IN THE SUPREME COURT OF FLORIDA

JAMES HUDSON SAVAGE,

Appellant,

v. CASE NO. 75,494

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee rejects Savage's statement of the case and facts because it is incomplete, at times inaccurate, and frequently argumentative. For the sake of clarity, appellee has prepared a statement of the case and facts upon which it will rely, rather than attempt to add to and set forth its disagreements with that of Savage. Appellee has set forth its specific disagreements with Savage's statement of the case and facts, as well as the facts referred to in his arguments, in the attached appendix. (R __) refers to the record on appeal and (IB __) refers to Savage's Initial Brief.

On December 13, 1988, James Hudson Savage was indicted for the murder, robbery and sexual battery of Barbara Ann Barber (R 3356-57). Pursuant to defense motion dated December 16, 1988, the trial court appointed Dr. Wooten to assist in the preparation of the defense (R 3369-71). On April 10, 1989, the defense filed a second motion for psychological evaluation, stating that Dr. Wooten's opinion appeared to align itself with the State of Florida and a second opinion was required (R 3382-83). The trial court appointed a second expert to examine Savage (R 3389-91).

On September 13, 1989, Savage filed a motion to suppress evidence, stating that the conditions of his detention were illegal so the obtaining of his shirt, watch and shoes was illegal in nature; and a motion to exclude the DNA test results (R 3395-98, 3399). On September 19, 1989, Savage filed a motion for individual voir dire (R 3400). On September 29, 1989, Savage filed a motion to suppress confession or admission illegally

obtained, contending that any and all confessions and admissions were illegally obtained through the use of coercion, duress and inducements, ultimately resulting in an involuntary confession (R 3407-10). Hearings on these motions were held October 16 and 17 and November 6, 1989 (R 1610-1936, 1978-2083). The state had no opposition to the motion for individual voir dire (R 1613)[1]. Regarding the motions to suppress, the following testimony was given:[2]

On November 25, 1988, Officers Plymale and Baker of the Melbourne Police Department were instructed by their captain to go to areas surrounding the murder scene to contact people and see if they heard or saw anything that night (R 1638). They were dressed in plain clothes, which concealed their guns and vests (R 1640). They saw three men sitting on benches at the Colonial Motel, approached them, identified themselves as police officers and asked if they could speak with them (R 1250, 1643). The men

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[1] While there is no further transcribed hearing on this issue, the trial court stated on the record, just prior to the commencement of voir dire, what the parties had agreed to (R 21-24). The jurors were to be brought over in panels of approximately thirteen to fifteen jurors, where they would first be *individually* questioned regarding possible knowledge of the case (R 22-23). After approximately 48 of those jurors were tentatively acceptable to both sides, inquiries would be made regarding the death penalty, which would be handled in groups of one to seven, depending on the circumstances (R 23). Finally, those jurors still tentatively acceptable would proceed to what the trial judge termed "normal voir dire", where the parties could acquaint themselves with the jurors (R 23). This is exactly the manner in which voir dire progressed, without objection from either party.

[2] Much of this same testimony was given at trial so citations will also be given to the trial record.

were addressed as a group, and there was a general reply, with nobody saying no (R 1643).

The officers said that they were investigating some burglaries in the area, and the men stated that they had not seen or heard anything (R 1252, 1644). The officers were approximately three to four feet from the men, and talked to them about five to ten minutes (R 1644, 1659). The officers gave no directives, there was no physical contact with the men, and though the men moved around, nobody left or asked to leave (R 1659). The officers asked for the men's names and filled out field interview cards (R 1645). Savage commented that he had seen a lot of police cars in the area, and asked if someone had been murdered or killed (R 1252, 1647). The officers radioed a warrants check, and received word back that Detective Sarver wanted to speak with Savage (R 1252, 1645-46). Savage's name had come up when Sarver was initially briefed on the case November 23 (R 1316, 1669-70). Savage had been seen in the area the night of the murder by a patrol officer, who had completed a field interview card indicating such (R 1316, 1670-71).

Detective Sarver, along with Detective Nichols, arrived at the Colonial in about three to five minutes (R 1646, 1661, 1672, 1809). Both detectives were in plain clothes, and were driving an unmarked car (R 1673-4). Sarver probably was not carrying a weapon (R 1673). Sarver introduced himself as a detective with the Melbourne Police Department and asked Savage, who was seated on a bench, if he would accompany them to the station, because they wanted to ask him some questions (R 1317, 1674-75, 1783).

Savage asked Sarver what he wanted to talk to him about and Sarver replied that he wanted to ask a few questions about what Savage had been doing over the last several days (R 1675). Savage said okay and stood up (R 1676). Sarver turned and began to walk back to the car, Savage followed and got in the front seat (R 1676). No force or restraints were used, Savage was not helped into the car by the officers, nor did Savage ever indicate that he did not want to go (R 1661, 1677, 1784).

The three entered the police station through the north door directly into the detective's division, as opposed to entering through the booking area, and went into an interview room that was probably within twenty feet of the door they entered (R 1678, 1693). The detectives talked to Savage for fifteen to thirty minutes reconstructing what he had been doing over the past several days (R 1679, 1687). They noticed dark spots on Savage's shirt and shoes that could be blood, as well as scratches on his face and right hand and swelling on his knuckles (R 1172, 1680, 1687, 1748). The detectives asked Savage about the injuries, and he told them he had been in a fight with a man named Whiggy on Wednesday night and received the scratches on his face, and had injured his hand by hitting the television in his room as he was trying to get away from two girls who were attempting to borrow money from him (R 1681). Savage also told the detectives he had borrowed $40 from Speedy Gartland (R 1684). Sarver asked Savage if he could have his flannel shirt (Savage had a T-shirt on as well) and Savage gave it to him (R 1174, 1680). Savage also turned over his shoes (R 1174, 1749). Savage had also told the

detectives that he was on probation and had never reported, though the detectives were not aware of an active warrant for such (R 1687, 1729-30, 1790). The detectives then left Savage unattended for ten to fifteen minutes (R 1682).

The detectives first took the shirt to the evidence section for a presumptive blood test (R 1681-82, 1789). After the presumptive test showed blood, Nichols returned to Savage along with Sergeant Fernez (R 1789). Sarver, along with others, was attempting to verify Savage's story (R 1682). Whiggy was interviewed and said that he had never been in a fight with Savage and would not have injured him in any way (R 1683). Speedy Gartland mentioned nothing about loaning money to Savage (R 1685). Sarver spoke with Christina Denius, who had seen two men across from the victim's business the night of the murder, and had described one as being a black male wearing a large, loose fitting jacket, which she told Sarver could have been a flannel shirt (R 1686). Sarver also spoke with Paul Violas from the Department of Corrections regarding Savage's probationary status, and Violas said he would come to the station (R 1687). This took approximately an hour, during which time Nichols and Fernez had moved Savage to a conference room and continued to speak with him (R 1686, 1747, 1750, 1790-91). Sarver went to the conference room, told Nichols and Fernez what he had learned, and left that area to wait for Violas to arrive (R 1688, 1690).

Fernez and Nichols went back into the room and told Savage what they had learned and asked him if he would consent to a one on one confrontation with the alleged eyewitness, and Savage

verbally agreed (R 1752-53). Fernez obtained a one on one confrontation waiver sheet, returned to the room and informed Savage of his rights and read him the consent form (R 1754). Savage asked to read the consent sheet, and when he got to the point in reference to *Miranda* rights he told Fernez that Fernez had not read him those rights (R 1804). Fernez replied that he had, Savage responded "oh, yeah", read some more of the sheet and said he did not want to sign it (R 1804). The sheet has no advisement that a person has a right to refuse (R 1805).[3] Savage also said that he had been standing around when people have been killed before and hadn't been arrested (R 1272, 1756). No one had mentioned a murder investigation at that point (R 1272, 1756-57). Fernez and Nichols left the room, and Savage was left alone for an hour to an hour and a half (R 1757). At one point it appeared as if he had fallen asleep (R 1696, 1759).

Violas arrived at the station, said he had been able to verify that Savage was on probation, and advised Savage that he had violated his probation (R 1697). Fernez testified that until that point, Savage had been free to leave (R 1760). Fernez spoke with Savage, asked if he could have the rest of his clothes, and Savage agreed if he could have other clothing (R 1760). The clothes were relinquished to the evidence technician and photos

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[3] Counsel raised an objection as to the voluntariness of this statement (R 1263, 1266). It was the trial court which expressed concern over the possible inflammatory aspects of the statement, and defense counsel acknowledged that the court had brought out an important aspect, and stated he did feel it would be extremely prejudicial to Savage (R 1266). Counsel then stated that for appellate purposes, the objections were made pursuant to the eighth and fourteenth amendments to the constitution (R 1267).

were taken of Savage's scratches and abrasions (R 1760). Right after Savage put on the other clothes he appeared in a rather remorseful state; Fernez asked him what was wrong, and Savage looked down, began to cry, and said that he was there with another black male when the homicide occurred (R 1274, 1761). Savage stated that he was there to steal the victim's car when she came out and surprised them (R 1761). He said he initially struck her and the other man strangled her (R 1761). Fernez got Nichols and returned with a tape recorder (R 1762). Savage was readvised of his rights and repeated the statement (R 1763). He said that the man he was with had been in the stolen car when the police had arrested an Albert Broomfield and agreed to go through some photopacks and try to identify the other person (R 1700, 1764). He also showed the officers where he had burned his pants after the murder (R 1698).

Sarver spoke with Broomfield and got the names of the two people in the car with him (R 1700-01). The next day Sarver and Fernez went to the detention center with a photopack containing a picture of one of the individuals (R 1702). Savage stated he knew the person but did not identify him as the person he was with that night, and agreed to look at more photos (R 1702). The officers returned later with a photopack containing a picture of the other person, and again there was no identification (R 1703). Fernez told Savage that Broomfield had said those were the people in the car, and Savage admitted that he had committed the murder alone (R 1297, 1704). Sarver took notes as Savage spoke (R 1705). The officers were advised by Lieutenant Parsons to charge

Savage with murder (R 1707-08). Savage was brought to the booking area and told he was going to be charged with murder (R 1708). Savage began to talk about the circumstances of the murder and Fernez stopped him so he could be informed of his rights again (R 1709). After being readvised of his rights, Savage gave another statement (R 1711-13).

Savage testified that after the officer called his name over the radio, he heard somebody say to hold him there, they wanted to talk to him, and he was asked to stay there (R 1809). Sarver arrived about five minutes later, told Savage he wanted to talk to him, and asked him if he would go down to the police station (R 1813). Savage stated he did not believe he could leave (R 1814). Savage had previously been in that police department before, but in the back part where the holding cells are (R 1814). On cross-examination, Savage testified that was the first time he had been transported in the front seat of a police car with no handcuffs and no restraints (R 1818). He had previously been read his rights a number of times and knows what they mean (R 1820-22). He agreed it was a little unusual that they went into the detective division instead of *through* the salliport and that it would be unusual for the police to leave an arrested person alone (R 1822, 1824).

On November 6, 1989, the trial court entered an order denying the motions to suppress statements and exclude physical evidence, finding that the statements were voluntarily made and the seizure of the clothing was either a voluntary relinquishment when Savage was cooperatively present at the police station or

lawfully detained for purposes of further investigation (R 3435). The trial court also ruled that the DNA evidence would be admissible (R 2054).

At a hearing on October 27, 1989, Savage's attorney Mr. Delgado informed the trial court that he had prepared an *ex parte* motion relating to the retention of a number of defense witnesses, and had sent a copy to cocounsel Mr. Turner for his signature (R 1941-42). Mr. Delgado stated that the motion outlined some of the things that the defense would need for mitigation should a penalty phase be required (R 1942, 3451-52). The state expressed concern over the *ex parte* nature of the motion (R 1958). The trial court noted several possible ways of handling the motion, including perhaps having another judge preliminarily review it (R 1960). Mr. Delgado expressed concern over the fact that one of the attachments was a confidential report (R 1961). The state replied that it did not want to see the report, but it was entitled to be presented with a motion for what expenditures the defendant was requesting (R 1963). The trial court noted that they were speaking in the hypothetical, and perhaps they should wait until Mr. Turner received the motion, and if hearing time was needed it could be set (R 1965).

On October 31, 1989, Mr. Turner delivered the *ex parte* motion to the trial court, who delivered it to Judge Johnson for preliminary review (R 2078). At a hearing on November 6, 1989, the trial court informed counsel that Judge Johnson felt the motion contained nothing that would harm the trial court's ability to sit on the case, and if counsel wanted to remove the

exhibits they could have a discussion on the record as to the requested funds (R 2079). The trial court told defense counsel that if he wished to argue the motion he had to give a copy to the State Attorney's Office (R 2080).

The motion was further developed at a November 9, 1989 hearing (R 2115-36).[4] All of the exhibits had been withdrawn (R 2116). The defense first requested Dr. Phillips, a psychiatrist from Connecticut, to conduct a detailed evaluation for the mitigational stage (R 2118). An addictionologist, a neurological evaluation, and an Australian psychiatrist were also requested (R 2124-31). The trial court concluded that Dr. Phillips and a neurologist were appropriate expenditures, and that he would keep an open mind as to the other two areas (R 2133).

The issue was next addressed on December 5, 1989, after the verdict and the defense had filed a renewal of *ex parte* motion for funds for expert witnesses and memorandum of law (R 3494-3525). The defense requested funds for Peter Macaluso, an addictionologist from Tallahassee (R 2412), Arcelia (sic) Johnson-Fannin, a pharmacologist from Tallahassee (R 2143-44), and Joyce Carbonell, a psychologist from Tallahassee (R 2145, 3519). The defense withdrew its requests for funds for Lee Norton, an investigator, Joseph Burton, a pathologist, and Robert Spangenberg or David Van Drehle, experts on the cost of capital litigation (R 2143, 2144, 2147). The trial court denied the requests for the addictionologist and pharmacologist, but told

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[4] It appears from the record that a written copy of the motion was filed November 21, 1989 (R 3451-76).

defense counsel that if he could locate local experts he would certainly reconsider it (R 2157). Defense counsel stated "that this inadequately allows us to develop mitigational circumstances to outweigh the state's aggravational circumstances. And we are thereby prejudiced" (R 2163).

Testimony at trial, held November 13-20, 1989, demonstrated that on November 23, 1988, the victim Barbara Ann Barber gave one of her employees a $100 check to cash for her (R 1049). After making several purchases, the employee returned $84.00 to Ms. Barber that afternoon (R 1050). Marcia Denius, a friend of Ms. Barber's, stopped by her shop later that evening for about fifteen minutes, and last saw Ms. Barber around 7:00 p.m. (R 993-94). Ms. Barber was wearing a khaki dress (R 997).

On November 25, 1988, Marcia Denius received a call from one of Ms. Barber's relatives, and as a result went to Ms. Barber's shop (R 998). She discovered Ms. Barber's body in the alley behind Ms. Barber's business (R 1000-01). The body was dressed in a khaki colored dress which was open in the front and pulled up exposing the buttocks (R 1100). The bra was undone in the front, and the pantyhose had been torn in the crotch area exposing the anus and genitalia (R 1100). An electrical cord was partially wrapped around the neck (R 1101).

A number of bruises and lacerations were found about the face and head (R 1137-38, 1141). The medical examiner opined that probably two blows to the face were received, and possibly more (R 1141). The front of the neck had a large area of bruising, and there were two imprints from a ligature, which

crossed just to the left of the midline on the front of the neck; there were no ligature marks on the back of the neck (R 1142-43). Other injuries included a bruise on the chest, bruising over the knuckles and on the backs of the hands, a bruise on the back and one on the left thigh, all of which could be attributed to events surrounding the death (R 1147-48). The cause of death was asphyxia due to strangulation (R 1149).

The tape of Savage's first statement was played (R 1276-95). Savage stated that he was with another black male, they were smoking rocks, ran out and looked for something to steal so they could sell it and get more (R 1278-79). Savage saw a brown car behind a store and was going to steal it (R 1279). The lady came out of the store so Savage got behind a crate that was standing against the wall, and the other person went in the bushes (R 1280). The lady put some items in the car, came around the driver's side and Savage hit her in the face area; she fell down and he hit her three or four more times (R 1280). The other person pulled a small clear plastic cord and started choking the woman (R 1281). Savage got her purse out of a bag from under the back seat of the car, dumped it out and took about eighty dollars (R 1282). The other man took her panties off, but nobody raped her (R 1282). Savage burned the pants he was wearing because they had blood on them (R 1288).

Detective Sarver testified as to the contents of the other two statements from notes he made contemporaneously therewith (R 1327). In the first, Savage stated he was alone, and had gotten a cord out of the victim's car (R 1328). The victim came out of

the store a second time and Savage hit her in the throat, causing her to fall down and gurgle blood (R 1328). He took her purse over to the stairs and went through it (R 1329). He started to leave, walked by the victim and choked her with the cord again because she was still alive (R 1329). He took her panties off and jammed them in her mouth to keep her from breathing (R 1329-30). The panties came out and he choked her with the cord again (R 1330). He snatched her jewelry and left (R 1330). He said he did not have sex with the victim (R 1330).

In the next, made shortly thereafter, Savage said he had been at the victim's shop between nine and ten p.m. with some other people talking about a stolen car that somebody had recently been arrested in and he was told that you could get money from stealing cars (R 1331-33). Savage saw the victim inside of the store talking with someone (R 1336). Savage went behind the store because he had seen the car there, and the victim came out so he hid behind a crate (R 1333). She went back in the store and he went towards the car; she came out again and he hit her (R 1333). He took her purse out of the car, went over to the stairs and went through it (R 1334). As he was leaving, she came to and he got a cord out of the car and choked her (R 1334). She was fighting as he was choking, so he took her panties off and jammed them in her mouth to keep blood from getting on him (R 1334). She kept fighting and he kept choking (R 1334). He strangled her for several minutes and left (R 1335). Savage said he had taken a little over eighty dollars from the purse and snatched some jewelry, and laid the body up

against the wall (R 1335). Savage was asked again if he had sex with the victim and after hesitating he replied yes, stating that he started having sex with her when she was unconscious on the ground (R 1337). She woke up and began to struggle, he stood up and kicked her in the throat, paused for a brief moment and choked her again with the cord (R 1337).

The parties stipulated that the blood on Savage's shirt was the victim's, that it was deposited on the shirt November 23, 1988, and stipulated into evidence Savage's shirt, a sample of the victim's blood, and the victim's bra, dress, pantyhose and panties (R 1219-20, 3447). Apparently Savage reserved his right to appeal all of the pretrial motions with respect to the search and seizure (R 1210).

Argument concerning the admission of photographs was held outside of the jury's presence, with the medical examiner remaining and stating what the pictures depicted (R 1112-35). Eight photographs of the victim were admitted; one of the body, used for identification (R 1102-03), one of the back of the neck, which showed no ligature marks (R 1115-16), one of the hand, which showed areas of bruising (R 1117-18), two which showed injuries to the face (R 1121-22), one showing the crisscrossing of the ligature marks on the neck (R 1125-26), one showing the ligature imprint on the right side of the neck, demonstrating the direction in which the force was applied, which the court admitted after the portion showing the upper chest was cropped (R 1129, 1132), and one of the body at the scene, showing the cord around the neck, which the trial judge also cropped, because he

felt the plastic bags on the hands gave the impression of boxing gloves and the victim fighting for her life (R 1212-13, 1220). The court sustained objections to two of the photographs offered (R 1123, 1128), and four others were withdrawn after the medical examiner said they were duplicative or not necessary for his testimony (R 1120, 1124, 1126).

Savage moved for a judgment of acquittal on the sexual battery charge, stating that there had been no testimony to support the charge (R 1356). As to the robbery, the defense stated there had been no proof of corpus delicti to show that robbery was intended until after the victim had been killed (R 1361). The motion was denied (R 1365). The defense rested (R 1367).

At the charge conference the defense requested an instruction on intoxication (R 1417). The trial court stated that the evidence was woefully insufficient to show that the defense of intoxication was applicable, but asked the prosecutor to type up the instruction, and if the defense convinced him it was appropriate it could be given (R 1423). The trial court noted that there was no testimony regarding the period of time between smoking the cocaine and the crime, and no testimony regarding how long a duration the intense high lasts after smoking cocaine (R 1424). After further argument the next day, the trial court ruled the instruction would not be read (R 1471).

The defense also objected to the trial court instructing the jury that if it found Savage guilty of a lesser included crime the court had the discretion to sentence him or place him

on probation (R 1436, 1446). The defense asked that the "or to place him on probation" be deleted (R 1447). There was no objection to the standard instruction on reasonable doubt (R 1458).

The jury returned verdicts of guilty on all counts on November 20, 1989 (R 3448-50). The penalty phase took place December 11-14, 1989, after which the jury returned a recommendation of life imprisonment (R 2258-3031.

At the penalty phase the state presented the testimony of Officers Doler and Shellhouse, who testified as to the circumstances surrounding Savage's prior conviction for battery on a law enforcement officer (R 2287-2306). Savage presented six witnesses: Beverly Moore Whyman, his natural mother (R 2356)[5]; Loryl Oglethorpe, who knew the Savage family in Australia in 1966-68 (R 2594); Molly Dyer, an Aboriginal Community Development Officer from Australia (R 2594); Catherine Nix, who attended the same church as Savage when he lived in Starke, Florida (R 2667); Dr. Phillips, who examined Savage; and Marshell Johnson-Fannin, a pharmacologist (R 2821). Savage also proffered the testimony of Dr. Michael Radelet, John Halden Wootten, Dr. Peter Read, and Burnard Healy; the trial court found that neither Radelet's nor Wootten's testimony was admissible, and the defense withdrew Read and Healy as witnesses (R 2418, 2491, 2625). In rebuttal the

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[5] Ms. Whyman's testimony was first proffered, and the trial court ruled that while portions of it were admissible, others went into irrelevant and extraneous circumstances which may be part of a political or legal problem in Australia. Thus, that portion of the proffer where she stated that if she did not allow the adoption to go through she and the father would face police action was never presented to the jury.

state presented the testimony of Dr. Greenblum, Les Hallum, and Graeme Savage.

Ms. Whyman testified that she was fourteen years old when she gave birth to Russell Moore at a home for unwed mothers in Melbourne, Australia (R 2354-56). Four days later the baby was taken away and she returned home (R 2356). Ms. Whyman attempted to revoke the adoption (R 2357). She testified that she was forced into the adoption by Allen West, a white aboriginal welfare worker, although she did not want to give the baby up (R 2367-68).

Ms. Oglethorpe testified that Savage's father was the minister in her church from 1966 to 1968, and that she saw Savage in church, was his Sunday school teacher, and helped with the Savage children at their home because Mrs. Savage was sick (R 2375). She said the Savages had two other children, but the parents were not as strict with them as they were with Savage, and he always was the odd man out and got the blame for everything (R 2378). There were no other dark people in the area, and "Huddy", as she called Savage, was special to the people in the church and they loved him (R 2378-79). Ms. Oglethorpe had been in the Savage home less than ten times (R 2384). Any discipline she witnessed was limited to spankings, and other than that Savage was well cared for (R 2386-87).

Ms. Dyer, an Aboriginal Community Development Officer, has done studies and written papers on the concerns at the separation of aboriginal children from their natural family (R 2598). Based on her conversations with Savage, she found similarities between

the children she has assisted and Savage's situation, specifically a lack of confidence, lack of identity, frustration at not knowing where he fitted into one family or where he did not fit in at all, frustration and acting out behavior, which she stated is very common in these situations (R 2599-600). Ms. Dyer testified that the Savages had not been instructed on the importance of rearing a culturally different child within its own community, that they believed they were doing the right thing in rearing their child as a white child, and they could not be justly criticized for doing what they believed was the right thing (R 2603-04). Ms. Dyer also testified that the statistics of breakdowns in Australia with aboriginal children placed in white families was said to be ninety percent as against a 47 percent breakdown in white placement into white families (R 2607). These statistics came from a sample study done in 1974 (R 2610).

Ms. Nix attended the same church as Savage in Starke, Florida, from approximately July of 1978 until 1981, and remembered Savage as being by himself in church, even when he was in the choir (R 2669). She observed a closeness between Mr. Savage and his daughter; sometimes the family sat together, and sometimes the children sat with their friends (R 2670-71). Ms. Nix never visited the Savages at their home (R 2671). Her husband was fired from his job at Florida State Prison because of action taken by Mr. Savage (R 2680).

Dr. Phillips is a licensed psychiatrist from Connecticut (R 2692). He examined Savage for approximately four and a half

hours and conducted a phone interview for approximately one hour and fifteen minutes (R 2696). He conducted a physical exam, a cursory neurological exam, and reviewed Savage's life history as provided to him in reported medical, social, and educational documents and documents that were court records provided by counsel, as well as a series of newspaper articles detailing Savage's life experiences (R 2696-97). Savage described himself to Dr. Phillips as being reprimanded verbally and physically by his father at a frequency and intensity different from his siblings, and whether or not that is true, what is important is that this was his perception (R 2747). Savage has far less hostile, if not openly positive memories of his adoptive mother (R 2751).

It was Dr. Phillips' opinion that Savage is a man of normal to low normal general intellectual functioning who possesses concurrent deficits and adaptive functioning that renders him less effective in meeting the standards that are expected for his age in areas such as social skills and responsibility, communication, daily living skills, personal dependence and self-sufficiency (R 2700). He further believed that Savage presents on examination with psychological and educational evidence of a cognitive dysfunction that may profoundly impact and contribute to his behavior, and that the historical evidence made the index of suspicion rather high that Savage suffers from what the doctor would clinically refer to as organic brain syndrome, which is secondary to both his significant alcohol and drug abuse and concurrent histories of head trauma (R 2700-01). He also

believed that Savage suffers from a schizoid personality disorder, and that Savage's personality disorder coupled with his alcohol and drug abuse diminished his capacity at the time of the crime (R 2709, 2725). Dr. Phillips could not say with a reasonable degree of medical certainty that Savage was unable to appreciate the wrongfulness of his act; he did state, however, that Savage was impaired to the point he could not conform his conduct to the law (R 2771, 2773). Dr. Phillips believes that Savage may be arrested in developmental maturity, and that he is operating at approximately a mental age of someone who is in the neighborhood of fourteen years old. (R 2775). There were no gross abnormalities in Savage's CAT scan (R 2791). While the presence of a schizoid personality puts Savage within the "world of mental illness", the problem that Savage has is not extreme (R 2805-06).

Circumstances Dr. Phillips ascertained from collateral sources which he used in arriving at his diagnosis include the following. Savage's mother related a series of events in which she "perhaps rightfully so...given her age and given her circumstances" was pressured into placing her child up for adoption (R 2736). Dr. Phillips learned there were about eighty other aboriginal children in the school Savage attended in Australia, where he was remembered as a very polite and well dressed boy (R 2739). Savage's brother and sister had a very different experience of having to live in an environment that may not have been very tolerant and accepting (R 2750). Valda Hanns, one of the Australians who wrote a letter, used to notice that

Savage cringed when approached by a man, and it used to be pathetic to see a small boy so frightened (R 2752). Savage would cuddle up to her in church as if he needed attention (R 2752). In an interview Dr. Norton conducted with Savage's sister Glenise, she stated that Starke and Salem were the worst places the family lived in terms of the way Savage was treated and the increasing trouble he was getting into, and that she and her other brother took a lot of abuse as well (R 2760). Glenise said Savage was her brother first and the adopted part was not important (R 2761). When Savage's brother and sister were in church they did what they could to not involve him in activities because they were struggling with the very same building blocks that Savage was and it was as uncomfortable and as unfortunate and as difficult a situation for them as it was for Savage (R 2762).

Marshell Johnson-Fannin testified about the effects and actions of cocaine, as well as drug-seeking behavior. She testified that it may take from one to four weeks for a person using cocaine to progress from the beginning phase, which is learning to enjoy it, to the end phase in which a person needs it to be normal, whereas the same progression with alcohol may take from ten to fifteen years (R 2828). People who smoke cocaine require less time for drug seeking behavior, or addiction, to occur (R 2829). After this occurs, once the supply is gone they immediately begin to look for another source (R 2830). Cocaine would not have any special effect on a person with organic brain syndrome (R 2831). Ms. Johnson-Fannin could not say whether

Savage was under the effects of cocaine at the time of the murder because she did not know when his last ingestion was (R 2844). She agreed that the murder in this case, which occurred after Savage had money in his possession, was not drug seeking behavior (R 2854, 2858).

The proffer of Dr. Radelet's testimony involved the cost of capital punishment (R 2394-2415). Mr. Hal Wootten,[6] who claimed to have an expert knowledge of the history and conditions of aboriginals in Australia, reviewed literature on aboriginal adoption, held discussions with the head of the adoption unit and other experts in Victorian government, including the chief

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[6] The proffer of Hal Wootten's testimony revealed that he has been in the legal profession since 1941; he has been a barrister, queen's counsel, helped establish a law school and served as dean and professor, formed the Aboriginal Legal Services in Australia, was Secretary General of the Law Association of Asia and the Western Pacific, did labor arbitration for the aboriginals and indigenous population of Papua, New Guinea, and was a judge for ten years where he dealt with adoptions (R 2420-2428). The prosecutor then requested that counsel pursue the area of testimony relevant to the case (R 2434-35). Defense counsel replied that if the state was willing to accept Judge Wootten as an expert in Australian law specifically relating to aboriginals and adoption and history and administration of laws relating to aboriginals and adoptions, they could cease at that point (R 2435). The prosecutor replied that he had some difficulty qualifying Mr. Wootten as an expert in Australian law, just as he would if they were trying to qualify Justice Overton as an expert on United States law, as it is not a specific field (R 2435). The prosecutor was more concerned, however, with the witness' qualifications as an expert in aboriginal affairs, and he stated they needed to get to that instead of pursuing all of the other commissions and boards he had served on (R 2436). Mr. Wootten testified that the governments of Australia had established a royal commission to inquire into aboriginal deaths in government custody, to which he had been appointed, and his assignment since 1988 had been to investigate deaths and underlying issues in New South Wales, Victoria, and Tasmania (R 2436-38). He has endeavored to learn as much about everything bearing on the aboriginal situation, through research and visits to aboriginal communities (R 2439-41).

officer of the Victorian Aborigine Welfare Board, read all of the annual reports of that board and Savage's adoption file in preparation for the instant case (R 2441-42). Most of the adoption file related to dealings between adults, with the only references to Savage being the fact of his birth and that he was losing weight which was thought to be due to fretting (R 2445). Defense counsel then proffered the following:

> Judge Wootten, in light of your knowledge of the aboriginal peoples of Australia and in light of your knowledge of the laws relating to their adoption and their position in Australian society, let me propose to you the following facts please, sir.
>
> First, that Russell Moore is born to fourteen year old Beverly Moore, an unmarried aboriginal girl originally from Swan Hill but living at that time in Deniliquin in New South Wales.
>
> Secondly, that Russell Moore is adopted in the circumstances described in the official file produced by the Victorian Welfare Protection Board.
>
> Further that Russell Moore's adoptive parents, Reverend and Mrs. Graeme Savage are a white Australian couple.
>
> Further that the adoptive father, Reverend Savage is a minister of religion.
>
> Further that at the age of six Russell Moore is taken to the United States by his adoptive family.
>
> At the age of eighteen, the adoptive parents and a brother and sister return to Australia leaving Russell in the United States.
>
> Would you be able to assist this jury as to the events I have enumerated and which we have discussed and the

> commission of the crime for which Russell has been convicted?

(R 2448-49). Mr. Wootten stated this crime was an expression of some powerful feelings of rage or frustration within the individual and it indicates his personality has not been fully integrated and socialized (R 2455).

He next commented on the aboriginal's status in society at the time Savage was born, and described various types of discrimination he would be subject to, the damage to one's self-esteem it would cause, and the advantages of remaining in the aboriginal community (R 2456-57, 2463-64). Mr. Wootten next discussed the problems with the way adoptions were carried out at that time, and the problems associated with adoption itself (R 2464-65). He discussed problems with bonding, identity, rejection, and adoption of aboriginals into white families (R 2464-72). He then testified how these problems have been strongly recognized since 1976, and that Savage's sort of adoption would not be permitted to happen in Australia today (R 2473). He discussed the problems associated with being taken to another country, and the guilt, pain, rejection and resentment resulting from all of these experiences (R 2474-75). Mr. Wootten is neither a psychiatrist nor psychologist (R 2477). He has never met Savage nor his adoptive parents (R 2478).

The trial court found that Mr. Wootten's experience comes primarily from the unique Australian experience with aboriginals and he is primarily experienced in the impact of aboriginals with Australian law and vice versa (R 2491). The trial court found

that such experience and the relevance of his testimony could only possibly relate to Savage up to the age of six and was too remote in time given Savage's immigration to the United States (R 2491). The court further noted that the witness was not acquainted with Savage and did not speak from a point of view of direct examination with him to see if he showed signs or expressed thoughts consistent with a person given those risk factors (R 2491). In sum, the court found the testimony was not relevant to prove any mitigating factor for Savage, and that he would more appropriately be used as a consultant to the experts who examined Savage (R 2492).

After the proffer of Dr. Peter Read's testimony, the defense offered him as an expert in the aboriginal culture especially as it relates to aboriginal adoptions (R 2526).[7] Dr. Read had concluded that aboriginals who are adopted by white families cannot function as normal people when separated from their culture, and this problem manifests itself in violence (R 2586). The prosecutor asked Dr. Read if he had reviewed Savage's record to see if he had any previous episodes of violence and Dr. Read replied no, as that was not important (R 2534-35, 2586). The prosecutor stated he was demonstrating that Dr. Read was making an opinion and he would not take the step to substantiate that opinion (R 2586).

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[7] Dr. Read apparently holds a Ph.D. in the history of an aboriginal tribe of New South Wales which involved over a four year period of documentary study of the records of the Aborigine Protection Board (R 2508).

The proffer of Burnard Healy revealed that he is a consultant clinical psychologist (R 2550).[8] The prosecutor stated that he wanted to ask Mr. Healy whether or not he was aware of the number of Savage's prior convictions; whether or not in viewing Savage's Department of Corrections records he knew Savage had violent incidents in custody; whether or not he realized from those records that Savage was out of prison 23 days when he committed the murder; and ask some follow-up questions concerning his opinion in that regard (R 2571). The defense argued that it would be very prejudicial for the state to delve into Savage's background, and that the impeachment aspects were not relevant as it was solely to bring out Savage's bad character (R 2579). The defense asked the court to preclude the state from asking questions in regard to criminal history, but not the medical history (R 2579). The trial court ruled that since the thrust of the proffer of the two witnesses related to areas involving Savage's emotional distress, lack of capacity to conform his conduct to the law, and emotional age, these areas did not invite cross-examination on Savage's prior convictions or prior disciplinary actions while in custody (R 2589). The court found it did invite cross-examination regarding Savage's medical records and the duration of time between Savage's release from custody and commission of the murder (R 2590).

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[8] Mr. Healy does not hold a doctorate, but is registered as a psychologist under the Psychological Practices Act within the State of Victoria, 1965 (R 2552).

After further discussion, defense counsel stated that if the sole question asked of Mr. Healy was if he was aware that there was a 27 day lapse between Savage's release from jail and the murder, the defense could live with that without waiving any prior objections (R 2620). The prosecutor replied that if the defense attempted to portray Savage as a non-aggressive personality or portrayed him as having an emotional disturbance that shows he is violent, the state would be allowed to get into that, and if he believed the door had been opened he would ask for a proffer (R 2622-23). After a recess, defense counsel stated that as a result of the trial court's rulings he would not at that time call Dr. Read or Mr. Healy, but he might in reply to the state's case (R 2625).

Dr. Greenblum is a psychiatrist, licensed in the State of Florida, who was appointed by the court pretrial to examine Savage for competence to stand trial and insanity at the time of the offense (R 2859, 3389-91). He has testified approximately 85 to 90 times; 65% for the defense and 35% for the state (R 2861). Savage had previously been treated for depression, though there were no previous diagnoses (R 2864). Savage told Dr. Greenblum how the murder occurred and exhibited no deficits in memory (R 2864). Savage made no complaints about any physical abuse in his lifetime (R 2863). Savage said he had consumed some beer and was smoking rock and crack two to three days before the murder, but gave no specific amounts (R 2865).

Savage knew where he was, knew it was a Sunday in August, 1989, knew who was the president, the governor and the previous

president, and his birth date (R 2866-69). Savage did not display any increase or decrease in psychomotor activity, his speech was relevant in answering questions though his voice was soft (flat affect), he had no delusions or hallucinations, and his general fund of knowledge was average (R 2866-68). Dr. Greenblum had Savage draw a picture of a clock showing 11:15, which is a very good test for showing that a lot of the parts of the brain are working fine, and Savage drew a very good clock, and also drew a good rendition of a three dimensional cube (R 2870). Savage also did very well in responding to questions which showed signs of concentration, attention, and ability to formulate a response to a problem (R 2873-74). Other responses demonstrated that Savage is if not average, very close to average intelligence (R 2875). Dr. Greenblum found no signs of organic brain syndrome, dementia or deliria (R 2875).

Dr. Greenblum's diagnosis was an antisocial personality disorder, and disagreed with Dr. Phillips' diagnosis of schizoid personality disorder (R 2876). Dr. Greenblum had a report describing Savage as a warm and intelligent individual, which is inconsistent with a diagnosis of schizoid individual (R 2877). People with schizoid personality are often unable to express aggressiveness and hostility, and a person committing a robbery, sexual battery and murder has no such problem (R 2877-78, 2894). There was no evidence of psychomotor retardation (R 2894). Dr. Greenblum also testified that the studies are inconclusive as to what effect cross-racial adoption has on personality development (R 2895).

Dr. Greenblum testified that Savage's age was not significant in terms of his actions, and Savage's ability to appreciate the criminality of his conduct was not impaired (R 2896). The fact that Savage was hiding and afterwards tried to obscure some evidence suggests he knew exactly what he was doing and knew it was wrong so he could sufficiently appreciate the criminality and decided to try and avoid prosecution (R 2896-97). The capacity of Savage to conform his conduct to the requirements of the law was not substantially impaired based on the fact that he thought about the crime ahead of time, he thought about what was going on and decided he wanted to steal a car to obtain some money (R 2897-98). In addition, Savage was able to relate almost a point by point scenario of what occurred (R 2899). It was Dr. Greenblum's opinion that Savage was not acting under an extreme mental or emotional disturbance at the time of the crime (R 2899).

Les Hallum met the Savages when Mr. Savage was the pastor of his church in Scottsmore, Florida (R 2906). The Savages appeared to be a normal family, and Savage participated in church activities (R 2908-09). Mr. Hallum saw no abuse, no disparity in the treatment of the children, and never heard any racial remarks from Graeme Savage, and in fact Graeme was just the opposite (R 2908-09).

Graeme Savage testified that Savage came into their home when he was four weeks old and the adoption was finalized a year later (R 2916). Graeme Savage did not know the natural mother's name until he had to get a copy of the adoption order seven years

later to come to the United States; he did not know the mother tried to revoke the adoption (R 2918). During the first three years of Savage's life the Savages had a number of aboriginals in their home, through their connections with the United Aborigine Mission for Teenage Children (R 2918-19). The children attending school would stay with them during vacation (R 2919). Later on they had extensive contact with aboriginal people (R 2919). Mr. Savage did his best to treat his children the same (R 2919).

Mr. Savage does not remember striking Savage in the face and calling him a nigger, though he understands Savage said it and he cannot say he was wrong (R 2920). At that time Savage was president of a small bible college they were attempting to establish in Salem, Florida, and there was a decision that one third of the board members come from the white denomination, one third from the black, and the rest elected or appointed at large (R 2921). There were those in the white community who were offended and the family suffered incredible persecution (R 2921). There are areas in Mr. Savage's mind that are blank, and his family has told him things he cannot remember, including the fact that their lives were threatened (R 2921).

On what appears to be the day the penalty phase commenced, Graeme, Nesta, Grettin and Glenise Savage were standing in the hall after the witnesses had been asked to leave the courtroom (R 3014-15). Mr. Delgado, Savage's attorney, was standing at the door and as the Savages approached him he made a comment that included the statement "you are going to help the state put your son in the electric chair" (R 3014). The comment cut Mr. Savage

very deeply because the last thing the family wanted to do was help the state put his son in the electric chair (R 3016). Mr. Savage had originally been contacted by one of the prosecutors and told he would have to appear for depositions, which he could not believe, but then found out that Mr. Turner, Savage's other attorney, had listed them as witnesses (R 3017). Turner told Mr. Savage he had no choice but to appear (R 3017). Mr. Savage was subpoenaed by the state to testify at the penalty phase (R 2925). While Mr. Savage was under threat of subpoena, he contacted three lawyers and each told him he had no choice (R 2926, 3018). Mr. Savage remained in Brevard County to support his son (R 2926). When Grettin Savage mentioned the incident to the prosecutor, he said the family would be happy to let the whole matter drop with an apology (R 3019).

At the close of the second day of the penalty phase, Mr. Delgado informed the court that the previous afternoon, around 4:30, Mr. Bausch, the prosecutor, had told him he had learned of the exchange between Mr. Delgado and Mr. Savage (R 2650). Mr. Delgado said that Mr. Bausch informed him in a pleasant, personable way that such conduct may constitute witness tampering, a third degree felony (R 2651). Mr. Delgado told the court that he was to handle the penalty phase, and for the state to say that had interfered with his client's right to counsel (R 2652). Mr. Delgado said he personally was absolutely prejudiced (R 2652). Mr. Delgado requested a mistrial (R 2655). He said that he could not personally continue with the matter because of what he would not be able to say; it would be in the back of his

mind as he cross-examined Mr. Savage and examined Dr. Phillips, who he believed would call Mr. Savage extremely racial and insensitive (R 2655). Mr. Delgado was concerned about things Mrs. Nix might say about the Savage family (R 2656). He was concerned about what "he" could do to him through the State Attorney's Office and the bar associations of Florida and North Carolina (R 2656).

Mr. Bausch stated that the only thing he indicated to Mr. Delgado was that some people might view the situation as an attempt to intimidate a witness, and he did mention witness tampering and third degree felony (R 2662). It was neither a threat nor an indication that any charges would be filed, but a concern that no further conduct be initiated in that regard (R 2662). The trial court denied the motion for mistrial and motion to withdraw as he understood it to be (R 2663). The judge noted that Mr. Savage would not be in the courtroom during the testimony of any of the other witnesses, and prior to his testimony the court would bring him into a hearing room and attempt to ameliorate the situation (R 2663-64). A short recess was taken so Mr. Delgado could discuss the situation with Mr. Turner and Savage, after which he stated that he would not withdraw from the case (R 2665). Mr. Turner would do the direct on Ms. Nix and Dr. Phillips, even though he had never spoken with Ms. Nix (R 2665-66). Mr. Delgado noted that it had been Mr. Grettin Savage, Mr. Savage's other son, who had initially gone to the prosecutor and told him what occurred (R 2666).

After Ms. Nix testified, Mr. Delgado went on record again stating that Mr. Turner's and his responsibility was to protect their client, but they could not proceed along the lines he had stated earlier, specifically that Mr. Turner had never met Ms. Nix and it was only in the past ten minutes he had gotten a chance to speak with Dr. Phillips (R 2685-86). Mr. Delgado felt that constituted ineffective assistance of counsel (R 2686). He stated that he would continue the case but would sit at the defense table and not enter into any other procedures (R 2686). He further stated that the only other way would be to violate either his rights or put himself in a position unless the State Attorney's Office was willing to say it would not do anything, but even then he did not think he could do it (R 2686). The judge asked if Mr. Savage was present then, and Mr. Delgado stated that he could not continue with it in any event, because no court could tell him what he (apparently Mr. Savage) could do next week or six months in the future (R 2687). Mr. Delgado also stated he was afraid of what ethical sanctions Graeme and Grettin Savage would impose on him (R 2686). Mr. Delgado concluded by stating that Mr. Savage's personal integrity is more important than his son's life (R 2687). Mr. Turner then examined Dr. Phillips and Marshell Johnson-Fannin; cross-examined Dr. Greenblum, Mr. Hallum, and Mr. Savage; and did closing argument.

The jury returned a recommendation of life (R 3545). On January 23, 1990, the trial court imposed the death penalty, finding five aggravating factors: cold, calculated and premeditated; during the commission of a sexual battery;

pecuniary gain; prior violent felony conviction; and heinous, atrocious and cruel (R 3581-83). In mitigation, the court stated that Savage's apparent schizoid personality, coupled with the suggestion of continuous drug and alcohol use for at least 48 hours prior to the crime, together with sleep deprivation, had some effect on his judgment, and that his need for cocaine created an eagerness to participate in a crime of financial gain (R 3583). The court found that the capacity of Savage to conform his conduct to the requirements of the law was impaired though not substantially, and that at all times he retained the capacity to appreciate the criminality of his conduct (R 3584).

The court found no link between Savage's age as having a significant impact in causing this crime (R 3584). The court next noted that Savage had the misfortune of being taken from his natural mother before he was a month old, and that he was raised in Australia and the United States by a strict and religious family (R 3584). The court further noted Savage was of a different race than his adoptive parents, that uniqueness breeds contempt, and Savage's name would probably serve to reinforce negative feelings with other races he encountered (R 3585). The court also noted that Savage could not seem to do anything right within his own family and it was probably worse with people outside his family (R 3585). The court stated that the above mitigating circumstances, together with the allegedly strict discipline and emotional abuse, were offered, but the court could not give significant weight to them (R 3585). Notice of appeal was timely filed (R 3589-90).

SUMMARY OF ARGUMENTS

I. The trial court properly overrode the jury's life recommendation and imposed a sentence of death. This crime involves a series of brutal events, which culminated in the death of Barbara Ann Barber. After sorting the drama from the reality and the fact from the fiction, reasonable persons cannot differ that death is the appropriate penalty in this case. Indeed, if the recommendation is so reasonable as Savage claims, why is he willing to forego "serious constitutional challenges" to his conviction so that he will not receive another one?

II. The trial court properly determined that evidence proffered in mitigation was inadmissible. Mr. Wootten never met or spoke with Savage or his family. Any testimony within his area of expertise, Australian law as it relates to aboriginals, was not relevant to Savage's character, prior record, or the circumstances of the offense. Any testimony regarding the emotional impact of adoption or alleged psychological trauma was beyond this witness' area of expertise, and thus properly excluded by the trial court. Savage's claim that the trial court's ruling that a psychologist could be impeached by the fact that Savage had recently been paroled precluded the introduction of other important evidence was waived below, as defense counsel stated he could live with such question. Savage's claim that this information is false is not cognizable as it was never presented to the trial court and is based on nonrecord hearsay information.

III. The state did nothing to interfere with Savage's right to effective assistance of counsel as it was Savage's counsel who made the statement and refused to continue under any circumstances. Savage has failed to set forth any instances where counsel's performance fell below acceptable standards, so there is no cognizable claim of ineffective assistance of counsel.

IV. The aggravating factor of cold, calculated, and premeditated was properly found by the trial court. This crime is not a classic example of a robbery gone bad, but rather a series of unprovoked attacks upon a victim who was powerless to resist, by a man who had ample time to reflect upon what he was doing.

V. There is no bar to reimposition of the death penalty after an appellate court orders a new trial in a capital case. The judge is the sole decisionmaker as to sentence, and that decisionmaker determined that death was the appropriate penalty. To accord finality to a jury recommendation, which contains no factual findings, would be contrary to all precedent in this area.

VI. The trial court was correct in finding that evidence obtained from Savage was admissible at trial. Savage's claim that state witnesses misled the trial court so the lower court's finding cannot be ratified is not cognizable as it has never been presented to the trial court and is based on nonrecord hearsay information. The trial court found that the evidence was admissible because it was voluntarily given, not because Savage

had been arrested for violation of probation. The record supports this finding.

VII. The record supports the trial court's finding that Savage voluntarily accompanied the officers to the police station and was not in custody when he voluntarily spoke with the officers. There is no evidence of coercion and any claim that Savage's actions were involuntary is without merit.

VIII. Savage's claim that individual *voir dire* should have been conducted in the instant case is not cognizable, as well as without basis in fact or law. The parties reached a specific agreement as to the manner in which *voir dire* would be conducted, and it proceeded as such without objection from either party. All comments which allegedly tainted the entire panel were made in an individual setting and were not heard by the panel.

IX. Savage's vague objection was insufficient to preserve the instant claim for appeal. In any event, the trial court was correct in finding that Savage's statement that he had been standing around before when people were murdered and had not been arrested was admissible. The statement was relevant to show Savage's consciousness of guilt as nobody had mentioned a murder investigation to him. Even if error, it was harmless at worst.

X. The trial court was correct in refusing to instruct on the defense of voluntary intoxication. At best, the evidence may demonstrate use, but does not constitute evidence of intoxication at the time of the crime sufficient to establish that Savage was unable to form the intent necessary to commit the crime charged.

XI. The trial court correctly instructed the jury. Even if error, it was harmless at worst.

XII. There is no requirement that requests for funds for expert assistance during the penalty phase be handled on an *ex parte* basis and Savage has failed to demonstrate a denial of his constitutional rights. It appears that Savage is contending he was denied expert assistance in presenting a voluntary intoxication defense, but the record demonstrates that none was requested.

XIII. There was no objection to the trial court reading the standard jury on reasonable doubt and this court has previously approved the use of such instruction.

XIV. There was no abuse of discretion in the admission of photographs of the victim. Eight photographs, none of which were cumulative, does not constitute an unusually large number of inflammatory photographs, and the photos are not so shocking as to outweigh their relevance.

XV. The defense stipulated that the blood on Savage's shirt was the victim's so this claim is not cognizable.

XVI. The evidence was sufficient to support the convictions.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY IMPOSED THE DEATH SENTENCE.

Prior to addressing the propriety of the death sentence in the instant case, appellee will address the propriety of Savage's alleged contingent waiver of "the serious challenges to his

conviction". Savage has raised twelve challenges to his conviction, covering 54 pages of argument, in which he charges the state with everything from coercion to subornation of perjury. Yet Savage is willing to forego these allegedly serious challenges if this court will first review his sentence and find that the override was improper.

First, it is apparent that Savage must not be serious about these constitutional challenges. Second, there are problems with first reviewing the sentence, then, only after finding that it is proper, proceed to the merits of the trial. Sentencing follows and is based upon facts established at trial, so it is only logical to first review the trial proceedings, for if reversible error did indeed occur, the sentencing becomes a nullity, and any further proceedings will be based upon facts from the new trial. The state is equally entitled to proper proceedings with a properly informed jury and trial court. Thus, Savage should be required to waive or not to waive, and should not be permitted to direct this court's review of his case.

In addition to the twelve challenges to his conviction that he might waive, Savage has also raised three additional challenges to his sentencing. Savage claims that there is a level of prejudice even with a life recommendation (IB 37, n.16). Thus any error in the penalty phase requires a new penalty proceeding with a new sentencing jury. As stated, the state is equally entitled to a properly informed jury, and should not be required to conduct a resentencing based on a sentencing recommendation grounded on misinformation.

Since Savage has raised the issues and the state has responded to them, appellee submits that such conviction issues must first be reviewed, and if reversible error did occur, as Savage so frequently contends, a new trial would be mandated. If this court determines that reversible error did not occur during the trial, the next step is to review the penalty phase proceedings. Again, if reversible error occurred, a new penalty phase, with a new, properly informed jury is required. Finally, if error did not occur in the penalty phase, the sentence imposed is reviewed.

This crime involves a series of brutal events, which culminated in the death of Barbara Ann Barber. Savage first saw Ms. Barber while she was in her shop. He claimed he wanted to steal her car to get money for crack cocaine. Instead, after hiding behind a crate in the alley behind Ms. Barber's shop, Savage punched out and incapacitated Ms. Barber. He got her purse, took it over to a stairwell, rummaged through it, and removed approximately eighty dollars. Instead of leaving to go buy the crack, Savage got an electrical cord from Ms. Barber's car, strangled her, and sexually battered her. He stuffed her panties in her mouth to prevent the blood she was spewing from getting on him. Still not content to leave the seriously injured victim, Savage strangled her again for no other reason than that she was still alive. Savage then snatched her jewelry, departed, and burned his pants because Ms. Barber's blood was on them.

When asked about his whereabouts on the night of the murder, Savage came up with a story to explain away his visible

cuts and scratches. When confronted with the fact that this story could not be true, Savage came up with another story wherein he shifted the blame for the actual murder to somebody else. Finally, Savage gave a detailed account of the murder.

After Savage was convicted of first degree murder, sexual battery and robbery, the defense, apparently with the assistance of the Australian government[9] presented a long and dramatic case for life. The trial court allowed great latitude in the presentation of this evidence, after which the jury returned a life recommendation. The fact of the matter is that the Australian government, even though it wanted desperately to plead guilty for its treatment of its natives, was not on trial here. Nor was the Savage family on trial for adopting an infant that had been born to an unmarried fourteen-year-old aboriginal girl. When the facts are sorted from the drama, supposition, and unsupported inferences, the record demonstrates that the trial court properly overrode the life recommendation.

Appellee will not be contending that there are no mitigating factors present, for as the trial court found, there was some mitigation present, it just was not entitled to significant weight against the aggravating factors. Appellee does contend that the override was proper in this case, in light of the standards set forth by this court. However, appellee first submits that this case provides a classic example of why this court should recede from its holding in *Tedder v. State*, 322

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[9] At least one penalty phase witness, who had travelled from Australia to testify, stated that she was to be reimbursed from a grant from the Australian government (R 2388-89).

So.2d 908 (Fla. 1975), as has been discussed by Justice Shaw in his special concurrences in *Combs v. State,* 525 So.2d 853, 858-60 (Fla. 1988) and *Grossman v. State,* 525 So.2d 833, 846-51 (Fla. 1988), and the dissenting portion of his opinion in *Burch v. State,* 522 So.2d 810, 814-15. As was stated in that latter opinion:

> Thus, our decision to vacate the death sentence rests entirely on the advisory recommendation of the jury which has rendered no factual findings on which to base our review. This treatment of an advisory recommendation as virtually determinative cannot be reconciled with e.g. *Combs,* and our death penalty statute. Moreover, this situation of largely unfettered jury discretion is disturbingly similar to that which led the *Furman* Court to hold that the death penalty was being arbitrarily and capriciously imposed by juries with no method of rationally distinguishing between those instances where death was the appropriate penalty and those where it was not. Absent factual findings in the advisory recommendation, any distinctions we might draw between cases where the jury recommends death and those where it recommends life must, of necessity, be based on pure speculation. This is not a rational system of imposing the death penalty as *Furman* requires.

Id. at 815.

In discussing the "tension" between the cases requiring constraint on the sentencer's discretion and those forbidding constraint on the consideration of mitigating evidence, which he likened to the "tension" between the Allies and the Axis Powers in World War II, Justice Scalia recently noted:

> Our cases proudly announce that the Constitution effectively prohibits the States from excluding from the sentencing decision *any* aspect of a

> defendant's character or record, or *any* circumstance surrounding the crime: that the defendant had a poor and deprived childhood, or that he had a rich and spoiled childhood; that he had a great love for the victim's race, or that he had a pathological hate for the victim's race; that he has limited mental capacity, or that he has a brilliant mind which can make a great contribution to society; that he was kind to his mother, or that he despised his mother. *Whatever* evidence bearing on the crime or the criminal the defense wishes to introduce as rendering the defendant less deserving of the death penalty must be admitted into evidence and considered by the sentencer.

Walton v. Arizona, 110 S.Ct. 3047, 3062 (1990)(Scalia, J., concurring in part and concurring in judgment). Such tension, or actual conflict, is present in the instant case, and without written findings by the advisory jury, the rankest of speculation is required to determine what its recommendation is based upon.

Australia is bad, Australia is good, and it is all mitigating evidence. It is apparently mitigating that Savage had to leave Australia and come to the United States where he was subjected to discrimination, even though he apparently would have suffered extreme discrimination if he had remained there. Likewise, it is apparently mitigating that Savage had to leave Australia, yet also mitigating that if he had remained there he would still have become involved in crime. In short, Savage would have received help in Australia; Savage would have been victimized in Australia. Savage's first six years were his most formative, so the Australian experience is most relevant, yet Savage's formative experience as the only full-blood aboriginal

in Florida is a unique mitigating circumstance. Savage's remorse and cooperation is a mitigating circumstance, but his statements were involuntary.

Savage was loved, Savage was hated, and this is all mitigating evidence. Savage was abused as a child so this is mitigating, yet whether or not it is true that Savage was abused as child is not important-the important fact is that he believed it to be so. As a young lad in Australia Savage was the only dark person and "cringed when approached by a man", yet at the school he attended with eighty other aboriginal children Savage was remembered as a polite and well dressed boy, and was special to and loved by the people in his church. Savage's mother was forced to give him up for adoption, yet given Savage's mother's age and circumstances she was perhaps rightfully pressured into giving him up for adoption. Savage should have been permitted to stay with his fourteen-year-old mother, yet at this same age he was still in his most formative years. Savage has a schizoid personality disorder and people with disorder are often unable to express aggressiveness or hostility, yet this is supposed to mitigate this aggressive and hostile crime.

It is difficult enough to sort through this proffered mitigation where the fact finder has rendered written findings. To say that those findings should be reversed based upon speculation as to how an advisory jury "might" have viewed this evidence runs afoul of well established principles. In addition, the extremes to which this court's interpretation of *Tedder* is being pushed is evident in Savage's claim that the jury

recommendation is final for purposes of double jeopardy. The continued constitutionality of Florida's death penalty depends upon a fact, rather than speculation based review.

In any event, as stated, the trial court in the instant case properly imposed the death sentence. In *Tedder, supra*, at 910, this court stated that "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." In reviewing an override, this court's focus has been on whether it can be said that there existed a reasonable basis for the jury's recommendation of life. *Engle v. State,* 510 So.2d 881 (Fla. 1987). The existence of one or more mitigating circumstances does not mean that an override is never warranted. *Pentecost v. State,* 545 So.2d 861, 863 n.3 (Fla. 1989)(wherein this court receded from any implication in *Fead v. State,* 512 So.2d 176 (Fla. 1987), which is cited by Savage at page 30, that an override is never warranted when valid mitigating factors exist). As Justice McDonald recently stated in a concurring opinion:

> There are some cases, however, where the aggravating circumstances are so overwhelming that it is unreasonable to recommend life even when there are one or more mitigating factors.

Cheshire v. State, 568 So.2d 908, 914 (Fla. 1990). Indeed, if the life recommendation is so reasonable, as Savage claims, it certainly would seem that he would not be willing to forego what he terms "serious constitutional challenges" to his conviction to obtain a new trial and new reasonable recommendation.

Savage claims that the first "unique" mitigating circumstance is his "traumatic, formative experience as the only full-blood aboriginal in the State of Florida" (IB 18-22).[10] Savage first notes the circumstances under which his mother was "forced" to give him up for adoption. This is a prime example of the drama presented, which must be separated from the relevant facts.[11] Appellee would point out that these specific circumstances, aside from the fact that the mother felt "forced" to put Savage up for adoption, were revealed during a proffer and never presented to the jury. Most important, these circumstances are in no way relevant to Savage's character, prior record, or the circumstances of the offense. *See, Hitchcock v. State,* No. 72,200 (Fla. December 20, 1990). Thus, any sympathy for Savage's natural mother, who did not see him after he was four days old until after the murder, is an improper sentencing consideration in this case, and while it may well have influenced the jury, it does not provide a reasonable basis for its recommendation.

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[10] Appellee would first point out that there was no evidence that he is the only full-blood aboriginal in Florida, and while he is aboriginal, it would appear from the record that the only in the remote north and northwest central parts of Australia are full blood aboriginals (R 2433).

[11] Savage's entire brief, as a matter of fact, demonstrates the high drama involved in this case, with his references to truth being stranger than fiction and figments of confabulation. Appellee can only wonder how appellant overlooked the dramatic fact that he started life in Melbourne, Australia and was sentenced to die in Melbourne, Florida. No doubt the map of Australia was necessary so that the jury could make this distinction as well.

Savage next notes that by his sixth birthday, he moved to Florida. While by his sixth birthday the Savage family had moved to the United States, it appears from the record that they first moved to California, where they lived for four and one-half years (R 2924). Thus, Savage was closer to the age of eleven when the family moved to Florida. The only evidence pertaining to Savage's first two years in Florida, which were spent in Scottsmore, was that the Savage's appeared to be a normal family and Savage participated in church activities, and there was no evidence of abusive or disparate treatment. It was not until several years later, at a time when Savage was older than his mother when she gave birth to him, that the family moved to Starke. (R 2924). Interestingly, in his second point, Savage claims that his first six years were the most formative in his life (IB 42), but in this point seems to claim that these four years in Florida shaped his entire life and alone provide a reasonable basis for the jury's recommendation.

Further, the record demonstrates that Savage's early years in Australia, apparently his most formative, were far from traumatic, and there is no evidence that he was the victim of any prejudice or abuse. Savage's adoptive father testified that while in Australia the family had extensive contact with aboriginals. Dr. Phillips had information that Savage attended a school in Australia where there were about eighty other aboriginal children. Ms. Oglethorpe testified that Savage, or "Huddy" as he was known in the community, was special to the people and they loved him. The only allegations of any type of

abuse whatsoever came from Ms. Oglethorpe,[12] who felt that Savage was punished more often than and for the misdeeds of his siblings. Ms. Oglethorpe stated on cross-examination that she had been in the Savage home less than ten times, that any discipline she witnessed was limited to spanking, and other than that Savage was well cared for.

Further, while Savage refers to being "beat with a belt" by his adoptive father for "the sins of his white siblings", this evidence came from Dr. Phillips, who was relating what Savage had told him. In commenting on this, Dr. Phillips stated "[w]hether or not that's true--what is important in terms of the developmental theory is that this was his perception" (R 2747-48). While it may not matter so much if its true in terms of developmental theory, it certainly does matter whether or not it is true when asserting childhood abuse as a mitigating circumstance, and in the absence of such, it cannot provide a reasonable basis for a life recommendation. Savage never testified about childhood beatings. Savage's entire adoptive family was at the proceeding, yet not one of them was called by the defense to testify as to any childhood beatings. In addition, in arriving at his diagnosis, Dr. Phillips utilized information from Savage's sister, and while it mentions that the family was not treated well by the Florida locals, there is no mention of abuse from within the family. Dr. Greenblum also

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[12] While Savage states that Ms. Oglethorpe had watched him grow up (IB 20, n.1), the record demonstrates that she knew Savage from 1966-68.

testified that Savage never mentioned any incidents of abuse as a child.

In sum, sorting the reality from the drama and the fact from the fiction, Savage's "saga" consists of the following. He was born to a fourteen-year-old girl who Dr. Phillips said was pressured, perhaps rightfully so, into giving him up for adoption. He was born into a society that provided the potential for him to suffer from prejudice, though there is no evidence that he ever did, and moved from that society when he was six. Apparently the next four and one-half years spent in California were uneventful, as no evidence was presented relating to them. Likewise, his first two years in Florida appear to be uneventful. At worst, Savage had a strict father with whom he did not have a close relationship, who had once hit him in the face and called him a nigger, at a time when the father was under a great deal of stress due to the fact that the family was subjected to extreme prejudice as a result of his efforts to integrate the board of the bible college he was establishing. Savage has far less hostile, if not openly positive memories of his adoptive mother. Savage encountered hostility when the family lived in Starke and Salem, as did his white siblings, who found themselves in as an uncomfortable and unfortunate situation as Savage.

While it is unfortunate that Savage encountered prejudice in Florida, so do a number of other people, as did his adoptive family, and this does not constitute a reasonable basis for a recommendation of life. The trial court, who was able to sort the facts from the drama, was correct in finding that the offered

mitigation was not entitled to significant weight. The trial court followed the proper procedure in addressing all of the proffered mitigation and discussing whether it was established and if so, what weight it was given. *See, Campbell v. State,* 16 F.L.W. S1 (Fla. December 13, 1990).

The next mitigation that Savage contends is sufficient to sustain the life recommendation is what he terms his "incapacitation due to the overwhelming abuse of mind-altering drugs" (IB 22-25). Savage claims that "certainly" his "ability to understand the criminality of his conduct would have been substantially impaired as a result of these powerful and terrifying drugs" (IB 23). Savage's own expert, Dr. Phillips, testified that he could not say with a reasonable degree of medical certainty that Savage was unable to appreciate the wrongfulness of his act. Dr. Greenblum testified that Savage's ability to appreciate the criminality of his conduct was not impaired, and the fact that Savage was hiding and afterwards tried to obscure some evidence suggests he knew exactly what he was doing and knew it was wrong. Thus, it certainly cannot be said that Savage's ability to understand the criminality of his conduct was impaired where all of the evidence is to the contrary. Thus, the trial court properly rejected this statutory mitigating factor, *See, Nibert v. State,* 16 F.L.W. S3 (Fla. December 13, 1990), and it cannot be said to provide a reasonable basis for the jury recommendation.

As such, the only proper consideration of Savage's cocaine ingestion is in terms of nonstatutory mitigation. First, there

was no evidence of how much cocaine Savage ingested, so nobody testified that he was under the influence of cocaine when the crimes occurred. While Savage told Dr. Johnson-Fannin that he had smoked cocaine for two weeks before the murder, he also told Dr. Greenblum that he had consumed "some" beer and was smoking crack two to three days before the murder. Savage points to the testimony of Dr. Johnson-Fannin that he could have been addicted to cocaine within a week, and consequently the only premeditation he could have had was to obtain more cocaine. Dr. Johnson-Fannin testified that it *may* take from one to *four* weeks to become addicted. She could not say that Savage was under the influence of cocaine because she did not know how much he ingested. Most significantly, however, she testified this murder, which occurred *after* Savage had the cash for more drugs in hand, was not drug seeking behavior.

In its order, the trial court stated that Savage's drug and alcohol use had some effect on his judgment, and his need for cocaine created an eagerness to participate in a crime of financial gain. The trial court thus recognized the offered mitigation, and was entirely correct in finding it carried little weight, since the crime of financial gain was completed well before the murder and sexual battery occurred. Finding this as a reasonable basis would be like saying that a person who commits DUI manslaughter is not as culpable if he is an alcoholic, because after all, he needed a drink. Further, any claim that this factor is sufficient to support the recommendation is negated by the circumstances indicating that Savage was *not*

significantly impaired, if impaired at all, including the facts that he hid from the victim, disposed of incriminating evidence, had a very detailed recall of the circumstances of the offense, and initially tried to put the blame on somebody else.

Savage next alleges his mental incapacity as a mitigating circumstance. Savage claims he suffers from brain damage and crack cocaine would have added to the decline, and this debilitating mental illness significantly diminished his mental capacity at the time of the crime. The trial court found that Savage's capacity to conform his conduct to the requirements of the law was impaired, but not substantially impaired, and that the impairment, due to cocaine assaultive behavior, was entitled to little weight. Again, given the circumstances of the crime, the fact that Savage immediately destroyed his pants after the crime to conceal evidence, and the conflicting testimony on Savage's mental state, the trial court correctly rejected the impairment as substantial, and gave little weight to it. As noted, Savage even concocted a story shifting the responsibility to somebody else, which not only demonstrates an ability to understand the criminality of his conduct, but a further ability to understand varying degrees of culpability. A review of the testimony demonstrates that any alleged mental impairment is not a sufficient basis on which to base a life recommendation.

Dr. Phillips believed that the index of suspicion that Savage suffers from organic brain syndrome is high, although there were no gross abnormalities in Savage's CAT scan. Dr. Greenblum found no signs of organic brain syndrome. Further, the

record demonstrates that cocaine would not have any special effect on someone with brain damage, but could, not would, cause further brain damage. It must also be remembered that Savage had ingested cocaine for at most for only two weeks and at the least for two days prior to the murder. Savage also states that he is a schizoid personality. While Dr. Phillips testified that he believed Savage suffers from this, he also stated that while it puts Savage within "the world of mental illness", the problem that Savage has is not extreme. Dr. Greenblum disagreed with this diagnosis, on the basis of factors that were inconsistent with such disorder[13], and diagnosed Savage as having an antisocial personality disorder. Even if the jury could have believed that Savage has a schizoid personality disorder, the record demonstrates that such disorder was not the cause of, and in fact is in direct contradiction to the circumstances of this crime, so it cannot provide a reasonable basis for a recommendation of life.

Savage also claims that his mental age qualified as a statutory mitigating circumstance that the jury could have considered. This was specifically rejected by the trial court, who found that Savage failed to establish any link between Savage's chronological or mental age as having a significant impact in causing this crime. The record supports the trial court's conclusion, as there is no evidence of a link between Savage's alleged mental age and the commission of this crime.

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[13] People with this disorder are often unable to express aggressiveness and hostility, and indicate little if any desire to have sexual experiences with another person (R 2877-78).

Further, both experts agreed that Savage is close to average intelligence. Thus, even if the jury recognized this as a mitigating factor, in the absence of a link between it and the instant crime it is insufficient to support the life recommendation. It is interesting that Savage feels a fourteen-year-old is capable of raising a child, but not responsible for committing a series of brutal crimes.

Savage next claims that the jury might have reasonably found that his expressions of remorse justified a life sentence. There was no evidence of remorse presented, nor was such argued. The only evidence Savage points to is a police officer's statement that Savage looked remorseful during one of his confessions, and a statement from a pretrial hearing which was not before the jury. Further, several points later in his brief, Savage spends a number of pages charging the state with everything from coercion to subornation of perjury in regard to what he now claims was a totally voluntary statement and expression of remorse that should be viewed as a mitigating factor. This is not a reasonable basis for a life recommendation, particularly where the state may have been able to rebut such claim had it been presented. This simply was not an issue in sentencing, and is improperly relied upon now.

Savage next claims that where mitigating circumstances of such quality are presented, it is a clear abuse of discretion to override a life recommendation. Savage first claims that even absent the *Tedder, supra,* standard, the sentence would have to be reversed because while the trial court noted the existence of

various mitigating circumstances, it refused to give them significant weight. This is precisely what this court stated was the appropriate method for evaluating aggravating and mitigating circumstances, and the trial court did this without the benefit of this court's decision in *Campbell, supra.* As that court stated, "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." *Id.* at S2.

Appellee strongly contends that the override in the instant case is appropriate, as reasonable people cannot differ that death is the appropriate penalty for this brutal, unprovoked murder, committed after Savage already had cash in hand, which was his alleged reason for attacking the victim. While the focus has been on the proffered mitigation, the aggravating factors in this case cannot be discounted, as this court has found to be a possibility in reversing other overrides. In *Hallman v. State,* 560 So.2d 223 (1990), this court noted that the defendant had fired in reaction to the victim's shots, and also noted that Hallman's prior conviction may have been entitled to little weight, as he had acted merely as a lookout, was taken without a struggle, had done well on parole and had a blemish free record as an inmate.

In the instant case, the victim did nothing except remain alive after she was initially knocked out, and attempt to struggle after Savage returned to her, after taking her money, to rape her. Savage's prior conviction involved battery on law enforcement officers, which indicates total disregard for the law. While in prison, he was convicted of yet another crime, and

committed the instant crime shortly after being released. Thus, the weight to be accorded Savage's prior conviction was much stronger than in *Hallman.*

In *Amazon v. State,* 487 So.2d 8 (Fla. 1986), this court noted that one could see how the aggravating factors could carry less weight and thus be outweighed by the mitigating factors, such as the fact that the heinous, atrocious and cruel murders were committed in a frenzy. There is no such evidence of a frenzy in this case; rather, the facts demonstrate a calculated decision to find a murder weapon and kill the victim. There was evidence of defensive wounds on the victim's hands, and evidence that she was struggling as Savage raped her and attempted to stop her from bleeding on him by stuffing her underpants in her mouth. There was evidence that Savage made a deliberate decision to rob the victim. Most important, there was evidence that Savage could have simply walked away from the robbery with eighty dollars, but instead returned to the victim with an electrical cord because she was still alive, sexually battered her and then stole her jewelry as well.

In *Thompson v. State,* 553 So.2d 153 (Fla. 1989), this court sustained an override where the same aggravating factors as those in the instant case were present. The court stated that with five valid aggravating factors, no statutory mitigating factors and very little nonstatutory mitigating evidence, the judge's override was legally sound. There, as here, the defendant argued that his capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired, and

there, as here, the evidence supports the trial court's rejection of this factor. As in that case, the proffered mitigation that remains is not sufficient to support a life recommendation.

While Savage claims childhood beatings at the hands of his father, the record simply does not support such allegation. There was no evidence that Savage's alleged mental age was relevant to the circumstances of this crime. The fact that Savage is an aboriginal, in and of itself, certainly has no place in a sentencing consideration. The fact that Australia feels it mistreated its natives is irrelevant to the circumstances of this crime. What remains is that Savage was adopted as an infant into a white family instead of being raised by his fourteen-year-old mother, Savage faced discrimination when he lived in Starke and Salem Florida, as did his family, and Savage drank alcohol and smoked crack cocaine in the short time he had been out of prison, for a period of two days to two weeks.

While there was evidence of mental impairment presented, it does not outweigh the aggravating factors in this case. Although Dr. Phillips felt there is a high suspicion that Savage has organic brain syndrome, Dr. Greenblum disagreed and the CAT scan showed no abnormalities. As stated, if Savage does indeed suffer from schizoid personality, and there was conflicting evidence on this, it certainly is apparent that it did not cause this crime, and is thus entitled to very little weight. These factors are not of such weight that reasonable people could conclude that they outweigh the aggravating factors. *Torres-Arboledo v. State*, 524 So.2d 403 (Fla. 1988). The trial court properly overrode the jury recommendation and imposed a death sentence.

Finally, Savage claims that in sentencing him to death, the trial court considered impermissible factors. Savage first claims that the trial court ignored the extensive testimony of Dr. Phillips on Savage's mental health problems. There is no evidence that the trial court ignored such evidence, and in fact the court found that Savage apparently has a schizoid personality, which was Dr. Phillips diagnosis (R 3583). Further, as finder of fact, the trial court is required to make certain determinations which require him to accept some testimony while rejecting other testimony. This certainly does not constitute error. Further, Savage's claim that the jury "apparently" discounted Dr. Greenblum's testimony is pure speculation, as the jury makes no factual findings.[14]

Savage next claims that the trial judge's consideration of Dr. Wooten's report raises totally different concerns, as he was dead. There is nothing in the record to show that the trial court ever considered Dr. Wooten's report in sentencing Savage, and Savage has failed to demonstrate that he did. *See, e.g., Scull v. State,* 533 So.2d 1137 (Fla. 1988)(when a judge merely sees a victim impact statement but does not consider it for purposes of sentencing no error has occurred). Savage relies on the fact

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[14] Savage appears to argue that Dr. Greenblum's testimony should be discounted because he was only concerned with competency and sanity. However, such examination requires "a description of the mental and emotional condition and mental processes of the Defendant at the time of the alleged offense, including the nature of *any* impairment and its relationship to the actions and state of mind of the Defendant at the time of the offense" (R 3390); Fla.R.Crim.P. 3.216(e)(2). Thus, it is not as if the examiner merely administers a sanity and competency test, and if the defendant passes, he proceeds to trial; rather, the entire mental process is examined.

that the prosecutor referred to such report in his argument, but it is apparent that the trial court had already prepared its sentencing order at that time.

Savage next claims that during the sentencing proceeding the judge took a plea to a nonexistent charge of violation of probation, then listened to the prosecutor argued the need for elevating the sentences on these charges. This claim is based on nonrecord hearsay material and is not cognizable on appeal. Further, a review of the record shows that the prosecutor was arguing for a maximum sentence on the VOP charges, and was not in any way arguing that the instant sentence should be elevated because of such. Again, the sentencing order was already prepared. In conclusion, appellee contends that the trial court, which made specific factual findings in support of the sentence, properly overrode the jury recommendation, which can only be speculated about.

POINT II

THE TRIAL COURT CORRECTLY DETERMINED THAT THE EVIDENCE PROFFERED IN MITIGATION WAS INADMISSIBLE.

Savage contends that the trial court erred in excluding critical evidence in mitigation. He first claims that expert testimony should have been allowed as to the effects on him of the historical plight of the Australian Aboriginal, which was characterized as unique by the trial court. Savage next claims that the trial court erroneously ruled that a psychologist could properly be impeached by the fact that Savage had recently been paroled, and this precluded the introduction of other important mitigating evidence.

The defense offered Mr. Hal Wootten "as an expert in Australian law specifically relating to aboriginals and adoption and history and administration relating to aboriginals and adoptions." The trial court found that Mr. Wootten's experience came primarily from the unique Australian experience with aboriginals and that he was primarily experienced in the impact of aboriginals with Australian law, and further found that such experience and the relevance of the testimony could only possibly relate to Savage up to the age of six, and was too remote in time given Savage's immigration to the United States. The trial court noted that Mr. Wootten had never met or spoken with Savage. In sum, the court found the testimony was not relevant to prove any mitigating factor for Savage, and that the witness would more appropriately be used as consultant to the experts who examined Savage. Appellee submits this ruling was correct.

As this court recently stated:

> *Lockett*[15] requires that a sentencer "not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. 604 (emphasis in original, footnote omitted). After making this statement, the Court noted: "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* at n.12. Therefore, "the State cannot bar *relevant* mitigating evidence from being

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[15] Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

> presented and considered during the penalty phase of a capital trial." *Saffle v. Parks,* 110 S.Ct. 1257, 1261 (1990)(emphasis supplied).

Hitchcock v. State, No. 72,200 (Fla. December 20, 1990).

Savage claims that Mr. Wootten was able to provide insight into the Australian experience which neither the jurors nor the trial court could hope to bring to the case. However, Savage was not part of that experience, as he had been raised, from the age of six, in the United States. The Australian government was not on trial. Thus, the trial court correctly ruled that Mr. Wootten's testimony, or area of expertise, did not bear on Savage's character, prior record, or the circumstances of this offense. This is particularly true where, as the trial court noted, the witness had never even met Savage, so was unable to tell if he expressed thoughts or showed signs consistent with people who had been through that experience.

Savage claims that even if the evidence was relevant to only his first six years, there was still no basis for its exclusion, as those were the most formative years in his life. Savage states that he had suffered discrimination as the only "black fellow" in his Australian community.[16] Savage claims that "already he was beginning to wonder how he came to be in a white family, the bitter fruit of a 1928 law in the hands of ardent

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[16] While a witness did testify that Savage was the only dark person, she also testified that the people in the church loved Savage and people used to make a fuss of him (R 2378-79). Other testimony demonstrated that there were about eighty other aboriginal children at the school Savage attended, (R 2379), and Savage's father testified that they had a number of aboriginals in their home and extensive contact with aboriginal people (R 2918-19).

advocates of forced assimilation," and "already he was beginning to feel the rejection experienced by others forcibly adopted under that same law" (IB 42). Further, "he was realizing that he had no identity, and none of the support enjoyed by other Aboriginals," and "he was being harshly disciplined by his father for the transgressions of his white siblings" (IB 42).

Appellee would first note that there was no evidence presented that the five-year-old Savage ever contemplated the 1928 law concerning assimilation, that he was beginning to feel rejection experienced by others adopted under the same law, or that he was realizing he did not have the support system enjoyed by the other Aboriginals. This is not a case where a trial court refused to consider evidence of serious psychological and physical abuse during a defendant's formative years because it was remote in time. *See, Campbell, supra.* Indeed, the trial court permitted great latitude in the presentation of such mitigation. The trial court simply found, and properly so, that testimony from a witness who had never met Savage on matters which did not relate to Savage's character, prior record, or the circumstances of the offense. *Hitchcock, supra.*

Further, many areas of the proffered testimony were beyond the witness' area of expertise. Section 90.702, Florida Statutes, requires that before an expert may testify to his opinion, two preliminary factual determinations must be made:

> 1) the subject matter is proper for expert testimony;
>
> 2) the witness is adequately qualified to express an opinion on the matter.

Erhardt, *Florida Evidence,* §702.1 (2nd Ed. 1984). An expert is defined as one qualified by knowledge, skill, training or education. §90.702, Fla. Stat. (1987). Mr. Wootten was not qualified as an expert in psychology, psychiatry, or theology, nor did he purport to be one. *See, Russ v. Iswarin,* 429 So.2d 1237 (Fla. 2d DCA 1983); *Wright v. State,* 348 So.2d 26 (Fla. 1st DCA 1977). When a witness goes beyond his area of expertise he will not be allowed to testify in terms of expert opinion. *Buchman v. Seaboard Coast Line Railroad Company,* 381 So.2d 229 (Fla. 1980); *Salinetro v. Nystrom,* 341 So.2d 1059, 1061 (Fla. 3d DCA 1977). As stated, any testimony within Mr. Wootten's area of expertise, Australian law as it relates to aboriginals, was not relevant. Any testimony regarding the emotional impact of adoption or alleged psychological trauma was beyond this witness' area of expertise, and thus properly excluded by the trial court.

Most of this evidence was before the jury from testimony of other witnesses who had met and spoken with Savage, so even if this court finds that it was error to exclude Mr. Wootten's testimony, it was harmless at worst. *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986). Loryl Oglethorpe testified as to Savage's treatment in the community when he was a child, and it appears he was treated quite well. Molly Dyer, an Aboriginal Community Development Officer, testified that based on her conversations with Savage, she found similarities between him and the aboriginal children she has assisted. She also testified as to the breakdowns in Australia with aboriginal children placed with white families. Dr. Phillips testified extensively about what he

found to be Savage's psychological problems. Finally, the jury, even without Mr. Wootten's testimony, returned a life recommendation, so it cannot be said that Savage was in any way prejudiced. Relief is not warranted.

Savage's claim that the trial court's erroneous ruling that a psychologist could properly be impeached by the fact that Savage had recently been paroled precluded the introduction of other important mitigating evidence was waived below. Savage states that the jury did not know at the time that he had been released just days before the crime occurred, and rather than allow this highly prejudicial fact to come out, the defense did not offer the testimony of Dr. Read and Mr. Healy. The record demonstrates that defense counsel stated that if the sole question asked of Mr. Healy was if he was aware that there was a 27 day lapse between Savage's release from jail and the instant murder, the defense could live with that without waiving any prior objections. The prosecutor replied that if the defense attempted to portray Savage as a non-aggressive personality or portrayed him as having an emotional disturbance that shows he is violent, then the state would be allowed to get into that, and if he believed the door had been opened, he would ask for a proffer. After a recess, defense counsel stated that as a result of the trial court's rulings, he would not at that time call the witnesses, but he might in reply to the state's case. The witnesses were never called.

Since counsel specifically stated that he could live with such question, it certainly cannot be said that any ruling of the

trial court prevented these witnesses from testifying. Rather, it appears that it was counsel's concern over opening the door that kept these witnesses off the stand. Thus, it cannot be said that the trial court made any erroneous rulings, as he was never provided the opportunity to do so. Savage certainly should not be permitted to attribute as error to the trial court what was actually a strategic decision made by defense counsel. In addition, as noted, the jury returned a life recommendation so prejudice cannot be demonstrated.

Savage also claims that this information was false, based on a letter he has attached as an appendix. Any such claim, based on nonrecord hearsay material, is not cognizable in the instant appeal. Further, the state never stated that it wished to cross-examine on the fact that Savage had been released on parole or probation, but just the fact that he had been released such a short time prior to the murder. Thus, even if cognizable, there is no factual basis for such claim.

POINT III

THE STATE DID NOTHING TO INTERFERE WITH SAVAGE'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL; SAVAGE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Savage claims that since counsel withdrew from representation because the prosecution made unfounded threats against him regarding potential prosecution, the state interfered with his right to effective assistance of counsel to an intolerable degree. Savage states that the state alleged that his attorney, Mr. Delgado, told Graeme Savage that he would be

helping the state put his son in the electric chair, and claims that this was hardly a threatening statement as it could be construed as encouraging Mr. Savage to help his son. Savage notes that one can only attribute Mr. Savage's discomfort to the fact that the statement was true. Savage states that early in the penalty phase, one of the prosecutors told Delgado that he was being investigated for witness tampering, and when Delgado received no assurances that he would not be subject to prosecution, he took no further action and other counsel was forced to do the entire penalty phase.

Savage further notes that Delgado reasonably perceived that anything he might say which would be offensive to Mr. Savage would add fuel to the fire, as witnesses would be recounting the incidents of abuse by the father on his adoptive son, and a centerpiece of this defense would be this physical and emotional suffering. Savage claims that Delgado took no further part in the case as a result of the state's threat that he would be prosecuted and referred to the bar associations. Finally, Savage claims that the state could have cured the entire problem when Delgado spontaneously offered to apologize, but apparently decided against this simple solution to the evisceration of his right to counsel.

The record demonstrates that this was more than an allegation; Delgado did indeed tell Mr. Savage that he would be helping the state put his son in the electric chair. Obviously the statement could be construed as encouraging Mr. Savage to help his son, i.e., by not testifying, which is exactly why the

state expressed concern about it. Mr. Savage's discomfort was due to the fact that he did *not* want to help the state put his son in the electric chair, and Savage omits the fact that Mr. Savage was under subpoena and had consulted three attorneys who told him he had no choice but to appear. Savage also omits the fact that it was his attorney who initially listed Mr. Savage as a witness, which is why the state deposed him in the first place. Further, as the trial court noted, Mr. Savage would not be in the courtroom when the other witnesses testified, and the record demonstrates that the "incidents of abuse" amounted to one, which is the reason the state intended to call Mr. Savage in rebuttal.

The record further demonstrates that the prosecutor did not threaten Delgado with prosecution; he stated that while he did mention witness tampering and third degree felony, he also stated that it was neither a threat nor an indication that charges would be filed. The prosecutor never mentioned referring Delgado to any bar associations; it was Delgado who expressed concern that the information may be relayed to South Carolina, and further concern about the ethical sanctions Graeme and Grettin Savage might impose upon him. Other counsel, Mr. Turner, was not forced to do the entire penalty phase; the penalty phase was half over at this point and Turner examined the last three witnesses, while Delgado stayed at the defense table. Further, while Delgado did move for a mistrial and state for the record that Turner had never met Ms. Nix and had only gotten a chance to speak with Dr. Phillips in the past ten minutes, no continuance was requested. In addition, it was Delgado who stated that even if the State

Attorney's Office was willing to say it would not pursue the matter, he did not feel he could continue in any event. Finally, the jury returned a life recommendation.

These facts demonstrate that the state in no way interfered with Savage's right to counsel. Delgado made the statement to Mr. Savage, Delgado brewed up this "tempest in a teapot", and Delgado refused to continue under any circumstances. At best, the record demonstrates frayed nerves and strained tempers. It certainly does not demonstrate "unfounded threats" by the prosecution which led to the "evisceration" of Savage's right to counsel. Savage should not be permitted to place blame on the state for actions that were entirely counsel's own making.

Since Savage does not set forth any allegations that Delgado himself was ineffective for doing this, nor set forth any alleged instances where Turner's performance fell below acceptable standards, there is no cognizable claim of ineffective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Further, Savage has not demonstrated any prejudice resulting from anyone's actions in this matter. It is difficult to take seriously Savage's claim that there is a level of prejudice even with an eleven to one life recommendation, because the trial court may have lent more weight to a unanimous life recommendation.

POINT IV

THE AGGRAVATING FACTOR OF COLD, CALCULATED, AND PREMEDITATED WAS PROPERLY FOUND BY THE TRIAL COURT.

Savage argues that the trial court erred by instructing the jury upon and finding as an aggravating factor that the murder was cold, calculated, and premeditated because the evidence did not establish this circumstance. While aggravating factors must be proven beyond a reasonable doubt, evaluating the evidence and resolving factual conflicts are the trial judge's responsibility. When a trial judge, mindful of the applicable standard of proof, finds that an aggravating circumstance has been established, the finding should not be overturned unless there is a lack of competent, substantial evidence to support it. *Bryan v. State,* 533 So.2d 744 (Fla. 1988); *Swafford v. State,* 533 So.2d 277 (Fla. 1988).

In support of this factor, the trial court found:

> The defendant commenced the criminal episode by lying in wait and planning to steal the victim's car. He had seen the victim at her place of business from the store front window on Thanksgiving Eve and later went to the back door of her business where her vehicle was parked. Before the car theft could be consummated the victim exited the back door of her business and placed some of her personal belongings in her vehicle. The victim returned to her business and the defendant elected not to abandon his criminal enterprise, rather, when she returned to her vehicle he brutally attacked and punched her causing her to fall to the ground. He may have strangled her to unconsciousness. At this point the defendant proceeded to rob the victim of her personal belongings and at least $80.00 in currency while she was unable to resist. The victim returned to some state of consciousness causing the defendant to recommence an attack upon her strangling her again (with an electrical cord this time) causing her to lapse into unconsciousness.

> At this point the defendant proceeded to sexually assault the victim. The defendant dropped his trousers and inserted his penis into her after her clothing had been torn around the genital area. The victim returned to consciousness and attempted to resist her attacker again but the defendant - instead of retreating and abandoning his depraved criminal conduct _ stuffed the victim's own panties in her mouth to silence her screams and stood over her and brutally kicked her in the head or throat. The defendant finally strangled her to death by constant and continuous pressure to her throat until her life was gone. The defendant burned his own trousers later to hide evidence of the crime. These facts are established beyond a reasonable doubt.

(R 3581-82). This crime is not, as Savage terms it, "a classic example of 'a robbery gone bad'". This is a crime which involved an unprovoked series of attacks upon a victim who was powerless to resist, by a man who had ample time to reflect upon what he was doing. Appellee submits that these facts are sufficient to support the trial court's finding that the instant murder was indeed cold, calculated, and premeditated.

In *Swafford, supra,* the evidence showed that the defendant shot the victim nine times including two shots to the head at close range and that he had to stop and reload his gun to finish carrying out the shooting. This court stated that the aggravating factor of cold, calculated, and premeditated could be found when the evidence shows reloading because this demonstrates more time for reflection and therefore heightened premeditation. This court further stated that this factor can also be indicated by circumstances showing such facts as advance procurement of a

weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. *Id.* at 277.

While the instant crime does not involve reloading a gun, the circumstances are analogous. Savage had first seen the victim in her store. He initially knocked the victim out, went to her car and removed her purse, and took it over to the stairwell where he ransacked it and took the cash from the wallet. Savage, instead of simply walking away with the proceeds to buy crack, noticed the victim was still alive. So he went to her car, got an electrical cord, returned to her, and strangled her *because she was still alive.* Not because she was screaming, and not because she was attempting to get up, but simply because she was not yet dead. He did not choke her with his hands, but instead retrieved an electrical cord from the victim's car, from which he had originally removed her purse. Again, instead of merely walking away, Savage ripped the victim's panties off and stuffed them in her mouth to assure she could not breath, and also to prevent the blood she was gurgling from getting on him. Savage also sexually assaulted the victim, and when she again regained consciousness and began to struggle, he stood up, kicked her in the throat, and choked her again with the cord until she was dead. At no point during all of this did Savage ever attempt to steal the car, even though by that time he even had access to the keys.

Indeed, these facts are more egregious and demonstrate even more reflection than the reloading of a gun. Savage's first attack on the victim did not kill her, and after ransacking her

purse and taking the money he realized she was still alive and found a more suitable weapon and returned to her to finish what he had started. After realizing his second attempt, the initial strangling with the cord, was still not successful, he strangled her again. The fact that Savage left the victim to ransack her purse, along with the additional fact that he sought out an appropriate murder weapon after realizing she was still alive, provided a respite during which he could reflect upon and plan his resumption of attack on Ms. Barber. Thus, it cannot be said that these actions took place over one continuous period of physical attack. *See, Campbell, supra*.

In *Rose v. State,* 472 So.2d 1155, 1159 (Fla. 1985), this court upheld this factor because the defendant searched for an object in an accompanying lot before he found the concrete block with which he killed the victim; the defendant carried the block back over to where the victim was located; the defendant lifted the concrete block over his head, paused, and asked the victim to get up before he struck the victim; and the defendant hurled the block six to eight times onto the head of the helpless and defenseless victim. In *Mills v. State,* 462 So.2d 1075, 1081 (Fla. 1985), this factor was upheld because the defendant was not content to let the bound and injured victim escape into the woods, but instead took a shotgun and stalked the victim through the underbrush until he found and executed him. Similarly, in the instant case, after realizing Ms. Barber was still alive, and not content to merely leave her there injured, Savage retrieved a murder weapon from her car, took it over to her, strangled her,

ripped off her panties and stuffed them in her mouth to prevent her from breathing, and after they came out he strangled her again.

The cases upon which Savage relies are distinguishable. In *Hansborough v. State*, 509 So.2d 1081 (Fla. 1987), this court found that the frenzied stabbing of the victim did not demonstrate cold and calculated premeditation, but appeared to be a robbery that got out of hand. As stated, Savage already had the victim's money, and after realizing she was not dead he found a weapon and finished the job. These actions not only demonstrate cold and calculated premeditation, but belie any claim of a frenzied attack. *See, Turner v. State*, 530 So.2d 45 (Fla. 1987)(any assertion of uncontrollable frenzy belied by fact that defendant temporarily ceased attack and hid when policeman drove by, resuming attack thereafter). In *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), the victim was shot because he "was playing hero", and this court found that this was insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation". As stated, Savage's actions in returning to the injured victim with a murder weapon because she was still alive bear the indicia of calculation.

In *Hamblen v. State*, 527 So.2d 800 (Fla. 1988), this court noted that the defendant had no conscious intent to kill the victim when he robbed the store, but did so only after he became angered because the victim pushed the alarm button, and found this was more akin to a spontaneous act taken without reflection.

The victim in the instant case did nothing to cause a spontaneous act by Savage, but merely remained alive after his first brutal attack. Savage's own description of the events demonstrates reflection and not just a spontaneous act. In *Smith v. State,* 515 So.2d 182 (Fla. 1987), the *only* evidence to support this factor was that the rock used to bludgeon the victim was not of a type found in the immediate vicinity. In the instant case, the evidence demonstrates that Savage made a conscious decision to find a murder weapon and kill the victim because she was still alive, and he persisted in this course of action over a period of time until she was dead.

The evidence supports the trial court's finding that the instant murder was cold, calculated and premeditated. Even if this aggravating factor was stricken, it would not change the sentence where there are still four valid aggravating circumstances remaining, and the trial court did not find significant weight in the mitigation offered by Savage. *Rogers, supra. See also, Clemons v. Mississippi,* 110 S.Ct. 1441 (1990). This crime is clearly one of those for which the death penalty is deserved. *State v. Dixon,* 283 So.2d 1 (Fla. 1973).

Savage next claims that the jury instructions on heightened premeditation and cruelty failed to adequately channel the jury's discretion. This claim has been rejected by this court as to both of those aggravating factors. *Smalley v. State,* 546 So.2d 720 (Fla. 1989); *Brown v. State,* 565 So.2d 304 (Fla. 1990).

POINT V

THERE IS NO BAR TO REIMPOSITION OF THE DEATH PENALTY AFTER AN APPELLATE COURT ORDERS A NEW TRIAL IN A CAPITAL CASE.

Savage contends that since the first trial conclusively settled the impropriety of sentencing him to death, the Double Jeopardy Clause precludes his exposure to the death penalty at a second trial. Savage's reasoning not only puts the cart before the horse, it is flawed because it ignores the fact that the judge is the sentencer in Florida, and the judge sentenced him to death. Savage glosses over this distinction between his case and those upon which he relies, but it is precisely this distinction which makes those cases inapplicable.

In *Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), the Court held that a defendant sentenced to life imprisonment by a capital sentencing jury is protected by the Double Jeopardy Clause against imposition of the death penalty in the event he obtains reversal of his conviction and is retried and reconvicted. In *Arizona v. Rumsey,* 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), the Court explained how it arrived at its decision in *Bullington.* It stated that several characteristics of Missouri's sentencing proceeding make it comparable to a trial for double jeopardy purposes: first, the discretion of the sentencer, the jury, is restricted to two options, death or life imprisonment; second, the sentencer is to make its decision guided by substantive standards and based on evidence introduced at a separate proceeding that formally resembles a trial; and finally, the prosecution has to prove certain statutorily defined facts beyond a reasonable doubt in

order to support a sentence of death. 104 S.Ct. at 2309. The Court stated that when the Missouri sentencer imposes a sentence of life imprisonment in a capital sentencing proceeding, it has determined that the prosecution has failed to prove its case. *Id.* The Court thus concluded that the Double Jeopardy Clause prohibits the State from resentencing the defendant to death after the sentencer has in effect acquitted the defendant of the death penalty. *Id.*

In *Rumsey,* the trial judge, who imposes sentence under the Arizona scheme, found that no aggravating or mitigating circumstances were present and imposed a life sentence. The Court determined that the capital sentencing proceeding in Arizona shared those characteristics of the Missouri proceeding that make it resemble a trial for purposes of the Double Jeopardy Clause. The Court declined to draw a distinction based on the fact that in Arizona the judge is the sentencer whereas in Missouri the jury is the sentencer. Thus, the Court found that the double jeopardy principle in Rumsey's case was the same as that invoked in *Bullington:* "an acquittal on the merits by the *sole decisionmaker* in the proceeding is final and bars retrial on the same charge." 104 S.Ct. at 2310 (emphasis supplied). The Court stated that such judgment, "based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty." *Id.*

In Florida, the *sole decisionmaker* is the judge. That decision maker determined that death was appropriate in this case, so it

cannot be said, as was the case in *Bullington* and *Rumsey,* that the prosecution did not prove its case, *See, Poland v. Arizona,* 476 U.S. 106 S.Ct. 1749, 1755, 90 L.Ed.2d 123 (1986), or that there was an "acquittal" on the death penalty. As the United States Supreme Court stated in finding that the Double Jeopardy Clause did not preclude Florida's override system:

> If a judge may be vested with sole responsibility for imposing the penalty, then there is nothing constitutionally wrong with the judge's exercising that responsibility after receiving the advice of the jury. *The advice does not become a judgment simply because it comes from the jury.*

Spaziano v. Florida, 468 U.S. 447, 465, 104 S.Ct. 3154, 3165, 82 L.Ed.2d 340 (1984)(emphasis supplied).

More recent cases provide further support for rejecting Savage's argument. In *Hildwin v. Florida,* 490 U.S. ___, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), the Court found that the Sixth Amendment does not require that a jury specify the aggravating factors that permit imposition of capital punishment. Last term, in again rejecting a claim that every finding of fact underlying the sentencing decision must be made by a jury, the Court again noted that while in Florida, the jury recommends a sentence, it does not make specific factual with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the judge. *Walton, supra.* The Court specifically stated, "A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." 110 S.Ct. at 3054.

Thus, to accord finality to a jury recommendation, which contains no specific factual findings as to aggravating and mitigating factors, in terms of double jeopardy, would be contrary to all precedent in this area, and such contention must be rejected. Further, as stated, such contention puts the cart before the horse. Since the sentencer in this case has never "acquitted" Savage of the death penalty, should this court determine that reversible error occurred in Savage's trial, the inquiry ends there and the case is remanded for a new trial, with a "clean slate" as to sentencing. Any other result would require an advisory opinion as to the imposition of the death penalty in this case, which again is contrary to all precedent.

POINT VI

THE TRIAL COURT WAS CORRECT IN FINDING THAT EVIDENCE OBTAINED FROM SAVAGE WAS ADMISSIBLE AT TRIAL.

Savage contends that state witnesses misled the court with testimony that has now proven to be untrue, so this court cannot ratify the lower court's finding that evidence was properly seized upon his illegal detention and arrest. Savage claims that at the very least, this court should order a remand to determine the nature and scope of the state's subornation of perjury in this case, or alternatively find that the lower court erred in failing to suppress the seized evidence.

Savage's claim is not cognizable. In the first place, it is based on non-record hearsay material which involves both factual and legal issues that have never been resolved in a court of law. *See, Johnson v. Dugger,* 520 So.2d 565, 566 n. 2 (Fla.

1988)(affidavit which state attached to response not properly before this court on appeal and not part of the record so not considered). It is ironic indeed that a defendant is attempting to base a claim on non-record hearsay material contained in a letter from Probation and Parole Services which the opposing party has never had an opportunity to rebut. While Savage has asked this court to remand for a hearing to determine the nature and scope of the state's subornation of perjury, he has never asked this court to relinquish jurisdiction to the trial court to resolve the underlying issue of his probationary status. It is clear that Savage knew about this issue well before he filed his brief, yet he made no attempt to resolve it in the trial court before presenting it to this court. Consequently, appellee contends that any claim in the instant case related to Savage's probationary status must be found to be waived and procedurally barred as well.

In any event, relief is not warranted. The ruling of a trial court on a motion to suppress comes to an appellate court clothed with a presumption of correctness, and the reviewing court will interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the trial court's ruling. *McNamara v. State,* 357 So.2d 410, 412 (Fla. 1978). Contrary to Savage's assertions, the trial court did not uphold the procedures because Savage was arrested for violation of probation. In fact, Savage's relinquishment of his shirt and statements regarding his whereabouts occurred prior to his arrest for violation of probation, so even if such issue

is cognizable, it has no bearing on the correctness of the trial court's ruling on the admissibility of this evidence[17]. Thus, the remaining issues raised by Savage with regard to this evidence are first, whether Savage was illegally stopped and detained, and second, whether Savage was in custody for purposes of *Miranda*[18] warnings. For the sake of clarity, the second issue is addressed in the next point as that is how it has been raised by Savage.

A person is "seized" only when his freedom of movement is restrained by means of physical force or show of authority. *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). Characterizing every street encounter as a "seizure" would impose wholly unrealistic restrictions upon a variety of legitimate law enforcement practices, while not enhancing any Fourth Amendment interest. 100 S.Ct. at 1877. There is no intrusion upon a person's liberty or privacy that would require some particularized and objective justification under the Constitution as long as a person to whom questions are put remains free to disregard the questions and walk away. *Id.* As the *Mendenhall* Court concluded, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." *Id.*

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[17] Neither Savage's shoes nor any evidence derived therefrom was admitted in the instant trial.

[18] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Savage states that after Officers Plymale and Baker spoke with him, they were told by Detective Sarver to "hold" him "for questioning" (IB 68). Savage states it was ten minutes before the other officers arrived, at which time there were four officers standing around him (IB 68) He further alleges that there was some dispute as to the visibility of the officers' guns and bulletproof vests (IB 68). Savage claims that Plymale clearly "stopped" him on the pretext that he was investigating a rash of burglaries, and continued to "detain" him at Sarver's request, after which Sarver "transported" him to the police station (IB 68, 70).

The record demonstrates that Plymale and Baker, who were on foot, approached Savage and two other men, who were sitting on benches by a motel. They identified themselves as police officers and told the men they were investigating burglaries. After radioing a warrant check the officers were told that Sarver wanted to speak to Savage. No directives were given, no physical contact was made, and though the men moved around, nobody asked to leave. Detectives Sarver and Nichols arrived in three to five minutes in an unmarked car. All of the officers were in plain clothes, with guns and vests concealed; in fact, Sarver thought he was not even carrying a gun. Sarver introduced himself as a detective and asked Savage if he would accompany them to the police station to answer some questions about what he had been doing the past several days. Savage agreed to go and stood up; again, no force or restraints were used, Savage was not helped into the car, and never indicated he did not want to go.

As in *Mendenhall, supra,* the events took place in a public area, the officers were not in uniform and displayed no weapons, they did not summon Savage to their presence but instead approached him and identified themselves as police officers, and requested, but did not demand to see identification. Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest. 100 S.Ct. at 1870. Savage was not "seized" by reason of the fact that the officers approached him and posed a few questions. *Id.* This conclusion is not affected by the fact that Savage was not expressly told by the officers that he was free to decline to cooperate with their inquiry. *Id.* at 1878.

Nor were Savage's constitutional protections violated when he accompanied the detectives to the police station. The evidence, including Savage's testimony, shows that Savage was not told that he had to go to the station, but was simply asked if he would accompany the officers. There were no threats, no show of force, and no directives, either verbal or physical. Savage simply followed Sarver to the car and climbed into the front seat. This evidence supports the trial court's finding that Savage's actions were voluntary. *See also, Sanchez-Velasco v. State,* 15 F.L.W. S538 (Fla. October 11, 1990).

POINT VII

THE TRIAL COURT WAS CORRECT IN FINDING THAT EVIDENCE OBTAINED FROM SAVAGE WAS ADMISSIBLE AT TRIAL.

It logically follows from the previous point that since Savage voluntarily accompanied the officers to the station, he

was not in custody at the time he relinquished his shirt[19] and told his initial story to the officers. Even if the initial encounter with Savage could somehow be construed as an illegal stop, any illegality dissipated when Savage voluntarily accompanied the officers to the station. As this court has stated:

> In determining whether a suspect is in custody, 'the ultimate inquiry is whether there is a "formal arrest or restraint of movement" of the degree associated with formal arrest'''. *California v. Beheler,* 463 U.S. 1121, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1977)(quoting *Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977)). This inquiry is approached from the perspective of how a reasonable person would have perceived the situation. *Drake v. State,* 441 So.2d 1079 (Fla. 1983).

Roman v. State, 475 So.2d 1228, 1231 (Fla. 1985).

Savage's situation, like Roman's, was that he was being questioned in an investigation room at the police department, having voluntarily complied with an officer's request to go there. Like Roman, Savage was never told that he was not under arrest. While Roman was interrogated for approximately three and one half hours prior to his confession, Savage relinquished his shirt shortly after arrival at the police station and the first period of questioning lasted approximately fifteen to thirty minutes. Thus, as in *Roman,* it cannot be said that a reasonable

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[19] Savage's relinquishment of his shirt was non-testimonial and the Fifth Amendment is not concerned with nontestimonial evidence. See, Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 1290, 84 L.Ed.2d 222 (1985); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

person in Savage's position, having voluntarily accompanied the officers to the station, would have perceived a restraint on his freedom of movement of the degree associated with a formal arrest. *Id.* at 1232. *See also, Correll v. State,* 523 So.2d 562 (Fla. 1988).

Savage also claims that his relinquishment of his shirt and subsequent statements were involuntary, based on his limited educational background, low intelligence, and "prison mentality". Savage notes that the state did not refute the evidence that he functions at the level of a fourteen-year-old, and further claims that the fact that he is an aboriginal is also important because aboriginals are indoctrinated to be polite and will answer questions in a manner they believe the questioner desires (IB 73). Appellee first submits that Savage waived any involuntariness claim by proceeding on a theory that he was totally cooperative with the police, eliciting information on cross-examination to support this theory then arguing to the jury that it was indeed voluntary.

At the suppression hearing, Savage testified that he had an eighth grade education, and that when you are in prison you do what the guards tell to or you get "whooped up" (R 1808, 1814). The only evidence that Savage functions at the level of a fourteen-year-old was presented at the penalty phase, so any reference to such evidence in regard to the suppression issue is improper. The fact that Savage is an aboriginal is also an improper consideration, as this was not presented to the trial court, and in any event, it has no bearing on this issue since

Savage was not raised in an aboriginal society so he certainly cannot be said to have been "indoctrinated" as such. Further, the record demonstrates that Savage was neither threatened, coerced nor promised anything. Savage's statements were not made under prolonged or unreasonable questioning.

Noncustodial interrogation might possibly, in some situations, by virtue of some special circumstances, be characterized as one where the behavior of law enforcement officials is such as to overbear a person's will to resist and bring about an involuntary confession. *See, Beckwith v. United States,* 425 U.S. 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976). That Court stated that proof that some kind of warnings were or were not given is relevant evidence only on the issue of whether the questioning was in fact coercive. 96 S.Ct. at 1617. Since that time, the Court has held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connolly,* 479 U.S. 157, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986). Savage has shown no coercion in the instant case, and the record shows there was none. Consequently, any claim that Savage's actions were involuntary is without merit.

POINT VIII

SAVAGE'S CLAIM HAS NO BASIS IN FACT OR LAW SINCE INDIVIDUAL VOIR DIRE WAS CONDUCTED TO DETERMINE THE PROSPECTIVE JURORS' KNOWLEDGE OF THE INSTANT CASE PURSUANT TO THE PARTIES' AGREEMENT.

Savage states that while the defense requested that individual *voir dire* be conducted, the trial court held it in panels of roughly a dozen, with each member of the panel hearing the prejudicial statements made by his or her peers (IB 75, n. 36). Savage's argument includes numerous record cites to statements made by the jurors, specifically referring to some as being made "[i]n the collective setting of panel voir dire", and others being made "in front of their fellow jurors" (IB 84, 85). Savage claims that it is indeed a mystery why individual *voir dire* -was denied in this highly publicized case (IB 79). Appellee submits that the only mystery is why this claim has even been raised.

The record demonstrates that the parties reached a specific agreement as to how *voir dire* would be conducted, it was conducted as such without objection from either party, including an individualized questioning of each prospective juror as to his or her knowledge of the case, and every record reference[20] but one[21]

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[20] R 32, 34, 39, 45-6, 47, 48, 50, 51, 54, 67, 68, 73, 74, 80, 85, 91, 86, 93, 96, 99, 104, 112, 113, 114, 115, 116-17, 118, 120, 125, 126, 128, 129, 134, 135, 137, 148, 151, 152, 158, 159, 164, 165, 167, 169, 171, 178, 185, 188-89, 198, 202, 208, 216, 222, 223, 226, 230, 232, 237, 245, 247, 248, 250, 251, 258, 265, 267, 268, 270, 280, 282, 286, 293, 300, 305, 315, 316, 318, 320, 321, 322, 326, 328, 341, 343, 344, 351, 354, 356, 359, 361, 363, 364, 373, 375, 376, 377, 380, 381, 386, 387, 393, 394, 402, 408, 416, 420, 426, 434. It should also be noted that the jurors making the comments on pages 51, 54, 67, 68, 73, 74, 78, 80, 148, 151, 152, 171, 202, 216, 230, 232, 265, 267, 268, 270, 280, 282, 286, 300, 402, and 426 were not excused by the defense and served on the instant panel.

[21] R 777, which is cited for the proposition that various jurors knew the crime scene well. Ms. Book likes to shop down town, but does not know the addresses; Mr. Glauberman knows approximately but not specifically, Ms. Brady had been down the street years ago but not any more; Mr. Franklin knows where the street is. Again, Glauberman, Brady and Franklin served as jurors.

cited by Savage occurred during that individual questioning. In addition, there was never a motion for a change of venue, and the defense did not even exhaust all of its original peremptory challenges. Finally, it must be remembered that this jury recommended a life sentence.

First, since Savage did not object at trial to the method in which *voir dire* was conducted, and in fact specifically agreed to the procedure utilized, this issue has not been preserved for appellate review. *See Parker v. State,* 456 So.2d 436 (Fla. 1984)(counsel's satisfaction with juror's response after initial objection and no further request for ruling does not preserve issue of challenge for cause). Second, even if the parties' agreement could somehow be construed as a denial of Savage's motion which has preserved the issue for appellate review, relief is not warranted.

The granting of individual and sequestered *voir dire* is within the trial court's sound discretion. *Randolph v. State,* 562 So.2d 331, 337 (Fla. 1990). It certainly cannot be said that the trial court abused its discretion since the crux of Savage's claim is that individual *voir dire* should have been conducted due to the pretrial publicity in this case, and it was conducted individually as to that aspect of the case. Further, there has been no demonstration that any of the jurors were tainted, since all of the comments referenced by Savage occurred in that individual setting. *See Cummings v. Dugger,* 862 F.2d 1504 (11th Cir. 1989). No abuse of discretion has been demonstrated.

POINT IX

THE TRIAL COURT WAS CORRECT IN FINDING SAVAGE'S STATEMENT THAT HE HAD BEEN STANDING AROUND BEFORE WHEN PEOPLE WERE MURDERED AND HAD NOT BEEN ARRESTED WAS ADMISSIBLE.

Savage contends that the trial court should not have allowed the jury to hear a "highly prejudicial yet totally irrelevant admission" he made (IB 85). Savage states that when defense counsel learned that this was to be presented, he vociferously objected. Counsel did, in a way, object, but it was limited to the previously raised voluntariness issue (R 1263, 1266). It was the trial court which initially expressed concern over the possible inflammatory aspects of the statement, and defense counsel acknowledged that the court had brought out an important aspect, and stated that he did feel it would be extremely prejudicial to Savage (R 1266). Counsel then stated that for appellate purposes, the objections were made pursuant to the eighth and fourteenth amendments of the constitution (R 1267). Appellee first contends that such a vague objection did not preserve the instant claim for appellate review, particularly where the instant argument attacks both the relevance and probative value of the statement, and this was never presented to the trial court. *Tillman v. State,* 471 So.2d 32 (Fla. 1985).

Even if the instant claim is cognizable, relief is not warranted. A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. *Blanco v. State,* 452 So.2d 520, 523 (Fla. 1984). As this court has stated, almost all evidence to be introduced by the state in a criminal trial will be prejudicial to the defendant, but only

where the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded. *Amoros v. State,* 531 So.2d 1256, 1257 (Fla. 1988). Savage's statement that he had been standing around before when people had been murdered and hadn't been arrested was relevant, and its probative value was not outweighed by any unfair prejudice.

The record shows that Savage made the statement to Sergeant Fernez shortly after he stated he did not want to participate in a one on one identification (R 1272). The statement was presented to the jury as follows:

> Q. Okay. And did he make any other statements in that regard?
>
> A. Yes, he did, sir.
>
> Q. And what were those statements?
>
> A. He stated I've been standing around before when people have been murdered, and I haven't been arrested.
>
> Q. Now, had anybody--let me--had you mentioned to him that you were investigating a homicide?
>
> A. No, sir, we did not.
>
> Q. And did you, after hearing that statement, did you check around with the other detectives to see if anybody had mentioned to the Defendant that you were investigating a homicide?
>
> A. That's correct, sir.
>
> Q. And to your knowledge, did anybody say that they had made that statement to the Defendant?
>
> A. No one had made any statement to the Defendant.

(R 1272-73).

When viewed in context, it is clear that the purpose of presenting the statement was to show Savage's consciousness of guilt, since nobody had told him about the murder investigation and he obviously knew about it. *See, Grossman v. State,* 525 So.2d 837 (Fla. 1988). In a number of cases this court has held admissible statements of a defendant made either before or after the time of the crime charged, even though the testimony about the statements also showed the commission of separate crimes or wrongs or cast the defendant's character in a bad light. *Haliburton v. State,* 561 So.2d 248, 251 (Fla. 1990)(testimony relevant to the issue of whether appellant was confessing to the instant murder); *Waterhouse v. State,* 429 So.2d 301, 306 (Fla. 1983)(testimony about incident relevant "because it included, and explained the context of, an incriminating admission"); *Phillips v. State,* 476 So.2d 194, 196 (Fla. 1985)(statement of defendant "relevant to discredit appellant's alibi and to explain the context of an incriminating admission"). Thus, even though the statement may have cast Savage in a bad light, it cannot be said that its sole relevancy was on the matter of character or propensity. *Swafford v. State,* 533 So.2d 270, 275 (Fla. 1988).

Even if this court determines that the issue is preserved and error occurred, appellee contends it was harmless at worst. *DiGuilio, supra.* Savage was seen in the area when the murder occurred, the victim's blood was on his clothes, and he confessed to committing the murder; in fact, defense counsel acknowledged in opening statement that Savage had committed this crime (R 955). Consequently, it cannot be said that the admission of this

statement contributed to the verdict. Reversible error has not been demonstrated.

POINT X

THE TRIAL COURT WAS CORRECT IN REFUSING TO INSTRUCT ON THE DEFENSE OF VOLUNTARY INTOXICATION.

Savage contends that the trial court's failure to give an intoxication instruction deprived him of the entire defense theory. Savage states there was concrete evidence that he used cocaine that night, as he had told Officer Plymale[22] he had been smoking rock cocaine that evening, and after exhausting his supply he began to look for something to steal so he could obtain more. Savage further states that Officer Plymale was familiar with the drug, its effects, and the behavior of addicts, and he "explained" that crack cocaine was extremely addictive, and after an intense high the user had an immense craving for more (IB 92).

The record demonstrates that in his first statement, a tape of which was played for the jury during the testimony of Sergeant Fernez, Savage stated: "We were smoking rocks, and then we ran out, and just looked for something to steal so we could sell it and get some more" (R 1278-79). On cross-examination, Sergeant Fernez did not explain anything, but merely agreed with defense counsel that in his training, rock cocaine is extremely addicting, it gives an intense high initially, and an immense craving for more rock cocaine (R 1309). On redirect, Sergeant Fernez agreed that Savage never told him that the crime occurred

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[22] The record demonstrates that this testimony came from Sergeant Fernez, not Officer Plymale.

because he was high on crack cocaine, marijuana, or alcohol (R 1310). Savage had also stated that after the crime he got drunk and used rock cocaine (R 1311).

It is not error to refuse an instruction on intoxication when there is no evidence of the amount of alcohol consumed during the hours preceding the crime and no evidence that the defendant was intoxicated. *Gardner v. State,* 480 So.2d 91 (Fla. 1985); *Jacobs v. State,* 396 So.2d 1113 (Fla. 1981). Evidence of alcohol consumption prior to the commission of a crime does not, by itself, mandate the giving of a jury instruction with regard to voluntary intoxication. *Linehan v. State,* 476 So.2d 1262 (Fla. 1985). The defendant must come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged. *Id.* at 1264

The only evidence supporting Savage's theory was his statement that he had been "smoking some rocks and ran out." There was no evidence as to the amount of cocaine Savage smoked or its quality or the time frame involved, and Savage never stated that he committed the crime because he was high on crack cocaine. It must also be remembered that this evidence came from Savage's first statement, where he claimed he was with someone else smoking rocks, and in his later statements where he admitted he was alone he never mentioned smoking anything. At best, this evidence may demonstrates use, but certainly does not constitute evidence of intoxication at the time of the crime sufficient to establish that Savage was unable to form the intent necessary to commit the crime charged.

A similar situation was before this court in *Robinson v. State,* 520 So.2d 1 (Fla. 1988). There the evidence consisted of three beer cans found at the scene, testimony of an eyewitness that he had seen the defendant earlier in the evening drinking from a pint of cognac, and the defendant's statement to the police which included references to consuming unspecified amounts of gin, cognac and beer. This court found that although there was evidence of consumption of alcoholic beverages on the night of the murder, there was no evidence of intoxication. *Id.* at 5.

Similarly, in *Watkins v. State,* 519 So.2d 760 (Fla. 1st DCA 1988), there was evidence that the defendant was drinking before the robbery, but no evidence as to the amount of alcohol consumed during the several hours he drove around prior to the robbery. There was also testimony from several witnesses indicating that the robbery was carried out from a preconceived plan. Although the arresting officers and the defendant's companion gave some conflicting testimony concerning his condition after the robbery, the record showed that he was at a pub for about an hour after the robbery and before his arrest. The court found that at best some of the testimony intimated that the defendant may have been intoxicated one hour after the offense, but no evidence was introduced indicating he was intoxicated during the hours preceding the crime such that he was unable to form the intent necessary to commit the crime charged. *Id.* at 761. Likewise, in *Jacobs, supra,* there was no evidence as to the amount of alcohol consumed during the several hours that the defendant drove around prior to the murder. *Id.* at 1115.

In *Bertolotti v. State,* 534 So.2d 386 (Fla. 1988), the only evidence of intoxication was a statement made by Bertolotti in his first confession to the police that at the time of the murder he was "high" on a Quaalude he bought from a friend. This court stated that such a "self-serving declaration" made during a confession, which was unsupported by independent testimony or evidence and was specifically contradicted at trial, was insufficient to warrant the giving of an intoxication instruction. *Id.* at 387. First, Savage's declaration that he had "smoked some rocks", with no indication of how many or when, does not even rise to the level of a claim of being high, and certainly is not supported by any other testimony at trial. Further, while Savage attempts to distinguish *Bertolotti* by claiming that his evidence on this score was unrefuted (IB 92)[23], it must be remembered that immediately following his statement about smoking some rocks, Savage said he looked for something to steal to get more. This, along with Savage's deliberate actions and detailed recall clearly refutes any claim of intoxication to the point of not being able to form the specific intent to commit the instant crimes.

It must also be remembered that Savage was also charged with and convicted of robbery, and since his own statement indicates the ability to form the specific intent to permanently deprive, intoxication would not provide a defense to felony murder. Further, Savage was charged with and convicted of sexual

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[23] Savage's reference to penalty phase testimony is irrelevant to this point. *See, Robinson, supra,* at 5, n.6.

battery, which is not even a specific intent crime, so an intoxication defense is not even available. *Linehan, supra; Buford v. State,* 492 So.2d 355 (Fla. 1986); *Askew v. State,* 118 So.2d 219 (Fla. 1960).

The trial court correctly concluded that there was no evidence presented of intoxication to the degree that Savage was unable to form the specific intent necessary to commit the crimes charged. As stated, Savage was able to provide a detailed account of the crime. *See, Buford v. State,* 403 So.2d 943 (Fla. 1981); *Cooper v. State,* 492 So.2d 1059 (Fla. 1986). No error occurred.

POINT XI

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE PENALTY FOR THE LESSER INCLUDED OFFENSES.

Savage contends that instructing the jury that a conviction for second degree murder may result in probation served only to encourage the jury to reject his sole defense to first degree murder, and as a result his convictions and sentences must be reversed and the case remanded for a new trial. The trial court did not exactly instruct the jury that a conviction for second degree murder may result in probation. Rather, after informing the jury of the maximum and minimum penalties for first degree murder, the trial court stated:

> If you find the defendant guilty of a lesser included crime, I have discretion to sentence the Defendant or to place him on probation.

(R 1523). Immediately prior to this, the court had told the jury that the possible results of the case were to be disregarded, and its duty was to discuss only the question of whether the state had proved guilt in accordance with the instructions (R 1522). The jury was later told that its duty was to determine if the defendant was guilty or not guilty, and it was the trial court's duty to determine the proper sentence (R 1546).

Appellee recognizes that in *Craig v. State,* 510 So.2d 857 (Fla. 1987), this court found that the action of the trial court in instructing the jury on the minimum and maximum penalties for all of the lesser included offenses of the crime charged was error. The instant case is distinguishable from *Craig* in that the court here did not instruct on the minimum and maximum penalty for each specific lesser included offense. Rather, it instructed the jury *once* as to the possible penalties that could be imposed should the defendant be convicted of one of the lesser included offenses. Appellee submits that the giving of such an instruction should not be deemed error.

First, there is no prohibition against doing such in Florida Rule of Criminal Procedure 3.390(a). The rule simply states that "[e]xcept in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial." When an accused is on trial for first degree murder, he is also, in the absence of an express waiver, on trial for all of the necessarily included offenses. *See, Harris v. State,* 438 So.2d 787 (Fla. 1983); Fla. R. Crim. P. 3.510. It is somewhat inconsistent to find error when a

trial court does not instruct on second degree murder, and also find that it is error when a judge does instruct on second degree murder but also instructs on the applicable penalties for it.

In any event, even if this court determines that the trial court erred in so instructing the jury, the error is non-reversible on the ground that it was harmless beyond a reasonable doubt. In view of the overwhelming evidence of first degree murder, including Savage's own detailed accounts of the murder, it cannot be said the trial court's one instruction as to the possible penalties for the lesser included offenses could have affected the verdict. Further, the jury is presumed to follow the law, *Adams v. Wainwright,* 709 F.2d 1443 (11th Cir. 1983), and it was specifically instructed not to consider the possible sentence in its deliberations. The instruction was neither confusing, misleading, nor an incorrect statement of the law. Further, Savage simply cannot show prejudice, since the jury was instructed on felony murder as to the robbery and sexual battery, and since he was convicted on both of those crimes it is clear that there was no possibility of a conviction on a lesser included offense as to the murder. *See, e.g., Buford v. Wainwright,* 428 So.2d 1380, 1391 (Fla. 1983). Relief is not warranted.

POINT XII

THERE IS NO REQUIREMENT THAT REQUESTS FOR FUNDS FOR EXPERT ASSISTANCE DURING THE PENALTY PHASE BE HANDLED ON AN *EX PARTE* BASIS AND SAVAGE HAS FAILED TO DEMONSTRATE A DENIAL OF HIS CONSTITUTIONAL RIGHTS.

Savage claims that expert assistance was denied because counsel had allegedly made an insufficient showing of need, as he was constrained by the necessity of maintaining some level in the defense camp. Savage is appealing both the denial of his request to make an *ex parte* request for experts, and the denial of what he terms "the requisite funds for his defense". Appellee will first address Savage's claim that he was denied requisite funds for his defense. Since the record demonstrates that this was clearly not the case, Savage cannot demonstrate prejudice in any form so relief is definitely not warranted on this claim. Appellee will then address Savage's claim that an indigent defendant should be permitted to make *ex parte* applications for funds for the preparation and presentation of the defense.

Savage states that the trial court denied funds for expert assistance on his drug and alcohol abuse, and that this error was not cured by the defense subsequently expending their own funds to secure this vital expert since this expenditure was made after the guilt phase. It thus appears that Savage is contending that he was denied expert assistance on the defense of voluntary intoxication at the guilt phase. The record clearly demonstrates that Savage never requested such assistance for the guilt phase. The first mention of such *ex parte* request was made at a hearing on October 27, 1989, and defense counsel specifically stated that such motion "outlines some of the things that we need for mitigation in this case, should a second phase in this death case be required" (R 1942). The motion itself demonstrates that the experts were requested for the penalty phase (R 3451-52). Thus,

such claim is not even cognizable. It is ironic indeed that Savage can even raise such claim in the same breath that he questions why he should not be permitted to make an *ex parte* application for funds, and relies on a case where this court stated that it expects defense counsel for indigents to be responsible in their application for funds under Florida Rule of Criminal Procedure 3.216. *See, State v. Hamilton,* 448 So.2d 1007, 1009 (Fla. 1984); (IB 103).

In terms of the penalty phase, the record demonstrates that while the trial court denied Savage's request for such funds for a named addictionologist and a named pharmacologist, both of whom were from Tallahassee, he told defense counsel that he would certainly reconsider such requests if local experts were found. Even in those cases where an indigent defendant is able to make a threshold showing that sanity is likely to be a significant factor in the defense, the defendant does not have the right to choose a psychiatrist of his personal liking or to receive funds to hire his own. *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). The record demonstrates that Savage requested and was granted two experts to evaluate him prior to trial (R 3369-71, 3382-83, 3389-91).[24] It certainly cannot be said that Savage was denied any constitutional rights.

Further, there is no requirement that requests for funds for expert assistance during the penalty phase be handled on an *ex parte* basis. Florida Rule of Criminal Procedure 3.190 specifically provides that a copy of all pretrial motions shall

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[24] Both motions were served on the State Attorney's Office.

be served on the adverse party's attorney before the time the original is filed. The *Ake* decision does not provide any additional rights that are not already provided for in Florida's rules.

The *Ake* Court first recognized that while it had never held that a State must purchase for an indigent defendant all the assistance that his wealthier counterpart might buy, it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system. 105 S.Ct. at 1093, *citing Ross v. Moffitt,* 417 U.S. 600, 94 S.Ct. 2437, 2444, 41 L.Ed.2d 341 (1974). The Court went on to note that states such as Florida that make psychiatric assistance available to indigent defendants have not found the financial burden so great as to preclude this assistance, especially when this obligation is limited to provision of one competent psychiatrist, as it limited the right it recognized in the decision. 105 S.Ct. at 1094. It further stated that the indigent defendant does not have the right to choose a psychiatrist of his own liking or to receive funds to hire his own, and left the decision of how this right should be implemented up to the states. 105 S.Ct. at 1096.

Florida Rule of Criminal Procedure 3.210 implements this right, and even goes as step further, as it removes from the trial court all discretion and requires it to appoint an expert solely on the basis of defense counsel's representations. *Oats v. State,* 472 So.2d 1143 (Fla. 1985). Further, under Florida's broad discovery provisions, each side knows well in advance what

witnesses the other side will be calling, and in addition, the state cannot use any information from the defense until the defense puts it in issue. Thus, the concerns of the federal courts and other state courts, that the state will gain a strategic advantage, are not present in Florida. In actuality, permitting the defendant to file such *ex parte* motions, particularly where such experts will be used not to counter the state's proof but to establish independent facts, would put the state at the disadvantage, and provide the defense with the opportunity for trial by ambush.

The *Ake* Court noted that where the potential accuracy of the jury's determination is so dramatically enhanced and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield. Appellee does not dispute the fact that in some situations the State must provide expert assistance to an indigent defendant, but submits that when such defendant is going well beyond that scope of the *Ake* holding, which provides for one psychiatric assistant, and Florida's procedural rules, the state's interest in its fisc is much greater, and it should be permitted a voice on the issue. This is particularly true in a case such as this, where the defense was requesting funds for an investigator to travel to Australia, funds for an expert from Connecticut, as well as a variety of other experts. The state's interest is not in ascertaining trial strategy, which it is essentially privy to through the discovery rules. It simply has an interest in what the cost will be.

POINT XIII

THERE WAS NO OBJECTION TO THE TRIAL COURT READING THE STANDARD JURY INSTRUCTION ON REASONABLE DOUBT SO THE CLAIM IS WAIVED.

Savage contends that his jury should not have been instructed on the meaning of reasonable doubt or that it must convict absent such a doubt. The record in the instant case demonstrates that the trial court read the standard instruction on reasonable doubt, and defense counsel specifically agreed to that instruction (R 1458, 1541). Consequently, the claim has not been preserved for appellate review. Fla. R. Crim. P. 3.390(d); *Squires v. State,* 450 So.2d 208 (Fla. 1984). In any event, this court has previously approved the use of this standard instruction finding that it adequately defines "reasonable doubt". *Brown v. State,* 565 So.2d 304 (Fla. 1990).

POINT XIV

THERE WAS NO ABUSE OF DISCRETION IN THE ADMISSION OF EIGHT PHOTOGRAPHS OF THE VICTIM.

Savage contends that the introduction of a "plethora of gruesome photographs" denied him his right to a fair trial (IB 108). The trial court has discretion, absent abuse, to admit photographic evidence so long as the evidence is relevant. *Thompson v. State,* 565 So.2d 1311, 1314 (Fla. 1990). The record demonstrates that the trial court utilized extreme care in determining which photographs were relevant and therefore admissible, and no abuse of discretion has been demonstrated.

Argument concerning the admission of photographs occurred during the medical examiner's testimony after the jury was sent out. The trial court sustained objections to two of the photographs, and four others were withdrawn after the medical examiner said they were duplicative or not necessary for his testimony. Eight photographs were found to be admissible, two of which were cropped to reduce the prejudicial effect. One of the body was used for identification; one of the back of the neck showed no ligature marks and demonstrated the position from which the victim was strangled; one of the hand showed bruising, or evidence of a struggle; two showed various injuries to the face; one showed the crisscrossing of the ligature marks on the neck, which demonstrated that the victim was strangled twice; one showed the ligature imprint on the right side of the neck, which demonstrated the direction in which the force was applied; and one of the body at the scene showed the cord around the neck.

The photographs were relevant to establish the victim's identity and to show that Savage's out-of-court confessions were consistent with the physical evidence, and the fact that some of them may have been somewhat gruesome does not render the decision to admit them into evidence an abuse of discretion. *Thompson, supra.* The photographs were also used by the medical examiner to illustrate the nature of the victim's wounds, so any prejudice is outweighed by the probative worth of the photographs. *Haliburton v. State,* 561 So.2d 248 (Fla. 1990). Finally, the photographs were relevant to prove the violent and extensive nature of the wounds inflicted, and tended to support the claim that the murder was

heinous, atrocious, or cruel. *Randolph, supra.* The eight photographs admitted, none of which were cumulative, did not constitute an unusually large number of inflammatory photographs, and because the photos are not so shocking as to outweigh their relevancy, the trial court did not abuse its discretion in admitting them. *Nixon v. State,* 15 F.L.W. S630 (Fla. November 29, 1990)(seven photos of charred victim).

POINT XV

THE DEFENSE STIPULATED THAT THE BLOOD ON SAVAGE'S SHIRT WAS THE VICTIM'S SO NO DNA EVIDENCE WAS ADMITTED AT TRIAL.

Savage acknowledges that the defense stipulated to the results of the DNA test, but states that it reserved for appeal the issues raised pretrial (IB 111). Savage reserved his right to appeal the search and seizure issue, but certainly cannot reserve any claims as to the reliability of the DNA evidence. (R 1197, 1210). Once the stipulation was entered into, any legal issue concerning the reliability of DNA evidence became an undisputable fact that the blood on Savage's shirt came from the victim. Appellate review of this issue has been waived.

In any event, there is an abundance of precedent favoring the admission of DNA evidence, or what Savage terms "latter-day voodoo". *See, e.g., State v. Pennington,* 393 S.E.2d 847 (N.C. 1990)(relevancy test); *Kelly v. State,* 792 S.W.2d 579 (Tex. Ct. App. 1990)(*Frye*[25] test); *Glover v. State,* 787 S.W.2d 544 (Tex. Ct. App. 1990)(*Frye* test); *Caldwell v. State,* 393 S.E.2d 436 (Ga. 1990)(relevancy test); *Spencer v. Commonwealth,* 393 S.E.2d 609 (Va.

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[25] *Frye v. United States,* 293 F.2d 1013 (D.C. Cir. 1923).

1990)(*Frye* and relevancy tests); *State v. Schwarz,* 447 N.W.2d 422 (Minn. 1989)(modified *Frye*); *Andrews v. State,* 533 So.2d 841 (Fla. 5th DCA 1988)(relevancy or *Frye*); *People v. Castro,* 545 N.Y.S.2d 643 (Sup. Ct. 1989)(*Frye* test)[26]; *United States v. Jakobitz,* Case No. 89-65 (D.C. Vt. September 20, 1990).

POINT XVI

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICTS.

Savage states that the defense correctly argued that there was no corroboration of his statement that he had committed robbery, and the state incorrectly countered by saying that there did not have to be any evidence of specific intent to rob. The defense actually argued that there was no proof of corpus delicti to show that robbery occurred until after the death, and if the victim was already dead when the items were taken it was a theft. The state correctly countered that the specific intent required for robbery was the intent to deprive, not the intent to use force, and since the robbery statute had been amended the force could occur before, after, or contemporaneously with the taking, so long as it was all in the same episode. §812.13, Fla. Stat. (1987).

It is not clear what the point of this claim is, or what relief is sought. Merely making reference to arguments below without further elucidation does not suffice to preserve the issues, and such claim should be deemed waived. *Duest v. State,* 555

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[26] The *Castro* court did not admit the evidence due to the way in which the procedures had been performed, but found that the scientific theory was sound.

So.2d 849 (Fla. 1990). In any event, the evidence was sufficient to support the robbery conviction. Defense counsel conceded there was substantiation as to the jewelry (R 1360). The victim's blood was on Savage's shirt. A witness testified that she had given the victim approximately eighty dollars the afternoon before the murder occurred, yet no money was found at the scene, though other items from the victim's purse were scattered about.

Savage next states that the only evidence which directly bore on his state of mind at the time of the crime was his statements, where he stated that he "committed the crime from the impulse to secure his next 'fix' of crack cocaine", so the charge should have been reduced to second degree murder (IB 114). This claim was never presented to the trial court so it must be deemed waived. *Tillman, supra.* In addition, Savage has not cited any cases for this proposition, so this claim should not be addressed. *See Goss v. State,* 15 F.L.W. 2897 (Fla. 5th DCA November 29, 1990). In any event, as discussed in Point X, Savage never said any such thing, and in fact the evidence shows that Savage already had the victim's money before he went back and killed her, thus demonstrating that this was not done for the purpose of securing a "fix". Even if the claim is cognizable relief is not warranted.

Savage next claims that the evidence is insufficient to support a death sentence. This claim is thoroughly addressed in Point I.

CONCLUSION

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

Respectfully submitted,

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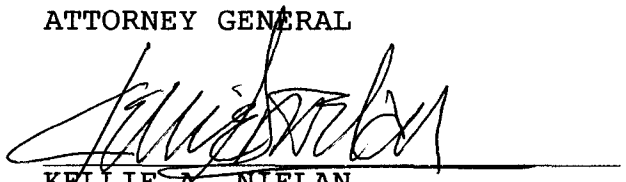

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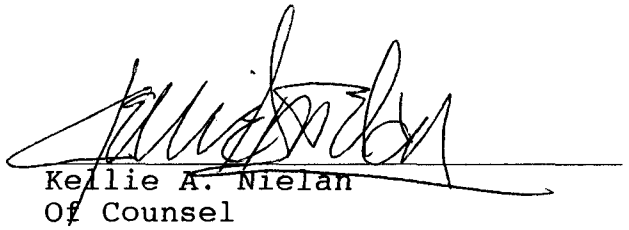
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail to Clive A. Stafford Smith, 83 Poplar Street, N.W., Atlanta, Georgia 30303; and by delivery in the box at the Fifth District Court of Appeal to Christopher S. Quarles, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 7th day of January, 1991.



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