IN THE SUPREME COURT OF FLORIDA

DANIEL PETERKA,

Appellant,

v. CASE NO. 75,995

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee generally accepts Appellant's statement of the facts, but would respectfully note that, in many respects, the version set forth in the Initial Brief represents the facts, as seen most favorably to the defendant. Because the record does include a number of other facts relevant to this Court's disposition of the issues presented on appeal, the State would supplement Peterka's statement of the facts, as follows:

The day that Daniel Peterka was to surrender himself to the Scottsbluff County Circuit Court in Nebraska to begin serving his sentences, he met with his girlfriend; Peterka had previously been convicted of two counts of retaining stolen property. On this date, February 11, 1989, the two drove around in Cindy Rush's car, and had an argument about whether Peterka should turn himself in (R 1145). Peterka stated that he did not want to go to jail and that he wanted to reestablish himself somewhere else (R 1148). Finally, he simply got out of the car and walked away (R 1147). He reappeared in Niceville, Florida, later that same month, and eventually moved in with the LeCompte family (R 1571-72). At this time, Peterka persuaded Ronald LeCompte to sign for a .357 Magnum which Peterka wished to purchase; Appellant told his friend that he did not have any "I.D. for the State" (R 1573). By April of 1989, Peterka was employed at Okaloosa Supply and Plastering Company in Ft. Walton Beach, and at that time he moved into a duplex owned by his employer, Shorty Purvis, in Ft. Walton Beach; his roommate was John Russell, the victim in this case (R 1649, 1656). According to the victim's cousin, Deborah

Trently, Peterka and Russell did not have a good relationship (R 1184). Peterka brought the .357 Magnum with him when he moved in with Russell, as such was seen by one of Russell's friends, Gary Johnson (R 1273).

Connie LeCompte testified that she visited Peterka when he was living with Russell, around the end of June or beginning of July, and that at such time Appellant told her that "if everything went like he wanted it to, he was going to be moving up north." (R 1592). On June 27, 1989, Peterka went to the motor vehicle department, and applied for, and received, a duplicate driver's license in the name of John Russell; the license bore Russell's name and Peterka's picture (R 1642). Similarly, on that same day, Peterka went to the Vanguard Bank and Trust and, using the driver's license, cashed a money order for three hundred dollars ($300) which had been sent to Russell by his aunt in Indiana (R 1454); Peterka admitted in his statement that the victim had constantly asked him to check for this money order, and that, when he had found it, he had simply taken it from the mail (R 2444-2445). Russell became concerned when the check did not come, and apparently contacted the bank and obtained a copy of it. On the weekend before his death, he showed this copy to his cousin (R 1605). He told her that he was waiting for the bank to get the original back, so that he could turn it over to the police and begin formal prosecution; Russell told Deborah Trently that he did not intend to confront Peterka about this matter "until he knew that the gun was out of the house" (R 1605).

On Tuesday, July 11, 1989, Russell discussed the matter of the stolen check with Kimberly Cox, a teller at the bank; he had apparently talked with her about it previously (R 1458-1459). Russell pointed out that it was not his signature on the back of the check and told her that he thought that his roommate had taken the money order from the mailbox (R 1453). Cox testified that she told Russell that a formal forgery prosecution could not begin until the bank had received the original money order (R 1454, 1456); Russell said that he did not intend to bring up this matter with his roommate, and that he would wait until the sheriff's department had the formal papers, so that they could handle it (R 1457). Finally, on the night of July 11, 1989, Russell told his girlfriend, Lori Slotkin, that he was waiting for the bank to contact him, so that he could bring charges in regard to the stolen check; Russell stated that he did not intend to confront Peterka because he was "nervous about the gun" (R 1435). Several witnesses testified that Russell had a reputation as a non-violent person (R 1169, 1181, 1301).

Slotkin testified that she last saw Russell at 2:30 a.m., on July 12, 1989 (R 1415). Peterka's girlfriend, Francis Thompson, testified that she stayed the night with Peterka at the duplex, and that on the morning of July 12, 1989, John Russell had helped her move her belongings out (R 1610). Thompson stated that Peterka came by the K-Mart where she worked that night at around 8:30 p.m.; at this point, Peterka was driving the victim's car (R 1611-12). Appellant told her that he wanted to talk to her, and they went out to dinner (R 1611-12); they later drove to

the beach in Thompson's vehicle (R 1612). At this time, Peterka told her that he had lied to her earlier about his parents being dead, and also admitted that he was wanted in Nebraska; he stated that he did not want to go to jail (R 1612-1613). Afterwards, they returned to the duplex, with Thompson driving the victim's vehicle (R 1613). Thompson spent the night at the duplex and went to work the next morning (R 1615).

Meanwhile, when Russell had not shown up for work that day, i.e., Thursday, July 13, 1989, a payday, his friend and co-worker, Gary Johnson, became worried (R 1277); Johnson testified that Russell had never missed work prior to that day (R 1276). Accordingly, at around 9:00 a.m., Johnson drove over to the duplex (R 1280). He noted that the victim's vehicle was parked in the driveway (R 1280). When no one answered the door, he climbed into the house through a window (R 1280-1281). Johnson noted several things struck him as unusual (R 1281). He saw Russell's cigarettes, lighter and car keys on the coffee table of the living room; he testified that Russell always carried his car keys with him and that, given his income, he would never leave an unfinished pack of cigarettes around (R 1281). Johnson also noted that some of the couch cushions were missing (R 1282). Johnson then looked in Peterka's bureau for the gun which he knew was there; he found it in a drawer, unloaded, with six live shells lying beside it (R 1282-1283). Johnson left the house at this time, but returned after work; at this time, Peterka was at home (R 1284-1285). When Johnson asked Peterka if he knew where Russell was, Appellant replied, "You are about the twenty-fifth

person to ask"; Peterka denied any knowledge of Russell's whereabouts (R 1285). Appellant also pointed out that Russell had left his eyeglasses behind on the window sill of the kitchen; Johnson testified that this was very unusual, because Russell was practically blind without them (R 1285-1287). Johnson left at this time. Afterwards, Kevin Trently, the husband of Russell's cousin, also came over to inquire about Russell (R 1164-1165); Peterka told him that Russell had left with someone the previous night (R 1164).

Johnson became increasingly concerned, and contacted the Okaloosa County Sheriff's Department (R 1349). After speaking with Johnson, Deputy Harkins went over to the duplex at around 8:00 p.m. that night; he was accompanied by Johnson and two others, including Russell's girlfriend, Lori Slotkin (R 1349). At the time that they arrived, Peterka and Frances Thompson were at the duplex (R 1350). Johnson testified that when he told Peterka that he had filed a missing persons report on Russell, Appellant replied, "Oh, I didn't think it was anything that serious." (R 1289-1290). Peterka told Deputy Harkins that Russell had left the previous day with "some long-haired guy", adding that the victim had probably gone off and gotten drunk and passed out (R 1290). At this point in time, Russell's eye-glasses were on the coffee table with the car keys and cigarettes (R 1353). When Harkins asked Peterka for identification, Appellant stated that he had lost his driver's license; Peterka, however, supplied his birth certificate (R 1353). At this point, the deputy and other visitors left (R 1617). Thompson then asked

Peterka if he knew where Russell was, and Appellant stated that he did *not* (R 1617-1618). She also asked him why some of the cushions from the couch were outside on the back porch; Peterka told her that he had gotten sick, thrown up blood on them and had tried to clean them off (R 1618). Thompson suggested that Peterka write a note for Russell, in case he returned, so that he would know that everyone was out looking for him; Appellant did so (R 1618).

Thompson then left, and, several hours later, Deputy Harkins, who had returned to the sheriff's department, ran Peterka's name and birthdate through the computer; the computer check indicated that Peterka was a fugitive from Nebraska, with an outstanding warrant against him (R 1355). Accordingly, Harkins and other deputies returned to the duplex at around 1:00 a.m. (R 1359). Peterka was arrested on the warrant, and, with his consent, the officers searched the house (R 1359-1364). The .357 Smith & Wesson was found in the top drawer of the dresser in Peterka's room; the gun was unloaded and ammunition was found on top of the dresser (R 1365). Peterka claimed that the gun belonged to a friend of his in Niceville, and supplied a bill of sale; because the bill of sale seemed regular, the officers did not seize the gun (R 1366). Harkins testified that he also asked Peterka for identification, and Appellant indicated his wallet on top of the dresser (R 1368-1369). The wallet proved to contain the driver's license, with Peterka's picture and Russell's name, as well as other items of identification belonging to Russell, including his social security card and his bank identification

card (R 1371-1372). The wallet also contained four hundred and seven dollars ($407) and a newspaper clipping advertising jobs in Alaska, as well as Peterka's Nebraska driver's license (R 1376-1377). The deputy testified that he advised Peterka of his rights, under **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and that, afterwards, Peterka told him that the victim had allowed him to obtain the duplicate license, with his picture, for one hundred dollars ($100) (R 1378).[1] Peterka continued to insist that Russell had left with a unknown individual (R 1378-1379).

The next morning, Peterka called Frances Thompson from jail, and she agreed to go to the duplex and pick up and move out his belongings (R 1620). As she was doing so, Jean Purvis, the wife of Peterka's landlord, came over (R 1622). She suggested that they look inside the trunk of the victim's vehicle; when they did so, they noted a shovel inside (R 1622). Thompson called the sheriff's department and reported her concerns about Russell (R 1382). Harkins went by the duplex and noted the presence of the couch cushions outside the house; he stated that they looked as if blood had been washed off of them (R 1383). Later that day, with the consent of the owner of the duplex, the authorities conducted a search (R 1384). The search of the house revealed blood stains on the padding of the couch, in the area

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[1] In the Initial Brief, opposing counsel represents this matter as one of fact, **i.e.**, that the victim authorized Appellant's use of his identity to obtain a driver's license (Initial Brief at 4). Inasmuch as no corroboration exists to support this allegation, and further, inasmuch as Peterka has given a number of inconsistent statements, there is no reason for this Court, on appeal, to credit such assertion.

where the cushions had been removed (R 1467). Likewise, blood stains were found on the liner of the couch and on the rug underneath (R 1311, 1467-1468). No blood spatters were detected on the walls or anywhere else (R 1468,1508-1509). Although no projectile was recovered, there was a hole in the couch liner (R 1511-1512). A search of Russell's vehicle revealed blood stains on the tail lights and inside the trunk (R 1514); in addition to the shovel, some sand was discovered in the trunk (R 1475-1476).

Appellant also called Shorty Purvis, his employer and landlord, and asked him to visit him in jail that day (R 1672). When he arrived at the jail, Purvis met Frances Thompson, who then proceeded to give him Peterka's gun (R 1672). When he met with Peterka, Appellant told him that he did not know where the victim was, and that Russell had gone off with an unknown individual (R 1672). Later that night, Purvis gave the gun to the sheriff's department (R 1673). The revolver was later examined by a firearms expert, David Champagne (R 1553). He testified that it was in good working order and that, after testing it, he had concluded that it would not fire accidentally (R 1558). His testing method involved hitting the gun with a rubber mallet, with the hammer cocked (R 1555). He stated that there were two specific safety mechanisms which would prevent the gun from discharging unless the trigger was pulled (R 1556). He also testified that the cartridges found with the gun were both jacketed and semi-jacketed hollow points, which would expand upon contact (R 1558-1560).

Peterka called Purvis on Tuesday, July 18, 1989, and again asked him to come and see him in jail; Appellant told him that he wanted to talk about John Russell (R 1674). Upon arrival, Purvis was placed in an interview room with Peterka (R 1675). Appellant then told Purvis that he had killed Russell during a fight (R 1676-1678); Peterka said that he had then panicked and buried the body, and had ridden around all night, unable to sleep (R 1678). At this point, Purvis told Appellant that he would have to tell the authorities everything that he was told, and Peterka said, "I know that. That's why I'm telling you." (R 1675). At Appellant's urging, Purvis summoned Deputy Atkins, who advised Appellant of his rights and who called the other officers (R 1679-1680); both Peterka and Purvis made written statements (R 1680). One of the officers who responded to Purvis' call was Deputy Vinson (R 1318). Vinson testified that he advised Peterka of his rights and that Peterka indicated that he wanted to show him where the body was buried (R 1323). At Appellant's direction, the officers then drove into a remote wooded area near Niceville, in the reservation of Eglin Air Force Base (R 1324, 1495). Appellant eventually led them to a spot and indicated that the body was there (R 1324).

At the time that the body was found, it was covered with branches and a mound of earth (R 1499-1500); when it was dug up, it was discovered that the body was wrapped in a rug from the kitchen of the duplex. The medical examiner testified that the body was severely decomposed (R 1197). Dr. Kielman testified that the cause of death was a bullet wound to the brain case (R

1201). An entrance wound was found at the top of the skull, and the doctor testified that the wound was surrounded by black ridging, indicating that the shot had been fired at very close range (R 1218). Indeed, Kielman stated that the muzzle of the gun had either touched the scalp or been, at most, three quarters of an inch away (R 1224). He stated that the bullet had literally caused the brain and skull to explode and shatter (R 1221-1222). Dr. Kielman testified that he never recovered the bullet, but believed that it had exited at the base of the skull (R 1231). The doctor also stated that he felt that the gun had been pointed straight down (R 1225), and testified that the wound was consistent with the victim having been shot from behind while he was in a reclining position (R 1238-1239).

Meanwhile, when the officers returned to the sheriff's office, Peterka had given a videotaped statement, after having been reminded of his rights (R 1325). In this statement, Appellant contended that Russell had come home from work on the 12th "a little bit upset" and "acting kind of strange" (R 2442). Russell confronted him in the kitchen and demanded his money (R 2442); Peterka stated that he knew that Russell was referring to the stolen check (R 2443). An argument had ensued, and Russell had pushed him into the living room, where they struggled (R 2443). Peterka stated that it "wasn't really a fight" and "didn't last too long" (R 2443). Nevertheless, the two fell onto the coffee table, where the gun lay (R 2443). Peterka claimed that it "seemed as if" they both "grabbed" for the gun and, "in a flash", Peterka had the gun (R 2444). At this point, Russell was

"pushing up off the couch" and Peterka fired (R 2444). The victim then "sat back down" and fell over backwards, bleeding. Peterka tried to stop the bleeding with towels, but panicked (R 2444). He carried the body into the kitchen, rolled him into a rug, and put him in the trunk of the car; he then drove to the reservation and buried him (R 2444). Peterka then tried to get the blood out of the cushions, put away his gun and went off to see his girlfriend (R 2451, 2449); he claimed that the bloody towels were outside with the cushions (R 2456).

While Peterka was awaiting trial, Ronald LeCompte came to visit him (R 1575). At this time, Appellant presented his version of events (R 1576-1577). Peterka claimed that as they struggled for the gun, he grabbed the butt of it, while Russell put his hand over the barrel (R 1576). They struggled, and, according to Peterka, both ended up on the couch before the fatal shot was fired (R 1576-1577).

SUMMARY OF ARGUMENT

Peterka presents eleven (11) points on appeal, in regard to his conviction of first degree murder and sentence of death. Appellant raises five (5) claims in regard to his conviction, five (5) in regard to his sentence, and one (1) which he regards as relating to his conviction, but which, at most, impacts upon his sentence. This last-noted claim relates to the trial court's granting of a state challenge for cause, in regard to a prospective juror, on the basis of his inability to follow the judge's instructions at the penalty phase. If Appellant were correct in his allegations, he would be entitled to a new sentencing; he is not, however, in that the judge did not abuse his discretion in excusing this juror and, additionally, prejudice has not been demonstrated. The primary points on appeal in regard to the conviction are Peterka's attacks upon the sufficiency of the evidence and upon the trial court's denial of his motion to suppress his statements. As to this latter claim, error has not been demonstrated. The trial court's findings that Peterka's statements were voluntary and untainted by any prior irregularity are supported by the record, and these statements were made after Peterka reinitiated contact with the authorities.

As to the sufficiency of the evidence, the primary hypothesis of innocence propounded by Peterka was not reasonable and was rebutted by other evidence presented by the State. In addition, because Peterka made inconsistent statements, the jury was entitled to disbelieve him, and the State otherwise adduced sufficient evidence of premeditation. Of the three remaining

points, all relate to evidentiary matters. No abuse of discretion has been demonstrated, in regard to the admission into evidence of one allegedly gruesome photograph, assuming that any claim of error has been preserved for review. Similarly, reversible error has not been demonstrated, in regard to the admission into evidence of testimony concerning a Nebraska teletype describing Peterka's status as a fugitive. Appellant's status as a fugitive was material, relevant and properly admitted; indeed, no claim of error is raised in this regard. Rather, the only matter before this Court relates to the fact that, at most, unnecessary detail was presented in regard to the wording of the teletype; under all of the circumstances of this case, including the fact that the jury received a limiting instruction, any error was harmless. Finally, Appellant's claim in regard to the admission into evidence of testimony concerning the victim's state of mind and statement of intent is not well taken. Peterka claimed that the homicide occurred during a fight initiated by the victim, and, accordingly, it was appropriate that the jury hear testimony to the effect that the victim had stated that he did not intend to confront the defendant. The instant conviction of first degree murder should be affirmed in all respects.

In regard to Peterka's five claims of error involving the sentence of death, Appellee would contend that Appellant's claim involving alleged improper impeachment of a defense witness is not preserved for review and is otherwise not deserving of extended consideration. Likewise, Appellant's attack upon the

sufficiency of the sentencing order itself is unpersuasive, and the sentencing judge adequately discussed mitigation in this case, especially given the fact that the nonstatutory mitigation now alleged to be present is not adequately supported by the record. In sentencing Peterka to death, the judge found one statutory mitigating circumstance and five aggravating circumstances. On appeal, Peterka does not challenge three of these aggravating circumstances. His attacks upon the remaining two - those involving the homicide having been committed for pecuniary gain and for purposes of hindering law enforcement - are not convincing. Peterka stole a money order from the victim, prior to the homicide, and forged it; the victim was killed not only to cover up this crime, and to allow Peterka to keep the money, but also to allow Appellant to remain a fugitive from his out of state charges. Any error in regard to the finding of these two aggravating circumstances would be harmless, and the instant sentence of death, which is proportional when compared with other precedents of this Court, should be affirmed in all respects.

ARGUMENT

POINT I

APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR, IN REGARD TO THE COURT'S GRANTING OF THE STATE'S CHALLENGE FOR CAUSE TO VENIREMAN PICCOROSSI

As his first point on appeal, Peterka contends that he is entitled to a new trial, because the trial court allegedly erred in granting the State's challenge for cause to venireman Piccorossi. Appellant contends that an insufficient showing was made under **Wainwright v. Witt**, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), to the effect that Piccorossi would be unable to follow the court's instructions. Appellee disagrees.

The record in this case indicates that, upon initial examination by the judge, Piccorossi stated, unequivocally, that he was opposed to the death penalty; he did, however, state that such view would not interfere with his ability to determine guilt or innocence, and that he would not automatically vote against imposition of the death penalty (R 792). When the prosecutor questioned Piccorossi, the prospective juror stated that his opposition to the death penalty was largely rooted in his religious beliefs (R 793). Piccorossi then stated that he could not imagine a case, including one involving a serial killer or a mass murderer, in which he would vote for the death penalty (R 794). The following exchange then occurred:

> MR. ELMORE [Prosecutor]: . . . Is it -- for practical purposes, the answer to whether you would automatically vote against the death penalty yes for practical purposes -- we're not really in a philosophical discussion here.

> MR. PICCOROSSI: Okay. Yeah, I guess you'd have to say for practical purposes, yeah.

(R 794-795).

During voir dire by defense counsel, the venireman stated that he would attempt to follow the judge's instructions at sentencing, but, when the mechanics of capital sentencing were explained to him, he stated that following the instructions "would be difficult for [him]" (R 799). The following exchange then took place:

> MR. LOVELESS [Defense counsel]: I'm just asking you whether or not, that your religious or moral beliefs aside, that you would do your best to follow the law?
>
> MR. PICCOROSSI: I don't know if I could separate my beliefs from my vote in this case. It's very difficult to imagine at this point.

(R 800).

In answer to defense counsel's final question, the most that Piccorossi could say was that he would do his best to follow the court's instructions, adding, "I really don't know if I could or not." (R 800-801).

At the close of examination, the prosecutor challenged Piccorossi for cause (R 801). Defense counsel then "noted" the venireman's answers, which, in his view, indicated that Piccorossi would do his best to follow the law (R 801). The judge then made his ruling:

> THE COURT: . . . He can't assure us he can follow the law and get rid of it, he just said he'd do the best he could under the circumstances. The challenge for cause will be granted. The mere fact that he's against the death penalty itself is in and of itself not granted [sic] challenge for cause.

> MR. ELMORE [Prosecutor]: I understand that, Judge, but --
>
> THE COURT: It's the fact that the witness is not able to tell the court that he can weigh the aggravating and mitigating circumstances and make a decision in favor of the aggravating circumstances and vote accordingly which, of course, the law would require. Challenge for cause is granted . . . .

(R 802).

Initially, the State would question whether this point is preserved for appeal. While defense counsel did state his interpretation of the venireman's answers, in response to the State's challenge, he would seem to have acquiesced in the court's ultimate ruling. Certainly, the record is bereft of any contemporaneous objection by defense counsel to the court's granting of the State's challenge. Under this Court's precedent, such would seem to be a prerequisite for review. **See, e.g., Brown v. State**, 381 So.2d 690, 693-694 (Fla. 1980); **Maggard v. State**, 399 So.2d 973, 975 (Fla. 1981); **Rose v. State**, 425 So.2d 521, 524 (Fla. 1982); **Maxwell v. State**, 443 So.2d 967, 970 (Fla. 1983); **Hoffman v. State**, 474 So.2d 1178, 1181 (Fla. 1985) (point not preserved for appeal, where defense counsel interposed one basis for objection at trial, and raised different argument on appeal). Accordingly, this point is procedurally barred.

Assuming, in fact, that any claim of error is preserved for review, Peterka has nevertheless failed to demonstrate any basis for relief. This Court has repeatedly held that the trial court is entitled to broad discretion in determining the competency of a challenged juror, **see, e.g., Ross v. State**, 474 So.2d 1170,

1173 (Fla. 1985), **Hooper v. State**, 476 So.2d 1253, 1256 (Fla. 1985), and has justified such confidence in the fact, **inter alia**, that the trial court is in a position to actually observe the witness's demeanor and credibility. **See, e.g., Valle v. State**, 474 So.2d 796, 804 (Fla. 1985); **Lambrix v. State**, 494 So.2d 1143, 1146 (Fla. 1986). Thus, in **Cook v. State**, 542 So.2d 964, 969 (Fla. 1989), this Court recently held,

> There is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause. Appellate courts consistently recognize that the trial judge who is present during voir dire is in a far superior position to properly evaluate the responses to the questions proposed to the jurors. In fact it has been said:
>
> > There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than on ruling on challenges for cause in the empanelling of a jury. (citation omitted).

Appellant has failed to demonstrate a clear abuse of discretion **sub judice**.

In **Trotter v. State**, 16 F.L.W. S17 (Fla. December 20, 1990), this Court recently had cause to review, and reject, a claim of error premised upon **Wainwright v. Witt, supra**. In evaluating such claim, this Court held,

> It is the duty of a party seeking exclusion to demonstrate, through questioning, that a potential juror lacks impartiality. The trial judge must then determine whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. On appeal the question is not whether a reviewing court might disagree with

> the trial court's findings, but whether these findings are fairly supported by the record.

In rejecting the specific claim in **Trotter**, this Court stated,

> While being examined relative to his fitness to serve as a juror, Burse answered, 'I don't know' or otherwise equivocated ten times in response to questions concerning his views of the case and the death penalty. The fact that he ultimately responded affirmatively to a question regarding his ability to follow the law as instructed does not eliminate the necessity to consider the record as a whole. When the entire Burse colloquy is considered, we conclude that the trial judge did not abuse his discretion in removing Burse for cause.

(**Id.** at 17-18).

Trotter, and similar precedents, dictate that the instant conviction and sentence should be affirmed. It should be beyond dispute that there is support in the record for Judge Fleet's finding that Piccorossi could not follow the court's instructions at sentencing. Appellant's contentions notwithstanding, the court, as evidenced by its statements in the record, did not excuse the venireman simply because he was "reluctant" to return a death sentence (Initial Brief at 17). Rather, the court below excused Piccorossi because he could not assure the court that he could in fact follow the law; Piccorossi had, of course, also stated that "for practical purposes", he would automatically vote against the death penalty. Looking to the entire colloqouy, excusal of prospective juror Piccorossi was not error. **See also Lara v. State**, 464 So.2d 1173 (Fla. 1985); **Robinson v. State**, 487 So.2d 1040 (Fla. 1986); **Mitchell v. State**, 527 So.2d 179 (Fla. 1988); **Randolph v. State**, 562 So.2d 331 (Fla. 1990). As in **Trotter**, the fact that an isolated response by the venireman

might be said to indicate an ability to serve is not determinative; Judge Fleet was in a position to determine the credibility and demeanor of this prospective juror based upon the entire colloqouy.

Finally, the State would question the harmfulness of any error. While Appellant requests a new trial on this point (Initial Brief at 18), it is clear that he would not be entitled to such result, even if correct in his other allegations; the "penalty" for a violation of **Wainwright v. Witt**, in this regard is limited to the granting of a new sentencing proceeding. **Cf. Gray v. Mississippi**, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622, 628 (1987). In **Gray**, a plurality decision, the United States Supreme Court also refused to apply a harmless error analysis to the erroneous granting of a State challenge for cause in this regard. The next year, however, the Court rendered its decision in **Ross v. Oklahoma**, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), in which it not only receded in some respects from **Gray**, but also, in the context of a claim involving peremptory challenges, held that a defendant was required to make some showing of prejudice before securing reversal, based upon the trial court's allegedly erroneous denial of a defense cause challenge. In **Ross**, the defendant had argued that, following the trial court's denial of his cause challenge, he was "forced" to utilize a peremptory challenge; the Court found this an insufficient basis for reversal, barring some showing that the actual jury which had convicted Ross had been less than impartial. In **Trotter, supra**, this Court adopted the holding of

Ross. The State respectfully suggests, **Gray** notwithstanding, that a defendant such as Peterka, who wishes to complain of a trial court's **granting** of a state cause challenge, should likewise be required to show some prejudice before being entitled to reversal. This would certainly seem to be in conformity with the law in Florida in the past. **See, e.g., Piccott v. State**, 116 So.2d 626, 627 (Fla. 1959) ("Seldom, if ever, will excusal of a juror constitute reversible error for the parties are not entitled to have any particular juror serve. They are entitled only to have qualified jurors. No complaint is made here that the jurors who served were not qualified."). Thus, under **Piccott**, the focus remains the same as under **Trotter** - whether the jury which actually convicted the defendant was impartial. This approach has much to recommend it, inasmuch as the only "prejudice" allegedly suffered Peterka **sub judice**, is ephemeral. He had no right to have any individual, including venireman Piccorossi, sit on his jury, **see Piccott, supra, Lambrix v. Dugger**, 529 So.2d 1110, 1112 (Fla. 1988), and, had the cause challenge been denied, the State would quite certainly have achieved the same result by using a peremptory challenge. Inasmuch as Peterka has made no attack upon the impartiality of his jury, it is clear that reversible error has not been demonstrated. The instant conviction and sentence of death should be affirmed in all respects.

POINT II

APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR, IN REGARD TO THE TRIAL COURT'S DENIAL OF HIS MOTION TO SUPPRESS STATEMENTS

As his next point on appeal, Peterka contends that his conviction of first degree murder must be reversed because the trial court erroneously denied his motion to suppress his statements made on or after the evening of July 18, 1989. Appellant argues that these statements were admitted in violation of his rights under the Fifth and Fourteenth Amendments, in that: (1) these statements had been "tainted" by alleged irregularities in prior statements, and (2) the statements were not voluntary, in that, allegedly, improper promises had been made. It is important to note that no Sixth Amendment violation has been alleged, nor has Appellant ever argued that these statements were admitted in violation of such precedents as **Edwards v. Arizona**, 451 U.S. 427, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Appellee would contend that no error has been demonstrated, and would briefly review the operable facts in this cause. Although Peterka made several statements to the police, aside from his original statement, only those which were made on or after the evening of July 18, 1989, after the defendant had reinitiated contact with the police through his employer, Shorty Purvis, were actually admitted at trial. Because, however, Appellant argues that these statements were "tainted" by prior irregularities, it is necessary to examine all of Peterka's contacts with the police.

Peterka's first contact with the police occurred on the night of July 13, 1989. On this date, at around 8:00 p.m., Deputy Harkins of the Okaloosa County Sheriff's Department proceeded to the duplex shared by Appellant and John Russell, the victim in this case, in regard to a missing person report filed on Russell (R 10). Appellant invited the deputy into the house, and advised him that the last time he had seen Russell, the victim had left the house with an unknown individual; at this point, it was noted that the victim had left behind his automobile and his eyeglasses, the latter fact surprising, in that Russell was "practically blind" without them (R 12). Pursuant to standard procedure, Harkins asked Peterka for identification, and Appellant supplied his birth certificate, claiming that he had lost his driver's license (R 12). After obtaining this information, Harkins left (R 14).

The deputy stated, however, that later that night, he ran a computer check on Peterka, using his date of birth. The computer indicated that Peterka was a fugitive, wanted in another state, for a charge involving stolen guns. The computer also indicated that Peterka was to be considered armed and dangerous (R 14); an arrest warrant was outstanding (R 189). At this point, it was approximately 1:00 a.m. on July 14, 1989 (R 15). At around 1:30 a.m., Harkins, accompanied by other officers, returned to the duplex (R 15). Peterka was arrested, and gave the officers permission to search the house (R 17). The officers found a .357 Smith & Wesson in Appellant's bedroom, which he claimed belonged to a friend; while looking for further identification, the

officers found, in Peterka's wallet, a driver's license, with Russell's name and Peterka's picture on it, and further noted several items of identification belonging to Russell, i.e., a social security card, bank card, etc. (R 21).

Peterka was then taken to the sheriff's deparment in Shalimar and advised of his rights under **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); a signed waiver form was introduced into evidence at the suppression hearing (R 25, 184). At this time, approximately 1:50 a.m., Peterka stated that Russell had been a heavy marijuana user and had left to purchase drugs with another individual (R 24). Appellant claimed that he had told the victim of his status as a fugitive and that, in exchange for one hundred dollars ($100), Russell had allowed him to use his I.D. to get a driver's license (R 24). Harkins testified that, although Peterka never stated that he wanted an attorney, the interview had ended when Appellant indicated that he did not want to answer any more questions (R 56-57). At trial, Harkins offered brief testimony as to this statement (R 1378-1380).

Peterka was then placed in a holding cell and, later that morning, transferred to Crestview (R 58). Once there, Appellant called his girlfriend, Frances Thompson, and it was agreed that she would go to the duplex and remove Appellant's belongings (R 143-144). While she was there, she noticed that some cushions from the couch had been removed, and were outside by the fence, seemingly wet (R 151); she also looked inside the trunk of the victim's vehicle and saw a shovel (R 149). Alarmed, she called

the sheriff's office, at approximately 9:15 that morning, and reported these findings (R 28). At approximately 3:00 p.m., on the afternoon of July 14, 1989, several police officers, including deputy Harkins, with the consent of the owner of the duplex, Shorty Purvis, searched the premises (R 31); at this time, Purvis indicated that he had possession of the .357 Magnum which the police had not originally seized, and which Peterka had given to Thompson (R 36). A search of the house revealed blood stains on the couch, underneath where the cushions had been (R 37), as well as blood stains on the rug underneath the couch (R 228). A later search of the victim's vehicle revealed blood stains on the tail lights and blood inside the trunk; the trunk contained a shovel and a quantity of sand (R 312-313).

At this point, one of the officers, Deputy Vinson, left the scene and returned to the county jail to talk with Peterka (R 240). Vinson testified that he advised Appellant of his **Miranda** rights, and stated that Peterka appeared to understand them (R 240-242); again, a signed waiver form was introduced into evidence (R 242). From the form, it would appear that the interview took place at approximately 5:38 p.m. (R 242). At this point, Peterka again stated that his roommate had left the duplex with a "long-haired stranger" (R 243). Peterka contended that he had not known of any blood stains in the house, and stated that he had washed the couch cushions because they had seemed dirty (R 244). Vinson testified that no threats or promises were made to Peterka (R 244). The officer similarly stated that the interview ended "on friendly terms" and that Appellant had never requested

a lawyer (R 245-246). This statement, likewise, was **not** introduced at Peterka's trial.

Vinson testified that, at the time he interviewed Peterka, he had not known that blood stains had been found in the trunk of the car (R 246). The detective further stated that he returned to the jail at approximately 5:30 p.m., on Tuesday, July 18, 1989, to speak with Peterka (R 247). Vinson testified that he again advised Peterka of his **Miranda** rights, and that Appellant seemed to understand them; again, a signed waiver form was introduced into evidence (R 247-248). At that point, Peterka reiterated his claim that the victim had "sold" him his identification papers for one hundred dollars ($100), so that Peterka could get a driver's license (R 249); Appellant admitted, however, that he had used the phony driver's license to cash a check made out to Russell (R 241). Vinson testified that he had told Peterka that he believed that Appellant had something to do with the victim's disappearance (R 250). He advised him that he had been at a meeting with other officers concerning whether Peterka would be charged with first degree murder, in the absence of a dead body (R 250, 252, 258).

Vinson explained that if any death had occurred during a fight, there was a chance that the charge would be second degree murder or manslaughter, but if the victim had been deliberately killed, the charge would be first degree murder (R 250). The officer also stated that he had told Peterka that the penalty for second degree murder was sometimes as low as seventeen years, and that for manslaughter, sometimes as low as five (R 252); he

described this discussion as involving "possibilities" (R 297). Vinson expressly denied making Peterka any promises or threats (R 253, 296); he specifically denied ever mentioning the electric chair (R 254). Vinson acknowledged that the sheriff had told him not to "come back" without a confession, but stated that such remark had not pressured him (R 294-295). He stated that his discussion of the lesser offenses had constituted his giving Peterka "an out" (R 289). Peterka asked if he could then go back upstairs, and Vinson replied that he could (R 250). Vinson asked Peterka if he could talk to him again, at a later date, and Peterka asked if he could call him (R 250). As Vinson was walking out, Peterka asked Vinson if he could arrange for the prison to allow Peterka to make a phone call (R 250). Vinson stated that he relayed Appellant's request to a jailer and, as he was leaving, saw Peterka talking on the telephone (R 251). These statements were **not** introduced against Peterka at trial.

Peterka did, indeed, make a phone call, and he called his former boss, Shorty Purvis (R 84-85); this was Appellant's second phone call to Purvis, and Purvis had previously visited him at the jail (R 79-84). Peterka again asked Purvis to come to the jail so that he could talk to him, and Purvis agreed (R 95-96). Purvis testified that he was **not** acting as a "state agent" and said that the authorities *had never asked him* to obtain any information from Peterka (R 95-96). Upon arrival, Deputy Atkins took Purvis in to see Peterka, and the two were left alone in a room (R 96-97). At this time, Peterka told his former employer that he had shot John Russell during an argument (R 100); Peterka

said that he considered Purvis his only friend and stated that he would rather tell Purvis what he had done (R 98). Purvis intervened and told Peterka, "Dan, look, everything you tell me, I have got to tell the law. I can't keep nothing from them." (R 97). Peterka replied, "I want you to", adding that he wanted to "get it off his chest" (R 97, 98). Accordingly, Purvis called Atkins, who testified that, immediately upon entering the room, he had advised Peterka of his **Miranda** rights (R 214).[2] According to Atkins, Peterka had appeared to understand his rights, and had signed a written waiver (R 215). At this point, Atkins gave both Purvis and Peterka statement forms and asked them to write down what Peterka had said (R 99); according to Atkins, Peterka also admitted to him having killed the victim (R 215). Atkins then called Vinson (R 215). At trial, both Purvis and Atkins testified as to Peterka's admissions (R 1664, 1676-1679); the written statement, in which Peterka claimed that the killing had occurred during a fight, was also admitted (R 1332).

Vinson testified that, upon receiving Atkins' call, he had picked up the sheriff and returned to the jail (R 257). Purvis testified that, by the time they had written out the statements, Sheriff Gilbert had arrived (R 101). Purvis stated that he heard the sheriff advise Peterka of his rights and heard Peterka indicate that he understood them (R 102). Vinson testified that,

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[2] At trial, Purvis testified that his exchange with Appellant had consisted of him saying, "Dan, look, everything you are telling me, I've got to tell the law," and Peterka replying, "I know that. That's why I'm telling you." (R 1675). He also testified that Peterka had told him to "go get" Atkins, and that, when Peterka was asked if he wanted a lawyer, he had replied, "I want to talk right now" (R 1679).

upon his entry into the room, Peterka told him that he was sorry that he had lied to him (R 258). Vinson also testified that he advised Peterka of his **Miranda** rights (R 258), and a signed waiver form was introduced into evidence (R 258). According to Vinson, Peterka then agreed to take him to the body (R 261). Once in their vehicles, Peterka directed the officers to a deserted location within the reservation of Eglin Air Force Base, where the body was found in a shallow grave, covered by branches (R 265).

The parties then returned to the courthouse in Shalimar, arriving at close to midnight (R 265). At this time, Vinson and Deputy French interviewed Peterka (R 266). Vinson reminded Peterka of the rights which he had described to him several hours earlier (R 266); Peterka stated that he was willing to give a statement (R 266). This statement was videotaped (R 268). According to Vinson, there was no formal discussion of the nature of charges that might be brought (R 269); additionally, there were no promises of leniency offered for the statement (R 269). In this statement, Peterka contended that Russell had precipitated an argument, and that he had shot him during a fight (R 2443, 2444). Peterka also stated, when asked what had made him tell the officers about the crime and lead them to the body, "I have to do what is right." (R 2453). This videotape was played for the jury and introduced into evidence (R 1328, 1708, 2441-2458).

Peterka himself testified at the suppression hearing, and offered a view of the evidence significantly different from that

of the other witnesses (R 2087-2144). Following all the testimony, both parties presented their arguments to the court (R 315-357). During the course of defense counsel's arguments, the court asked him if his arguments would be the same "without the benefit of Peterka's testimony" (R 328). During the State's argument, the judge questioned the prosecutor as to whether Peterka had invoked his right to silence at the close of the initial interview with Deputy Harkins and, if so, at what point the State had been entitled to reinitiate contact (R 346). When the prosecutor was questioned as to the admissibility of the statements made by Peterka during his two interviews with Vinson, the prosecutor stated that he felt that such had been voluntarily made and could be used for impeachment, if necessary; he stated, however, that he did not believe that they were admissible in the State's case in chief (R 347). The prosecutor pointed out that both of the statements had been made after Peterka had terminated his interview with Harkins, and the court stated that it granted the motion to suppress as to those statements (R 348). The State then argued that Peterka's voluntary statements to Purvis had been free of any "taint" (R 350-354). The court subsequently announced its ruling (R 356-357). The court stated that the earlier statements would be suppressed, in accordance with its prior ruling, noting that their admissibility as impeachment would be deferred until appropriate (R 356). Judge Fleet then stated,

> The court finds that the defendant's conversation with his former employer and landlord, Shorty Purvis, on the evening of July 18, with the express intention that the

> contents of that statement would be made aware [sic] to the law enforcement officers, was the functional equivalent of the defendant's resumption of dialogue with the law enforcement officers and that, therefore, statements obtained by the law enforcement officers subsequent to the statement made to Purvis and the written statement which the defendant made shorty thereafter were freely and voluntarily made and are admissible and the motion to suppress is denied.

(R 357).

As noted, Appellant argues that Judge Fleet erred in two respects, in allegedly failing to consider if Peterka's later confessions were "tainted" by Vinson's questioning of Peterka earlier on July 18, 1989, and in allegedly failing to consider the effect of Vinson's "lure" upon the voluntariness of the later confessions (Initial Brief at 20). Inasmuch as both of these claims, in essence, relate to statements which were never introduced, they are somewhat interrelated; there would not seem to be any claim presented that the statements Peterka made to Purvis, and those that followed, were involuntary, based upon promises made at the time that such statements were made. Appellant also contends that the "key 'fact' is that the court suppressed the statements taken after Peterka invoked his right to remain silent on July 14" (Initial Brief at 20).

It is, however, difficult to appreciate the full significance of this "key fact", given the fact that the judge did not make any express findings. Indeed, the transcript indicates that the motion to suppress these statements was "granted", largely because the prosecutor stated that it would not be seeking to introduce them in its case in chief (R 347-

348); of course, any "concession" by the State should simply have mooted the issue, as opposed to justifying the suppression of statements which would never be offered. To the extent that Judge Fleet was concerned about the admissibility of the prior statements, it would not seem that such concern was based upon lack of voluntariness. The judge left the door open for the State to seek to admit these statements as impeachment, if warranted (R 356-357); it is, of course, well established that the involuntary statements by defendant cannot be used for impeachment, **see, e.g., Mincey v. Arizona**, 437 U.S. 385, 397-398, n.12, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). The State, despite any "concession", affirmatively represented to the court below that all the statements were voluntary (R 347), and there is no basis to believe that Judge Fleet found any statement at issue involuntary.

From the court's questions to counsel during the arguments below, it would appear that Judge Fleet was concerned that Peterka might have invoked his right to remain silent at the close of his initial interview with Deputy Harkins, and that the authorities had had no subsequent right to resume interrogation (R 345-348, 350-352); the court's ultimate ruling, of course, was that Peterka's conversation with Shorty Purvis was the functional equivalent of his resumption, or initiation, of dialogue with the law enforcement officers (R 357). Inasmuch as this is a capital case, it was, perhaps, the safest course for the court below to have barred admission of any statement arguably subject to suppression. Deputy Harkins testified that the initial interview

with Peterka on July 14, 1989, had ended when Peterka indicated that he did not want to answer any more questions (R 56); Deputy Ashmore, however, testified that Peterka had never indicated a desire to end the interview (R 185), and both officers had testified that Peterka had never requested an attorney (R 56, 185). It would appear, under this Court's recent decision, **Owen v. State**, 560 So.2d 207, 211 (Fla. 1990) (defendant's statement during interview, "I don't want to talk about it", sufficient invocation of right to remain silent, so as to preclude further interrogation), that Peterka's statement that he did not want to answer any more questions could be considered an invocation of his right to silence.[3] The question then becomes whether Judge Fleet erred in finding the subsequent statements admissible.

In the Initial Brief, Appellant contends that, under **Michigan v. Mosley**, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), Peterka's right to remain silent was not "scrupulously honored" and, further, his statements on the evening of July 18, 1989, were "tainted" by Deputy Vinson's earlier questioning of him on that day. The problem with the above, however, is that,

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[3] Peterka's testimony at the suppression hearing was to the effect that he had indicated several times that he did not wish to speak with the officers (R 2094); Peterka also testified that he ended the interview by stating that if the officers wished to continue questioning him, he wanted a lawyer present (R 2094). Because, on appeal, the court's ultimate ruling on the suppression motion comes to this Court with the presumption of correctness, and because the reviewing court on appeal must interpret the evidence and reasonable inferences and deductions therefrom in a manner most favorable to sustaining the trial court's ruling, **see McNamara v. State**, 357 So.2d 410, 412 (Fla. 1978), the State assumes, for purposes of this point on appeal, that the judge credited the testimony of the police officers, as opposed to that of Peterka, especially in the absence of any express finding to the contrary.

if there was any "taint" in this case, it stemmed from Peterka's alleged invocation of his right to silence to Deputy Harkins on July 14, and not from any earlier interview with Vinson on Tuesday. The State respectfully suggests that, under **Mosley**, any prior "taint" evaporated by the time Peterka initiated contact with the authorities, through Shorty Purvis, on July 18. In **Mosley**, the United States Supreme Court pointed to a number of factors, relevant in the determination of whether a subsequent statement by a defendant was admissible. Thus, the Court looked to the fact that Mosley had initially been advised of his rights under **Miranda** and had signed a written waiver of such. The Court also looked to the fact that when Mosley had indicated a desire to terminate interrogation, his wish had been respected. Further, the Court noted that, prior to the second statement, Mosley had again been advised of his rights under **Miranda** and executed a written waiver. The second interview had been conducted by a different officer, after a "significant period of time" had elapsed, and was in regard to a different offense. In applying **Mosley**, courts have not always required that the second interrogation relate to a different offense, **see State v. Isaac**, 465 So.2d 1384, 1386 (Fla. 2nd DCA 1985), and the State suggests that the **Mosley** criteria have been satisfied **sub judice**.

Both Deputies Harkins and Ashmore testified that Peterka was advised of his **Miranda** rights prior to the interview on July 14, 1989; Peterka's written waiver of rights was introduced into evidence (R 22-24, 184). Similarly, it is clear, from the deputies' testimony that Peterka's rights were scrupulously

honored. According to Harkins, when Peterka indicated that he did not want to answer any more questions, the interview terminated (R 56). Peterka's statements to Shorty Purvis were made on the evening of July 18, 1989, almost four days later, and they were made to a personal friend, as opposed to a law enforcement officer. Prior to his giving of additional statements to the authorities, Peterka was readvised of his rights under **Miranda**, and executed additional written waivers, at least four times (R 214-215, 102, 258, 266). The fact that, in the interim between the first statement and Peterka's confession to Purvis, Appellant was twice interviewed by Deputy Vinson does not change this analysis. Prior to both interviews, Vinson advised Peterka of his **Miranda** rights, and in both instances Peterka indicated that he understood such and was willing to talk; signed waivers were introduced into evidence (R 242, 247-248). In neither interview did Peterka invoke his right to silence. Vinson testified that the interview of July 14, 1989, ended "on friendly terms", with Peterka never asking for counsel (R 245). Vinson likewise never stated that Peterka had asked for an attorney during the interview of July 18, 1989, and this interview ended when Peterka said that he wanted to make a phone call (R 250). Vinson stated that he left the jail at around 6:30 p.m., and that it took him approximately one-half hour to get home (R 256). He stated that he received a call, relating Peterka's statement to Purvis, at around 8:00 or 8:30 p.m. that evening, and that he returned to the jail, just as Peterka was finishing his written statement (R 258); the written statements indicate that they were executed at approximately 8:52 p.m..

Thus, on the basis of the above facts, it should be clear that no action of the police overbore Peterka's will, and his subsequent statements of July 18, 1989, were properly admitted, such statements given, of course, after Peterka had reinitiated dialogue with the police through Purvis. No error has been demonstrated. **See, e.g., State v. Isaac, supra** (subsequent statement properly admitted under **Mosley** where, **inter alia**, defendant's rights honored, subsequent statement preceded by readvisement of rights and one hour and forty minutes elapsed between statements; single offense involved); **McNickles v. State**, 505 So.2d 633 (Fla. 4th DCA), **cert. denied**, 515 So.2d 230 (Fla. 1987) (subsequent statement properly admitted under **Mosley**, where forty-five minutes elapsed since prior statement, and subsequent statement made following readvisement of rights; single offense involved); **Wells v. State**, 540 So.2d 250 (Fla. 4th DCA), **cert. denied**, 547 So.2d 1212 (Fla. 1989) (second statement properly admitted under **Mosley**, where no request for counsel made, and second statement made following acknowledgement of rights, two hours later; single offense involved); **State v. Chavis**, 546 So.2d 1094 (Fla. 5th DCA 1989) (error to suppress second statement made following invocation of rights, and following one and one-half hour lapse since original statement, where defendant readvised of **Miranda** rights; different confessees and offenses involved); **Zerquera v. State**, 549 So.2d 189, 192 (Fla. 1989) (defendant informed of **Miranda** and initial questioning ceased after defendant invoked right to silence; later statement properly admitted under **Mosley** where defendant reinitiated conversation

and was readvised of rights). On the basis of the above precedents, the instant conviction should be affirmed. **Cf. Castro v. State**, 547 So.2d 111 (Fla. 1989) (court's decision to exclude defendant's first statement did not dictate that all subsequent statements be suppressed); **Oregon v. Elstad**, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

Peterka is similarly not entitled to relief on the basis of his claim that his subsequent statement should have been suppressed due to allegedly improper inducements made by Deputy Vinson during the interview on the afternoon of July 18, 1989; as noted, this particular statement was not introduced, and Judge Fleet made no specific finding that any of the statements, including those not admitted, had been involuntary. The State would initially contend that the subsequent statements were not "tainted", because there was no "taint" to begin with. Appellee fully agrees that all confessions must be freely and voluntarily made, and that the police may not exert undue influence upon a prisoner to delude him as to his true position. **See, e.g., Bram v. United States**, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897); **Brewer v. State**, 386 So.2d 232 (Fla. 1980).

In the case at bar, Deputy Vinson did nothing to mislead Peterka as to his true position. Rather, he informed him of the different degrees of homicide, with a brief description as to their penalties, and advised Appellant, truthfully, that the State was seeking to charge him with first degree murder. All of the information which Vinson provided was accurate, and, as

evidenced by his testimony, no promises of any sort were made.[4] The fact that Vinson discussed some of the evidence against Peterka was not coercive. **See, e.g., Moore v. State**, 525 So.2d 870, 873 (Fla. 1988) (officer's statement to defendant that, based on known evidence, he knew defendant had committed the crime, no basis to suppress confession). Further, the fact that Vinson discussed the **possibility** of charges less than first degree murder being filed, if the facts supported such, did not constitute a promise of leniency (R 297); Vinson was emphatic that he had made no promises to Peterka and that he had not represented to him how, in fact, either the sheriff's office of the state attorney's office would charge him (R 296). As the second district held in **State v. Moore**, 530 So.2d 349, 350 (Fla. 2nd DCA 1988), statements suggesting leniency are only objectionable if they establish an express **quid pro quo** bargain for a confession. There has been no such showing **sub judice**. **See also Burch v. State**, 343 So.2d 831, 832-833 (Fla. 1977) (statement by police officer that he would make decision as to whether defendant charged with first or second degree murder and that, in determining whether to confess, defendant should consider difference in penalty between capital crime and one calling for sentence of between seven to twenty years,

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[4] Again, as noted in footnote 3, Peterka's testimony differed from that of the other witnesses, and he told Judge Fleet that Vinson had, in essence, "promised" him that if the murder occurred during a fight, he would only be charged with manslaughter and serve five years (R 2105, 2135). As in footnote 2, the State assumes for purposes of this point on appeal, that Judge Fleet credited the contrary testimony of Deputy Vinson, especially in the absence of any express finding to the contrary. **Cf. McNamara, supra.**

insufficient basis to suppress confession); **Cannady v. State**, 427 So.2d 723, 727-728 (Fla. 1983) (confession not involuntary where, although detective stated that he would try to help defendant, such offer of help not specifically made in exchange for confession); **Jones v. State**, 440 So.2d 570, 574 (Fla. 1983) (detective's statement that if defendant's cousin had nothing to do with case, he would not be charged, simply truthful statement which did not coerce defendant into confessing); **Bush v. State**, 461 So.2d 936, 939 (Fla. 1984) (defendant's partially exculpatory statement voluntary, despite undescribed "minimizing statements" by detectives, where such was defendant's rational choice, once alibi defense fell apart); **Bruno v. State**, 16 F.L.W. S65 (Fla. January 3, 1991) (officer's statement to defendant that if gave sworn statement exculpating son, son would not be charged, insufficient to bar confession; statement was truthful, in that, if Bruno exculpated son, there would be no basis to charge him). On the basis of the above precedents, especially **Burch** and **Bruno**, the instant conviction should be affirmed.

The cases cited by Appellant are simply distinguishable. Appellee has no qualm with the holding of **Brewer**, but finds no similarity between such case and Peterka's. In **Brewer**, the police had specifically threatened the defendant with the electric chair, specifically advised him that he was only guilty of second degree murder, although a jury would convict him of first degree murder and sentence him to death, and assured him that he would be out of jail in a number of years. Deputy Vinson certainly made no promises on par with those described above, and

he certainly never suggested to Peterka that he was only guilty of a lesser offense, especially because, Appellant, at such time, had never offered his exculpatory version of the homicide. The other cases cited by Appellant, such as **Fillinger v. State**, 349 So.2d 714 (Fla. 2nd DCA 1977), **Foreman v. State**, 400 So.2d 1047 (Fla. 1st DCA 1981), and **State v. Favoler**, 424 So.2d 47 (Fla. 3rd DCA 1983), are inapposite.

In **Fillinger**, the arresting officer had told the defendant that, in return for her confession, he would advise the State of her cooperation and would further consider such in setting her bail; the officer testified that he felt that the reason the defendant had confessed was because she did not want to be arrested later. It should be noted that the defendant in **Fillinger** went from denying all knowledge of the offense to admitting culpability, whereas here, Peterka simply exchanged one untrue story for another, **i.e.**, his tale that the victim had left with a unknown person for his tale that he had killed the victim during a fight. Similarly, in **Foreman**, the inducement for the defendant to confess was quite high. The arresting officer therein explicitly advised the defendant that he had spoken with the victim and that, if the property were returned, he did not think that the victim would press charges; as in **Fillinger**, the officer offered his explanation for why the defendant had confessed - because the officer had led the defendant to believe that he would not be prosecuted. Finally, **Favoler** represents an unsuccessful State appeal, in which the issue was the voluntariness of the defendant's consent to search.

On the basis of the precedents cited earlier, i.e., **Bruno, supra, Burch, supra,** error has not been demonstrated. **See also Rivera v. State,** 547 So.2d 140 (Fla. 4th DCA 1989), **cert. denied,** 558 So.2d 19 (Fla. 1990) (remarks by detective that he was not interested in defendant's other offenses and that charges could not be filed in them without specific information did not unlawfully induce confession to case at issue, especially where confession made after advisement of rights); **State v. Ferrer,** 507 So.2d 674 (Fla. 3rd DCA 1987) (fact that defendant admitted culpability in offense, due to mistaken belief that, as driver of getaway car, he could not be charged with substantive crime, insufficient basis for suppression); **Harley v. State,** 407 So.2d 382 (Fla. 1st DCA 1981) (fact that officer told defendant that he would only charge him with seven of the one-hundred and sixteen counts at that time, and that it would be up to the state attorney's office to file additional charges, not improper promise or threat so as to vitiate confession); **La Rocca v. State,** 401 So.2d 866 (Fla. 3rd DCA 1981) (polygraph examiner's statement to defendant that, because codefendant fired first shot at victim, what defendant did was "not that a big a deal", insufficient basis for suppression).

Assuming, however, that this Court finds any irregularity in Peterka's statement to Deputy Vinson on the afternoon of July 18, 1989, the State would contend that any impropriety dissipated by the time that Peterka made the admissions which were introduced against him at trial. It is clear that such abatement can occur. **See, e.g., State v. Oyarzo,** 274 So.2d 519 (Fla. 1973) (initial

statements suppressed due to fact that police officer told defendant that he had nothing to fear and that officer would protect and take care of him; later statement admitted, where such made to different officer, after advisement of rights and after passage of two hours). In **Oregon v. Elstad**, the Court looked to some of the factors to be considered in making the determination at issue, **i.e.**, whether a prior statement has "tainted" a subsequent one - the time that passes between the statements, the change in place of the interrogations and the change in identity of the interrogators. **Elstad**, 470 U.S. at 310-11, 105 S.Ct. at 1294, 84 L.Ed.2d at 232-233. **See also Elledge v. Dugger**, 823 F.2d 1439 (11th Cir. 1987).

In this case, a number of hours passed between Vinson's interrogation with Peterka at around 5:30 p.m. on July 18, 1989, and Peterka's interview with Purvis. Although this latter interview took place at the jail, the most significant fact was that Peterka's first admission to complicity in the homicide was made to a personal friend, as opposed to a law enforcement officer, and that such was made at the initiation of Peterka himself. Certainly, it cannot be argued that Peterka made this latter statement because he felt that Shorty Purvis would guarantee that he was only charged with a lesser crime; indeed, Purvis testified that Peterka had never mentioned to him the potential charges that he was facing (R 109). The State would contend that this case is analogous to **Nettles v. State**, 409 So.2d 85 (Fla. 1st DCA), **cert. denied**, 418 So.2d 1280 (1982). In such case, the defendant claimed that the sheriff had improperly

induced his later statement, when the officer had told Nettles that, if he complied, "it will make it a little easier." The court rejected the defendant's claim, noting that Nettles' eventual confession had come sometime later, after the defendant had visited with his father in the jail and after readvisement of his rights. The court, citing to **Oyarzo** and distinguishing **Brewer**, concluded that any improper inducement or suggestion of benefit had been sufficiently attenuated by the time that the confession was made. A similar result is dictated **sub judice**.

In conclusion, Appellant has failed to demonstrate reversible error in regard to the denial of his motion to suppress his statements. Assuming in fact that Peterka ever invoked his right to silence at the conclusion of his first interview, such fact did not preclude admission of the statements made, several days later, after Peterka had reinitiated contact with the police. All statements made by Peterka were voluntary, and the testimony of Deputy Vinson clearly indicates that no improper promise was made. If it is not impermissible, under the law, for the police to essentially mislead a defendant by telling him, falsely, that his codefendant has confessed to the crime, **see Frazier v. Cupp**, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969), or, again, falsely, that he has failed a lie detector test, **see Burch v. State, supra**, it hardly seems logical that a police officer's truthful recital of the potential charges and penalties that a defendant faces should somehow taint his confession. Peterka's claim, in essence, is that, having perceived it in his interest to fabricate a statement of having

committed the crime during a fight, he is now entitled to "specific performance" in regard to a bargain never struck. The law does not dictate such result. The instant conviction and sentence of death should be affirmed in all respects.

POINT III

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE TRIAL COURT'S DENIAL OF PETERKA'S MOTION FOR JUDGMENT OF ACQUITTAL; SUFFICIENT EVIDENCE OF PREMEDITATION EXISTS, SUCH THAT THIS COURT SHOULD AFFIRM APPELLANT'S CONVICTION OF FIRST DEGREE MURDER

As his next point on appeal, Peterka contends that the trial court erred in denying his motion for judgment of acquittal, in that, allegedly, insufficient evidence of premeditation had been adduced; Appellant asks this Court to reverse his conviction of first degree murder and to order imposition of a judgment for manslaughter (Initial Brief at 34). Peterka concedes that the evidence at trial supports the State's version of what happened, i.e., an intentional killing, but suggests that the State did not refute all aspects of Peterka's statement, i.e., that the murder occurred during a fight initiated by the victim (Initial Brief at 27). Peterka then devotes a good portion of his brief asserting that the State's theory was not logical -

> . . . if murder was Peterka's intention, he certainly would have planned and executed it better. For instance, why would he have killed a person he knew had several friends who almost on a daily basis came to his house . . . ? Likewise, why would Peterka have killed a person chronically short of money . . . in midday, immediately before payday and in his house . . .? Also, he surely would

> have come up with a better story of Russell's disappearance than that he went off with a man with 'scraggly hair' . . .

(Initial Brief at 30).

Of course, the simple answer to the above is that Peterka is by no means the only individual on Death Row who did not commit "the perfect crime". It is not, and was not, the State's burden to prove that Peterka committed his crime in the most efficient manner possible, and denial of the motion for judgment of acquittal was proper.

Inasmuch as there is no doubt that the defendant killed the victim, Peterka having conceded such both at trial and on appeal, the only question is the degree of homicide. Thus, this case is not in the same posture as **Cox v. State**, 555 So.2d 352 (Fla. 1990), or **Davis v. State**, 90 So.2d 629 (Fla. 1956), wherein the defendant's entire involvement in the homicide at issue rested upon circumstantial evidence. It is, of course, well established that premeditation, which is rarely susceptible to direct testimony, can be established through circumstantial evidence, and that whether the evidence shows a premeditated design is a question of fact for the jury. **See, e.g., Penn v. State**, 16 F.L.W. S117 (Fla. January 15, 1991); **Preston v. State**, 444 So.2d 939 (Fla. 1984). When premeditation is established through circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference. **See Cochran v. State**, 547 So.2d 928, 930 (Fla. 1989). The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where

there is substantial, competent evidence to support the jury's verdict, it will not be reversed on appeal. **Cochran, supra.**

Cochran also specifically provides that the circumstantial evidence standard does not require the jury to believe the defendant's version of the facts on which the State has presented conflicting evidence, and further recognizes that the State, as appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. **Id.** This view is in accord with **State v. Law**, 559 So.2d 187, 189 (Fla. 1989), wherein this Court held that a trial court's responsibility in ruling upon a motion for judgment of acquittal in a circumstantial evidence case is to determine whether, viewing the evidence most favorably to the prosecution, competent evidence exists from which the jury could infer guilt to the exclusion of all other inferences; the State is not required to conclusively rebut every possible inference which could be drawn from the evidence, but, rather, must introduce competent evidence which is inconsistent with the defendant's theory of events. It should also be noted that in **Cochran**, this Court, citing to its earlier decision, **Songer v. State**, 322 So.2d 481, 483 (Fla. 1975), stated that it rejected the contention that a defendant's interpretation of circumstantial evidence had to be accepted unless specifically contradicted.

Applying the above precedent, it is clear that denial of Peterka's motion for judgment of acquittal was not error, and that sufficient evidence of premeditation was adduced below. Peterka's primary story, or hypothesis of innocence, was that the

homicide occurred during a fight, initiated by the victim. Peterka claimed that Russell precipitated the fight by confronting him about the stolen money order (R 2442, 2445). Yet, several witnesses testified that the victim had stated categorically that he did not intend to confront Peterka about the stolen check, preferring to await the filing of formal forgery charges; indeed, this testimony indicated that the victim was afraid of confronting the defendant when he knew that he had a gun (R 1605, 1435, 1457). According to Peterka, the two struggled, although "it wasn't really a fight" (R 2443). Appellant stated that, after the two had wrestled around, he fell across the coffee table; despite all of this vigorous activity, it would not appear that any actual damage was done, in that Peterka stated that there was a minimal amount of "straightening up" to do (R 2450).

At this point, Peterka stated that both he and Russell had gone for the gun which was on the coffee table (R 2443). According to Appellant, they struggled over it, and Peterka was able to "dislodge" Russell, pushing him off backwards (R 2441). Peterka then claimed that he turned around and saw Russell "pushing up off the couch", "pretty much from a seated position", "kind of head down", and Peterka then "in a flash" fired the weapon (R 2444). Russell "sat back down on the couch" and "just fell backwards" (R 2444). According to Appellant, there was "blood everywhere", which he attempted to staunch with towels (R 2444). The problem with all of the above is that it is inconceivable that the gun could fire accidentially or that

Peterka did not intend to kill Russell. The firearms expert testified that the gun could only be fired by the application of between two and one half and nine pounds of pressure exerted on the trigger (R 1554); the expert tested the revolver, by hitting it with a rubber mallet, and concluded that the safety mechanisms would prevent an accidental firing (R 1555-1556).

Further, even if Russell were "pushing off" from the couch from a seated position with his head "kind of down", such could not explain the location and nature of the entrance wound. The bullet entered Russell's head at the top of the skull and it would appear that the gun had shot downward (R 1225). The muzzle of the gun was either touching the scalp or, at most, within three quarters of an inch of it (R 1224). Indeed, the impact of this hollow point bullet, fired at close range from a .357 Magnum was so intense that it caused the victim's brain and skull to literally explode and shatter (R 1215, 1221). Despite the magnitude of this injury, blood was not, in fact, "everywhere" as Peterka stated. Significantly, there was no blood spatter found on the wall, ceiling or anywhere else in the living room, except on, or around, the seat cushion area of the couch, and the rug underneath (R 1508-1509); the medical examiner testified that the wound was consistent with one inflicted while the victim was in a reclining position (R 1238).

Returning to Peterka's statement, Appellant claimed that, after his efforts to revive Russell failed, he "panicked"; it should be noted that the towels allegedly used by Peterka would not ever seem to have been found, despite his claim that they

were outside with the bloody cushions (R 2456). In any event, Peterka then dragged the body into the kitchen, in such a way as to leave absoluteley no blood stain. He rolled the body up into the kitchen rug and backed the victim's car up to the door (R 2447). After putting the body into the car, he then drove from Ft. Walton Beach all the way to an area in the vicinity of Niceville, where, of course, he had previously resided with the LeComptes. Peterka then turned into what was described as a "not well travelled" secondary road, which eventually became a dirt trail (R 1195-1196). Removing the body from the trunk, he dug a hole and buried it, covering it with an earth mound and branches. For someone in a "panic", Peterka displayed great presence of mind. Although Peterka told Shorty Purvis that he had simply ridden around all night unable to sleep (R 1678), the truth is, of course, quite different. Instead, he went home, changed his shirt, put the gun away and tried to wash the blood out of some of the couch cushions (R 2449-2450). He then got back into the victim's car and drove over to see his girlfriend Frances Thompson, with whom he went to dinner (R 2451). He later brought her home to the duplex to spend the night. When she asked him about the cushions outside, he told her that he had vomited blood onto them (R 1618). When she suggested that they leave a note for the "missing" Russell, to advise him that people were looking for him, Peterka complied, and wrote a message to the man whom he had murdered several hours earlier (R 1618).

Appellee respectfully suggests that Peterka's hypothesis of innocence was not reasonable, and was contradicted by other

evidence adduced by the State. Accordingly, a jury question existed as to premeditation. **See, e.g., Cochran, supra** (physical evidence contradicted defendant's claim that shooting was accidental, and that defendant "panicked" afterwards; conviction of first degree murder affirmed); **Bello v. State**, 547 So.2d 914 (Fla. 1989) (defendant's "reasonable" explanation for firing of fatal shot, not inconsistent with premeditation; conviction of first degree murder affirmed); **Huff v. State**, 495 So.2d 145, 150 (Fla. 1986) (conviction affirmed where jury could find defendant's story untruthful and unreasonable; circumstantial evidence alone sufficient for conviction in absence of reasonable alternative theory). The primary cases relied upon by Appellant, **McArthur v. State**, 351 So.2d 972 (Fla. 1977), and **Wilson v. State**, 493 So.2d 1019 (Fla. 1986), are distinguishable. In **McArthur**, where the defendant's claim was that, as here, an accidental shooting had taken place, it is clear that the evidence presented therein was much more equivocal than that **sub judice**. In **Wilson**, it must be noted that, while this Court reversed one of the convictions for first degree murder, it affirmed the other, despite the fact that it was apparently uncontradicted that the homicide had arisen out of a violent struggle, and where the victim had been shot once in the forehead.

Additionally, it would not appear that in either **McArthur** or **Wilson**, the defendant had made any inconsistent statement or asserted more than one "reasonable" hypothesis of innocence. In this case, Peterka was literally a fountain of reasonable

hypotheses. While the primary theory of innocence was that asserted at trial, i.e., that the victim had been killed during a fight, Peterka had taken other positions, and the jury in this case was quite aware of it; it should also be noted that even in regard to the fight, Peterka gave a different version of events to Ronald LeCompte (R 1576-1577). When Peterka was first questioned about the disappearance of his roommate, he told Gary Johnson that he didn't know anything about it. Later he claimed that he had seen Russell go off with a mysterious long-haired stranger (R 1285, 1164, 1290, 1378-1379). It is, of course, well recognized that the fact that a defendant makes inconsistent statements is evidence of consciousness of guilt and unlawful intent. **See, e.g., Johnson v. State**, 465 So.2d 499, 504 (Fla. 1985); **Smith v. State**, 424 So.2d 726, 730 (Fla. 1982). Similarly, this Court has held that a jury is entitled to disbelieve a defendant's "reasonable" hypothesis of innocence, when the defendant, as here, has made another inconsistent statement. **See Peek v. State**, 395 So.2d 492, 495 (Fla. 1980) (jury could disbelieve defendant's claim that he had only entered victim's car after the murder, where defendant had also denied that he had ever been in the vicinity). Such position, of course, is conformity with that taken by other courts. **See, e.g., State v. Frazier**, 407 So.2d 1087, 1089 (Fla. 3rd DCA 1982). Accordingly, denial of Peterka's motion for judgment of acquittal is not error.

Finally, in addition to the above arguments, Appellee would contend that the record also indicates that the State adduced

sufficient evidence of premeditation to justify the judge allowing the jury to consider the case. This Court has, of course, held that evidence from which premeditation may be inferred includes, **inter alia**, the existence of previous difficulties between the parties, the nature of the weapon used and the nature and manner of the wounds inflicted. **See, e.g., Sireci v. State**, 399 So.2d 964 (Fla. 1981). In this case, Peterka used an extremely lethal weapon to commit his crime, **i.e.**, a .357 Magnum, armed, no doubt, with hollow point jacketed or semi-jacketed bullets. **Cf. Griffin v. State**, 474 So.2d 777 (Fla. 1985) (premeditation shown by fact, **inter alia**, that defendant used particularly lethal gun with jacketed bullets having a high penetrating ability). The victim in this case was killed by a single shot directly to the brain, executed at such close range that it literally caused the brain and skull to explode and shatter. **Cf. Sireci** (nature and manner of wound inflicted). Further, there was testimony that the victim and defendant did not have a good relationship (R 1184), and that, within the twenty-four hours preceding the murder, Russell had told various people that he intended prosecuting Appellant for forgery (R 1454-1457, 1435); he was simply awaiting receipt of the original forged check, such item necessary for prosecution, when he was killed. **Cf. Sireci** (previous difficulties between the parties).

Finally, the actions which Peterka took after the murder are certainly consistent with a premeditated plan, **i.e.**, cleaning up the duplex, burying the body in a remote spot a considerable

distance away and telling people that the victim had gone off with an unknown individual. **Cf. Blair v. State**, 406 So.2d 1103, 1107-1108 (Fla. 1981) (defendant's claim that he killed wife during argument and panicked, refuted by fact, **inter alia**, that he cleaned up evidence of crime, buried victim's body and told children that mother was in Miami). While the State also finds it reasonable to believe that the defendant's motive for killing the victim was to "assume his identity", a theory debunked by opposing counsel (Initial Brief at 27-31), the fact remains that the State presented sufficient evidence of premeditation to support the instant conviction of first degree murder. Accordingly, such conviction and sentence of death should be affirmed in all respects.

POINT IV

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE ADMISSION INTO EVIDENCE OF TESTIMONY CONCERNING THE NEBRASKA TELETYPE

As his next point on appeal, Peterka contends that the trial court erred when it allowed the admission into evidence of testimony concerning the contents of the Nebraska teletype regarding Appellant's status as a fugitive, **i.e.**, that he was considered "armed and dangerous." This testimony occurred during the State's direct examination of Deputy Harkins, the officer who had arrested Peterka and obtained his first statement. Harkins testified, without objection, that he had run Peterka's name and birthdate through the computer to check for outstanding warrants (R 1355). The following then took place:

Q. Allright. What's a hit?

> A. It came back with that same name and that same date of birth as being wanted as a fugitive from out of state, considered armed and dangerous.

(R 1355).

As noted in the Initial Brief, defense counsel objected to this testimony on hearsay grounds; while defense counsel also contended that admission of this testimony had been a violation of a prior rule **in limine**, it should be noted that that motion had been denied in its entirety (R 370-380). Judge Fleet overruled the hearsay objection, noting that the testimony was not being offered for the truth of its contents, but rather to explain the actions of the officer (R 1356). Defense counsel's motion for mistrial, on grounds of prejudice, was then denied (R 1357).

Harkins then continued testifying as to the events of the arrest, and during the course of this testimony, stated, over objection, that the information which he had received from Nebraska had given him reason to believe that Peterka would be in possession of a weapon or gun (R 1361, 1363-1364); in both instances, the inquiry was phrased so as to call for a yes or no answer, with the witness providing no elaboration (R 1361, 1363-1364). During defense counsel's cross-examination, he sought to impeach Harkins with alleged inconsistencies in his prior testimony, in regard to whether Peterka had in fact consented to the search of the house before the officers entered (R 1389-

1391).[5] On re-direct, Harkins testified, over objection, that he had asked Peterka for permission to search the house because he had been informed that the Nebraska charges involved a burglary in which firearms had been taken (R 1403); the admission of this last matter has **not** been raised in the Initial Brief. Prior to Harkins testimony on re-direct, the court instructed the jury,

> The jury's instructed that that's the only purpose for which you are to consider this answer of this witness is to show the reasons why he did a certain action and not for the purpose of proving the truth of the contents of the communications he received from Nebraska. (R 1402).

It is Appellant's contention on appeal that all of the above testimony was inadmissible hearsay which was unduly prejudicial to the defense. As to the question of whether or not the testimony was hearsay, the courts, in the past, would seem to have been divided. **Compare Lane v. State**, 430 So.2d 989 (Fla. 3rd DCA 1983) (no "BOLO" exception to hearsay rule; admission of testimony nevertheless harmless), **with Hulzberg v. State**, 523 So.2d 699 (Fla. 4th DCA), **cert. denied**, 531 So.2d 1353 (Fla. 1988) (not error for officer to testify that computer check indicated that vehicle driven by defendant had stolen tag, where defendant never charged with offense in regard to stolen tag, as

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[5] At the prior suppression hearing, defense counsel had asserted that the officers had tricked Peterka into leaving the house, so as to be able to arrest him, and that, further, he had not consented to the warrantless search; defense counsel also contended that there had been no exigency to authorize a search for weapons at that time (R 315-317, 329-330). Accordingly, the State had elicited testimony from Harkins in regard to the Nebraska teletype and the fact that it had indicated that Peterka was armed (R 16-18, 44); such testimony obviously explains why the deputy searched for weapons.

such testimony not hearsay). In **State v. Baird**, 15 F.L.W. S613 (Fla. November 29, 1990), this Court put the matter to rest, holding that it was not hearsay for an officer to testify that he received information to the effect that the defendant was a major gambler and operator of a gambling operation in the area, inasmuch as such testimony had not been offered for the truth of the matter. This Court then went on to hold, however, that although the evidence went toward the officer's motive for investigating the defendant, such was not a material fact at issue before the jury at the time the testimony was elicited. Any error was found to be harmless under **State v. DiGuilio**, 491 So.2d 1129 (Fla. 1986), in that admission of the testimony had simply been premature, and would have been proper had it come in on re-direct, following defense counsel's cross-examination on the subject. This Court concluded, that although the jury had not received a limiting instruction as to the manner in which it should consider the evidence, there was no reasonable probability that the verdict had been based upon admission of this testimony, in that the matter had never been brought to the jury's attention again, and, in that the State based its case on evidence which was properly before the jury.

Appellee respectfully submits that **Baird** is, in all respects, an instructive case. While the contested testimony therein differs somewhat from that at issue **sub judice**, in most other material respects, the cases are identical. As in **Baird**, it would appear that the State elicited this testimony during direct examination, because it anticipated, correctly, that the

defense would put the matter of the officer's motives at issue during cross-examination; again, as in **Baird**, the only error was that the evidence was introduced prematurely. Further, again, as in **Baird**, any error was harmless beyond a reasonable doubt under **DiGuilio**. The contents of the teletype, as well as its reference regarding Peterka as being "armed and dangerous", were never mentioned again during the trial, and neither defense counsel nor the prosecution referred to the matter during closing argument. Further, as in **Baird**, the State based its case upon evidence which was properly before the jury and, indeed, focused their attention on the murder itself. Finally, it must be noted that, in contrast to **Baird**, the jury in this case **was** given a limiting instruction, specifically being told that they were **not** to consider the evidence as going toward proving the truth of the contents of the Nebraska teletype (R 1402). As this Court noted in **Baird**, instructions of this type generally operate so as to limit the prejudicial effect of testimony such as that at issue. **Baird**, 15 F.L.W. at S614. While the instruction **sub judice** was given at the latter part of Harkins' testimony, there is no reason to believe that the jury did not regard this instruction as governing its consideration of all of the witness's testimony on this subject. **Baird** dictates that the instant conviction should be affirmed.

In applying the harmless error analysis under **DiGuilio**, the reviewing court looks to how the impermissible evidence might have influenced the jury's verdict, considering not only the evidence at issue but also the permissible evidence upon which

the jury could have legimitately relied; the focus is upon the effect of the alleged error upon the trier of fact. **See, e.g., State v. Lee**, 531 So.2d 133 (Fla. 1988). In pursuing this analysis, it is important to recognize the "boundaries" of the error asserted **sub judice**. Thus, Appellant is **not** arguing on appeal that admission of **any** testimony concerning his status as a fugitive is grounds for reversal. **Cf. Czubak v. State**, 570 So.2d 925 (Fla. 1990) (conviction reversed where irrelevant testimony concerning defendant's status as an escaped convict admitted). Indeed, Peterka could make no such argument, given the fact that his status as a fugitive was material and relevant, as going toward, **inter alia**, his motive for the offense. Further, at the time that the jury heard this testimony, they had already heard testimony from two other witnesses concerning the fact that Peterka had committed prior crimes in Nebraska and had fled before sentencing; indeed, during the testimony of the court clerk from Scottsbluff County, the State introduced into evidence complete case histories of Peterka's prior convictions (R 1134). This jury was likewise already aware, prior to the testimony of Deputy Harkins, that, in addition to being a fugitive, Peterka was armed, in that Gary Johnson had already testified as to his possession of the murder weapon (R 1213). **Cf. Jackson v. State**, 522 So.2d 862 (Fla. 1988) (*erroneous admission* of testimony concerning defendant's possession of firearms unrelated to homicide harmless error). Here, there is no reason to believe that the jury unduly speculated about Deputy Harkins' testimony concerning the Nebraska teletype in a manner so as to unduly

prejudice Peterka. Harkins' testimony did not distract the jury from the primary focus in this case and played no part in their ultimate rejection of Appellant's hypothesis of innocence. The instant conviction should be affirmed.

As opposing counsel notes in his brief, there would not seem to be a great deal of precedent directly on point in regard to this issue. Most of that which does exist pertains to the erroneous admission of what was deemed "collateral crime evidence". Appellee does not deem the instant claim of error as embracing such subject matter, in that, evidence of Peterka's fugitive status was material, relevant and properly admitted and, at most, Deputy Harkins simply offered some undue embellishment on an otherwise relevant subject. Thus, the claim at issue is not on a par with those involving the erroneous admission of a completely irrelevant subject.[6] Nevertheless, some of the following precedents, which involve the erroneous admission of collateral crime evidence, are relevant. The State would suggest that, in many respects, this case resembles **Henderson v. State**,

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[6] Because Appellee takes this position, the State does not regard as controlling such cases as **Keen v. State**, 504 So.2d 396, 401 (Fla. 1987), or **Castro v. State**, 547 So.2d 111, 115 (Fla. 1989), which provide that the erroneous admission of collateral crime evidence is "presumed harmful." Appellee would further question the continuing validity of this "presumption", which apparently derives from certain language in **Straight v. State**, 397 So.2d 903, 908 (Fla. 1981), in light of **DiGuilio**. The whole point of this Court's holding in **DiGuilio** was that all errors, including those previously deemed **per se** reversible, **i.e.**, comments upon a defendant's right to silence, would be subject to the same harmless error analysis. It hardly furthers the teachings of **DiGuilio** to now enshrine another type of error, **i.e.**, improper admission of collateral crime evidence, as somehow requiring a different type of analysis. As noted above, the **DiGuilio** standard for harmlessness has been satisfied in this case.

463 So.2d 196 (Fla. 1985). In such case, the jury heard testimony that, when the defendant turned himself in for the murders in question, he had also told the police that he was wanted in other states. This Court concluded that admission of this testimony had been error, but decided that such was harmless under the circumstances of the case. Those circumstances are quite comparable to the case **sub judice**. In **Henderson**, the defendant had murdered three hitchhikers and buried their bodies; the bodies were discovered when the defendant gave a statement to the police. This statement, however, like Peterka's, was not completely inculpatory, in that Henderson claimed that he had killed the victims because he was afraid that they were planning to kill him; at trial, the State persuaded the jury that this hypothesis of innocence was not reasonable and that evidence of premeditation existed. If, in **Henderson**, it was not reversible error for the jury to hear testimony concerning the defendant's status as a fugitive, which was totally irrelevant, it cannot be said **sub judice** that it was reversible error for this jury to have simply heard additional details as to Peterka's status as a fugitive, when such overall matter was properly admitted. **Henderson** dictates that the instant conviction should be affirmed. **See also Buenoano v. State**, 527 So.2d 194 (Fla. 1988) (new trial not required where witness irrelevantly testified that defendant committed unrelated arson for insurance purposes, where, **inter alia**, curative instruction given); **Robinson v. State**, 520 So.2d 1 (Fla. 1988) (new trial not required where officer testified that murder weapon obtained during unrelated

burglary; error harmless); **Fox v. State**, 543 So.2d 340 (Fla. 1st DCA 1989) (reference to unrelated firearm charge against defendant harmless error); **Kothman v. State**, 442 So.2d 357 (Fla. 1st DCA 1983) (witness's reference to outstanding warrant from another state, irrelevant to prosecution, not grounds for reversal).

Thus, opposing counsel's belief that the jury in this case convicted Peterka because they regarded him as "a desperate fugitive" or, more exactly, because they heard that someone else might have regarded him in such a light, is simply not supported by the record. In contrast to the cases cited above, the testimony at issue did not impermissibly bring to the jury's attention a matter totally collateral to the proceeding. Furthermore, because the jury did learn the true nature of Peterka's prior convictions, which did not involve violence, there is not reason to believe that they engaged in prejudicial speculation. This one slip of the tongue by Deputy Harkins did not doom this prosecution or vitiate the entire trial, such that defense counsel's motion for mistrial should have been granted. **See Buenoano, supra; Duest v. State**, 462 So.2d 446 (Fla. 1985); **Ferguson v. State**, 417 So.2d 639 (Fla. 1982). Because any error was harmless beyond a reasonable doubt, under **State v. DiGuilio, supra**, the instant conviction of first degree murder should be affirmed in all respects.

POINT V

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE ADMISSION INTO EVIDENCE OF TESTIMONY CONCERNING RUSSELL'S FEAR OF PETERKA AND HIS INTENTION NOT TO CONFRONT APPELLANT ABOUT THE STOLEN MONEY ORDER

As his next point on appeal, Peterka contends that it was reversible error for the State to have introduced, through the testimony of witnesses Deborah Trently, Kimberly Cox and Lori Slotkin, evidence to the effect that Russell had stated, in proximity to the murder, that he did not intend to confront Peterka about the stolen money order, in that he was afraid to do so while Appellant had a gun; Russell also stated that he intended to wait for the bank to reobtain the original copy of the money order so that the police could handle prosecution of the case (R 1435, 1457, 1605). Prior to the testimony of these witnesses, the judge instructed the jury that they were to consider the testimony only for the purposes of tending to prove the state of mind of the victim, John Russell (R 1433, 1452, 1604).[7] Appellant contends that admission of this evidence was error, under such precedents as **Fleming v. State**, 457 So.2d 499 (Fla. 2nd DCA 1984), **Hunt v. State**, 429 So.2d 813 (Fla. 2nd DCA 1983), and **Kingery v. State**, 523 So.2d 1199 (Fla. 1st DCA 1988), which provide that, in general, evidence of the state of mind of the victim in a homicide is irrelevant. **See also Kennedy v. State**, 385 So.2d 1020 (Fla. 5th DCA 1980); **Bailey v. State**, 419

[7] Although opposing counsel makes reference to the testimony of Gary Johnson in this regard (Initial Brief at 39), the record indicates that, in fact, the judge excluded this testimony after a proffer (R 1602).

So.2d 721 (Fla. 1st DCA 1982). Appellant concedes that there are exceptions to the above general rule, but asserts that none of them apply **sub judice**.

Appellant is simply incorrect. The error in many of the above cases was that the State tried to use evidence of the victim's state of mind to prove the defendant's state of mind. **See, e.g., Hunt, supra.** Obviously, such was error, in that statements of the victim can only prove his own state of mind. In this case, Appellant's contentions notwithstanding, Russell's state of mind was squarely at issue and Peterka himself put it there. Peterka, through his statement to the police, contended that the victim had initiated the fatal fight by confronting Appellant about the stolen money order (R 2442, 2445). Obviously, in light of this position taken by Peterka, it was highly relevant whether or not the victim had ever stated that he was in fear of the defendant, as such would be totally inconsistent with the defense theory that the victim had been the aggressor. **See, e.g., United States v. Brown**, 490 F.2d 758, 768-774 (D.C. Cir. 1973) (discussion of precedent, including that holding that, when self-defense asserted by defendant, evidence that victim feared defendant properly admitted). The jury in this case was instructed on self-defense (R 1824-1825). Accordingly, this testimony regarding Russell's fear of Peterka was relevant and properly admitted.

Brown also recounts that testimony regarding the victim's state of mind is relevant when the claim is made that an accidental shooting has taken place,

> In such cases the deceased's statements of fear as to guns **or of the defendant himself** (showing that he would never go near defendant under any circumstances) are relevant, in that they tend to rebut this defense.

Brown, 490 F.2d at 767 (emphasis supplied).

Thus, it was indeed relevant, and proper, for the jury to hear that Russell had previously stated that he did not intend to confront Peterka, because of the presence of the gun, in that such statement was inconsistent with any defense theory that the shooting had been accidental, following a confrontation initiated by the victim. The jury in this case was instructed on all forms of excusable homicide (R 1825). In contrast to the testimony apparently at issue in **Hunt, supra**, there was no testimony by anyone that Russell had stated that the defendant intended to kill him; Appellee can see why courts would specially scrutinize testimony of such nature. Here, however, because the defense contended that the homicide had occurred during an accident and during a fight initiated by the victim, statements by the victim which indicated that he was afraid of the defendant and would not confront him due to the presence of the gun were relevant and properly admitted under §90.803(3)(a)(1), Fla.Stat. (1987).

There is, however, an even more compelling reason why the statements at issue were properly admitted. The statements were properly admitted under §90.803(3)(a)(2), Fla.Stat. (1987), in that the testimony went toward Russell's intent, i.e., his intent not to confront Peterka and to let the authorities handle the prosecution of the forgery. The principle of law to the effect that a statement of intent to do an act in the future is

admissible as circumstantial evidence to infer that the act was done is almost a century old, and stems from the case, **Mutual Life Insurance Company v. Hillmon**, 145 U.S. 285, 12 So.2d 909, 36 L.Ed.2d 706 (1892). This most certainly is the law in Florida. **See, e.g., Erhardt**, Florida Evidence §90.803. 3b (West 2nd Ed. 1984) at 479 ("**Hillmon** is the landmark decision for the rule that prior and contemporaneous statements of intent are admissible to prove the person did the act which they said they were going to do; it is included within §90.803(3)(a)(2)."); Committee Notes following §90.803(3) ("Generally, the statement of then existing state of mind is admissible to show that the declarant did certain acts which he intended to do."). Additionally, this principle has been specifically applied in a number of different contexts. **See, e.g., Bowen v. Keen**, 17 So.2d 706 (Fla. 1944) (statement by a person since deceased as to the purpose and destination of a trip admissible); **Jenkins v. State**, 422 So.2d 1007 (Fla. 1st DCA 1982) (statement in which victim had said that he intended to "straighten defendant out" admissible in prosecution for aggravated battery, where self-defense claimed); **Jones v. State**, 440 So.2d 570 (Fla. 1983) (defendant's statement, week prior to murder, that he intended to "kill a pig" admissible in subsequent prosecution for homicide of policeman under §90.803(3)(a)(2)); **Morris v. State**, 487 So.2d 291 (Fla. 1986) (statement by third party that informant had said that he intended to "set up" defendant admissible in support of defendant's claim of entrapment, under §90.803(3)(a)(2)). In light of these precedents, it is clear that this testimony was

admissible, as it flatly contradicted Peterka's claim that the victim initiated the conflict by confronting him over the stolen money order. Further, the statements introduced possessed sufficient indicia of trustworthiness, under §90.803(3)(b)(2), Fla.Stat. (1987). It is difficult to conceive of any reason why Peterka would have lied to Kimberly Cox, the bank employee whose job it was to help persons such as he initiate forgery prosecutions. The instant conviction should be affirmed in all respects.

In conclusion, the State would simply submit that, Appellant's contentions notwithstanding, this case does have similarities to **Peede v. State**, 474 So.2d 808 (Fla. 1985), in which this Court held that the victim's statement that she was afraid of the defendant was admissible when her state of mind was at issue; Peede was charged with kidnapping, and the victim's state of mind, in regard to whether she would have consented to get into the car with him, was relevant. **See also Jennings v. State**, 512 So.2d 169 (Fla. 1987) (child victim's statement that she looked forward to being in school play on day of homicide relevant to show that she would not have left home willingly). These holdings cannot be limited to felony murder prosecutions based upon kidnapping; the victim's state of mind **sub judice** was relevant, and proper evidence was adduced to place the matter before the jury. Further, Appellee would note that, in other capital cases, this Court has twice found errors of this nature to be harmless, despite the allegedly prejudicial nature of this type of testimony. **See, e.g., Correll v. State**, 523 So.2d 562

(Fla. 1988); **Downs v. State**, 16 F.L.W. S166 (Fla. January 18, 1991). To the extent that a harmless error analysis is required **sub judice**, the State would submit that reversal is not required under **DiGuilio**, given, **inter alia**, the evidence against Peterka. The instant conviction of first degree murder should be affirmed in all respects.

POINT VI

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE ADMISSION INTO EVIDENCE OF A PHOTOGRAPH OF THE VICTIM'S SKULL

As his final attack upon the conviction in this case, Peterka contends that he entitled to a new trial, because, near the close of the State's case, the State introduced Exhibit #36, a photograph of the victim's skull (R 1702). As Appellant notes, the State had earlier sought to admit seven photographs (Exhibits #31-37), including this exhibit, during the testimony of the medical examiner, Dr. Kielman (R 1203-1207). At this point, defense counsel objected to two of the photographs (Exhibits #34 & #35), on the grounds of gruesomeness, and the State pointed out that the witness could, instead, testify using the skull itself (R 1203-1206). Judge Fleet then directed defense counsel to choose which, in his opinion, would be less prejudicial, the photographs or the skull itself (R 1205-1207). It is important to note that, at this point, defense counsel had interposed no specific objection to Exhibit #36, and that his "choice" was apparently between the skull and Exhibits #34 and #35 (R 1205-1206). Defense counsel conferred with Peterka, and announced that the defense preferred that the skull be introduced itself (R

1206). After this announcement, defense counsel stated that he objected to Exhibits #36 and #37 on grounds of prejudice, and such objection was sustained (R 1207); the judge excluded Exhibits #34, #35, #36 and #37 at this time.

Dr. Kielman did, in fact, utilize the skull during his testimony, showing the jury the exact location of the entrance wound, the black ridging around it, and the location where he felt that the bullet had exited (R 1218, 1222-1234); the expert also used some photographs which defense counsel had not found objectionable (R 1203, 1216-1227). During his testimony, the witness stated that he had best been able to determine the distance from which the fatal shot had been fired by studying the skull itself, inasmuch as the scalp area had decomposed by that time (R 1219). Toward the end of the State's case in chief, the prosecutor contended that some of the earlier photographs had become relevant, due to the testimony of a subsequent witness (R 1699-1703).[8] Judge Fleet ruled that Exhibit #36 would be admitted, but sustained defense counsel's objections as to Exhibits #34, #35, #37 and #38 (R 1702). Defense counsel's objections were based on the gruesome nature of the photographs and the fact that the "body was not in the condition in which it was found." (R 1702).

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[8] The prosecutor pointed to the subsequent testimony of Donald Champagne, the firearms expert, in this regard (R 1701). While there is a lengthy examination of this witness, in regard to the difficulties which one might experience in determining the presence of powder on decomposing skin (R 1566-1570), it would appear that this examination was conducted by the prosecutor, as opposed to defense counsel.

Peterka contends on appeal that his conviction of first degree murder must be reversed, because, in allowing the admission into evidence of this one photograph, the judge denied him his Sixth Amendment right to confrontation (Initial Brief at 46). Appellee would contend that this claim is not preserved for appeal, in that such was not the basis of defense counsel's objection below. It is well established that a defendant cannot object to the admission of evidence on one ground at trial, and then present another argument on appeal. **See, e.g., Bertolotti v. Dugger**, 565 So.2d 1343, 1345 (Fla. 1990) (specific legal ground upon which a claim is based must be presented to the trial court in order to preserve an issue for appeal); **Tillman v. State**, 471 So.2d 32 (Fla. 1985); **Steinhorst v. State**, 412 So.2d 332 (Fla. 1982). Accordingly, because defense counsel below never alerted the judge that he was asserting a violation of the Sixth Amendment, or any need to re-examine the pathologist, Dr. Kielman, this point is procedurally barred; the State does not regard defense counsel's observation that the body was not in the same condition in which it was found as sufficient "notice" to the trial court that a confrontation claim was being asserted. Appellee would note that at the time this objection was made, the State had not yet rested its case (R 1702, 1719). Had defense counsel asserted a need to re-examine Dr. Kielman, the court below certainly could have afforded him that opportunity, if it had deemed such to be necessary. Inasmuch as Appellant provided the court below with no adequate opportunity to cure any error in this regard, this point on appeal must be regarded as waived.

See, e.g., Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979) (appellate court will not indulge in presumption that trial court would have made erroneous ruling, had objection been made and pertinent legal authorities cited).

Assuming that any claim of error is presented in regard to the admission of this photograph on grounds of prejudice, the State would maintain that reversal is not warranted. This is not the first capital case in which the victim's skull has been introduced into evidence or utilized by an expert witness during testimony, **see, e.g., Larmon v. State**, 81 Fla. 553, 88 So. 471 (1921), **Stone v. State**, 378 So.2d 765 (Fla. 1979), nor, of course, is this the first capital case in which photographs of the victim's skeletal or decomposing remains were introduced. **See, e.g., Straight v. State**, 397 So.2d 903 (Fla. 1981); **Welty v. State**, 402 So.2d 1159 (Fla. 1981); **Henderson v. State, supra; Grossman v. State**, 525 So.2d 833 (Fla. 1988). Given the relevance of the location and nature of the fatal wound in this case, as well as the significance of the path of the bullet, these exhibits were unpleasant necessities. **See, e.g., Turner v. State**, 530 So.2d 45 (Fla. 1987) (tape recording of murder, including victim's screams, relevant to prove premeditation). The fact that this one photograph was admitted, as well as the skull, did not amount to overkill; although the skull was admitted, the photograph would certainly have been a more practical item for the jury to utilize, if necessary, during their deliberations. This case is distinguishable from **Czubak, supra**, in which this Court found that the trial court had erred

in admitting numerous totally irrelevant photographs of the victim's body, where, **inter alia**, the photographs did not reveal the location of any wounds and were not probative as to the cause of death.

It is well established that the admission of photographic evidence is within the trial court's discretion and that a court's ruling thereon not be disturbed on appeal unless a clear abuse of discretion has been shown. **See Duest, supra.** No abuse of discretion has been shown **sub judice**, and, to the extent that any error existed, such is harmless under **DiGuilio.** The instant conviction of first degree murder should be affirmed in all respects.

POINT VII

PETERKA IS NOT ENTITLED TO A LIFE SENTENCE, ON THE BASIS OF ANY LACK OF CLARITY IN THE SENTENCING ORDER SUB JUDICE

As his first attack upon his sentence of death, Peterka contends that, due to alleged lack of clarity in regard to the sentencing judge's findings in aggravation, he is entitled to a life sentence, under such precedents of this Court as **Van Royal v. State**, 497 So.2d 625 (Fla. 1986). Appellee would contend that this case is distinguishable from **Van Royal**, and that Appellant is not entitled to have his valid sentence of death overturned on the basis of this technical argument.

This Court reversed the sentence of death in **Van Royal** because the record on appeal did not contain **any** written sentencing findings at all. The judge in that case had orally announced at sentencing that he would impose the death penalty,

and override the jury's recommendation of life, but only after jurisdiction had vested in this Court, was a formal sentencing order prepared. This Court concluded that that sentencing order was not properly before it, and found the omission of specific findings particularly critical, given the fact that the case was a jury override. This case bears no similarity to **Van Royal**, or to the more recent case of **Bouie v. State**, 559 So.2d 1113 (Fla. 1990), in which the sentence of death had to be reduced to life imprisonment, due to a complete failure on the part of the sentencing court to comply with §921.141(3), Fla.Stat. (1989). In **Bouie**, the judge had simply stated orally that the unenumerated aggravating circumstances outweighed the unenumerated mitigating circumstances. In this case, the record on appeal contains a sentencing order which specifically delineates the aggravating circumstances found (R 2077-2078), and **Van Royal** and **Bouie** are not applicable; the order was filed the same day as the sentencing proceeding (R 1077-1078; 2440-2450).

Given the fact that a sentencing order does exist, Peterka's complaint, in essence, relates to its sufficiency. While it is indisputable that in **Mann v. State**, 420 So.2d 578, 581 (Fla. 1982), this Court held that a trial judge's findings in regard to the death sentence should be of unmistakable clarity, this Court also recognized in **Holmes v. State**, 374 So.2d 944, 950 (Fla. 1979), that there is no prescribed form for the sentencing order containing the findings of aggravating and mitigating circumstances. When this Court has been unable to determine that the death sentence imposed was the result of reasoned judgment,

this Court has remanded the cause to the circuit court for reconsideration and for redrafting of the sentencing findings. **See, e.g., Lucas v. State**, 568 So.2d 18 (Fla. 1990). This is the most relief that Peterka would be entitled to **sub judice**, but Appellee would maintain that he is not even entitled to that.

The State suggests that the sentencing order in this case clearly indicates that the instant sentence of death was the result of reasoned judgment on the part of the sentencer. Judge Fleet has specifically identified the aggravating circumstances which he found, and, preceding their listing, the judge has set forth a lengthy recitation of the facts which he found to have been proven beyond a reasonable doubt (R 2077-2078); the fact that he did not match up each aggravating circumstance with its formal factual predicate should not fatally flaw the sentencing order at bar. Further, the judge specifically identified the statutory mitigating circumstance which he found applicable; Peterka's claim involving nonstatutory mitigation is discussed in Point X, **infra**. Because this Court is in a position to meaningfully review the instant sentence of death, Appellant is not entitled to have his sentence reduced to one of life imprisonment. The instant sentence of death should be affirmed in all respects.

POINT VIII

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE SENTENCER'S FINDING THAT THE HOMICIDE WAS COMMITTED FOR PURPOSES OF HINDERING ENFORCEMENT OF THE LAWS, PURSUANT TO SECTION 921.141(5)(g)

In sentencing Peterka to death, Judge Fleet found five aggravating circumstances - that the homicide had been committed by one under sentence of imprisonment, §921.141(5)(a), Fla.Stat. (1987); that the homicide had been committed for purpose of avoiding arrest, §921.141(5)(e), Fla.Stat. (1987); that the homicide had been committed for pecuniary gain, §921.141(5)(f), Fla.Stat. (1987); that the homicide had been committed to disrupt or hinder the lawful exercise of any governmental function or th enforcement of the laws, §921.141(5)(g), Fla.Stat. (1987), and that the homicide had been committed in a cold, calculated and premeditated manner, §921.141(5)(i), Fla.Stat. (1987) (R 2077-2078). On appeal, Peterka challenges the finding of only two of the above aggravating circumstances, those under §§921.141(5)(f) & (g).[9] In regard to the latter circumstance, Appellant contends that the finding of this aggravating factor was error, in that, allegedly, there was an insufficient showing that the

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[9] In the Initial Brief, opposing counsel complains that, due to the alleged inadequacy of the sentencing order, see Point VII, he is unable to attack on appeal the sentencer's finding of various aggravating circumstances (Initial Brief at 51, 54). The raising of the instant point on appeal, as well as that immediately following, see Point IX, infra, obviously would seem to belie such contention. Appellant's failure to attack on appeal the other three aggravating circumstances must be read as a concession that such were proven beyond a reasonable doubt below.

instant homicide had been committed for purposes of disrupting any governmental function. Appellee disagrees.

Given the fact that this aggravating circumstance is often found in accompaniment with that under §921.141(5)(e), that relating to a homicide having been committed for purposes of avoiding arrest, it is instructive to review the evidence which supports both of these aggravating circumstances; as noted above, however, Appellant has made no specific challenge to the sentencer's finding that the instant homicide was committed for purposes of avoiding arrest. If there is one thing that is beyond peradventure in this case, it is Daniel Peterka's great fear of going to prison. He told his Nebraska girlfriend of this, hours before he failed to surrender himself to the authorities and fled the state (R 1148). He told his Florida girlfriend of this, hours after he killed the victim in this case (R 1612-1613). At the sentencing proceeding, there was testimony offered to the effect that for Appellant, incarceration would be the harshest penalty (R 1884). When one keeps this central fact in mind, all of the rest of Peterka's actions makes sense. Thus, after his flight from Nebraska, one of the first things that he did, upon arriving in Florida, was to persuade Ronald LeCompte to sign a bill of sale for a gun that Peterka wished to purchase in Niceville (R 1573); Peterka told LeCompte, untruthfully, that he did not have any identification. This subterfuge on Peterka's part paid off, in that when the police initially searched the house and found the handgun, Appellant was able to convince them that he had a right to possess it, given the bill of sale; the

officers, thus, did not immediately realize that they held in their hands the murder weapon in this case.

After moving in with Russell, Peterka then took steps to acquire his roommate's identity. Peterka began by obtaining a duplicate driver's license in Russell's name, with his own picture on it; he then used this driver's license to cash a money order which he had stolen from the victim, forging Russell's name on it. Appellant concedes these actions in his own statement (R 2445-2446). At the time that he was arrested, Peterka had in his possession, in addition to the doctered driver's license, other items of identification belonging to the victim, such as his social security card, his bank identification card and his video club identification card. If, as Peterka contends, the victim "voluntarily" allowed Peterka to use his identity to obtain a driver's license, then one must wonder why, two weeks after Peterka's acquisition of the license, Appellant **still** had in his possession so many other items of identification belonging to the victim; the undersigned respectfully submits that it is not reasonable that an individual would part with his own social security card and bank identification card for an indefinite period of time. Alternatively, if Peterka's primary motivation in obtaining the driver's license was simply to "cover himself" if he was ever stopped while driving one of his employer's vehicles, then one must wonder why he held on to the victim's social security and bank identification cards. Peterka's contentions that Russell was a voluntary participant in this scheme or that these events are irrelevant to the homicide are simply implausible.

Further, there was testimony to the effect that, in relative proximity to the murder, Peterka had told a friend that "if everything went the way he wanted it to", he would be going back up north (R 1592); at the time of his arrest, a newspaper clipping was found in his wallet advertising jobs in Alaska (R 1376-1377). In his statement, which was introduced into evidence, Peterka contended that the victim had watched the mail everyday for the money order, which Peterka, of course, ended up stealing (R 2445); although there is no direct testimony to the effect that Peterka knew of this, there was also significant testimony adduced that, within the twenty-four hours prior to his murder, John Russell had stated that he intended to have Peterka prosecuted for forgery, although he did not intend to confront Peterka immediately (R 1605, 1453-1457, 1435).

If one were to focus upon Peterka's state of mind at the time of the murder, one would see a man who was an interstate fugitive, and who had continuously been adamant about his desire not to go to prison. Similarly, one would see a man who, while knowing that his roommate was eagerly expecting a money order, had stolen that money order, forged his roommates signature upon it, cashed it and pocketed the proceeds. On the afternoon of July 13, 1989, Daniel Peterka was already a wanted man in Nebraska, and he must have known that it was only a matter of time before he became a wanted man in Florida as well, on charges of forgery or theft. Accordingly, Daniel Peterka needed a way to extricate himself from these twin dilemmas, and, by means of a single well-placed bullet, he found it. Thus, with one fatal

shot, Peterka eliminated forever the complaining witness in any Florida forgery prosecution and, through that same action, removed an obstacle to his continued freedom from the Nebraska charges. With a move to yet a third location, Peterka's assumption of Russell's identity, a part which he had already play-acted, could become permanent. Judge Fleet did not err in finding that the homicide had been committed for purposes of hindering enforcement of the laws.

This Court has previously held that the facts in a given capital case can give rise to multiple aggravating factors, as long as the factors themselves are separate and distinct and not merely restatements of one another. **See Echols v. State**, 484 So.2d 568, 575 (Fla. 1985). Accordingly, in a number of cases, this Court has affirmed a sentencer's finding, not only that the homicide has been committed for purposes of avoiding arrest, but also that that same homicide has been committed for purposes of hindering enforcement of the laws, where different factual predicates are involved. **See, e.g., Tafero v. State**, 403 So.2d 355, 362 (Fla. 1981) (finding of both factors proper, where one based upon defendant's avowed intention never to go back to prison, and the other based upon the fact that the victims were about to arrest the defendant); **Provenzano v. State**, 497 So.2d 1177, 1183-1184 (Fla. 1986) (finding of both factors proper, where one based upon fact that defendant killed victim to avoid arrest for prior crime, and other based upon fact that defendant committed crime to disrupt trial). Because there are separate factual predicates **sub judice**, i.e., Peterka's intention to avoid

arrest for the Nebraska charges and his desire to preclude prosecution on any Florida charges, the finding of both of these aggravating circumstances was not error.

To the extent that this Court disagrees, Appellee would simply note that any error would be harmless, and that the "merger" of these two aggravating factors would have no effect upon the weighing process or the validity of the death sentence **sub judice**; it is, of course, well established that capital sentencing in Florida involves a weighing, as opposed to a mere counting, process. Indeed, such has been this Court's holding, when it has "merged" the two aggravating circumstances at issue, in prior cases. **See, e.g., Jackson v. State**, 498 So.2d 406, 411 (Fla. 1986); **Kennedy v. State**, 455 So.2d 351 (Fla. 1984); **Thomas v. State**, 456 So.2d 454 (Fla. 1984) (double recitation harmless error, even where jury recommended life). Although, as noted, Appellant would not seem to have made any express challenge to the sentencer's finding that the instant homicide had been committed for purposes of avoiding arrest, Appellee would simply note, at this juncture, that such factor was unquestionably proven beyond a reasonable doubt. It is well established that such aggravating circumstance can properly be found even where arrest is not "imminent at the time of the murder", **see Swafford v. State**, 533 So.2d 270, 276 (Fla. 1985), and this Court has approved the finding of this factor where the defendant's motive for killing the victim was to prevent his arrest on an antecedent crime. **See, e.g., Bryan v. State**, 533 So.2d 744, 748-749 (Fla. 1988) (circumstance properly found, where defendant, "a wanted

bank robber", killed victim to ensure that he would not report defendant's subsequent kidnapping and robbery); **Grossman v. State**, 525 So.2d 833, 840 (Fla. 1988) (aggravating circumstance properly found, where defendant on parole on time of offense and where defendant was afraid that victim, a wildlife officer, would report his commission of a subsequent burglary); **Johnson v. State**, 465 So.2d 499, 506-507 (Fla. 1985) (circumstance properly found, where defendant was on parole and afraid that victim would inform on him in regard to use of illegal drugs or robbery); **Tafero, supra** (circumstance properly found, where defendant on parole and fugitive from justice, and victim subsequently sought to arrest defendant on firearm and drug charges, following automobile stop). Under all of the circumstances of this case, the finding of this aggravating circumstance was not reversible error, and the instant sentence of death should be affirmed in all respects.

POINT IX

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE SENTENCER'S FINDING THAT THE INSTANT HOMICIDE WAS COMMITTED FOR PECUNIARY GAIN, PURSUANT TO SECTION 921.141(5)(f)

As his next point on appeal, Peterka contends that his sentence of death must be reversed, because the sentencer committed reversible error in finding that the homicide had been committed for pecuniary gain, under §921.141(5)(f), Fla.Stat. (1987). Appellant contends that the State presented "no evidence Peterka had stolen any money or anything else from Russell" (Initial Brief at 57), and further states that, given the

"temporal separation" between the incident involving the stolen money order and the murder, this aggravating circumstance had no application. The State disagrees.

Initially, it must be noted that Appellant is entirely incorrect in stating that the prosecution adduced no evidence to the effect that Peterka had stolen anything from Russell. In Peterka's own statement, he admitting stealing, forging, and cashing the money order in question (R 2444-2445). Further, Appellant's complaints concerning the "temporal separation" of the theft and the murder are unpersuasive. While it is true that this Court has reversed the finding of this aggravating circumstance, where it has appeared that the defendant's theft of various items from the victim was simply an "afterthought", unrelated to the homicide, **see, e.g., Hill v. State**, 549 So.2d 179 (Fla. 1989), such cases have nothing in common with the situation **sub judice**.

In this case, the theft preceded the homicide and, from all of the circumstances of this case, it would appear that the theft, in effect, necessitated the homicide. As noted earlier, Appellant knew that the victim was expecting the arrival of this check; he nevertheless stole it, forged the victim's signature, impersonating the victim, and cashed it. Peterka killed the victim in this case, not only so that his theft would not be discovered (after two weeks, Peterka must have been beginning to worry), but also so that Appellant could keep the proceeds; the taking of this three hundred dollars ($300) was not integral to Peterka's avoidance of arrest in regard to the Nebraska charges.

Accordingly, the fact that Peterka was found with four hundred and seven dollars ($407) in his wallet is, in fact, highly relevant. The finding of this aggravating circumstance was not error. **See, e.g., Thompson v. State**, 553 So.2d 153 (Fla. 1989) (aggravating circumstance properly found, even though homicide partially motivated by revenge, and defendant stated that he did not care about money involved); **Rutherford v. State**, 545 So.2d 853 (Fla. 1989) (aggravating circumstance properly found, in case where defendant planned to force victim to write check and then kill her, even though, in fact, check never written); **Hildwin v. State**, 531 So.2d 124 (Fla. 1988) (aggravating circumstance properly found where defendant forged one of victim's checks after murder); **Craig v. State**, 510 So.2d 857 (Fla. 1987) (aggravating circumstance properly found where defendant killed victims because he was afraid that they would discover his ongoing thefts of cattle from a ranch where they were employed).

Appellee would contend that, even if the finding of this aggravating circumstance was error, any such error would be harmless. Such conclusion would be particularly applicable, if, in fact, this Court, in effect, merges this aggravating circumstance with any other found; as noted, such merger has no effect upon the weighing process. **See Jackson v. State, supra.** There was, in any event, adequate evidence to at least support a jury instruction on this factor, and no basis exists to vacate the instant sentence of death due to the instruction alone. **Cf. Jones v. State**, 569 So.2d 1234 (Fla. 1990) (error to instruct jury on heinous, atrocious and cruel aggravating circumstance,

where no evidentiary support existed). It is clear that the erroneous finding of an aggravating circumstance can be harmless error, even where mitigation has been found to exist. **See, e.g., Holton v. State**, 16 F.L.W. S136 (Fla. January 15, 1991); **Robinson v. State**, 16 F.L.W. S107 (Fla. January 15, 1991); **Rivera v. State**, 561 So.2d 536 (Fla. 1990); **Hamblen v. Dugger**, 546 So.2d 1039 (Fla. 1989); **Bassett v. State**, 449 So.2d 863 (Fla. 1984). In this case, it can be said, in light of the existence of at least three valid aggravating circumstances, and the relative paucity of mitigation, that exclusion of this aggravating circumstance from the weighing process, as well as that attacked in Point VIII, **supra**, creates no reasonable likelihood that the sentencer would have imposed a different sentence, or found that the valid aggravating circumstances were outweighed by the single finding in mitigation. **See Rogers v. State**, 511 So.2d 526, 535 (Fla. 1987).

This was an extremely premeditated crime, committed by one under sentence of imprisonment, who wanted, at all cost, to avoid arrest and detection. In finding the existence of mitigation, the sentencer gave Peterka the benefit of a very large doubt. Apparently because none of Peterka's **twenty-eight** prior convictions involved violence, the judge found that Appellant lacked a significant history of prior criminal activity; as argued in Point X, **infra**, it certainly would not have been error for the judge to have rejected this mitigating factor under the circumstances. In any event, in contrast to the vast majority of capital defendants who come before this Court, Peterka has never

offered any evidence to the effect that he suffers from any alleged mental or emotional disorder, that he has low intelligence or that he suffered an abused childhood. Rather, the focus of Peterka's offerings in mitigation at the penalty phase was in the nature of "good boy testimony", which the jury was entitled to afford little weight; of course, the jury's recommendation of death itself is entitled to great weight. **See Grossman, supra; Smith v. State**, 515 So.2d 182 (Fla. 1987). Accordingly, any error committed in the sentencer's findings in aggravation is harmless beyond a reasonable doubt.

Additionally, although Appellant has not specifically raised this point, Appellee would contend that the instant death sentence is not disproportionate. While it would not seem that the annals of Florida's capital cases contain a homicide which is "on all fours" with that committed **sub judice**, it still must be recognized that a convicted felon who kills a completely innocent person, simply so that he can continue to avoid arrest and apprehension in regard to his prior crimes has committed a crime which warrants the imposition of the death penalty. Considering the relative strength of the findings in aggravation, and in mitigation, death is the appropriate sentence in this case. **See, e.g., Brown v. State**, 565 So.2d 304 (Fla. 1990) (death sentence proportional where three valid aggravating circumstances outweighed findings in mitigation in regard to defendant's mental capacity, mental and emotional distress and non-violent past); **Hudson v. State**, 538 So.2d 829 (Fla. 1989) (death sentence proportional where two valid aggravating circumstances outweighed

three statutory mitigating circumstances). This case, perhaps, most resembles those cited in the previous point, involving homicides committed by defendants, either on parole or simply on the run, who wished to avoid detection at all costs. **Cf. Grossman, supra.** Peterka has failed to demonstrate any basis for reversal of his sentence of death, and the instant sentence should be affirmed in all respects.

POINT X

PETERKA'S SENTENCE OF DEATH SHOULD NOT BE REVERSED ON THE BASIS OF THIS COURT'S RECENT DECISION, CAMPBELL v. STATE, 571 So.2d 415 (Fla. 1990), IN THAT THE SENTENCER DID NOT "IGNORE" ANY VALID NONSTATUTORY MITIGATION, SUPPORTED BY THE RECORD

As his next attack upon his sentence of death, Peterka argues that such should be reversed, on the basis of this Court's recent decision, **Campbell v. State**, 571 So.2d 415 (Fla. 1990). Appellant contends that, not only does the sentencing order not sufficiently discuss the nonstatutory mitigation allegedly presented, but that Judge Fleet allegedly "ignored" nonstatutory mitigation. Peterka, accordingly, contends that he is entitled to be resentenced. Appellee disagrees in all respects.

This Court held in **Campbell** that a sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature; similarly, the court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been

reasonably established by the greater weight of the evidence. **Campbell**, 571 So.2d at 419. The State recognizes that the sentencing order in this case would not seem to fully comply with the requirement of **Campbell** involving express discussion of each proposed mitigating factor; the order finds one statutory mitigating circumstance, that Peterka did not have a significant history of prior criminal activity, §921.141(6)(a), Fla.Stat. (1987), but then relates, "While there was evidence tending to show other mitigating circumstances, the Court did not find any to exist." (R 2078). Appellee would respectfully note, however, that at the time that the sentencing order was prepared in this case, i.e., April 25, 1990, the judge did not have the benefit of this Court's decision in **Campbell**. The State would contend that **Campbell** should not be applied retroactively, in that, at the time of sentencing, the law was to the effect that nonstatutory mitigation did not have to be expressly addressed in sentencing orders. **See, e.g., Mason v. State**, 438 So.2d 374 (Fla. 1983); **Brown v. State**, 473 So.2d 1260 (Fla. 1985); **Woods v. State**, 490 So.2d 24 (Fla. 1986). This Court has previously held that other refinements in the capital sentencing procedure would have prospective application only, **see, e.g., Jackson v. State**, 502 So.2d 409 (Fla. 1986), **Grossman, supra**, and the State would suggest that **Campbell** should be treated in a similar manner. Appellee would also note that this Court has not found every alleged violation of **Campbell** to merit relief, **see, e.g., Downs v. State**, 16 F.L.W. S55 (Fla. January 3, 1991), and would suggest that reversal would be particularly inappropriate **sub judice**, in

that it cannot be said that any valid nonstatutory mitigation was sufficiently proven in this case.

In the second "prong" of its **Campbell** holding, this Court, as noted, held that the sentencer must find as a mitigating circumstance each proposed factor that is mitigating in nature and which has been reasonably established by the greater weight of the evidence. The undersigned must respectfully question the notion of "mandatory mitigation", and would contend that such is directly contrary to this Court's prior precedents. **See, e.g., Porter v. State**, 429 So.2d 293, 296 (Fla. 1983) ("There is no requirement that the court find anything in mitigation."). This Court has repeatedly upheld a sentencer's failure to find in mitigation such nonstatutory factors as a defendant's abused childhood, low intelligence or status as a "good family man or employee", when, under the facts of the given case, such was not appropriate. **See, e.g., Kight v. State**, 512 So.2d 922 (Fla. 1987); **Tompkins v. State**, 502 So.2d 415 (Fla. 1987). Further, there is nothing in either **Lockett v. Ohio**, 438 U.S. 586, 98 S.Ct. 2958, 57 L.Ed.2d 973 (1978), or **Eddings v. Oklahoma**, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), which requires, or even authorizes, this Court's holding in **Campbell**. Both cases simply mandate that a sentencer not be precluded from **considering** any and all evidence proffered in mitigation; neither case mandates that the sentencer must accept or find any matter presented in mitigation, even if unrebutted. Appellee respectfully urges this Court to reconsider this portion of its holding in **Campbell** and to return to the long line of this

Court's precedents which provide that, as long as all the evidence has been considered, a sentencer's refusal to find certain facts in mitigation will not be disturbed on appeal. **See, e.g., Hill v. State**, 549 So.2d 179 (Fla. 1989); **Cook v. State**, 542 So.2d 964 (Fla. 1989); **Daugherty v. State**, 419 So.2d 1067 (Fla. 1982).[10]

As noted, **Campbell** itself provides that the sentencer need not find a factor in mitigation, unless it is mitigating in nature and has been reasonably established by the greater weight of the evidence; this latter requirement is in accordance with **Rogers v. State**, 511 So.2d 526 (Fla. 1987), which requires that factors in mitigation must be supported by the record. Additionally, in **Lucas v. State**, 568 So.2d 18, 23 (Fla. 1990), this Court not only reiterated the fact that, in order to be mitigating, a circumstance must, in some sense, "ameliorate the enormity of the defendant's guilt", **see also Eutzy v. State**, 458 So.2d 755, 759 (Fla. 1984), but also held,

> Because nonstatutory mitigating evidence is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish. This is not too little to ask if the court is to perform the meaningful analysis required in considering all the applicable aggravating and mitigating circumstances.

Lucas, 568 So.2d at 24.

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[10] The undersigned has presented these arguments, in greater detail, in the Answer Brief filed in **Bryant v. State**, Florida Supreme Court Case No. 75,317, at pages 59-66.

The above standards have not been met **sub judice**, and Peterka is entitled to no relief.

Pursuant to **Lucas**, the focus of this claim is upon the nonstatutory mitigation which defense counsel argued to the judge and jury as a basis for a life recommendation (R 1909-1917; 2439; 2444-2445); opposing counsel cites these factors in the Initial Brief (Initial Brief at 61). Accordingly, for purposes of this point on appeal, the mitigation at issue would seem to be: (1) Peterka's alleged lack of a violent past; (2) Peterka's alleged capacity for rehabilitation; (3) Peterka's alleged remorse, and (4) Peterka's alleged cooperation with the authorities. Appellee would respectfully submit that error has not been demonstrated under **Campbell**, in that there is no view of the record which would support a finding that these facts have been established by the greater weight of the evidence; even under **Rogers**, it could not be said that they are supported by the record at all.

As to the first matter, Appellee would suggest that Peterka's alleged lack of a violent history was subsumed within the sentencer's finding of the statutory mitigating circumstance relating to the lack of a significant prior criminal history. Indeed, this is the only rational explanation for Judge Fleet's incredibly generous finding in this regard. The presentence investigation report indicates that, as a juvenile, Peterka was adjudicated delinquent on the basis of no less than **twenty-three (23)** counts of burglary and theft between the years of 1982 and 1985 (R 2427-2428); as an adult, Peterka was convicted of four additional counts of retaining stolen property and one of

unauthorized use of a vehicle (R 2428-2429). Peterka's mother acknowledged many of these facts during the State's cross examination (R 1897-1901). Of course, it is clear that, on the basis of the above record, this Court would have found no abuse of discretion had Judge Fleet **not** found this mitigating circumstance. **See, e.g., Mills v. State**, 462 So.2d 1075, 1081 (Fla. 1985) (". . . commission of several burglaries, even without convictions for those crimes, will justify the rejection of the lack of a significant history of prior criminal activity as a mitigating circumstance."); **Teffeteller v. State**, 439 So.2d 840, 846-847 (Fla. 1983) (single conviction of forgery and of escape sufficient to preclude finding of this mitigating circumstance); **Washington v. State**, 362 So.2d 658, 666 (Fla. 1978) (defendant's participation in burglaries and offenses involving stolen property sufficient to preclude finding of this mitigating circumstance, even in absence of convictions). Inasmuch as Peterka has literally already received, in this regard, much more of a finding in mitigation than he had any right to expect, his continued quibbling is particularly unconvincing.

Peterka does not fare any better in regard to the other three matters. As to his alleged capacity for rehabilitation, such would seem to solely be the opinion of the family members and friends who wrote to the judge on his behalf. The facts, however, indicate otherwise. The presentence investigation report shows that, as a juvenile, Peterka was placed on probation three times, and two such probations were revoked; Peterka was

placed first in a group home (from which he ran away), then at a Forestry Camp, and finally, after release and subsequent violation of probation, in a juvenile correction facility (R 2427-2428). Peterka's mother corroborated these facts during her testimony at the penalty phase (R 1901). These are hardly demonstrations of amenability to rehabilitation, and it must also be remembered that, following his arrest as an adult in Nebraska, the state authorities trusted Peterka to turn himself in and begin serving his sentences. Of course, he did not, and they made a mistake, which was fatal for the victim in this case.

As to Peterka's alleged "remorse", there is truly little to say. In order for a defendant to be remorseful, he must accept responsibility for his own actions. Peterka still does not do so, inasmuch as he continues to maintain that the homicide was not intentional. Appellant's statement during the penalty phase, to the effect that he felt that if he thought that it would bring Russell back, he would be glad to give up his life (R 1905), represents, at most, conditional contrition; the existence of remorse has not been established. Finally, Peterka's "cooperation" with the authorities is vastly overstated. Appellant might have some pretense of entitlement to such claim, if, after the homicide, he had immediately notified the authorities and informed them of Russell's death. Peterka, of course, did nothing of the kind. Instead, when Russell's worried friends and relatives anxiously asked him about the victim's whereabouts, Peterka led them on a merry dance, first claiming that he knew nothing of the matter, and then relating that the

victim had disappeared with a mythical long-haired stranger; Peterka also found it necessary to suggest that the victim had disappeared on a drunken binge (R 1290). While it is true that Appellant "led the authorities to the body", he is hardly entitled to a merit badge for such action, inasmuch as he was the one who killed the victim and buried him in such a remote location in the first place. Defense counsel's best argument in support of this factor was Peterka's "lack of any attempt to destroy or remove evidence" (R 2439). This would truly be an astounding basis upon which to recommend mitigation, but it is, in any event, unproven in this case, given the fact that Peterka attempted to wash the blood stains out of the couch cushions. Finally, Peterka's alleged "cooperation" is undermined by the fact that, even when he assisted in locating the body, he persisted in promulgating his untruthful version of the homicide. Peterka is not entitled to any relief on the basis of **Campbell** or **Rogers**.

Appellee would further contend that, **Campbell** notwithstanding, this is a particularly inappropriate point for Appellant to raise on appeal, in that, if there ever was a sentencing judge who "went the extra mile" for the defendant, in regard to mitigation, it was the sentencing judge **sub judice**. As noted, Judge Fleet actually found the lack of significant criminal history in mitigation, despite at least **twenty-eight (28)** prior convictions on the part of Peterka. The judge, however, also did a lot more. Thus, at the beginning of the penalty phase, he announced that he did not regard **Lockett** as

going far enough and, accordingly, drafted a special jury instruction (R 1858). The jury in this case was not only instructed that they could consider in mitigation "any other aspect of the defendant's character or record and any other circumstance of the offense", but also that they could consider "any other mitigating circumstance which has been presented for your consideration." (R 1920); given the fact that it is presumed that a judge follows his own instructions in this regard, cf. **Johnson v. Dugger**, 520 So.2d 565 (Fla. 1988), this would seem to put to rest Peterka's claim that Judge Fleet "ignored" any evidence. The judge also announced that, in the name of mitigation, the defense, if it chose, could attack the character of the victim (R 1868-1869). After the penalty phase before the jury, the judge allowed two additional months prior to sentencing, and during such period permitted defense counsel to file a memorandum and submit letters on behalf of Peterka from family and friends. When, at the formal sentencing proceeding, defense counsel stated that he objected to certain portions of the presentence investigation report, the judge announced that he would not consider it at all, and would, instead, simply consider the letters submitted (R 2441-2442). All in all, Peterka's attacks upon the sentencing judge would seem not only to be unwarranted, but also the height of ingratitude. The instant sentence of death should be affirmed in all respects.[11]

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[11] In accordance with the judge's expansion of **Lockett**, a certain amount of totally irrelevant evidence was presented by Peterka's mother, who advised the jury of such matters as: (1) the financial sacrifice which the family had made to attend the sentencing proceeding (R 1890-1891); (2) the fact that Peterka's

POINT XI

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE STATE'S CROSS EXAMINATION OF A DEFENSE WITNESS AT THE PENALTY PHASE, ASSUMING, IN FACT, THAT ANY CLAIM OF ERROR IS PRESERVED FOR REVIEW

As his final point on appeal, Peterka contends that his sentence of death must be reversed, because the prosecutor allegedly improperly cross examined the defendant's mother during the penalty phase. Specifically, Peterka complains that the State never presented certified copies of his prior juvenile convictions, and that, accordingly, he is entitled to a new sentencing hearing, on the basis of this Court's decision, **Robinson v. State**, 487 So.2d 1040 (Fla. 1986). Appellee would contend that **Robinson** is distinguishable, and that no error has been demonstrated, assuming, in fact, that this point on appeal is preserved for review.

The record indicates that, during her direct examination, Appellant's mother, Linda Peterka, testified that, **inter alia**, Appellant was "a friend to everyone" who "helped" people and did

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Footnote 11 (continued)

younger sister was presently crying for Appellant to come home (R 1891), and (3) the fact that the reason Peterka's father would not be testifying was that, even as she spoke, he was outside having a heart attack (R 1894-1895). None of this remotely relates to Peterka's character, and Appellee presumes that this Court's holding in **Jones v. State**, 569 So.2d 1234, 1239 (Fla. 1990), to the effect that a verdict is an intellectual task to be performed on the basis of applicable law and facts and that juries should be insulated from emotional distractions, applies to bar emotional grandstanding on the part of the defendant's family. Further, the undersigned finds it difficult to believe that, in the name of mitigation, a defendant can violate **Booth v. Maryland**, 482 U.S. 496 (1987), and argue to the jury that they should recommend life because the victim was a lousy person.

not "hurt" them (R 1889-1896). On cross examination, the prosecutor questioned her as to her knowledge of Appellant's juvenile record; defense counsel's objections, to the effect that the matter was outside the scope of direct, were overruled (R 1897). After the court overruled defense counsel's objection, to the effect that a question had already been asked and answered, Judge Fleet called both counsel to the bench (R 1899). At this point, the judge asked the prosecutor if he had "a record of conviction on these offenses"; the prosecutor stated that he did not have certified copies of the juvenile convictions, but that the record indicated that Peterka had been adjudicated delinquent in regard to them (R 1899). The assistant state attorney likewise indicated that there had been "a determination contrary to the defendant" as to the adult convictions (R 1900). At this point, the judge ruled that the defense had opened the door to this inquiry regarding Peterka's prior record; while defense counsel apparently disagreed with this ultimate ruling, he voiced no objection at all in regard to any alleged failure on the part of the State to demonstrate a good faith basis for its questions (R 1900). Cross examination of the witness then proceeded without further objection (R 1901-1902).

On appeal, Peterka contends that his sentence must be reversed because the State "never produced certified copies of the crimes it alleged Peterka had committed." (Initial Brief at 62). Inasmuch as defense counsel never voiced an objection on this basis at the proceeding below, this claim of error is not preserved for appeal. **See, e.g., Bertolotti v. Dugger, supra.**

This Court has recently held that claims of this nature must be preserved through specific contemporaneous objection. **See, e.g., Gunsby v. State**, 16 F.L.W. S114, S116 (Fla. January 15, 1991) (claim that improper cross examination of defense witness involved admission of collateral crime evidence not preserved where objection at trial on different basis); **Farinas v. State**, 569 So.2d 425, 429 (Fla. 1990) (improper impeachment of witness did not constitute fundamental error, such that claim would be reviewed for the first time on appeal). Accordingly, this claim is procedurally barred.

Even if it were not, such claim would not be well taken, in that, even if the prosecutor did not have actual certified copies of the juvenile convictions, he obviously had some sort of record. During the cross examination of Linda Peterka, the witness constantly made reference to the prosecutor's "records" (R 1897-1902), and the prosecutor, when proffering his questions, often began, "My records reflect . . ." (R 1898-1902); during the court's instructions to the jury, Judge Fleet told them that they would not be allowed to utilize in their deliberations "some of the paperwork that Mr. Elmore [prosecutor] had in his hand when he was asking questions", in that such had not been introduced into evidence (R 1927). The presentence investigation report in this case clearly indicates that all of the matters raised by the prosecutor were accurate (R 2427-2429), and, while defense counsel did object to certain portions of the report, it would not appear that he ever attacked the validity of the information concerning Peterka's prior convictions (R 2438, 2441-2442).

Thus, this claim has nothing in common with **Robinson v. State**, relied upon by Appellant, where the prosecutor, apparently without any foundation, asked a defense witness about a crime with which the defendant had never been charged. Similarly, this case is distinguishable from **Rhodes v. State**, 547 So.2d 1201 (Fla. 1989), in which this Court held it had been error for the prosecutor to have questioned a defense witness about an uncharged act of misconduct by the defendant, where no good faith basis had existed for such question. The prosecutor **sub judice** obviously had a good faith basis for his cross examination of this witness, and no error has been demonstrated.

Finally, Appellee would simply note that, to the extent that this matter is at all at issue, Judge Fleet did not err in holding that the defense had "opened the door" to this cross examination. In **Jackson v. State**, 530 So.2d 269, 273 (Fla. 1988), this Court held that the defendant's testimony, to the effect that he would do his best to be a positive influence in the lives of his children, had opened the door to cross examination as to his prior history of convictions. Similarly, in **Hildwin v. State**, 531 So.2d 124, 127-128 (Fla. 1988), this Court held that testimony presented as to the defendant's alleged non-violent nature had opened the door to rebuttal testimony concerning an uncharged sexual battery. In accordance with such precedents, admission of the testimony at issue, which was clearly relevant as to Peterka's character, was entirely proper. **Cf. Elledge v. State**, 346 So.2d 998 (Fla. 1977) (purpose for consideration of aggravating and mitigating circumstances is to

engage in character analysis of defendant). The instant sentence of death should be affirmed in all respects.[12]

CONCLUSION

WHEREFORE, for the aforementioned reasons, Appellee moves this Honorable Court to affirm the conviction of first degree murder and sentence of death in all respects.

Respectfully submitted,

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[12] In his brief, Peterka also complains that the State brought up Appellant's allegedly having "stolen a gun from his father", despite the fact that no offense of such nature had ever been charged (Initial Brief at 62, n.11). No testimony of this nature was elicited from Appellant's mother. Rather, the State, when cross examining Cindy Rush, elicited testimony from her to the effect that she was aware that Peterka had stolen a gun from her father (R 1886). No objection was interposed in regard to this testimony, and no claim of error is preserved for review. **See Farinas, supra.** Appellee would maintain that, for the reasons set forth in **Gunsby v. State, supra,** no error could be demonstrated, and that, even if error did exist, such would be harmless. **See, e.g., Rogers v. State,** 511 So.2d 526, 533 (Fla. 1987).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. David A. Davis, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 22nd day of February, 1991.

RICHARD B. MARTELL
Assistant Attorney General