggie Blackshear, to bring in those of Anderson (R 326). Defense counsel said that both Harris and Anderson had been interviewed by Agent Mauge, and both had denied involvement in the offense (R 327); apparently, Mauge had also investigated an alibi given by Harris and had determined that such was false (R 327). In light of all of the above, defense counsel asked the court to call Harris and Anderson as court witnesses (R 328); he anticipated that each would deny their original statements and that, accordingly, he would then be able to "call [his] hearsay witnesses" to impeach them (R 328-329). In rebuttal, the prosecutor pointed out that Bryant had failed to demonstrate the unavailability of Harris (R 334-335); the Assistant State Attorney also attacked the untrustworthiness of the Mary Harris statement and pointed out that the Mary Harris "story" was inconsistent with the Kat Anderson "story" (R 335-339). A lengthy discussion ensued, during which the following occurred:

> THE COURT: But my concern, what kind of corroboration do you have on Mary Harris?
>
> MR. HARRISON: Well, I have got the corroboration that she is lying if she says that she didn't say this to Bertha Howard. In other words, because I can show that she doesn't have an alibi. See, Mary Harris tried to come up with an alibi, and Mr. Mauge checked it out and she doesn't have an alibi. She is lying about that. So that is consistent with the fact that what she told

> Bertha Howard was true. See, the bit about the Bambi Motel, it is consistent with what Bertha Howard said was true.

(R 351).

The judge then announced that he would allow the defense call Kat Anderson, and, that if she invoked the Fifth Amendment, she could then be called as a court witness (R 353); the judge also stated that the defense could call Maggie Blackshear (R 353). Judge Douglas then stated, "Now, I don't think you are going to have a lot of luck, Mr. Harrison, with talking to me about Mary Harris. I don't see the corroboration there that we are going to need." (R 353). Defense counsel, however, stated that he wished to introduce excerpts from Mauge's report, and the judge said that he would consider such overnight (R 354-355).

In fact, the matter was not raised until November 27, 1989, after the State had rested its case (R 864-897); in the meantime, however, Bryant had filed with the court a letter containing, as attachments, a number of reports by Agent Mauge (P 226-274). At this time, defense counsel stated that he wished the exhibits to be considered as a proffer and that he wanted to call Bertha Howard "to testify to certain matters regarding statements that Mary Harris made in her presence right after the Kennedy homicide." (R 865). Defense counsel said that, according to Howard, Harris had said that she, McNeil and Lockett had been in the victim's home on the night of the murder and that she had heard a shot and had later seen McNeil standing over the victim with his pants down (R 865-866); this was based on Howard's statement to Nellie Walker (R 236-237). Counsel said that he had

subpoenaed Mary Harris and that she was "on her way over here" (R 866); counsel further said, however, that he "had a feeling" that she would either deny making the statement at issue or would "take the Fifth", such that it would be necessary for him to call Howard or to have Harris called as a court witness (R 866). In rebuttal, the prosecutor noted that if Mary Harris took the stand and confessed to the crime, she would be relevant; he pointed out, however, that if she denied making the statement at issue or committing the crime, Howard's testimony would only be admissible as impeachment and not as substantive evidence (R 872). The prosecutor then contended that the statement lacked sufficient trustworthiness or corroboration, so as to be admissible (R 873). The prosecutor introduced a police report, which contained another version of Harris' statement; in such version, Harris had allegedly told others that she had seen Lockett standing over the victim with a Coke bottle and that he, as opposed to McNeil, had been standing over the victim with his pants down (R 873-875; P 274).

The prosecutor also called two witnesses, Lawrence Williams, an investigator with the State Attorney's Office, and Cla Parker, a Perry police officer (R 878-882). Williams stated that he had interviewed Bertha Howard on July 21, 1989, the day after she had made her statement to Nellie Walker. At such time, Howard related that Harris had told her that she, Lockett and McNeil had gone to the victim's house on the night of the murder. Harris had allegedly heard some "tumbling and bumbling", and had seen Lockett standing over the victim with a bottle; Lockett had

allegedly said that he had raped the victim with the bottle and McNeil had a gun and, apparently, later shot the victim through the head (R 879). Parker stated that he had interviewed Vicky Bolton, another cellmate of Harris', and the one to whom she had allegedly made the admission at issue. Parker testified that on July 26, 1988, Bolton had told him that, in fact, Harris had denied that she had been involved in the crime and had stated that she had only heard the details at issue from one Leroy Givens (R 881). The prosecutor also pointed out a number of other inconsistencies contained in the exhibits attached to defense counsel's letter (R 882-888; P 234-273). Thus, one exhibit indicated that Agent Mauge had interviewed yet another cellmate of Harris', Cassandra Hugger. Hugger related that Harris had speculated about how the murder had been committed, and had further stated that she had no personal knowledge, in that she [Harris] had not been involved (P 234); Hugger had apparently been acting as a police agent at the time that these statements were made, and, indeed, had been wearing a body bug (R 890-892). Another exhibit represented yet another interview between Mauge and Bertha Howard. In this one, Howard had related another version of the statement which had allegedly been made in the jail cell. According to Howard, Harris had stated that four persons had been involved - Harris, Lockett, Nathaniel McNeil and Pam McNeil; Pam McNeil had allegedly been the one to gain entry to the house, and Lockett had hit the victim in the head with a gun and raped her with a soda bottle (P 242). Finally, the exhibits included the report of an interview between Mauge and

Mary Harris; in such interview, Harris had denied any knowledge of or complicity in the incident, specifically stating that she did not know who had killed the victim (P 246-247).

Finally, after listening to both counsel, Judge Douglas announced,

> I earlier told Mr. Harrison, and I remain convinced of that, that there is insufficient corroborating evidence and no assurances whatever of the reliability of the declarant's, Mary Harris' statement.
>
> And to the contrary, I believe there are so many inconsistencies in the Mary Harris statement, or those attributed to her, as to not be worthy of an issue that we can give to the jury. And I think that is where we will have to leave that.

(R 897).

Subsequently, during the defense case, attorney Harrison called Bryant himself, who testified that he had been at certain bars on the night of the murder, that he had had a certain amount to drink and that he had later woken up on the floor of his bedroom at home (R 1007-1010). Appellant's mother, Willie Pearl Bryant, and her friend, Georgia Lee Ham, also testified that Appellant had come home at about 10:30 p.m. on the night of the murder and that he had seemed intoxicated at the time (R 914-916; 948-951). The defense also called Maggie Blackshear and Teresa Hampton; defense counsel announced that he had subpoenaed Kat Anderson without success three times, and that she was unavailable (R 960-961). Blackshear testified that she had shared a trailer with Kat Anderson, and that, on the morning of June 4, 1988, the latter had returned home, very upset, with a blood stain on her jacket, carrying a pistol (R 964-965); according to Blackshear,

Anderson had said, "Why did they do it?", and had later failed to explain who "they" were (R 969). Hampton, Blackshear's niece, testified that she had been present at this time, and had heard Anderson say that she had not "meant to do it" and that "he" had made her do it, although "he" was never identified (R 974, 977). Finally, the defense called a Perry police officer, Benjamin Flowers, as a witness (R 933-938). Flowers testified that on the night of the murder, he had seen one Richard Glenn near the victim's home, and that at such time Glenn's face had seemed bloody, as if he had been scratched (R 933-934). Flowers testified, however, that he had later learned that Glenn had not been scratched, and that the wound had been inflicted by Leroy Williams (R 935-938). The defense made no attempt to call Mary Harris, Bertha Howard or any other alleged recipient of Mary Harris' confidences.

As noted, Bryant asks this Court to reverse his conviction and sentence of death, due to the exclusion of evidence. In resolving this claim of error, one is immediately confronted with a problem - namely, what evidence is it that appellant claims was excluded? Was it the direct testimony of Mary Harris, herself, even though such was never proffered? If it was testimony by others as to statements made by Harris, then the next question is **which** statement is at issue, inasmuch as Harris would seem to have given **six**, all contradictory, statements. At various points, Harris is alleged to have said: (1) that she had been present at the victim's home with Cal Lockett and Nathaniel McNeil and that Nathaniel McNeil had apparently raped the victim;

(2) that she had been present at the victim's home with Cal Lockett and Nathaniel McNeil and that Lockett had apparently raped the victim with a bottle; (3) that she had been present at the victim's home with Cal Lockett, Nathaniel McNeil and Pam McNeil and that Lockett had hit the victim in the head with a gun and raped her with a soda bottle; (4) that she knew nothing about the crime and had only been told about it by Leroy Givens; (5) that she had only been speculating about how the crime was committed and had no personal knowledge, and (6) that she had no knowledge of the crime, had not been involved and had no idea who had done it. Further, given counsel's conflicting requests, it is unclear whether defense counsel wished to call Mary Harris herself, whether he wished her called as a court witness or whether he wished to "bypass" her entirely and call Bertha Howard. Given the fact that reversible error cannot be predicated on speculation or conjecture, **see Sullivan v. State**, 303 So.2d 632 (Fla. 1974), it is clear that Bryant merits no relief.

The reason for the instant confusion is that defense counsel below never adequately proffered the specific evidence which he wished admitted. While it is undeniable that Judge Douglas twice indicated that it was unlikely that evidence concerning Mary Harris would be admissible (R 353, 897), such fact did not excuse defense counsel below for making an adequate proffer. While, under some circumstances a police report could constitute a sufficient proffer, the problem in this case is that the documentary exhibit contains six contradictory statements

attributed to the declarant, and adds to the confusion, rather than dispelling such. As this Court held in **Jacobs v. Wainwright**, 450 So.2d 200, 201 (Fla. 1984),

> The purpose of a proffer is to put into the record testimony which is excluded from the jury so that an appellate court can consider the admissibility of the excluded testimony.

See also Lucas v. State, 568 So.2d 18, 22 (Fla. 1990). The necessity for a proffer in this case is not mere formality, in that not only did Mary Harris give inconsistent statements, but, according to the proffered documentary evidence and the testimony of Lawrence Williams, it would appear that Bertha Howard likewise gave inconsistent statements as to what she allegedly heard from Mary Harris (R 879; P 236, 242, 274). It cannot be said, on the basis of this record, that error has been demonstrated.

The State further suggests, from what it can glean from this record, that defense counsel, in all likelihood, was not entitled to what he was seeking to do. Defense counsel, essentially, wished to introduce the statements of Mary Harris through the testimony of Bertha Howard. Yet, as the State correctly pointed out, in order to introduce any hearsay statement, pursuant to §90.804(2)(c), Fla.Stat. (1987), defense counsel would have to demonstrate that the declarant, Mary Harris, was unavailable. Defense counsel never demonstrated this, and, contrary to the representation in the Initial Brief (Initial Brief at 22), the State did contend that the defense had failed to establish this prerequisite (R 334-335). Indeed, it is difficult to see how defense counsel could have made such a showing, inasmuch as, at the hearing of November 27, 1989, he announced that he had

subpoenaed Harris and that she "was on her way over." (R 866). Although defense counsel stated that he "had a feeling" that Harris would deny making the statement at issue or would invoke the Fifth Amendment (R 866), he failed to actually demonstrate that such was indeed the case. Given counsel's failure to demonstrate the necessary predicate for admission of this hearsay statement, i.e., Harris' "unavailability", it was not error for the court to have excluded this testimony. **See Card v. State**, 453 So.2d 17, 21 (Fla. 1984) (testimony offered as declaration against penal interest, under §90.804(2)(c), inadmissible where defense failed to establish unavailability of declarant); **Rivera v. State**, 510 So.2d 340 (Fla. 3rd DCA 1987) (admission of hearsay statement, pursuant to §90.804(2)(c), error, where no showing of declarant's unavailability).

The State also suggests that the trial court did not abuse its discretion in excluding this evidence on the grounds of lack of corroboration or trustworthiness. Although, in the Initial Brief, appellate counsel contends that it is unconstitutional to require the defendant to make such showing (Initial Brief at 24-28), the State would note that this objection was never presented to the trial court; hence, this argument is procedurally barred on appeal. **See Bertolotti v. State**, 565 So.2d 1343 (Fla. 1990); **Steinhorst v. State**, 412 So.2d 332 (Fla. 1982). The State would further note that in **Hill v. State**, 549 So.2d 179, 181-182 (Fla. 1989), this Court found an identical claim procedurally barred. In **Hill**, this Court alternatively addressed the merits of the claim, and concluded that the dictates of **Chambers v.**

Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), were not violated by the requirement that hearsay testimony of this nature be corroborated or possess some indicia of trustworthiness in order to be admissible. **Hill**, 549 So.2d at 182. Appellant, who has failed to even acknowledge the existence of **Hill**, has likewise failed to demonstrate that such decision was wrongly decided.[5]

In any event, Appellee would contend that there exist **no** indicia of reliability or trustworthiness in regard to the statements attributed to Mary Harris. Defense counsel's initial references to Harris, as "a noted crackhead and criminal" (R 323), hardly inspire confidence. Similarly, defense counsel's argument in favor of the admission of this testimony is equally unconvincing; counsel argued that because Mary Harris had allegedly lied about having an alibi at the time of the murder, such lack of veracity in that instance meant that her other "testimony" had to be true (R 351). Judge Douglas can hardly be faulted for failing to find such "logic" persuasive. Additionally, defense counsel's other "proffer", **i.e.**, the police reports, hardly furthered the cause of "reliability". As noted, the police reports contained not one statement attributed to Harris, but six contrary statements, and defense counsel never explained why any one statement was entitled to any more credence

---

[5] The testimony allegedly at issue would also seem to bear some similarity to the double hearsay properly excluded in **Hill**; although defense counsel wished to call Bertha Howard to testify as to statements made by Mary Harris, it would appear that these statements were not in fact made to Howard, but rather were made to a third person, either Vicky Bolden (P 236, 274), or Cassandra Hugger (P 242).

than another; in some of these statements, Harris denied any knowledge of the offense (P 246-247). Further, although appellate counsel contends in the Initial Brief that the evidence concerning Kat Anderson somehow corroborates that involving Mary Harris (Initial Brief at 22-23), nothing could be further from the truth. Kat Anderson, as noted, was seen with a pistol and a blood stained jacket on the morning after the murder, claiming that unnamed persons had "made" her do "it". Kat Anderson never identified Mary Harris as one of the persons involved, and, more significantly, Mary Harris, while placing a number of other persons at the murder scene - Nathaniel McNeil, Pam McNeil and Cal Lockett - **never** stated that Anderson had been there. Defense counsel contended that the "importance" of Harris' testimony was that she had not said that Bryant was at the scene (R 324); Harris' omission of Kat Anderson must be read in a similar light. Given all of the above, Judge Douglas did not abuse his discretion in excluding this evidence, assuming in fact that any proper proffer was made. **See Card,** 453 So.2d at 21 (not error to exclude hearsay evidence where there was "no corroborating evidence and no assurances whatever of the reliability of the statement"); **LeCroy v. State,** 533 So.2d 750, 754 (Fla. 1988) (not error to exclude "ambiguous hearsay", which was "meaningless without further development"); **Blanco v. State,** 452 So.2d 520 (Fla. 1984) (abuse of discretion standard applied to trial court's exclusion of defense evidence).

Further, the State suggests that Judge Douglas was entitled to exclude this evidence, pursuant to §90.403, Fla.Stat. (1987),

which provides that evidence is inadmissible if its probative value is substantially outweighed by the danger of ". . . confusion of issues, misleading the jury, or needless presentation of cumulative evidence." **See State v. McClain**, 525 So.2d 420 (Fla. 1988); **Tafero v. State**, 403 So.2d 355, 360, n.4 (Fla. 1981). Certainly, had the defense offered into evidence any **one** of Mary Harris' alleged statements, the State would then have sought to introduce the other five, and more than a reasonable probability exists that substantial jury confusion would result, with the venire hopelessly confused with, and entangled in, the resolution of what would be, essentially, a collateral matter, **i.e.**, the veracity of Mary Harris. Accordingly, this evidence was properly excluded.

Finally, the State would suggest that any error committed in this regard was harmless beyond a reasonable doubt, pursuant to **State v. DiGuilio**, 491 So.2d 1129 (Fla. 1986). Exclusion of this evidence had no effect upon the jury's verdict, in that Robert Bryant was not deprived of the opportunity to present significant defense evidence. Bryant himself took the stand and gave himself something of an alibi, which was allegedly corroborated by his mother and family friend, Georgia Ham. Additionally, defense counsel was able to elicit testimony concerning Kat Anderson's "suspicious" activities on the morning after the murder, and was equally allowed to bring in evidence concerning Richard Glenn. The State suggests that, in the name of reasonable doubt, the defense was not entitled to inundate the jury with an unlimited number of hypotheses of "innocence" in regard to alternative

suspects; surely, such course of action can reach the point of diminishing returns. The statement attributed to Mary Harris did nothing to explain the most damning evidence against Robert Bryant; it would not appear that any of the alleged "participants" in the crime - Mary Harris, Cal Lockett, Nathaniel McNeil or Pam McNeil - possessed AB blood, so as to explain the blood found at the scene, and, certainly, Mary Harris' "story" did nothing to explain how Bryant's fingerprint came to be found on the cigarette pack by the victim's body or on a document inside one of the victim's purses. Reversible error has not been demonstrated, and the instant conviction should be affirmed in all respects.

POINT III

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE DENIAL OF BRYANT'S MOTION FOR MISTRIAL, AND MOTION TO INTERVIEW JURORS; NO NEW SENTENCING PROCEEDING IS REQUIRED

As his third point on appeal, Bryant contends that he is entitled to not only a new sentencing proceeding, but also a new trial, because, allegedly, outside influences entered the jury deliberations. The State suggests that relief is not warranted, in that Judge Douglas conducted a sufficient inquiry into this matter and correctly concluded that a mistrial was not required. Given the fact that all of the events at issue occurred after the jury had already agreed upon its verdicts of guilt, Bryant would, at most, be entitled to a new sentencing hearing, even if he were correct in all of his allegations. The State respectfully suggests that he is not, and, as in the preceding points, the State would briefly set forth some of the pertinent facts.

The jury left the courtroom at around 8:20 p.m., on November 27, 1989, to begin its deliberations as to Bryant's guilt or innocence (R 1181). Subsequently, it was announced that the jury had reached a verdict, and the transcript then indicates that the jury started into the courtroom and then returned to the jury room (R 1186). Concerned that the jury might have a question for the court, the judge sent the bailiff, accompanied by the prosecutor and defense counsel, to the jury room to ask the jury if they had a written question (R 1187). Apparently, just as the bailiff knocked on the door, the jury announced that they did, in fact, have a verdict (R 1188). The verdict was announced - guilty as charged on all four counts (R 1188-1189). Upon defense counsel's request, the jury was polled, and all twelve, including jurors Morrow and Roach, announced that the verdict was correct (R 1189-1190). Court was then in recess until the next morning (R 1191).

When proceedings began the next day, the parties held a charge conference in regard to the penalty phase (R 1274-1282). At the conclusion of the conference, defense counsel announced that he had a motion (R 1282). Defense counsel stated that he had heard that one or more of the female jurors had indicated concerns about announcing the verdict, due to a belief that Bryant's family might cause them harm (R 1282). Counsel felt that such feeling would indicate bias against Bryant and, accordingly, moved the court "to empanel an entirely new jury to hear the penalty phase." (R 1283). Judge Douglas denied such motion, but indicated a willingness to interview the juror or

jurors involved (R 1283). After discussion as to how to proceed, the judge announced his intention to question the venire, as a whole, as to whether anyone had a concern to bring up before proceeding with the penalty phase; defense counsel indicated his agreement with this course of action (R 1289). Before this took place, however, the bailiff related that, over the weekend, someone had shot at the home of one of the jurors, Mrs. Roach; the bailiff speculated that this might have been the cause of concern (R 1290). Defense counsel then made a motion for mistrial (R 1291). Judge Douglas, however, continued with his intention of asking the jurors if any one of them had a concern to bring up to the court; no juror so indicated (R 1291).

Defense counsel then questioned the bailiff, Elco James, under oath (R 1293-1297). James related that he was a deputy sheriff, and had been on duty the previous Friday (R 1294). At such time, he had received a call concerning a broken window and had proceeded to the residence in question (R 1294). Upon arrival, he had recognized the owner as one of the jurors, Mrs. Roach (R 1294). James stated that he had determined that a stray bullet "from a hunter" had caused the damage (R 1295). The bailiff stated that Mrs. Roach had seemed "a little bit shook up" about the incident, but stated unequivocally that he had never heard her discuss this matter with the rest of the jury (R 1295). The court then agreed that it would be appropriate to question Mrs. Roach, and she was brought into the courtroom (R 1303). Mrs. Roach stated that she had been at home on the prior Friday afternoon and had heard a loud noise, subsequently finding her

window shattered (R 1304). Mrs. Roach said that she did not know who might have been responsible, and stated, "I don't think it had anything to do with this trial. I think it was just somebody going along the road and wanted to be mischievous." (R 1305).

Mrs. Roach then related that after the jury had arrived at a verdict, and, indeed, had signed it, one of the jurors, Carol Morrow, had become upset (R 1306, 1307); this had prompted the foreman to call all of the jurors back into the jury room (R 1307). According to Mrs. Roach, Morrow had been calm during deliberations and had not manifested any problem until it became time for the verdict to be announced (R 1309, 1310). In any event, Mrs. Morrow had stated that she had a husband and a child and that she did not want to die; Morrow was apparently afraid that harm would come to her because of the verdict (R 1306, 1307). Both Mrs. Roach and the foreman attempted to comfort her (R 1306-1308). In doing so, Mrs. Roach related the shooting incident, telling Morrow that such had had nothing to do with the trial; Roach said that she had not mentioned this matter previously (R 1306-1310). Defense counsel then requested that all of the jurors be interviewed, but Judge Douglas indicated that it would only be necessary to speak with juror Morrow (R 1311).

Accordingly, Mrs. Morrow was brought into the courtroom (R 1312). In response to the judge's questioning, she stated that she was afraid of what might happen to her, or her family, after the trial (R 1313); she also said, however, that she could follow the law in the penalty phase and would not be influenced by fear

or any other emotion (R 1313-1314). Morrow stated that no one had threatened her in any way in reaching her prior verdict (R 1314). Finally, at defense counsel's request, the judge asked her if she had any reason to believe that she would be harmed by Bryant or his family; she replied in the negative, indicating that she was just afraid "of what could happen in the future" (R 1314).

Following this inquiry, defense counsel moved that Morrow be replaced as a juror in the penalty phase, and asked for a mistrial as to the trial and a new jury for the penalty phase; defense counsel complained of "almost a soap opera situation" (R 1315). Judge Douglas stated that he found no basis for such request, and denied the motions (R 1316). The penalty phase then proceeded and, ultimately, the jury returned an advisory sentence of death by a vote of nine (9) to three (3) (R 1441). Upon defense counsel's request, the jury was polled (R 1445-1448). All jurors indicated that the announced verdict was accurate, although it is clear from the below exchange that juror Morrow voted for life:

> THE COURT: Do you, Mrs. Morrow, agree and conform that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?
>
> JUROR MORROW: No, sir.
>
> JUROR WHIDDON: Yes.
>
> JUROR MORROW: The majority, yes, sir.

(R 1446).

It would not appear that defense counsel renewed his request that the jury be interviewed prior to their excusal (R 1448).

As noted, Appellant contends in his Initial Brief that he is entitled to not only a new sentencing proceeding, but also a new trial, on the basis of the above. Appellant contends that the question before this Court "focuses upon the prejudicial effect the bullet fired through Mrs. Roach's window may have had upon the jury's deliberations." (Initial Brief at 31). Bryant contends that, "The strongest of men and women tremble with justifiable fear for the safety of themselves and their families in such a situation."; in analogy, appellate counsel cites to "this Court's recent increases in security measures taken for persons entering the Supreme Court Building" (Initial Brief at 34, n.5). Opposing counsel also writes, "Something during the jury's deliberations of Bryant's guilt prompted Mrs. Morrow's unjustifiable fear for her safety, yet if she was afraid, other jurors may have had similar concerns . . . " (Initial Brief at 35). Relying upon precedents involving the jury's receipt of outside matters, i.e., news reports, **see Amazon v. State**, 487 So.2d 8 (Fla. 1986), **Weber v. State**, 501 So.2d 1379 (Fla. 3rd DCA 1987), Bryant contends that he has demonstrated prejudice, and that it is the State's burden to rebut such. Appellee would contend that Appellant's reliance upon the above cases is misplaced, and that his claim for reversal is based upon nothing more than sheer speculation. This instant conviction and sentence of death should be affirmed in all respects.

Initially, Appellee would note that this Court has repeatedly held in other capital cases that determinations of whether substantial justice requires a mistrial and related

questions involving juror conduct are both lodged within the sound discretion of the trial court. **See, e.g., Doyle v. State,** 460 So.2d 353, 356-357 (Fla. 1984); **Gore v. State,** 475 So.2d 1205, 1208-1209 (Fla. 1985); **Dufour v. State,** 495 So.2d 154, 163 (Fla. 1986). Similarly, the sound discretion of the court extends to the matter of whether a juror inquiry or interview is called for. **See Walker v. State,** 330 So.2d 110, 112 (Fla. 3rd DCA), **cert. denied,** 341 So.2d 1087 (Fla. 1976); **Medina v. State,** 466 So.2d 1046, 1049 (Fla. 1985) (citing **Walker** with favor). Bryant has failed to demonstrate an abuse of discretion in regard to Judge Douglas' handling and resolution of this matter. The judge held a limited inquiry, questioning the two jurors most involved, and determined that no basis for a mistrial existed. The judge's conclusion is supported by the record. Juror Roach stated that the vandalism at her home had nothing to do with the trial, and that she had believed that the perpetrator had simply been someone "going along the road" who wanted to be "mischievous" (R 1305-1306). Mrs. Roach stated that she did not bring this matter up to any other juror until after the jury had already reached its verdict; hence, this matter played no part in the jury's deliberations. Mrs. Roach stated that she only told juror Morrow of this matter in an attempt to reassure her that things could happen in life which were unrelated to the capital trial. Similarly, while juror Morrow was generally afraid of the consequences of her verdict, this fear, again, did not manifest itself until after the jury had already agreed upon its verdict, and such was signed, sealed, and about to be delivered. Serving

on a jury in a first degree murder, and capital, trial is an extremely serious matter, and it is highly unlikely that juror Morrow was the first juror to be somewhat unnerved by such experience. It is clear, however, from Mrs. Morrow's own testimony, that her fear was a generalized one and that she had no reason to believe that she would be harmed by Bryant or his family (R 1314).

While all cases involving alleged irregularities in jury deliberation are **sui generis**, the State would contend, based upon the following comparable precedents, that reversible error has not been demonstrated. **See Walker**, 330 So.2d at 110 (not error to deny defense counsel's request to interview jurors in regard to claim that alternate juror had offered to pay one of the other jurors, so as to be able to take his place and convict the defendant; court held that investigation as to the impact on juror concerned would "involve speculation and conjecture" and, hence, properly denied); **Parker v. State**, 336 So.2d 426, 427 (Fla. 1st DCA), **appeal dismissed**, 341 So.2d 292 (Fla. 1976) (claim that juror had changed a vote, because of fear of being sequestered, matter which inhered in verdict, and, hence, not suitable subject for inquiry); **Murray v. State**, 356 So.2d 71, 72 (Fla. 1st DCA 1978) (not error to deny defense counsel's request to interview juror who had cried during polling of jury, in that such fact did not constitute basis for challenge to verdict); **Zeigler v. State**, 402 So.2d 365, 374 (Fla. 1981) (not error to deny defense counsel's request to interview jurors, where judge's inquiry had "evaporated any grounds, either real or imagined" for

challenge to verdict); **Odom v. State**, 403 So.2d 936, 941 (Fla. 1981) (trial court did not abuse its discretion in denying motion for mistrial, where juror had received anonymous threatening phone call during trial; juror stated that "although he was frightened by the call, he could still be a fair and impartial juror."); **Jones v. State**, 411 So.2d 165, 167 (Fla. 1982) (trial court did not abuse its discretion in denying motion for mistrial, where juror spoke with daughter of murder victim on unrelated matter); **Doyle**, 460 So.2d at 356-357 (trial court did not abuse its discretion in denying motion for mistrial, where, during recess, juror said to defense counsel, "Good luck. You're going to need it."); **Medina**, 466 So.2d at 1049 (court did not abuse its discretion in failing to grant a mistrial, after excusing one juror who had indicated that he no longer had an open mind, or in failing to interview excused juror as to other jurors' feelings, where such "would have produced only speculation and conjecture."); **Dufour**, 495 So.2d at 162-163 (trial court did not abuse its discretion in denying motion for mistrial, where excused juror told other jurors about mysterious phone call); **Occhicone v. State**, 15 F.L.W. S531 (Fla. October 11, 1990) (trial court did not abuse its discretion in denying motion for mistrial where spectator allegedly told prospective juror that defendant was guilty).

In conclusion, Bryant has failed to demonstrate any basis for reversal of his conviction or sentence. Even if Appellant were correct as to the existence of any "impropriety", such clearly had no effect upon the jury's verdict at the guilt phase.

Bryant is, in any event, not entitled to relief as to his sentence of death. There has been no showing that any improper matter entered the jury's deliberations at the sentencing phase. Juror Morrow expressly stated that she would not allow any feeling of fear to influence her in deciding upon a verdict and that she would, in fact, follow the judge's instructions; it is beyond dispute, however, that juror Morrow, in any event, voted for a life sentence. The instant conviction and sentence of death should be affirmed in all respects.[6]

POINT IV

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE SENTENCER'S FINDING THAT THE INSTANT HOMICIDE WAS COMMITTED FOR PURPOSES OF AVOIDING ARREST, PURSUANT TO 921.141(5)(e)

As one of the five (5) aggravating circumstances, Judge Douglas found that the instant homicide had been committed for purposes of avoiding arrest, pursuant to §921.141(5)(e), Fla.Stat. (1987); the sentencer also found that the homicide had been committed by one with a prior conviction for a violent felony, §921.141(5)(b), Fla.Stat. (1987), that the homicide had been committed during the course of a sexual battery,

---

[6] The State would also suggest that, in seeking to utilize juror Morrow's generalized "fear" as a basis for reversal, Appellant is, essentially, improperly seeking to impeach the verdict with a matter which inheres therein. **See Russ v. State**, 95 So.2d 594 (Fla. 1957); **Parker v. State**, 336 So.2d 426 (Fla. 1st DCA 1976); **Mitchell v. State**, 527 So.2d 179 (Fla. 1988). Further, if defense counsel truly wished to pursue this matter, he should have requested a subsequent interview prior to the discharge of the jury. **Cf. Tanner v. United States**, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987) (policy reasons against allowing post-verdict challenges based upon testimony of jurors).

§921.141(5)(d), Fla.Stat. (1987), that the homicide had been committed for pecuniary gain, §921.141(5)(f), Fla.Stat. (1987), and that the homicide had been especially heinous, atrocious or cruel, §921.141(5)(h), Fla.Stat. (1987) (P 314-318). The sentencer further found that the only mitigating circumstance that existed was Bryant's relatively low intelligence, but expressly stated,

> The court finds that any one of the aggravating circumstances alone would far outweigh the mitigating circumstance and warrant the imposition of the death sentence.

(P 318).

In support of his finding that the homicide had been committed for purposes of avoiding arrest, Judge Douglas noted that the victim had known the defendant, that she had been of small stature and elderly, and that she had been beaten, sexually battered and robbed; he found that Appellant could have taken what he wanted from the victim, given her inability to resist, and concluded that "Bryant killed Mrs. Kennedy to make sure she (the only witness) would not be able to identify him." (P 317).

In his Initial Brief, Bryant contends that the finding of this aggravating circumstance was error; Appellant raises no challenge in regard to the other four aggravating circumstances. Bryant argues that this finding is based upon speculation, in that the State failed to demonstrate that witness elimination was the primary reason that the victim was killed. Appellate counsel also maintains that Bryant could have "robbed, raped and killed the victim", while he was "drunk, stoned and stupid" (Initial Brief at 38). In response, the State would contend that it is

Appellant's "explanation" that is based upon speculation and, accordingly, that the trial court did not err in finding this aggravating circumstance.

In **Swafford v. State**, 533 So.2d 270, 276 (Fla. 1988), this Court reviewed the applicable law in regard to this aggravating circumstance. Thus, this Court specifically clarified that this factor can be found in cases in which the defendant has not made an express statement indicating his motive for killing the victim. **See Routly v. State**, 440 So.2d 1257, 1263 (Fla. 1983) (express statement not required). Thus, this Court specifically authorized that the finding of §921.141(5)(e), where such could be "supported by circumstantial evidence through inference from the facts shown." **Swafford**, 533 So.2d at 276, n.6. This Court cited such precedents as **Cave v. State**, 476 So.2d 180 (Fla. 1985), and **Routly**, in which the only "logical reason" for the murder or the only "reasonably inference from the facts" was that the victim had been killed for purposes of avoiding arrest. **Swafford**, 533 So.2d at 276. Here, the victim, a tiny elderly woman, was obviously helpless to prevent Bryant from committing the other felonies which he intended to commit - **i.e.**, burglary, robbery and sexual battery. Further, as Bryant himself concedes, he was well known to Annie Kennedy, and she certainly would have been able to identify him.

This Court has previously approved the finding of this aggravating factor under comparable circumstances. **See, e.g., Lightbourne v. State**, 438 So.2d 380, 391 (Fla. 1983) (aggravating circumstance upheld where defendant burglarized home of victim

whom he knew, raped victim, stole various items and then shot victim); **Clark v. State**, 443 So.2d 973, 977 (Fla. 1983) (circumstance properly found where, **inter alia**, victim knew defendant and victim, defenseless elderly woman, was helpless to prevent defendant's taking of her property; witness elimination only readily apparent motive); **Harmon v. State**, 527 So.2d 182, 188 (Fla. 1988) (circumstance properly found where, **inter alia**, victim knew defendant, and victim, elderly frail man, would have been in no position to thwart burglary and robbery); **Harvey v. State**, 529 So.2d 1083, 1087 (Fla. 1988) (circumstance applied, where, **inter alia**, defendant burglarized home of elderly couple who could identify him, and later shot couple to death). Further, appellate counsel's self-serving version of the homicide, **i.e.**, committed by one who was "drunk and stoned" is unsupported by the record. Bryant denied committing the offenses at issue, instead claiming to have an alibi, **i.e.**, that he had been home, drunk, at the time (R 1014-1015); the mental health expert who testified at the penalty phase stated that Bryant had never admitted committing the offense (R 1398). Far from being a "spontaneous" crime, this was a well planned one. From his own statements (R 436, 552), it is clear that Bryant was aware that the victim had cashed her social security check that day. Accordingly, it was hardly an accident that she was murdered on the only day of the month when she had enough money to make the crime worthwhile. The sentencer's finding of this aggravating circumstance was not error.

Should this Court disagree with any of the above, the State would contend that any error was harmless beyond a reasonable doubt. In addition to this factor, four valid, and unchallenged, aggravating circumstances were found to be weighed against a nebulous finding in mitigation; excision of this aggravating circumstance creates no reasonable likelihood of a different sentencing result. **See Rogers v. State**, 511 So.2d 526, 535 (Fla. 1987). This is particularly true, in light of the sentencer's express statement that any **one** of the aggravating circumstances would far outweigh the finding in mitigation (P 318). It is clear that this harmless error analysis is applicable in cases in which mitigation has been found. **See, e.g., Holton v. State**, 15 F.L.W. S500 (Fla. September 27, 1990); **Rivera v. State**, 561 So.2d 536 (Fla. 1990); **Hamblen v. Dugger**, 546 So.2d 1039 (Fla. 1989); **Bassett v. State**, 449 So.2d 803 (Fla. 1984); **Brown v. State**, 381 So.2d 690 (Fla. 1980). The instant sentence of death should be affirmed in all respects.

POINT V

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE SENTENCER'S FAILURE TO INSTRUCT THE JURY AS TO THE MITIGATING CIRCUMSTANCE SET FORTH IN 921.141(6)(b)

At the charge conference in the penalty phase, Judge Douglas announced that he would not instruct the jury on the mitigating circumstance set forth in §921.141(6)(b), Fla.Stat. (1987), that involving the capital felony having been committed by one "under the influence of extreme mental or emotional disturbance." (R 1408-1409). The judge did, however, instruct the jury that they

could consider in mitigation whether Bryant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law had been substantially impaired, §921.141(6)(f), Fla.Stat. (1987), as well as "any other aspect of [Bryant's] character or record, or any other circumstance of the offense." (R 1438). On appeal, Bryant contends that his sentence of death must be reversed due to the above omission, in that the defense allegedly presented sufficient evidence to justify an instruction on this factor, to-wit: that involving Bryant's abused childhood, placement in a program for the emotionally handicapped in high school, retardation and alleged intoxication on the night of the murder; Bryant relies upon such precedents of this Court as **Toole v. State**, 479 So.2d 731 (Fla. 1985), and **Smith v. State**, 492 So.2d 1063 (Fla. 1986).

The State would contend that the evidence which was presented at the penalty phase related exclusively to Bryant's ability to conform his conduct to the requirements of the law, §921.141(6)(f). There was, indeed, testimony from family members as to the manner in which Bryant's father had abused him (R 1323-1324, 1342); however, it should also be noted, that these same family members and friends testified that Bryant had been good to his mother and that the family had had a normal life after the father had left (R 921, 1325, 1330, 1337, 1341). According to Bryant's sister, the father had been in prison for the last three years (R 1322). There was also testimony from various teachers and counselors, as to Bryant's having been placed in a class for

the emotionally handicapped; these witnesses did admit, however, that such had occurred between 1978 and 1981 (R 1352, 1355, 1364, 1367). Similarly, Bryant's expert witness offered testimony as to Appellant's low intelligence and his exposure to drugs and alcohol. Dr. Mendelson, however, did concede that because Bryant had denied committing the instant offense, he could not say with certainty what Bryant's mental state had been at the time of the murder (R 1398, 1404-1405). Significantly, although the expert was specifically asked whether he felt that Bryant's capacity to conform his conduct to the requirements of the law had been impaired (R 1385, 1406), the doctor was never asked a comparable question as to the applicability of §921.141(6)(b). The only evidence which might be said to go toward extreme mental or emotional disturbance would seem to be that testimony regarding Bryant's alleged intoxication, which was introduced at the trial by Bryant himself, as well as his two alibi witnesses (R 915, 922, 924-925, 949, 950, 957, 1008-1010, 1021); of course, this claim was presented as part of the alibi defense which the jury rejected, in convicting Bryant, and, further, this same evidence could certainly be said to go toward Bryant's alleged incapacity, under §921.141(6)(f).[7]

Appellee would respectfully suggest that the above did not justify the jury instruction requested and, would further suggest

---

[7] If one wishes to give Bryant the benefit of every conceivable doubt, one could also include Dr. Mendelson's hearsay testimony that Bryant had told him that he had used cocaine on the day of the murder (R 1395); of course, it must also be noted that, at trial, Bryant stated, under oath, that he did not recall using any drug that day (R 1024).

that **Toole** and **Smith**, relied upon by Bryant, would seem to have been superceded by such recent decisions as **Stewart v. State**, 558 So.2d 416, 420-421 (Fla. 1990). In such case, this Court was confronted with a claim of error in regard to the trial court's denial of jury instructions on **both** mental mitigating circumstances, §921.141(6)(b) & (f). This Court resolved the claim of error as follows:

> We conclude that while no evidence was presented to support a standard instruction on extreme disturbance [§921.141(6)(b)], testimony was adduced to support a standard instruction on impaired capacity [§921.141(6)(f)]. Bilbrey's uncontroverted testimony showed that during the period when he lived with Stewart immediately following the shooting, Stewart 'was . . . drunk most of the time,' would drink 'anything he could get his hands on,' drank 'twenty six packs [sic] a day,' and used drugs. Dr. Merin's testimony indicated that Stewart had a history of chronic alcohol and drug abuse since early adolescence. Stewart told him that he normally drank as much as a gallon of alcohol a day and abused drugs. Dr. Merin stated that in his opinion Stewart was drunk at the time of the shooting and that his control over his behavior was reduced by his alcohol abuse.

The State respectfully submits that if the above evidence was insufficient to merit an instruction on extreme disturbance in **Stewart**, then it was certainly not error for the court below to have denied the instruction **sub judice**, given Bryant's much less compelling showing; of course, in contrast to **Stewart**, the jury in this case was given the opportunity to consider the applicability of the mitigating circumstance involving impaired capacity. **See below.** Appellee would also note that in **Roman v. State**, 475 So.2d 1229, 1234-1235 (Fla. 1985), this Court held

that it had not been error for the court to have denied an instruction on emotional disturbance, in regard to evidence presented as to the defendant's lengthy history of alcohol abuse. An instruction had been given on impaired capacity, §921.141(6)(f), just as was done **sub judice**, and this Court held that such had been sufficient under the circumstances of the case. On the basis of **Roman** and **Stewart**, the instant death sentence should be affirmed.[8]

Finally, the State would submit that another basis for affirmance exists. In this case, the jury was not only instructed that they could consider Bryant's "impaired capacity" in mitigation, but also that they could, in essence, consider anything that they wished in mitigation, **i.e.**, "any aspect of the defendant's character or record or circumstance of the offense." (R 1438). The purpose of capital sentencing is, of course, to allow for individualized sentencing, and it is beyond dispute that all relevant evidence in mitigation must be considered. **See, e.g., Hitchcock v. Dugger**, 481 U.S. 393, 107 S.Ct. 1821, 95

---

[8] Appellee would contend that this case is distinguishable from **Smith v. State**, 492 So.2d 1063 (Fla. 1986), on the grounds, **inter alia**, that at least one instruction was given on mental mitigation **sub judice**, whereas both were denied in **Smith**. Appellee would also note that the evidence presented in **Toole** did not relate to the defendant's alleged intoxication through alcohol or drugs, going more toward a long-standing psychological disorder. Should this Court find **Smith** and/or **Toole** to be controlling, as opposed to **Stewart** or **Roman**, the State would contend that the evidence of intoxication was insufficient to merit any specific instruction, given the fact that such evidence was part and parcel with Bryant's discredited alibi. **Cf. Reed v. State**, 460 So.2d 203, 206 (Fla. 1990) (not error to deny instruction on impaired capacity where no evidence defendant was intoxicated at time of murder); **Cooper v. State**, 492 So.2d 1059, 1062 (Fla. 1986) (presence of evidence of some alcohol and marijuana consumption insufficient basis for instruction).

L.Ed.2d 347 (1987). Appellee would contend that the jury instructions given in this case provided the jury with a more than adequate opportunity to consider and weigh the evidence presented in mitigation by Bryant; indeed, it can be argued that the standard jury instruction on extreme mental disturbance is somewhat misleading, in that it uses qualifying language. **Cf. Cheshire v. State**, 15 F.L.W. S504, 505 (Fla. September 27, 1990). In resolving comparable claims of error, this Court has noted the significance of the fact that the jury has been given the "catch-all" or **Hitchcock** instruction. **See Nixon v. State**, 15 F.L.W. S630, 633 (Fla. November 29, 1990) (not error for court to deny specific instructions on mental mitigation, under §921.141(6)(b) & (f), where, **inter alia**, catch-all instruction given and such "served as an adequate vehicle to allow the jury to consider all the mitigating evidence presented."); **Cave v. State**, 476 So.2d 180, 187-188 (Fla. 1985) (not error for court to deny jury instructions on defendant's age and minor participation in offense, where defense counsel argued such in mitigation and jury instructed that they might consider "any aspect of the appellant's character or record or any other circumstance of the offense" in mitigation). Any error committed **sub judice** was harmless, **See DiGuilio, supra**, and the instant sentence of death should be affirmed in all respects.

POINT VI

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE SENTENCER'S ALLEGED "IGNORING" OF THE MITIGATION PRESENTED; NO NEW SENTENCING HEARING IS WARRANTED

In his next point on appeal, Bryant contends that his sentence of death must be reversed, because Judge Douglas allegedly "ignored" the "wealth of mitigating evidence" presented. Bryant specifically argues that this Court's decision in **Campbell v. State**, 15 F.L.W. S342 (Fla. June 14, 1990), controls. Bryant argues that he presented "an abundance of evidence to justify a life sentence," to-wit: evidence concerning mental retardation, alcohol and drug addiction, disadvantaged childhood and physical abuse, emotional handicaps, illiteracy, a non-aggressive personality and an alleged lack of inhibition at the time of the murder (Initial Brief at 43-44). Appellant maintains that the sentencing order **sub judice** did not discuss all of the above, and suggests that, in light of **Campbell**, he is entitled to a new sentencing hearing.

The State vehemently disagrees with any contention that Bryant merits a new sentencing hearing. Appellee recognizes that in the revised **Campbell** decision, **Campbell v. State**, ____ So.2d ____ (Fla. December 13, 1990) (revised opinion on denial of rehearing) (slip opinion), this Court held that a sentencing court "must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature." (slip opinion at 8). As this Court recently recognized in **Lucas**

v. State, 568 So.2d 18, 23 (Fla. 1990), the requirement that sentencing orders contain the above specific discussion of non-statutory mitigating circumstances is a new one,

> We have previously held that a trial court need not expressly address each nonstatutory factor in rejecting them, **Mason v. State**, 438 So.2d 374 (Fla. 1983), **cert. denied**, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984), and "[t]hat the court's findings of fact did not specifically address appellant's evidence and arguments does not mean that they were not considered." **Brown v. State**, 473 So.2d 1260, 1268 (Fla.), **cert. denied**, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985).

See also Woods v. State, 490 So.2d 24, 27-28 (Fla. 1986) (claim of error rejected in regard to sentencer's alleged failure to consider unrebutted non-statutory mitigating evidence regarding defendant's low intelligence and past life; "that the trial court did not articulate how he considered and analyzed the mitigating evidence is not necessarily an indication that he failed to do so. We do not require 'magic words' when writing sentencing findings . . .").

Given that the law has, apparently, changed in this regard, the next question is whether such change should be applied to this case. The State suggests that it should not, inasmuch as Judge Douglas, in December of 1989, could have no way of knowing that his sentencing order would be attacked on this basis, in light of 1990 precedents. The State would note that this Court has previously held that other refinements in capital sentencing procedure would have prospective application only. **See, e.g., Jackson v. State**, 502 So.2d 409, 413 (Fla. 1986) (requirement that specific finding regarding defendant's participation in

offense be made in sentencing order, pursuant to **Enmund v. Florida**, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), prospective only); **Grossman v. State**, 525 So.2d 833, 841 (Fla. 1988) (requirement that all written orders imposing death be prepared prior to oral pronouncement of sentence effective thirty days after opinion final). Additionally, in **Ree v. State**, 565 So.2d 1329, 1331 (Fla. 1990), this Court recently mandated that written reasons for departure from the sentencing guidelines be issued at the time of sentencing, although this Court also provided that such would be done prospective only. The State can see no reason why the guidelines enunciated in **Campbell** should be treated differently than the matters set forth in the above cases. It is likely that the issue of prospective application was not briefed by the parties in **Campbell** or in **Nibert v. State**, ____ So.2d ____ (Fla. December 13, 1990) (revised opinion on denial of rehearing) (slip opinion), and it would appear that the sentence was reversed in **Lucas**, because the sentencing order additionally failed to discuss findings in aggravation. The State would respectfully submit that, capital litigation being what it is, this Court will no doubt be forced to clarify the scope of its holding in **Campbell**, as a strong likelihood exists that all of those whose convictions and sentences of death were final prior thereto will argue that their sentencing orders are not in compliance with **Campbell**.

Bryant's claim, of course, is broader than simply the clarity of the sentencing order. He contends that the sentencing court "ignored" the mitigation which was presented. Should this

claim be considered as one based upon **Hitchcock v. Dugger, supra,** it is clear that Bryant would merit no relief. Judge Douglas instructed the jury that they could consider in mitigation "any aspect of [Bryant's] character or record and circumstance of the offense" (R 1483), and it is well established that a judge is presumed to follow his own instructions in this regard. **See Johnson v. Dugger,** 520 So.2d 565, 566 (Fla. 1988). The sentencing order contains no indication that the judge limited his consideration of the evidence presented in any way, and, indeed, the order contains the following language:

> The Court has considered all of the statutory mitigating circumstances under §921.141, Florida Statutes, (1988). The Court has considered all non-statutory mitigating circumstances presented.

(P 318).

The court then went on to note that the only mitigating circumstance found was Bryant's "relatively low intelligence", but that the court did not believe that such "affected the defendant's understanding of what he was doing." (P 318). Under all of the circumstances of this case, Bryant would simply be entitled to no relief under **Hitchcock.**

Bryant, however, does not in fact rely upon **Hitchcock.** Rather, he relies upon other language in the **Campbell** opinion, which reads:

> The Court must find as a mitigating circumstance each proposed fact that is mitigating in nature and has been reasonably established by the greater weight of the evidence . . . The Court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in

> its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight.

(slip opinion at 9-10).

The State would respectfully suggest that, while this Court's goals in seeking uniformity and clarity in capital sentencing are indeed laudable, the above holding simply goes much too far. Appellee would respectfully maintain that there is no authority, statutory or precedential, which can **mandate** a finding in mitigation. Neither **Lockett v. Ohio**, 438 U.S. 586, 98 S.Ct. 2958, 57 L.Ed.2d 973 (1978), nor **Eddings v. Oklahoma**, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), can be read to require such holding; both dealt with situations in which the sentencer had refused to consider proffered mitigation **as a matter of law.** It is, of course, beyond dispute that a death sentence can never be "mandatory", **see Woodson v. North Carolina**, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), and that a sentencer's finding of an aggravating circumstance cannot be "automatic". **Cf. Lowenfield v. Phelps**, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). Yet, this Court now declares that certain matters "must" be found in mitigation. **But see Porter v. State**, 429 So.2d 293, 296 (Fla. 1983) ("There is no requirement that the court find anything in mitigation."). Nothing in the Constitution precludes a sentencer from assigning no weight to a mitigating factor which has been fully considered. In the past, this Court was content to leave the matter of the finding or not finding of a mitigating circumstance to the sound discretion of the trial court, and has

previously held that, as long as all of the evidence was considered, the trial court's decision that mitigation does not exist will stand. **See, e.g., Hill v. State**, 549 So.2d 179, 183 (Fla. 1989); **Cook v. State**, 542 So.2d 964, 971 (Fla. 1989); **Lopez v. State**, 536 So.2d 226, 231 (Fla. 1988); **Bryan v. State**, 533 So.2d 744, 749 (Fla. 1988); **Kight v. State**, 512 So.2d 922, 933 (Fla. 1987); **Daugherty v. State**, 419 So.2d 1067, 1071 (Fla. 1982). **Campbell** does not expressly recede from such precedents, and no good cause for such action has been shown.

In addition to the creation of "mandatory mitigation", this Court's decision in **Campbell** has "expanded" the mitigating circumstances. When the Legislature enacted §921.141(6), it chose to enumerate only seven (7) specific mitigating circumstances; of course, the jury instructions have been amended to encompass the holding of **Lockett v. Ohio, supra**, to the effect that "any other aspect of the defendant's character or record and any other circumstance of the offense" may be considered in mitigation. Fla. Std. Jury Instr. (Crim). at 81. Yet, in **Campbell**, this Court has declared that certain non-statutory factors are "as a matter of law" mitigating, to-wit: (a) a defendant's abused childhood; (b) a defendant's contribution to society; (c) a defendant's remorse and potential for rehabilitation; (d) disparate treatment of a codefendant, and (e) the defendant's charitable deeds; this list is not all inclusive. **Campbell**, slip opinion at 9, n.4. The undersigned respectfully submits that this Court is without authority to declare certain non-statutory factors as "mitigation as a matter of law." If the

Legislature had wished to include these matters in the statute, it could have done so. Inasmuch as it did not choose to do so, this Court cannot do it **sua sponte**. **See, e.g., Stern v. Miller**, 348 So.2d 303, 308 (Fla. 1977); **State v. Coban**, 520 So.2d 40, 41 (Fla. 1988).

Additionally, there is good reason why the subjects noted above do not constitute statutory mitigation. Thus, although any one of these factors in a given case **can** be mitigating, it cannot be said that each in the abstract **must** be regarded as such. Indeed, in many of this Court's prior opinions, this Court has specifically affirmed the sentencer's failure or refusal to find the factors enumerated in **Campbell** as mitigation. **See, e.g., Lara v. State**, 464 So.2d 1173, 1180 (Fla. 1985) (trial court justified in rejecting defendant's abused childhood as mitigation where no showing defendant's actions in committing murder were significantly influenced thereby); **Doyle v. State**, 460 So.2d 353, 357 (Fla. 1984) (not error for court to have rejected in mitigation evidence concerning defendant's low intelligence, classified as "borderline retarded", and fact that defendant was under stress from brother's death in previous year); **Mills v. State**, 462 So.2d 1075, 1081-1082 (Fla. 1985) (defendant's low intelligence need not be considered in mitigation); **Johnston v. State**, 497 So.2d 863, 872 (Fla. 1986) (not error for court to have rejected in mitigation defendant's history of being abused by parents); **Tompkins v. State**, 502 So.2d 415, 421 (Fla. 1987) (not error for sentencer to conclude that testimony to the effect that defendant was good family man and good employee did not rise

to the level to be weighed in mitigation); **Kight v. State**, 512 So.2d 922, 933 (Fla. 1987) (not error for court to fail to find defendant's low IQ and abused childhood in mitigation); **Rutherford v. State**, 545 So.2d 853, 856 (Fla. 1989) (defendant's service in Vietnam may be considered by trial judge in mitigation, "but need not be."). **Campbell** does not expressly recede from the above precedents, and, again, no good cause has been shown for such course of action.

In conclusion, while this Court apparently believes the guidelines promulgated in **Campbell** further the holdings of **Lockett** and **Eddings**, the State respectfully suggests that the opposite is true. In such decisions, the United States Supreme Court disapproved statutory schemes which precluded the sentencer from giving full consideration to the evidence presented in mitigation. While all parties agree on the necessity that mitigating evidence be fully considered, this Court has now shackled the sentencer with an entirely new, and unprecedented, system of "guidelines". Because it is clear that the holding of **Hitchcock** has been understood and followed by the circuit courts throughout the state, these guidelines are intrusive and unnecessary. The State respectfully moves this Court to recede from **Campbell** to the extent that it is in conflict with the prior precedents discussed above.[9]

---

[9] While the undersigned maintains his position that the **Campbell** holding is unprecedented, it is interesting to note that, at least in one instance, it was not unforeseen. Thus, in *Waters*, **Uncontradicted Mitigating Evidence in Florida Capital Sentencings**, *The Florida Bar Journal (January 1989)*, the extremely prescient author suggested that this Court "impose an obligation" on the trial courts "to recognize and expressly weigh the

In any event, no matter what analysis is employed, it is clear that the contention raised on appeal - that the sentencer "ignored" the evidence presented in mitigation - is incorrect. As to Appellant's specific contention that Judge Douglas failed to consider the evidence presented as to Bryant's mental retardation, such allegation is belied by the sentencing order. The judge expressly found Bryant's low intelligence in mitigation (P 318), and opposing counsel does not seem to suggest that the evidence rose to the level of a statutory mitigating circumstance. Accordingly, this claim is without merit. Appellant also contends that Judge Douglas failed to consider Bryant's illiteracy and the fact that he could not read or write. The State would initially question whether such was ever argued to the sentencer as a basis for mitigation, **cf. Lucas v. State**, 568 So.2d 18, 23-24 (Fla. 1990), but would further submit that such matters were subsumed within the court's finding in regard to Bryant's low intelligence. The contention raised in the Initial Brief, to the effect that Bryant "functioned academically on a second or third grade level" (Initial Brief at 43), is not supported by the evidence, **see Rogers v. State**, 511 So.2d 526, 534 (Fla. 1987), and most certainly has not been "reasonably established by the greater weight of the evidence," **cf. Campbell, supra**. The only basis for this contention is the testimony of Nann Albritton, who had come into contact with

---

Footnote 9 (continued)

uncontested mitigating evidence," in that under **Lockett, inter alia**, "each type of uncontested mitigating evidence must be weighed."

Bryant for about one month in 1981, and who stated that she "guesstimated" that he had performed at such level at that time (R 1367-1368). Significantly, Dr. Mendelson, the psychiatrist who had examined Bryant for the presence of mitigation, while finding an IQ of 66, never specifically testified that Bryant was functioning at a lower "age" or "grade" level than his chronological age would suggest. Error has not been demonstrated.

Likewise, the fact that Bryant "was emotionally handicapped and had been identified as such since grade school" (Initial Brief at 43), was not erroneously ignored. The record reflects that Bryant was diagnosed as emotionally handicapped in the second grade, largely on the basis of his low IQ (R 1351, 1361); as noted, Bryant's low intelligence was found in mitigation. The other reason that Bryant was diagnosed as emotionally handicapped was his "aggressive behavior", in that he "got in some fights in high school." (R 1361, 1367); the State respectfully suggests that such is not mitigating. **Cf. Eutzy v. State**, 458 So.2d 755, 759 (Fla. 1984) (mitigating circumstance must ameliorate enormity of defendant's guilt). Appropriately, the next putative mitigating circumstance to consider is the allegation that Bryant "is not a chronically aggressive person" (Initial Brief at 43); this contention is based upon a remark by Dr. Mendelson, to the effect that he did not "perceive" Bryant as "an aggressive individual." (R 1387). Again, it is questionable whether this matter was ever argued to the sentencer in mitigation, **cf. Lucas, supra**, but, in any event, it is clear that such is not

supported by the record, **cf. Rogers**, or reasonably established by the greater weight of the evidence, **cf. Campbell**. On cross examination, Dr. Mendelson was forced to admit that he had not been aware that Bryant had a prior conviction for aggravated assault; asked if such would change his opinion, the doctor replied, "It might." (R 1395). The equivocal nature of this testimony, coupled with the fact of the prior conviction and the high school "aggressive behavior" would again clearly indicate that error has not been demonstrated.

One next turns to Bryant's allegations concerning the sentencer's "ignoring" evidence concerning "drug and alcohol abuse" and Bryant's "loss of inhibitions" due to intoxication on the night of the murder. The State would likewise contend that these contentions are neither supported by the record, **cf. Rogers**, nor reasonably established by the greater weight of the evidence. **Cf. Campbell, supra**. As to the alleged cocaine abuse, this matter was presented only during the testimony of Dr. Mendelson, and, apparently, the only basis for such was a statement which Bryant had allegedly made to the doctor (R 1381, 1395). None of the family members, friends or former educators noted this fact, which is curious if Bryant's history of drug abuse is as longstanding as Dr. Mendelson apparently believed (R 1381). Interestingly, when Bryant was asked, on cross examination, if he had taken any drugs on the night of the murder, he stated that he could not recall doing so (R 1022, 1024); Bryant also testified that taking drugs did not make him "do nothing [he] ain't done before." (R 1025). Given the

questionable basis for the expert's opinion, **cf. Bates v. State**, 506 So.2d 1033 (Fla. 1987), error has not been demonstrated in this regard. As to any alleged history of alcohol abuse, or any contention that Bryant committed the instance offense under the influence of either substance, a similar result is mandated. Robert Bryant has never expressly contended that he committed this crime under the influence of drugs or alcohol, and, indeed, never told the defense expert that such had been the case. Dr. Mendelson was forced to concede that Bryant had never admitted committing the murder and that, accordingly, he had to speculate as to Bryant's mental state at the time the crime was committed (R 1398, 1404-1405). Accordingly, error has not been demonstrated, in the fact that the above was not found in mitigation. **Cf. Scott v. State**, 494 So.2d 1134, 1138 (Fla. 1986) (defendant made no statement setting forth alleged justification for homicide); **Roberts v. State**, 510 So.2d 885, 895 (Fla. 1987) (not error for court to reject contention that crime occurred during drug or alcohol induced rage, where defendant never made such statement and where defendant never told expert that such had occurred; experts' opinions based on speculation from, **inter alia**, test results and interviews with defendant).

While Bryant offered testimony at trial to the effect that he had been drinking on the night of the murder (R 1008-1010, 1021), the trial court was not bound to accept such testimony, given, **inter alia**, Bryant's other conflicting accounts of his whereabouts and actions at the time of the murder. **Cf. Johnston v. State**, 497 So.2d 863, 872 (Fla. 1986) (trial court not

required to accept defendant's claim that he took LSD on night of murder, where defendant "gave numerous statements full of discrepancies, and, in short, his credibility was rightfully questioned"). Again, while Bryant's mother and friend offered testimony that he had been drunk on the night of the murder (R 915, 922, 924-925, 949, 950, 957), it is impossible to reconcile this testimony with the facts, as found by the jury's verdict, **cf. Scott, supra;** the witnesses stated not only that Bryant had come home drunk, but that he had been at home at the time of the murder. Because there has not been sufficient allegation, let alone proof, that the above factors played any part in the homicide, it cannot be said that, even if proven, they could constitute mitigation. **Cf. Eutzy, supra** (mitigating factor must ameliorate enormity of defendant's guilt). If, under **Campbell**, a defendant must establish mitigation by the greater weight of the evidence, than it would seem that one such as Bryant, who wishes to assert that he was "intoxicated" at the time of the murder, must do more than simply present evidence to the effect that he had been intoxicated at some point in his life or that, while he had been intoxicated at the time of the murder, he did not do it (R 1014-1015). It should not be the burden of the sentencer to assemble these jigsaw pieces into a theory of mitigation which the defendant himself will not stand behind. **Cf. Lucas** (sentencer cannot be faulted for failing to consider matters which defendant never argued in mitigation). Error has not been demonstrated.

The final matter remaining relates to Bryant's disadvantaged childhood, including the abuse inflicted upon him by his father. The record does, indeed, reflect that Bryant's father shot him in the arm, approximately ten years ago, causing Bryant to suffer permanent damage to that limb (R 905), and the defense expert testified that this event traumatized Bryant, noting that he had later dropped out of school and begun to use drugs (R 1382). The record also reflects that Bryant's father was imprisoned for the offense, and that Bryant's father had been out of the house for at least the last three years (R 1322, 1365). Bryant's sister testified that Bryant had a very good relationship with his mother and that he had led "a fairly normal life" after this incident (R 1326). Bryant's aunt testified that the father had been primarily abusive toward the mother, although such had upset the children (R 1342-1343). Another witness testified that Bryant's family, apparently after the removal of the father, was "like a normal family", with "laugh[ing] and talk[ing] together" (R 1330). The State would respectfully suggest that, while it would indeed appear that the defendant "proved" that Bryant's father inflicted physical injury upon him, it was a question of fact for the court below to determine whether, on the whole, Bryant's childhood and early life had been "abused and disadvantaged." The State would also respectfully submit that neither **Lockett** nor **Eddings** mandate that an abused childhood, if proven, **must** be found in mitigation. Rather, the holding of those cases is that such factor cannot be disregarded as a matter of law. The United States Supreme Court did not grant relief to

Sandra Lockett and Monty Lee Eddings as individuals, because it was touched by the details of their tragic upbringings. Instead, it struck down the statutory capital sentencing schemes in Ohio and Oklahoma which had precluded consideration of the mitigation presented. Indeed, while the Court did note in **Eddings** that the proffered evidence had been of particular note, given the fact that Eddings, like Lockett, had been a juvenile at the time of the offense, the Court hardly mandated that every defendant, with an arguably comparable background, be "credited" with a fixed amount of mitigation. As this Court recognized in **Eutzy** and **Lucas**, mitigation must somehow ameliorate the enormity of the defendant's guilt. This Court has previously approved sentences of death where the sentencer has refused to find the defendant's abused childhood in mitigation, apparently on the grounds that such was too remote to be relevant. **See Lara, supra** (defendant's actions in murdering victim not significantly influenced by history of child abuse or childhood difficulties, such that latter must be found in mitigation); **Doyle, supra; Johnston, supra, Kight, supra.** The sentencer here could quite reasonably have concluded that Bryant's childhood, including the undeniably tragic shooting incident, simply did not significantly influence his actions in murdering this victim, so as to rise to the level of a mitigating circumstance. No error has been demonstrated.

In conclusion, the State would further note that a trial court's lack of clarity in a sentencing order in regard to mitigation has, at times, not been found grounds for reversal. Thus, in **Rogers**, this Court affirmed the sentence of death,

although the sentencer had stated that it found no mitigation, and this Court, in its review, apparently concluded that some non-statutory mitigating circumstances were supported by the record. Recently, in **Downs v. State**, 15 F.L.W. S478, 480 (Fla. September 20, 1990), this Court concluded that the sentencing order's lack of discussion of mitigation was an insufficient basis for relief under **Campbell**; it would also appear that the death sentence in **Campbell** was reversed, at least in part, due to the sentencer's application of an erroneous standard as to the existence of mitigation. **Campbell**, slip opinion at 7. It is undeniable that Judge Douglas, although not articulating his findings to the extent now required by **Campbell**, did, in fact, consider all of the evidence presented in mitigation, and his conclusion that death is the appropriate sentence remains the proper one. Reversal is not mandated, especially in light of **Clemons v. Mississippi**, ____ U.S. ____, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). The instant sentence of death should be affirmed in all respects.

POINT VII

THE SENTENCE OF DEATH IS NOT DISPROPORTIONATE

As his next point on appeal, Bryant contends that his sentence of death is disproportionate, in comparison to other, allegedly comparable, cases. The "comparable" cases which Appellant has chosen - **Cochran v. State**, 547 So.2d 928 (Fla. 1989), **Brown v. State**, 526 So.2d 903 (Fla. 1988), **Livingston v. State**, 565 So.2d 1288 (Fla. 1988), **Kight v. State**, 512 So.2d 922

(Fla. 1987), and **Nibert v. State,** ____ So.2d ____ (Fla. December 13, 1990) (revised opinion on denial of rehearing) (slip opinion) - all have a common "theme", mental retardation of the defendant. While the State would not contend that the presence of allegedly comparable mitigating circumstances in other capital cases is irrelevant for purposes of proportionality review, mitigation **per se** cannot be the exclusive focus of such comparison, as it is in the Initial Brief. The cases cited by Appellant are more dissimilar, that similar, and, based on this Court's prior precedents, the instant sentence of death is clearly appropriate.

Turning first to the cases cited by Bryant, the State would initially question Appellant's reliance upon **Kight,** in which this Court affirmed the death sentence; in **Kight,** two aggravating circumstances had been found, §921.141(5)(b) & (h), and the defendant had presented evidence of an abused childhood and an IQ comparable to Bryant's. Although opposing counsel contends that **Kight** is distinguishable, in that the crime therein was more premeditated than that **sub judice,** Appellee disagrees; the crime **sub judice** was planned, and planned quite well - Bryant found that the victim had cashed her social security check on the day of the murder and returned to her house that night and robbed, raped and killed her. This case is even more aggravated that **Kight,** and such case does not further Bryant's cause. Another easily distinguishable case is **Nibert,** in which the murder at issue would seemed to have been one committed for no reason by one with a lifelong history of alcoholism; only one aggravating

circumstance was found, §921.141(5)(h), and there was not only testimony that the defendant had been intoxicated at the time of the murder, but also that he felt great remorse. The murder **sub judice** was hardly a "senseless" one; Robert Bryant, who, of course, had a prior conviction for a crime of violence, not only stole the money from the victim's social security check, but also found it necessary, or desirable, to sexually batter the sixty-seven year old victim. Further, the proffered mitigation **sub judice** is nowhere close to that in **Nibert**, in which the defendant introduced evidence to the effect that he had been beaten daily by his mother and had been forced to begin drinking alcohol at age twelve.

Appellant also relies upon **Cochran v. State** and **Brown v. State**. The State would initially note that both of these cases represent instances in which the sentencing juries had recommended life imprisonment. In the Initial Brief, opposing counsel suggests that this fact is immaterial in a proportionality review (Initial Brief at 45, n.9). The State disagrees. When reviewing a jury override, this Court's predominant focus is whether, under **Tedder v. State**, 322 So.2d 908 (Fla. 1975), there is any reasonable basis for the jury's life recommendation. **See Hallman v. State**, 560 So.2d 223, 226 (Fla. 1990). Where no such reasonable basis is found, this Court will reverse the death sentence, even if, under other circumstances, such would have been considered proportionate. **Cf. Mills v. State**, 476 So.2d 172, 180 (Fla. 1985) (McDonald, J., concurring in part, dissenting in part) ("Were it not for the

jury's recommendation, I would have little difficulty upholding the death sentence. Valid aggravating circumstances existed, and the defense established the existence of no statutory mitigating circumstances . . .). Accordingly, **Cochran** and **Brown** are distinguishable on their face. There are other bases for distinguishment, however. Thus, in **Cochran**, there would seemed to have been a serious question as to whether the defendant had killed the victim in a struggle, after she had tried to stab him; although Cochran had a prior conviction for another murder, and the murder occurred during a felony, this Court disagreed that the homicide had been especially heinous, atrocious or cruel. Here, the victim was beaten and raped by Bryant, in addition to having all of her money stolen. Further, in **Cochran**, the defendant showed remorse for his crime, and there was testimony that he had been under great stress at the time of the crime. Here, Bryant has never even acknowledged his guilt, and any contention that he was under comparable stress at the time of this homicide is sheer speculation. Additionally, while Cochran had a low IQ, he was also only eighteen years old at the time; Bryant was twenty-five. Similarly, in **Brown**, there was record support for any contention that the crime had been "spontaneous" or "impulsive", in that the defendant shot the victim as they were struggling in the road over a gun; as in **Cochran**, this Court struck the aggravating circumstance relating to the heinous nature of the crime. There was testimony that the defendant, who had been eighteen at the time of the offense, had only the "emotional maturity of a preschool child"; as noted, Bryant was

significantly older than this and, although he was apparently borderline mentally retarded, there was no testimony to the effect that his maturity was on a par with Brown's.

The final case relied upon by Bryant is **Livingston**. In such case, the defendant shot and killed a convenience store clerk during a robbery, and this Court found that two valid aggravating circumstances existed, in regard to the commission of such robbery and the defendant's prior conviction for a crime of violence. This Court held, however, that the death penalty was disproportionate, given the testimony presented as to the severe beatings which Livingston suffered as a child, his youth (17), immaturity and marginal intellectual functioning. While Bryant undoubtedly proffered mitigation in these same general areas, the quantum is not comparable. As noted, Bryant was twenty-five at the time of the murder, he was certainly not "savagely beaten" on a regular basis during his childhood and there was no significant testimony that he could not function adequately. Further, the victim in this case was not simply shot to death; additional acts accompanied her murder, such as beating and rape. **Livingston** does not dictate that the instant sentence be vacated.

The State suggests, in contrast, that the death penalty is proportionate in this case, in light of such precedents as **Quince v. State**, 414 So.2d 185 (Fla. 1982), **Lightbourne v. State**, 438 So.2d 380 (Fla. 1983), **Hardwick v. State**, 461 So.2d 79 (Fla. 1984), and **Wright v. State**, 473 So.2d 1277 (Fla. 1985). **Quince** is, perhaps, the closest case, and, indeed, is chillingly familiar. In **Quince**, the defendant, a twenty year old of only

borderline intelligence, murdered his elderly neighbor for whom he had done yard work; the victim was beaten, raped and strangled. The sentencer found that the defendant's capacity to conform his conduct to the requirements of the law had been impaired, but concluded that such circumstance was outweighed by the aggravating circumstances found - that the homicide had been committed during a rape, for pecuniary gain, and in a particularly heinous fashion. In this case, these same aggravating circumstances were found, including additional factors in regard to Bryant's prior record. Certainly, **Quince** bears greater resemblance to this case than **Livingston** or any of the other cited above. In **Lightbourne**, the defendant, a twenty-one year old with no significant criminal history, murdered the daughter of his employer; Lightbourne broke into her home, stole various items, raped her and then shot her once in the head. In **Hardwick**, an itinerant house painter went to the home of an elderly victim for whom he had done work in the past, in an attempt to get a "loan". Instead, he stole various items, and beat, raped and strangled the victim; this Court found the death penalty appropriate. In **Wright**, the defendant, who was "emotionally immature" and who had "difficulty in controlling his impulses", broke into the home of a neighbor to steal money from her purse; when the victim surprised him, he stabbed her to death. Again, this Court found the death sentence appropriate.

Additionally, although the "burglary" aspect of this case has not been greatly emphasized, the State would contend that this murder bears similarity to those which occurred when the

defendant and victim were strangers to each other. **See, e.g., Freeman v. State**, 563 So.2d 73 (Fla. 1990) (defendant, who had prior record, murdered victim during burglary, and judge found in mitigation defendant's low intelligence and prior abuse by step-father; death sentence proportional); **Harvey v. State**, 529 So.2d 1083 (Fla. 1988) (defendant murdered elderly couple during burglary, and sentencer found in mitigation defendant's low IQ and poor education and social skills; death penalty appropriate); **Cherry v. State**, 544 So.2d 184 (Fla. 1989) (victim beaten to death during burglary; at penalty phase, defense presented evidence that defendant's father had beaten him severely, defendant's mother had alcohol problem and defendant smoked marijuana daily prior to crimes; death proportionate); **Johnston v. State**, 497 So.2d 863 (Fla. 1986) (defendant murdered elderly victim and stole various items from her home; in mitigation, defendant presented evidence concerning his abuse by parents, history of mental disorder and taking of LSD on night of murder; death sentence proportionate). All of the above cases dictate that Robert Bryant's death sentence is appropriate. Although opposing counsel describes this murder as "impulsive", or as one which occurred when Bryant "struggled with the victim", or after he "blacked out" (Initial Brief at 48, 51), such allegations totally without support in the record, and, although opposing counsel, for understandable reasons, emphasizes the evidence presented as to Bryant's mental capacity and alleged intoxication, these matters cannot obscure the underlying fact that Robert Bryant's heinous crime merits the death penalty. The instant sentence of death should be affirmed in all respects.

POINT VIII

BRYANT'S POLICY ARGUMENT, CONCERNING EXECUTION OF THE MENTALLY RETARDED, IS NOT PROPERLY BEFORE THIS COURT

In his next point on appeal, Bryant contends that execution of the mentally retarded violates the Eighth Amendment, as well as the Florida Constitution. Bryant argues that to allow such would violate society's "evolving sense of decency". Bryant, quite obviously, includes himself among the mentally retarded for purposes of this point on appeal. Appellee would contend that this claim is not properly before this Court, and, further, that Bryant has failed to demonstrate any sufficient basis for vacation of his sentence of death.

Initially, the State would contend that this claim is procedurally barred, in that no claim of this nature was ever presented to the trial court below. While the facial validity of a statute can be raised for the first time on appeal, an issue concerning the constitutional application of a statute to a particular set of facts is a matter which must first be raised in the trial court. **See Trushin v. State**, 425 So.2d 1126, 1129-1130 (Fla. 1982). This Court has applied this principle in other capital cases, where the defendant has failed to present his constitutional challenges to the circuit court. **See, e.g., Eutzy v. State**, 458 So.2d 755, 757 (Fla. 1984) (challenge to constitutionality of jury override procedurally barred where raised for first time on appeal); **Swafford v. State**, 533 So.2d 270, 278 (Fla. 1988) (constitutional challenges to capital sentencing statute procedurally barred); **Ventura v. State**, 560

So.2d 217, 221 (Fla. 1990) (same). This Court has apparently rejected any contention that this claim is fundamental in nature. **Cf. Woods v. State**, 531 So.2d 79, 82 (Fla. 1988) (claim that Eighth Amendment precluded execution of mentally retarded procedurally barred when first raised on post-conviction motion). Accordingly, this claim is procedurally barred.

Assuming that this Court finds this claim preserved for review, the State would still maintain that this matter represents a policy argument which should be addressed to the Legislature, and not to this Court. This was one of the holdings of **Penry v. Lynaugh**, ____ U.S. ____, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Further, as this Court noted in **Carter v. State**, 14 F.L.W. 525, 526 (Fla. October 19, 1989), the United States Supreme Court, in **Penry**, held that the Eighth Amendment did not, in fact, "categorically prohibit the execution of mentally retarded capital murderers." Appellant has failed to demonstrate why **Carter** does not control **sub judice**.

The State would also contend that **Penry** is an extremely instructive case. In **Penry**, the United States Supreme Court found that the defendant's death sentence violated the Constitution. Importantly, the Court did **not** reach this conclusion because Penry was mentally retarded. **Id.**, 106 L.Ed.2d at 289. Rather, the Court concluded that the manner in which Texas conducted its capital sentencing proceedings had not allowed the jury to fully consider Penry's mental retardation in mitigation. **Id.** at 284. As this Court held in **Porter v. Dugger**, 559 So.2d 201, 203-204 (Fla. 1990), the **Penry** "problem" is not

likely to occur in Florida, given the fact, **inter alia**, that both the judge and jury can consider in mitigation all relevant evidence pertaining to the defendant's character or record or circumstances of the offense. As noted in Point V, **supra**, the jury in Bryant's case was specifically instructed that not only could they consider relevant evidence concerning Bryant's character or record or circumstances of the offense, but also, specifically, that they could consider any substantial impairment in his ability to conform his conduct to the requirements of the law in mitigation (R 1438). The State suggests that Florida's capital sentencing structure provides for adequate consideration of a defendant's mental retardation, such that the draconian "policy" suggested by Appellant is unnecessary. The State would rely upon this Court's decision in **LeCroy v. State**, 533 So.2d 750 (Fla. 1988), as persuasive authority. In such case, this Court was confronted with a comparable claim of error, that the Eighth Amendment, as well as Florida's constitution, precluded execution of one who had been a juvenile at the time of his offense. This Court found that such absolute rule was unnecessary, given the fact, **inter alia**, that Florida's death penalty system allowed for adequate consideration of the defendant's age in mitigation. **Id.** at 758. A similar conclusion is mandated **sub judice**, in that it is clear that the Legislature, in enacting §921.141(6)(f), obviously intended that a defendant's mental capacity be considered in mitigation where appropriate. In this case, Bryant's limitations were fully argued to the judge and jury in mitigation, and considered accordingly. No further action by this Court is required.

Finally, even if this Court should agree, as a general principle, that a policy "statement" on this subject is required, the State would respectfully suggest that Bryant's case does not present a compelling vehicle for such pronouncement. Bryant's own expert places him in the mildly mentally retarded range, and his IQ is, at least, within two to four points of the "cut off" line of seventy (R 1380).[10] This later result is, in any event, difficult to reconcile with the testimony of another defense witness, who stated that Bryant's IQ had been between 76 and 81 at a more relevant time, **i.e.**, his formative years (R 1361), **cf. Penry**, 106 L.Ed.2d at 291-292 (". . . the mean scores on most intelligence tests cease to **increase** significantly with age.") Further, while Bryant's family and friends did testify that he had trouble reading and writing (R 1327), they also described him as leading a "fairly normal life" (R 1325); it should also be noted that Bryant was able to work various jobs and that family members and friends considered him trustworthy enough to babysit their children (R 909, 1323, 1325, 1331, 1337). In short, Bryant has failed to demonstrate the degree of impairment which would act to absolve him from the moral culpability of his offense. **Cf. Carter** (defendant's retardation so minimal as to render

---

[10] As noted earlier, see n.1, **supra**, Bryant's IQ would seem to be 68, not 66. Further, the test used has a "standard error of measurement" of 3, thus meaning that Bryant's IQ could in fact by over 70. *Grossman,* **Classification of Mental Retardation** (*American Association on Mental Deficiency 1983*), at p. 24. This text, cited by Appellant (Initial Brief at 52, et seq), also cautions that "any measurement is fallible." **Id.**

Penry issue irrelevant). No relief is warranted as to this procedurally barred claim.

POINT IX

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE PROSECUTOR'S CROSS-EXAMINATION OF THE DEFENSE EXPERT, AND SUBSEQUENT DISCUSSION THEREOF IN CLOSING ARGUMENT, ASSUMING, IN FACT, THAT ANY CLAIM OF ERROR IS PRESERVED FOR REVIEW

During the penalty phase, the defense called Dr. Mendelson, a psychologist, as an expert witness (R 1369-1407). On direct examination, defense counsel brought out the fact that Mendelson had been court-appointed, at the request of the defense, to examine Bryant (R 1372-1373). The doctor related that he had examined Bryant on two occasions and had administered a number of tests (R 1374-1378); the witness said that he had brought his report with him, and such was supplied to the prosecutor, for the first time, at trial (R 1374-1375). Defense counsel specifically asked the witness if the tests had been designed to determine whether Bryant "suffered from brain damage"; Mendelson stated that the test results did not indicate that Appellant had any organic brain damage (R 1378-1379). Similarly, defense counsel asked Mendelson whether he had tested Bryant to determine "whether or not he was competent to stand trial and to assist me in his defense"; the witness stated that he had found no evidence that Bryant was incompetent to stand trial (R 1379). Mendelson then detailed the test results which he had procured, and explained his conclusion that Bryant's capacity to conform his conduct to the requirements of the law had been substantially impaired, a statutory mitigating circumstance under §921.141(6)(f) (R 1379-1389).

On cross-examination, the prosecutor clarified that Mendelson's appointment had not just involved examination for the presence of mitigating circumstances, but also such matters as competency and sanity (R 1389). The witness stated that, during his interview with Bryant, he had found that the defendant was oriented, that he was not suffering from any memory loss and that he was not mentally ill (R 1396-1397). Mendelson stated that one of the matters he had been asked to determine was Bryant's sanity at the time of the offense (R 1397); he further stated that he had insufficient evidence to make a decision, given the fact, **inter alia**, that Bryant had never admitted committing the murder (R 1398). The doctor acknowledged, however, that he felt that Bryant had understood the nature and consequences of his behavior and had probably known right from wrong at the time (R 1398-1399). On redirect, defense counsel explored this area, and Dr. Mendelson stated that he could not say that Bryant had been sane at the time of the offense either (R 1403-1406). In closing argument, the prosecutor briefly discussed Mendelson's testimony, to the effect that Bryant had understood the nature and consequences of his actions and had been able to tell right from wrong at the time of the murder, in support of his contention that the impaired capacity mitigating factor did not apply (R 1417-1418).

On appeal, Bryant contends that his sentence of death must be reversed because the issue of sanity was wrongfully introduced at the penalty phase; Appellant relies upon this Court's precedents, **Mines v. State**, 390 So.2d 332 (Fla. 1980), and

Ferguson v. State, 417 So.2d 631 (Fla. 1980), in support of his contention that the prosecutor's argument was improper. Bryant's initial problem is that this point on appeal is not preserved for review. Thus, there was no contemporaneous objection to the prosecutor's cross-examination of Dr. Mendelson, thus waiving the issue. **See, e.g., Farinas v. State**, 15 F.L.W. S555, 556 (Fla. October 11, 1990) (contemporaneous objection necessary to preserve issue involving State's allegedly improper impeachment of defense witness); **Bertolotti v. State**, 565 So.2d 1343, 1345 (Fla. 1990) (specific objection necessary to preserve claim for review); **Steinhorst v. State**, 412 So.2d 332, 338 (Fla. 1982) (issues not considered for first time on appeal, in absence of fundamental error). Similarly, there was no contemporaneous objection to the prosecutor's closing argument, thus waiving any claim for appeal. **See, e.g., Rose v. State**, 461 So.2d 84, 86 (Fla. 1984) (no "capital case exception" to requirement for contemporaneous objection in regard to prosecutorial argument); **Davis v. State**, 461 So.2d 67, 71 (Fla. 1984); **Teffeteller v. State**, 495 So.2d 744, 747 (Fla. 1986). Inasmuch as Bryant has cited no precedent to the effect that what occurred **sub judice** constitutes fundamental error, it is clear that this claim is procedurally barred.

To the extent that this Court wishes to address the matter, Bryant has failed to demonstrate any basis for relief. The State's questioning of Dr. Mendelson was clearly within the scope of permissible cross-examination. It is, of course, well recognized that when direct examination opens a general subject,

the cross-examination may go into any phase and may not be restricted to the specific facts developed on direct; this is particularly true when only a portion of an event or transaction has been put into evidence initially. **See, e.g., Coco v. State,** 62 So.2d 892, 894-895 (Fla. 1953); **McCrae v. State,** 395 So.2d 1145, 1152 (Fla. 1980); **Steinhorst v. State, supra.** On direct examination, Dr. Mendelson had testified that he had been court appointed to examine Bryant, and that among the things he had been asked to determine was Bryant's competence to stand trial, as well the potential application of mitigating circumstances (R 1379). Surely, this inquiry opened the door to examination as to all of the matters which Mendelson had investigated, and, accordingly, the State was entitled to question Mendelson as to his findings concerning Bryant's sanity. **Cf.** §90.705, Fla.Stat. (1987) (expert can be cross-examined as to the facts or data upon which he bases an opinion). Additionally, the State would note that this Court recently rejected an identical claim of error. **See Lucas v. State,** 568 So.2d 18, 21 (Fla. 1990) (not improper for prosecutor to argue that fact that defendant knew right from wrong meant that mitigating factor regarding impaired capacity did not apply).

It is, in any event, difficult to see how Bryant was prejudiced by the admission of this evidence; on redirect, defense counsel brought out the fact that, in Mendelson's opinion, Bryant may not have been sane at the time of the offense (R 1403-1406). In closing argument, the State was certainly entitled to argue that Bryant's ability to distinguish right from

wrong and his knowledge of the nature and consequences of his acts were factors which the jury could consider in determining whether or not substantial mitigation existed. The cases relied upon by Bryant, **Mines** and **Ferguson**, involved instances in which the sentencing judge misunderstood the standards applicable in regard to the statutory mental mitigating circumstances. Given the complete and proper instructions given the jury **sub judice**, **see** Point V, **supra**, such is not a concern in this case; any error would, in any event, be harmless under **DiGuilio**, **supra**. No relief is warranted as to this procedurally barred claim.

POINT X

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE TRIAL COURT'S DENIAL OF BRYANT'S REQUESTED JURY INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE

During the charge conference at the trial, defense counsel requested that the court give a special jury instruction, based upon **Brumbley v. State**, 453 So.2d 381 (Fla. 1984), on circumstantial evidence (R 1083-1084); a copy of the case was submitted, apparently in lieu of a formal written request (P 171-178). Judge Douglas denied the request (R 1085-1086). On appeal, Bryant contends that such ruling constitutes reversible error. Appellant argues that the trial court seemed to have believed that it did not have the discretion to give this instruction, and maintains that the instruction was particularly necessary because this was, and is, a capital case. Finally, Bryant suggests that this is an extremely heated issue, with a "cacophony of legal wrangling", complete with "lawyers shouting" (Initial Brief at 70).

Appellee finds none of the above convincing. Assuming that any sufficient request for this instruction was made, given the fact that there would seem to have been no written request, **see Watkins v. State**, 519 So.2d 760, 761 (Fla. 1st DCA 1988) (where requested jury instruction not part of standard instructions, requested instruction must be submitted in writing, to preserve claim for appeal), no abuse of discretion has been demonstrated **sub judice**. The State finds no record support for Bryant's suggestion that Judge Douglas was unaware of the fact that he could give this instruction, if warranted. While this is, indeed, a capital case, this Court has consistently held, in other capital cases, that this instruction is not necessary, where, as here (R 1172-1173), instructions are given on the burden of proof and reasonable doubt. **See, e.g., Williams v. State**, 437 So.2d 133, 135-136 (Fla. 1983); **Rembert v. State**, 445 So.2d 337, 339 (Fla. 1984); **White v. State**, 446 So.2d 1031, 1035 (Fla. 1984). As this Court noted in its decision, **In re Florida Standard Jury Instructions in Criminal Cases**, 431 So.2d 594, 595 (Fla. 1981), the federal courts have likewise abolished any specific instruction on circumstantial evidence. **See also Holland v. United States**, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed.2d 150 (1954). Although opposing counsel, as noted, suggests that the "decibel level" on this issue is high, the undersigned counsel, in contrast, would maintain that the silence is deafening. The instant conviction should be affirmed in all respects.

POINT XI

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE DENIAL OF BRYANT'S MOTION FOR MISTRIAL AT THE END OF THE STATE'S CLOSING ARGUMENT AT THE GUILT PHASE, ASSUMING, IN FACT, THAT ANY CLAIM OF ERROR HAS BEEN PRESERVED FOR REVIEW

Because the defense had presented a number of witnesses at trial, the State was allowed opening and closing final argument (R 1088-1116; 1142-1151). No objection was interposed during the initial closing argument (R 1088-1116). In the defense closing argument, Bryant's counsel expounded upon a number of "themes". Thus, he suggested that Bryant should be acquitted because he had an alibi (R 1125-1129), and because the State had failed to prove their case beyond a reasonable doubt (R 1117-1125). Bryant's counsel, however, had one overriding theme to his closing argument - that the State's expert witnesses, as well as the law enforcement witnesses who had testified, had lied - and the prosecutor had, apparently, shaped his case accordingly.

Thus, defense counsel pointed out that the defense had introduced the transcript of Bryant's interview with Agent Mauge, going to state,

> And that document, I think, should be very helpful. Because in that document Mr. Mauge can't hide behind the fact that he cuts his recorder on and off at his pleasure. He can't hide behind this baloney about making Mr., Mr. Bryant making statements that are ridiculous, about being here, being there, because he made those as he was walking out the door.

(R 1127).

Defense counsel later suggested that Agent Mauge, as well as the prosecutor, had not been greatly interested in knowing "the

truth", and that the defense, in calling its witnesses, had performed the greater service,

> I asked you earlier, where is the smoking gun? Mr. Mauge puts the tail before the dog. He doesn't want to really run down other leads. He wants to take the path of least resistance. He doesn't want you to have much concern about that smoking gun. Mr. Phelps [the prosecutor] doesn't either. He doesn't want to have anyone try to figure out why, in all of this, there seems to be no gun.
>
> Well, there was a gun, and we chased this down. We investigated this, and we presented testimony in this case, of Maggie Blackshear and one other young woman, regarding that gun.

(R 1134-1135).

Bryant's counsel, however, reserved his primary ire for those "so-called experts", those "guy[s] with a briefcase from out of town." (R 1124), contending that it had been "a bunch of sheer baloney" for the prosecutor to have told the jury that the experts had been objective (R 1124). Defense counsel minced no words,

> Folks, these so-called experts work for the State. They get paid by the State. They are subpoenaed by the State. They are not objective. There are not being fair in terms of their testimony.

(R 1141).

Defense counsel argued specifically that the serological evidence actually showed that Bryant could not possibly have committed the crime (R 1128-1129), and that, apparently, the State and the expert witnesses were misleading the jury.

The prosecutor then presented the State's rebuttal argument (R 1142-1151). In the course of this argument, the assistant

state attorney pointed out that, contrary to defense counsel's argument, the experts, in fact, had no "interest" in the case, and were simply reporting their findings (R 1146, 1149-1150). In regard to Agent Mauge, the prosecutor stated,

> Mr. Harrison [defense counsel] attacks Mr. Mauge and says Mr. Mauge is very conveniently turning the tape on and off, and that sort of thing. You saw him testify. You saw the professional manner in which that experienced law enforcement officer gave you the findings of his investigation that he has worked months on.
>
> I am not going to ask you to convict Robert Bryant simply because that is the person Clarence Mauge chose to arrest, but it was the defendant who wanted to bring in all of this extraneous investigation. The purpose of all that was to cloud the issue.
>
> However, Clarence Mauge, after this investigation, followed up all of these leads, what is the conclusion that he necessarily came to? The same one that you have to come to when you look at all of this evidence. And that is Robert Bryant, Jr., himself, committed these offenses.

(R 1148).

At the conclusion of the State's argument, defense counsel moved for a mistrial (R 1152). Bryant's attorney claimed that the prosecutor had repeatedly injected his personal beliefs into the argument and had misstated the burden of proof (R 1152); apparently, some of the comments had allegedly occurred during the initial State argument, because defense counsel was particularly concerned that his failure to object at that time not be deemed a waiver (R 1152, 1154). Judge Douglas denied the motion (R 1153).

On appeal, Bryant contends that he is entitled to a new trial, because the prosecutor not only stated his "personal belief that Bryant was guilt", but also "vouch[ed] for the credibility of its witnesses" (Initial Brief at 73-74). Appellate counsel identifies the section of the closing argument cited above (R 1148), as that at issue, and contends that he is entitled to relief on the basis of such precedents as **Grant v. State**, 171 So.2d 361 (Fla. 1965), **Buckhann v. State**, 356 So.2d 1327 (Fla. 4th DCA 1978), **Jones v. State**, 449 So.2d 313 (Fla. 5th DCA 1984), and **Ryan v. State**, 457 So.2d 1084 (Fla. 4th DCA 1984). Appellee would contend that Bryant's reliance upon the above precedents is misplaced, and that no basis exists for reversal.

Initially, the State would question the preservation of at least a portion of Bryant's argument. Thus, it must be noted that, while defense counsel did move for a mistrial, and did voice two specific grounds for such, he said nothing about the State having "vouched for the credibility" of any witness (R 1152-1154). It is well established that the specific legal ground upon which a claim is based must have been presented to the trial court in order for such issue to be raised on appeal. **See Bertolotti v. State**, 565 So.2d 1343, 1345 (Fla. 1990); **Tillman v. State**, 471 So.2d 32, 35 (Fla. 1985). This Court specifically held in **Craig v. State**, 510 So.2d 857, 864 (Fla. 1987), "A motion for mistrial based on certain grounds cannot operate to preserve for appellate review other issues not raised by specific objection at trial." Further, the State would note that this Court has required preservation of any claim that

prosecutorial comments involved vouching for the credibility of a witness. **See Carter v. State**, 560 So.2d 1166, 1168 (Fla. 1990), **Wasko v. State**, 505 So.2d 1314, 1317 (Fla. 1987). Accordingly, this portion of Bryant's claim is procedurally barred.

Turning to Appellant's remaining claim, the State suggests that Bryant's argument is simply unconvincing. The portion of the prosecutor's argument which Bryant questions (R 1148), simply contains **no** expression of personal opinion by the prosecutor. The assistant state attorney **sub judice** certainly said nothing on par with the remarks condemned in **Grant** or **Buckhann;** in the former case, the prosecutor had told the jury that he had been a prosecutor for six years and knew when the defendant presented a bona fide defense, whereas in the latter case, the prosecutor had told the jury that he believed the defendant was guilty, which was "why they were there." Further, to the extent that this Court may wish to reach any claim involving alleged "vouching for the credibility" of a witness, in contrast to the situation in either **Jones** or **Ryan**, the prosecutor here was simply "fairly replying" to the preceding defense argument. In that argument, defense counsel had accused Agent Mauge of taking the course of least resistance and failing to follow through with other leads, thus allowing Bryant to become the major suspect "by default" (R 1134). The prosecutor, in response, was entitled to point out that this version of the facts was completely false, and only an extremely strained reading (or hearing) of the argument at issue would lead one to believe that the jury was being told that Bryant must be convicted because Agent Mauge (and/or the

prosecutor) thought him guilty. Error has not been demonstrated.[11] **See, e.g., State v. Mathis**, 278 So.2d 280, 281 (Fla. 1973) (State's argument "invited response" to prior defense argument); **Dufour v. State**, 495 So.2d 154, 160-161 (Fla. 1986) (same); **Williamson v. State**, 511 So.2d 289, 292 (Fla. 1987) (same). Further, to the extent that any error has been demonstrated, such would be harmless beyond a reasonable doubt under **DiGuilio**, in that such comments did not contribute to the jury's verdict, as Mauge's credibility was essentially a collateral matter. **Cf. Maggard v. State**, 399 So.2d 973, 976 (Fla. 1981) (prosecutor's statement of personal belief in closing argument harmless error); **Pope v. Wainwright**, 496 So.2d 798, 802-803 (Fla. 1986) (prosecutor's vouching for credibility of star witness harmless error); **State v. Murray**, 443 So.2d 955, 956 (Fla. 1984) (prosecutorial misconduct insufficient basis for new trial unless error so basic to fair trial that such cannot be harmless). The instant conviction and sentence should be affirmed in all respects.

---

[11] Defense counsel's argument was, indeed, false. The defense called Mauge as a witness during its case in chief (R 1037-1047). Despite defense counsel's best efforts, the only fair reading of Mauge's testimony indicates that he did "chase down every lead", investigating the potential involvement not only of Bryant, but also of Kat Anderson, Richard Glenn and Cal Lockett (R 1037-1047).

CONCLUSION

WHEREFORE, for the aforementioned reasons, the instant conviction of first degree murder and sentence of death should be affirmed in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

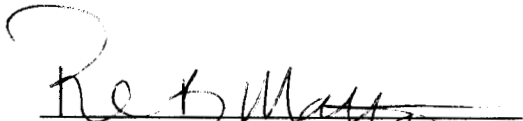
RICHARD B. MARTELL
Assistant Attorney General
Florida Bar No. 300179

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. David A. Davis, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 17th day of December, 1990.



RICHARD B. MARTELL
Assistant Attorney General