IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,666

THOMAS A. WYATT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE NINETEENTH JUDICIAL CIRCUIT COURT, IN AND FOR INDIAN RIVER COUNTY, STATE OF FLORIDA

****

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS.....ii-vii

STATEMENT OF THE CASES.....1

STATEMENT OF THE FACTS.....2

SUMMARY OF THE ARGUMENT.....5

ARGUMENT.....6

ISSUE I

THE VOIR DIRE WAS PROPERLY CONDUCTED

ISSUE II.....16

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS

ISSUE III.....18

THE DNA EVIDENCE WAS PROPERLY ADMITTED AT TRIAL

ISSUE IV.....20

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT'S PRIOR IMPRISONMENT

ISSUE V.....23

THE TRIAL COURT DID NOT IMPERMISSIBLE ALLOW IMPROPER COLLATERAL CRIME EVIDENCE

ISSUE VI.....26

SHACKLING OF THE DEFENDANT WAS NOT PREJUDICIAL

ISSUE VII.....27

THE TRIAL COURT DID NOT PRECLUDE DEFENSE COUNSEL FROM FULLY ARGUING HIS POINT TO THE COURT

ISSUE VIII.....29

THE MEDICAL EXAMINER DID NOT GIVE SPECULATIVE TESTIMONY

ISSUE IX.....30

THE JURY WAS PROPERLY INSTRUCTED REGARDING FLIGHT, PREMEDITATION AND REASONABLE DOUBT

ISSUE X.....33

THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT IMPROPER

ISSUE XI.....35

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR CONTINUANCE CONDUCTED THE SENTENCING HEARING

ISSUE XII.....41

THE PREMEDITATION AND HEINOUSNESS CIRCUMSTANCES ARE CONSTITUTIONAL

ISSUE XIII.....45

THE TRIAL COURT PROPERLY ALLOWED IN EVIDENCE OF APPELLANT'S ESCAPE FORM PRISON

ISSUE XIV.....47

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE REGARDING APPELLANT'S PRIOR VIOLENT FELONY

ISSUE XV.....48

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY REGARDING DETAILS OF PRIOR VIOLENT FELONY

ISSUE XVI.....49

THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT IMPROPER

ISSUE XVII.....51

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

CONCLUSION.....52

CERTIFICATE OF SERVICE.....52

TABLE OF CITATIONS

CASES **PAGES**

Andrews v. State, 533 So.2d 841 (Fla. 5th DCA 1988), review denied, 542 So. 2d 1332 (Fla. 1989).....18

Blystone v. Pennsylvania, 494 U.S. 299 (1990).....51

Boyde v. California, 494 U.S. 370 (1990).....51

Breedlove v. State, 413 So. 2d 1 (Fla. 1982).....33, 50

Bryan v. State, 533 So.2d 744 (Fla. 1988).....22

Bundy v. State, 455 So. 2d 330, 348 (Fla. 1984).....23

Bush v. State, 461 So. 2d 936, 941-942 (Fla. 1984).....49

Canady v. State, 427 So. 2d 723, 729 (Fla. 1983).....17

Carver v. Orange County, 444 So. 2d 452, 454 (Fla. 5th DCA 1984).....19

Chandler v. State, 534 So.2d 701 (Fla. 1988).....42

Clark v. State, 613 So. 2d 412 (Fla. 1993).....40

Collins v. State, 465 So.2d 1266 (Fla. 2d DCA 1985).....16

Cook v. State, 581 So. 2d 141 (Fla. 1991).....44

Craig v. State, 510 So. 2d 857 (Fla. 1987).....33

Crump v. State, 622 So. 2d 963 (Fla. 1993).....33

Czubak v. State, 570 So. 2d 925 (Fla. 1990).....21

Dobbert v. Florida, 432 U.S. 282, 303 (1977).....12

Durocher v.State, 604 So. 2d 810 (Fla. 1992).....40

Edwards v.State, 530 So. 2d. 936, 938 (4th DCA 1988).....21

Eutzey v. State, 458 So. 2d 755 (Fla. 1984).....434

Fenelon v. State, 549 So. 2d 292 (Fla. 1992).....30

Fitzpatrick v. State, 437 So. 2d 1072, 1076 (Fla.1983).....10

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).....18

Gerald v. State, 601 So. 2d 1157 (Fla. 1992).....12

Gore v. State, 599 So. 2d 978, 985 (Fla. 1992).....35

Gunsby v. State, 574 So. 2d 1085,. cert. denied,
116 L. Ed. 2d 102, 112 S. Ct.....8, 27

Henry v. State, 586 So.2d.1033 (Fla. 1991).....40

Herring v. State, 580 So. 2d 135, 138 (Fla. 1991).....44

Hildwin v. State, 531 So. 2d 124, 127 (Fla. 1988).....45

Hitchcock v. State, 578 So. 2d 685, 688 (Fla. 1991).....10

Hodges v. State, 595 So. 2d 929 (Fla. 1992).....48

In re Jury Instr. in Crim. Cases, 431 So.2d 594
(Fla. 1981).....32

Jackson v. State, 545 So. 2d 260, 264 (Fla. 1989).....14

Jackson v. State, 530 SO. 2d 269, 273
(1988), cert. denied, 488 U.S. 1051,
109 S.Ct. 882, 102 L. Ed. 2d 1008 (1988).....51

Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992).....13

Jennings v. State, 453 So. 2d 1109 (Fla.), cert.
granted, vacated on other grounds, 470 U.S. 1002, 105 S.Ct.
351, 84 L. Ed. 2d 374 (1984).....49

Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993).....41

Johnson v. State, 608 So.2d 4, 9-10 (Fla. 1992).....14

Jones v. State, 411 So. 2d 165 (Fla. 1980).....44

Jones v. State, 612 So. 2d 1370 (Fla. 1992).....33

Kennedy v. Singletary, 602 So. 2d 1285
(Fla.), cert. denied, 113 S. Ct. 2,
120 L. Ed. 2d 931 (1992).....42

Klokoc v.State, 589 So. 2d 219, 222 (Fla. 1991).....41

Lawrence v. State, 614 So. 2d 1092, 1094 (Fla. 1993).....23

Long v. State, 610 So.2d 1268 (Fla. 1992).....45

Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546,
98 L. Ed. 2d 568 (1988).....51

Mann v. State, 603 So. 2d 1141, 1143 (Fla. 1992).....34

McCutchen v. State, 96 So.2d 152 (Fla. 1957).....31

Mills v. State, 476 172 (Fla. 1985).....51

Muehleman v. State, 503 So. 2d 310, 317 (Fla. 1987).....34

Morgan v. Illinois, 112 S. Ct. 2222 (1992).....8

Nash v. Estelle, 597 F. 2d 513, 517 (5th Cir. 1979).....17

Nowitzke v. State, 572 So. 2d 1346, 1352 (Fla. 1990).....19

Occhicone v. State, 570 So. 2d 902, 905-906 (Fla. 1990).....11

Parker v. State, 456 So.2d 436, 444 (Fla. 1984).....32

Pentecost v. State, 545 SO. 2d 861, 862 (Fla. 1989).....10

Ponticelli v. State, 593 So. 2d 483, 489 (Fla. 1991).....23

Pope v. Wainwright, 496 So. 2d 798, 802 (Fla. 1986).....13

Pope v. State, 441 So. 2d 1073, 1076 (Fla.).....20

Power v.State, 605 So. 2d 856 (Fla. 1992).....43

Ragsdale v. State, 609 So. 2d 10, 14 (Fla. 1992).....42

Randolph v. State, 562 So. 2d 331 (Fla. 1990).....12

Reaves v. State, 531 So. 2d 401 (Fla. 1988).....28

Rhodes v. State, 547 So. 2d 1201 (Fla. 1989).....48

Robinson v.State, 610 So. 2d 1288, 1291 (Fla. 1992).....18

Robinson v. State, 574 So. 2d 108, 113 n.6 (Fla. 1991).....51

Smith v. State, 424 So. 2d 726 (Fla. 1983).....42

Sochor v. State, 619 So. 2d 285, 290 (Fla. 1993).....30

Sochor v. Florida, 504 U.S. __, 119 L. Ed.2d 326,
112 S. ct. __ (1992).....41, 51

Stein v. State, 19 Fla. L. Weekly S32
(Fla. January 13, 1994).....44

Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).....11

Swafford v. State, 533 So. 2d 270 (Fla. 1988).....23

Taylor v. State, 18 Fla. L. Weekly S643, 645 (Fla. December 16, 1993).....30

Thompson v. State, 619 So. 2d 261 (Fla. 1993).....42

Tillman v. State, 471 So.2d 32, 35 (Fla. 1985).....11

Trepal v. State, 18 Fla. L. Weekly S327, 328 (Fla. June 10, 1993).....16

Valle v. State, 581 So.2d 48 (Fla. 1992).....43

Van Royal v. State, 497 So. 2d 625 (Fla. 1986).....14

White v. State, 403 So. 2d 331, 338 (Fla. 1981).....42

Wike v. State, 596 So. 2d 1020, 1025 (Fla. 1992).....37

Williams v. State, 353 So. 2d 956 (Fla. 1st DCA 1978).....28

Woods v. State, 596 So.2d 156, 158 (Fla. 4th DCA 1992), rev. denied, 599 So.2d 1281 (Fla. 1992), cert. denied, 113 S.Ct. 256 (1993).....30

FLORIDA STATUTES:

Section 921.141 (6)(d) Fla. Stat., (1987).....39
Section 921.141 (5)(a).....44
Section 921.141 (5)(b).....44
Section 921.141 (5)(d).....44
Section 921.141 (5)(e).....44
Section 921.141 (5)(f).....44
Section 921.141 (5)(h), Fla. Stat. (1987).....41
Section 921.141 (5)(i), Fla. Stat. (1987).....41

OTHER AUTHORITY:

Fla. Stand. Jury Instr. in Crim. Cases 63 (Oct. 1981).....32

STATEMENT OF THE CASE

Appelle accepts appellant's statement of the case as it appears as section A Procedural History.

STATEMENT OF THE FACTS

Appellee accepts appellant's statement of the facts to the extent that they represent an accurate nonargumentative account of the facts adduced at trial. Appellee rejects the additional editorializations and self serving comments. Appellee would rely on the facts as presented in the argument portion of the brief. Below is a summary of the evidence adduced at trial used to determine appellant's guilt.

Appellant and his codefendant Lovette escaped from prison in North Carolina on May 14, 1988. They stole a Cadillac, owned by Jackie Wright, in Jacksonville on May 16, 1988. (R 1655-1656, 1664, 1670). That car was seen at the murder scene at the time of the murders, May 17, 1988 between 11:05 P.M. and 11:45 P.M. (R 1040-1041, 1054-1056, 1365, 1386-1392, 1407). Appellant and Lovette burned the Cadillac during the early morning hours on May 18, 1988 around 4:30-5:00 A.M.. (R 1589, 1627, 2025, 3258). Found near the burnt car was a zippered money bag, several money wrappers and two bullets. (R 1597, 1607, 1643) Appellant was in possession of Jackie Wright's camera ad flask, there was also a .38 caliber Smith and Wesson in the car. (R 1705, 2209-2211, 2233). He gave a friend in Clearwater a bag of bullets to hold for him. The bullets come from the same batch of bullets that were found in the bodies of the victims. (R 2315, 2335-2336, 2306-2308). The gun was probably a .38 caliber Smith and Wesson. (R 2306, 2308, 2315). Also found on the road between the Domino's and the burning car was a Domino's shirt with the name tag Matthew. (R 1657).

Appellant and Lovette were picked up by a truck driver, Darrel Booth, around 6:00 A.M. on May 18, 1988 and dropped off at Lake Wales. (R 1936-1937,1955-1957). Appellant was carrying a sports bag with something heavy in it. (R 1945). Appellant stayed in Clearwater at a mobile park from May 20-June 2 (R 2192-2194). He worked at the mobile park under the name of John Rassell. (Id.). He stole a Ford Taurus in Maderia Beach and went to South Carolina. While in Myrtle Beach South Carolina, appellant was employed by Larry Bouchette. During that time appellant was arrested for driving a stolen car. He told Bouchette that the had been arrested for public drunkenness, Bouchette bailed appellant out of jail. (R 2368-2370). Appellant stole Bouchette's truck shortly afterwards. (R 2372). Appellant told Bouchette that he had killed three people in Florida. (R 2371, 2379). Appellant was then stopped by police in Lancaster, it was there that he was ultimately captured on July 8, 1988 after an escape attempt. (R 2404-2405, 3266-3274).

Appellant made statements to various police officers. He stated that "Jim", another personality in him would do things that Tom had no control over. He told the police that "Jim" hurt a lot of people in Florida.

While in jail appellant told a cellmate Patrick McCoombs all about the Domino's murders. He told McCoombs that he and Lovette both armed with guns, went into the restaurant. (R 2757-2759). Lovette was surprised. (R 2760). Appellant put Mrs. Francis Edwards and Mr. Matthew Boornoosh in the bathroom.

(R 2761). Lovette was in the front of the restaurant wearing Boornoosh's shirt. (R 2763). Appellant brought Mr. Edwards to open the safe where he took one thousand dollars. (R 2760-2761). Appellant pistol whipped Mr. Edwards because there was not enough money in the safe. (R 2761-2762). Mr. Edwards begged for his life and appellant shot him (R 2766). Appellant told his codefendant that the other two people had to be killed in order to eliminate witnesses, upon hearing that Mrs. Edwards cried and Boornoosh started praying.[1] Mrs. Edwards was shot in the head as she cried, appellant told Mr. Boornoosh to listen to the bullet go into his ear. (R 2767). Appellant's semen was found in Mrs. Edwards vagina (R 2949 3196), she was totally nude but for her socks. (R 1148).

Appellant testified at trial. He admitted being with Lovette in Florida on May 17, 1988. (R 3249-3251). They went to a bar, appellant stayed and Lovette left to get liquor. (R 3253). Lovette came back to the bar and said that they had to leave. Lovette told him that he robbed a pizza store. (R 3254-3262). Appellant was not told of the details of the robbery but that he had to get out of town in case he would be recognized. (R 3262). Appellant explained that he used various alias because of stolen cars. (R 3318). Appellant claims he made statement to police about "Jim" to get them to stop asking questions. (R 3287-3289, 3339). He told McCoombs that his statement to police regarding

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[1] Boornoosh's wedding ring was found in the waste paper basket in the bathroom.

"Jim" was a ploy, and that he was confident that it would be inadmissible. (R 2786-2787). Appellant denied making incriminating statements to McCoobms and Bouchette. (R 3277, 3296). Appellant also claims that the DNA evidence proving that he had sex with Mrs. Edwards was a mistake. (R 3352).

The medical examiner stated that all three victims were shot. Mrs. Edwards was shot at close range in the head. (R 1455). Her husband Mr. Edwards was shot twice, one in the chest and once in the head. (R 1460). The shot to the chest was a contact wound the one to the head was at close range. (R 1462-1467). Mr. Boornoosh was shot twice in the head. One shot was a contact wound to his left ear, the other one entered the top of his skull. (R 1533-1541).

SUMMARY OF THE ARGUMENT

The trial court properly denied appellant's challenges for cause. The trial court properly precluded defense counsel from asking various questions. The court's conduct did not demonstrates any bias towards the prosecution. Most of this issue was not preserved for appeal.

The trial court properly allowed the admission of appellant's statement to police as the statement was voluntary. The court was correct in denying appellant's motion to suppress his blood sample.

The trial court properly admitted evidence of DNA testing.

The trial court properly admitted writing samples of appellant even though they inferred that appellant had escaped from prison. Appellant was given the opportunity to stipulate to same, he declined, consequently he cannot now complain of error.

The trial court properly admitted evidence of appellant's flight.

The trial court did not err in refusing to remove appellant's shackles. The jury was not aware that appellant was shackled during trial.

The trial court did not refuse to hear a proffer, appellant never requested one. In any event one was not needed for resolution of the issue.

The medical examiner did not engage in speculative testimony.

The instructions regarding flight, premeditated murder and reasonable doubt are correct. In any event this issue was not preserved for appeal.

The prosecutor did not engage in any impermissible argument.

The trial court conducted a fair sentencing hearing. Appellant chose not to present any evidence in mitigation.

The trial court properly instructed upon and found the aggravating circumstances of "cold calculated and premeditated" and "heinous atrocious and cruel". Both factors are constitutional on their face and as applied.

The state did not present nonstatutory aggravating factors.

The state was properly allowed to present evidence of appellant's prior violent felonies. The state never concede that such were impermissibly prejudicial.

The state did not present any penalty phase evidence that could not have been confronted by appellant.

The state's penalty phase argument was not impermissible.

Florida's death penalty statute is constitutional. Most of this issue is not preserved for appeal.

ISSUE I

THE VOIR DIRE WAS PROPERLY CONDUCTED

Appellant claims that the trial court erred by sustaining a state objection to defense questions about sympathy and anger to perspective jurors. It is alleged that the trial court's actions were in violation of Morgan v. Illinois, 112 S. Ct. 2222 (1992). Initially it must be noted that this issue is not preserved for appeal as appellant never attempted to apprise the court of his concern that jurors Hadley, McConnel or Burton would automatically vote for the death penalty, he never attempted to challenge any of them for cause based on any reason let alone for this concern. But most importantly, appellant never asked the prospective jurors if they would automatically vote for the death penalty regardless of the facts, consequently there can be no violation of Morgan as the issue was never properly raised. Gunsby v. State, 574 So. 2d 1085, 1088 (Fla. 1991).

As for the merits appellant has failed to establish that any of the jurors were unfit. Juror Hadley stated that he would find it difficult to overcome feelings of sympathy, however he would follow the law as instructed by the court. (R 332). Burton also stated that he would follow the law as instructed by the court. (R 278). Furthermore, juror Burton was ultimately struck by the state consequently there can be no prejudice as to Burton. (R 350). McConnell stated that death could be necessary and such a sentence is sometimes appropriate. (R 267-269). None

of these prospective jurors ever stated that they would automatically vote for the death penalty regardless of the court's instructions.

Appellant claims that the trial court impermissibly precluded questioning of the jurors regarding their feelings of anger and sympathy. Defense counsel persisted in asking questions about whether a juror would feel those emotions. The court sustained the state's objection to the question because it was misleading. (R 261-264). The court with the agreement of counsel rephrased the question to "could feelings of anger be put aside in reaching a verdict?" (R 264-265).

Likewise the trial court's ruling regarding the question posed to juror Bobbitt[2] is correct and is in no way a violation of Morgan. Whether a juror feels that society could be protected by a life sentence, is irrelevant to whether a juror could be impartial and recommend a sentence based on the facts. The trial court's ruling was correct and in no way precluded the defense from inquiring into any prospective juror's unwaivering bias. This claim is not preserved and without merit.

B. Appellant claims that the trial court erred by precluding further questioning regarding reasonable doubt and by giving an explanation regarding the importance of deliberation. The trial court's explanation was not a misstatement of the law.

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[2] Although appellant alleges that the trial court erred in its ruling regarding juror Bobbitt, appellant cannot demonstrate error as Bobbitt was struck sua sponte by the court. (R 373).

(R 677). Appellant does not point to any juror who was not able to understand and apply the concept of reasonable doubt.

C. Next appellant claims that the trial court erred in not allowing a cause challenge for juror Ryden.[3] Appellant further states that the trial court precluded proper argument on the issue. Initially it must be noted that trial court did allow defense counsel to state his reasons for the challenge. (R 346-347). Furthermore, appellant has failed to demonstrate that Ryden was unfit for jury service. Opinions that are contrary to the law do not make a person unfit for jury duty. It is the ability or inability to put aside those feelings that is the operative inquiry. A person need not be excused for cause unless he or she is irrevocably committed to voting for the death penalty and cannot follow the judge's instructions regarding aggravating and mitigating evidence. Fitzpatrick v. State, 437 So. 2d 1072, 1076 (Fla.1983). Simply because a juror's opinions are not in keeping with the law is not enough to excuse someone for cause. That prospective juror's bias or prejudice must prevent a person from rendering a decision based on the law and facts. Furthermore, the trial court possess discretion in making this determination. Pentecost v. State, 545 So. 2d 861, 862 (Fla. 1989); Hitchcock v. State, 578 So. 2d 685, 688 (Fla. 1991). Ryden expressed her belief in the death penalty for first degree murder and her opposition to life imprisonment. Once she was

[3] Appellant exercised a peremptory on Ryden. (R 350).

told that the law would differ from her opinions she stated more than once that she would give the defendant a fair trial and follow the law even if she did not agree with it. (R 173, 293, 294, 296, 330-331).

Lastly, appellant claims that the trial court erred in refusing to strike for cause juror Haughey.[4] Appellant claims that Haughey was unfit for jury service because he would automatically vote for the death penalty if the evidence warranted it. (R 856-857). This issue is not preserved for appeal as appellant did not raise this ground below. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985) ("In order to preserve for review an issue arising from a trial court's ruling on a question of admissibility of evidence, the specific ground to be relied upon must be raised before the court of first instance."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). During voir dire, appellant objected to Haughey's fitnesses based on the fact that he had been a victim of a robbery. Appellant never challenged Haughey based on his opinions regarding the death penalty. (R 865 -867). Occhicone v. State, 570 So. 2d 902, 905-906 (Fla. 1990). In any event, Haughey stated that he would be impartial, consequently

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[4] Haughey sat as a juror. Appellant requested additional peremptories in order to strike Haughey, that request was denied. (R 867-869, 800-891).

appellant cannot establish error in refusing to allow a challenge for cause. (R 846, 864-866).

Appellant also claims that Haughey should have been struck because he read about the case in the newspaper. Specifically Haughey read that there was a triple murder, involving two people in a Domino's restaurant and a hitchhiker. It is clear that Hughey was not sure about the facts regarding what happened. He first thought that the woman at the restaurant was raped and killed, (R 888-889) and then he stated that it was the hitchhiker that was found totally nude, in just her socks and the victim of a sexual assault. (R 927-928). He then stated that what he read was verbatim what was read to him from the indictment. (R 920-921, 928). Haughey agreed that the newspaper is sometimes inaccurate as far as facts are concerned. (R 926). He unequivocally stated that the newspaper article would not affect his ability to be impartial. (R 889, 926-929). Appellant has failed to establish that Haughey heard anything that was inadmissible or that would affect his impartiality. Geralds v. State, 601 So. 2d 1157 (Fla. 1992); Dobbert v. Florida, 432 U.S. 282, 303 (1977); Randolph v. State, 562 So. 2d 331 (Fla. 1990). It is clear that he knew only about three of the four murder.[5] The fourth murder, that of Kathy Neydeger was severed. She was

[5] Haughey stated that the hitchhiker was raped and found in her socks. The evidence admitted at trial established that Mrs. Edwards was raped and found only wearing her socks. (R 1148).

the hitchhiker that was also killed. Wyatt v. State, Case no. 79, 245.

D. Next appellant claims that the trial court was biased to the extent that it rendered his trial fundamentally unfair. This claim is not preserved for appeal as none of the alleged remarks were objected to. Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992). He claims that the trial court refused to allow argument on cause challenges. (R 344). The record belies that contention. When appellant challenged a juror for cause, the court did allow argument. (R 344-345, 544).

Appellant takes exception with the judge's comments to a prospective juror who was excused. (R 474). After excusing the prospective juror, she was a court reporter, the judge stated that it was unfortunate that she could not serve as she possessed certain expertise. The judge also stated that he wanted to be fair to all parties concerned, neither side was singled out. Id. Appellant further claims that the judge did not give that tribute to any other juror. That claim is belied by the record. When juror Bobbitt was excused sua sponte by the court, she received a similar tribute. (R 373). Likewise the judge extended other pleasantries to other excused jurors as well. (R 460, 462).

Appellant also challenges the trial court's sua sponte explanation regarding the presumption of innocence. There was no objection to the court's statements. As a matter of fact defense counsel made reference to the judge's explanation at least three more times to other prospective jurors. (R 709, 723, 772). The

judge's comments were not improper. Pope v. Wainwright, 496 So. 2d 798, 802 (Fla. 1986).

Next appellant complains that the judge sua sponte discussed the difference between a reasonable doubt and deliberations. R 677). Appellant fails to demonstrate how this can be construed as bias as the judge's comments were not incorrect. The fact that the judge had to precluded counsel from asking an improper question twice does not make the judge biased. There were no disparaging remarks made towards at counsel. Likewise the court's urging counsel to move on with the issues in the case is nothing more than the court's exercise of his power and duty. The judge has a right and a duty to control his courtroom. Jackson v. State, 545 So. 2d 260, 264 (Fla. 1989); Pope v. Wainwright, 496 So. 2d 798, 801-802 (Fla. 1986); Van Royal v. State, 497 So. 2d 625 (Fla. 1986).Johnson v. State, 608 So.2d 4, 9-10 (Fla. 1992). The record dos not establish that defense counsel was at all singled out or unfairly treated. The record is replete with examples of the judge affording defense attorney great latitude in trying his case.[6] Lastly

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[6] Prior to ruling on a defense motion during voir dire, the court allowed defense counsel the opportunity to obtain additional argument. (R 240).

The court allowed defense counsel to lecture the prospective panel at length before requiring that a questioned be asked. (R 404-408).

The court admonished both sides that they avoid repetition. (R 560, 577).

The court sustained various objections brought by defense counsel. (R 156, 301, 346, 589).

appellant claims that defense counsel was repeatedly precluded and admonished for attempting to ascertain from the jurors what factors that would consider in recommending the death penalty. The court properly held that the proper question is whether or not one can put aside any preconceived notions and follow the law. (R 821-822).[7] The court's reponses, demeanor, and conduct were not improper. Jackson ; Pope.

E. The trial court did not err in refusing to strike the venire. This issue is not preserved for appeal as appellant withdrew his motion for mistrial. (R 57). In any event the trial court cured the inadvertent mention of the severed count of possession of a firearm by a convicted felon. He told the jury that the count did not apply to this defendant. (R 58-59). The jury knew that appellant had a codefendant therefore the explanation/instruction was plausible. Furthermore the count was never mentioned again. (R 64, 67, 71, 124, 364-367, 470, 553). Jackson v. State, 599 So. 2d. 103, 107 (Fla. 1992). Lastly appellant himself testified that he was an eight time convicted felon and was in possession of a firearm in the state of Florida.

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[7] The state's questioning of the prospective panel regarding the death penaly was in keeping with the judge's directive, consequently, the defense was not signaled out for unfair treatment. (R 750, 821, 766, 484, 592, 658, 653, 766).

ISSUE II

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS

Appellant claims that trial court erred in denying his motion to suppress his blood samples. He argues that the affidavit presented to the judge was not sworn to. The record establishes otherwise. (R 2714). The officer was sworn in and testified that the allegations in the affidavit were true. (R 2715). Appellant has failed to establish error. Collins v. State, 465 So.2d 1266 (Fla. 2d DCA 1985).[8]

Appellant claims that the trial court erred in denying his motion to suppress his statements to various law enforcement officers. The denial of a motion to suppress is presumed correct. Trepal v. State, 18 Fla. L. Weekly S327, 328 (Fla. June 10, 1993). Appellant claims that he invoked his right to counsel when he elicited the advice of FBI agents regarding whether he should seek the advice of an attorney. (R 2484). The agent informed appellant that he could not advise him one way or another, only he could make that determination. (R 2484). He was then told again that an attorney would be appointed if he wanted one. (R 2484), or if he wanted to talk then the police would be

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[8] If error to admit appellant's blood samples, any error must be considered harmless with respect to appellant's convictions for first degree murder. The evidence established that Appellant and his codefendant were together on a crime spree for several days. Appellant told both Larry Bouchette and Patrick McCoombs about the murders. Appellant's explanation that he sat in a bar while his codefendant went and committed the murders is not plausible, given that the two men were inseparable for days prior to and after the murders.

interested in talking with him. (R 2484). Appellant then asked the officer what he wanted to talk about and the agent indicated that he would like to discuss the events that transpired from the time appellant escaped until his arrest. (R 2485). Appellant then gave a statement. (R 2564-2613).

At best, appellant's attempt at seeking the advice of the agent can possibly be construed as an equivocal request for an attorney. Consequently, the agent's attempt to clarify appellant's statement, decline the invitation to offer advice and then again repeat that an attorney would be provided if he wanted one was permissible. Nash v. Estelle, 597 F. 2d 513, 517 (5th Cir. 1979). Canady v. State, 427 So. 2d 723, 729 (Fla. 1983). If the court erred in admitting the statement made to law enforcement agents, it must be considered harmless. Appellant stated in detail to a cellmate that he killed all three people at the Domino's restaurant. Physical evidence places appellant and his codefendant in the area at the time of the murders. Their stolen car was spotted at the murder scene at the time of the crime. Appellant's explanation that his codefendant committed the murders while appellant stayed at a bar is just not credible.

ISSUE III

THE DNA EVIDENCE WAS PROPERLY ADMITTED AT TRIAL

Appellant claims that the trial court erred in admitting the statistical testimony regarding DNA evidence. This Court has ruled that such evidence is admissible. Robinson v.State, 610 So. 2d 1288, 1291 (Fla. 1992); Andrews v. State, 533 So.2d 841 (Fla. 5th DCA 1988), review denied, 542 So. 2d 1332 (Fla. 1989).

Appellant also claims that the trial court erred in allowing Dr. McElfresh to testify to certain data that was complied by others. Appellant claims that such was a violation of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). As noted above, this Court has recognized the reliability of DNA testing. Robinson. Although Dr. McElfresh's results were in part dependent upon findings of others, he himself rechecked those findings before relying upon them, they were properly admitted. (R 3171-3173, 3177, 3193, 3194).

Appellant also takes exception to the testimony of Daniel Nippes. Specifically he claims that Nippes improperly bolstered the credibility of a witness by listing his qualifications. This issue is not preserved for appeal as there was no objection to this testimony. An initial objection was made regarding Nippes's expertise in this area. (R 2952-53). Occhicone v. State 570 So. 2d 902, 905-906 (Fla. 1990). There was never an objection to the specific statement regarding

Nippes's affiliation to a scientific committee or to his "recommendation" that the DNA testing been done at Life Codes.

As for the merits the record reveals that Nippes never said he recommended that the testing be done at Life Codes. At one point a reference was made to a DNA committee in Florida. (R 2954). A separate exchange took place were Nippes said a decision was made to do DNA testing. (R 2955). He never said that he recommended that Life Codes do the testing. (R 2955). In any event there is no error. The cases relied upon by appellant are not dispositive of the issue. There is no improper opinion testimony as to the qualifications of one expert over another one as in Carver v. Orange County, 444 So. 2d 452, 454 (Fla. 5th DCA 1984) and Nowitzke v. State, 572 So. 2d 1346, 1352 (Fla. 1990). Nippes was called to lay a predicate as to why DNA testing was to be done. (R 2953-2954). Nippes did not bolster the credibility of one witness over another. He simply outlined the procedures utilized. There is no error.

ISSUE IV

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT'S PRIOR IMPRISONMENT

Appellant claims that the trial court erred in allowing the handwriting sample obtained from his prior prison records to be used as a comparison. This issue is not preserved for appeal as any error that may have been created was clearly invited by appellant. Pope v. State, 441 So. 2d 1073, 1076 (Fla.). This is not a situation were appellant was forced to forego one constitutional right in favor of another. The state agreed to stipulate to the identity of both appellant's and Lovette's handwriting on the hotel registration cards without bringing in the samples used for the comparison. The samples were obtained from both defendants prison records. Appellant wanted to stipulate to his own but not to Lovette's in order to imply that Lovette had previously been in prison but appellant had not. By qualifying the stipulation to include his handwriting sample only, appellant is not protecting one constitutional right over another, he is simply trying to gain an advantage for himself.[9] (R 2099-2102). The state was not compelled to accept appellant's limited offer as the implication created, i.e., Lovette was in prison and appellant was not, was incorrect. Johnson v. State, 608 So. 2d 4, 9-10 (Fla. 1992).

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[9] Appellant's trial defense was that while he was at a bar, Lovette took the stolen Cadillac, committed the robberies and murders and came back to the bar to get appellant. (R 3251-3260).

Although appellant has every right to make such a tactical decision, he certainly cannot now behind that and claim error.

Appellant's reliance upon Czubak v. State, 570 So. 2d 925 (Fla. 1990) is misplaced. In that case, the defendant's escape status was not relevant to any issue and was improperly introduced during cross-examination of a state witness. The statement was not invited because it was unresponsive to the defense's question. Czubak. In the instant case, appellant was apprised of the consequences of his refusal to stipulate to both handwriting samples, consequently appellant cannot complain as any error was invited. Edwards v.State, 530 So. 2d. 936, 938 (4th DCA 1988). (R 2100-2107). The handwriting sample was necessary to prove that appellant and Lovette signed hotel registration cards the nights before and after the murders. The state was attempting to prove that appellant was in the area of the murders during that time.

Appellant also claims that the state could have used samples other than those obtained from prison. At the time the comparisons were being made no other sample was available. (R 2109-1212). Furthermore, use of prior samples as opposed to use of those obtained in any was connected to this case were much more reliable. (R 2110-2114, 2181). The trial court properly allowed the state to use the handwriting sample from appellant's prior incarceration.

If there was error in admitting the prior prison records it must be considered harmless beyond a reasonable doubt.

When the handwriting samples were introduced, there as only a passing reference that they were from the Department of Corrections. There was no reference at all to the fact that appellant had escaped. (R 2118-2119). Furthermore, the charts that were used to make the comparison that went back to the jury make no reference to the Department of Corrections as stated by defense counsel, and the trial court made a finding that the charts were innocuous and without prejudice. (R 2166-2167).

There is no question that appellant was with Lovette and in the area during the murders. Appellant's semen is found in Mrs. Edwards's vagina. Appellant told two different people that he killed the three victims. Appellant himself testified that he was an eight time convicted felon. Finally his defense that Lovette did it is not credible, especially since it is rebutted by the physical evidence that appellant raped Mrs. Edwards. Any error must be considered harmless. Bryan v. State, 533 So.2d 744 (Fla. 1988).

ISSUE V

THE TRIAL COURT DID NOT IMPERMISSIBLE ALLOW IMPROPER COLLATERAL CRIME EVIDENCE

Appellant claims that the trial court erred in admitting into evidence various acts committed during the crime spree. Specifically he challenges the admission of evidence that appellant stole a Ford Taurus in Florida a week after the murders, he stole a truck from his employer, Larry Bouchette, in South Carolina, and he attempted to flee from an officer who was investigating a possible car theft in Myrtle Beach. Appellant also objects to admission of Bouchette's statement that appellant told him that he had killed three people and he could do it again. (R 2371). Appellant failed to object to the admissibility of his statement to Bouchette, consequently appellate review is precluded. Lawrence v. State, 614 So. 2d 1092, 1094 (Fla. 1993). In any event appellant's statement to Bouchette was admissible. Swafford v. State, 533 So. 2d 270 (Fla. 1988).

As for the thefts of the cars and escapes, the evidence was properly admitted. The trial court allowed evidence of the theft of the Ford Taurus, Bouchette's truck and the escape attempt from the Myrtle Beach police as evidence relevant to flight. (R 2203, 2361-2363, 2395-2396). The trial court's ruling was correct as the evidence demonstrated that appellant attempted to flee the state of Florida as well as avoid arrest in South Carolina once he was apprehended by police. Bundy v. State, 455 So. 2d 330, 348 (Fla. 1984).

Also not preserved for appeal is appellant's challenge to Patrick McCoombs statement regarding appellant's demeanor. (R 27721-2772). Appellant's objection at trial dealt with the witness's describing appellant to others he has seen on death row. That objection was sustained. (R 2771). The witness then described appellant's eyes as he was describing the murders. (R 27721-2772). Again appellant objected to the witness testifying as to what he thought rather than what he saw. (R 2772). There was no objection regarding improper collateral crime evidence. Review is precluded. Occhicone, 570 So. 2d 902, 905-906 (Fla. 1990); Lawrence, supra.

Appellant also objects to McCoombs testimony regarding a "convict code". This claim is not preserved for appeal as there was no objection to this statement. Lawrence. In any event the comment was clearly a general reference to the unpopularity of testifying against other inmates. Ponticelli v. State, 593 So. 2d 483, 489 (Fla. 1991). Appellant cannot establish harmful error. Finally appellant's objects to McCoomb's reference to being placed in a witness protection program. (R 3867). The prosecutor was attempting to elicit from the witness that he was going back to jail after he testified. He stated that he did not know for sure but maybe he was going into a witness protection program. (R 2866). Appellant moved for a mistrial which was denied. (R 2867). The prosecutor again asked the witness that question and McCoombs stated that after the trial that was what was going back to federal prison. (R 2867).

Any indirect reference to a threat was made in passing and was not harmful error. Ponticelli.

ISSUE VI

SHACKLING OF THE DEFENDANT WAS NOT PREJUDICIAL

Appellant claims that the trial court erred in allowing him to remain shackled during the trial. The record is clear that the jury was not aware of the shackles as appellant's legs could not be seen at the defense table. (R 3-6). Appellant has failed to establish any error. Robinson v. State, 610 So. 2d 1288, 1290 (Fla. 1992).

ISSUE VII

THE TRIAL COURT DID NOT PRECLUDE DEFENSE COUNSEL FROM FULLY ARGUING HIS POINT TO THE COURT

Appellant alleges that the trial court refused to allow a proffer of evidence regarding the admissibility of appellant's fingerprints. This issue is not preserved for appeal as appellant failed to request that the proffer be made prior to the court's disposition of the issue. Gunsby v. State, 574 So. 2d 1085,. cert. denied, 116 L. Ed. 2d 102, 112 S. Ct.

The record demonstrates that the trial court did not preclude the presentation of any evidence or argument during litigation of the issue. Defense counsel made his motion to suppress and stated his reasons. (R 1832). He stated that he was prepared to make a proffer of the testimony, the substance of which was that the fingerprints were obtained without appellant's consent and were obtained by someone not authorized to do so. (R 1832). The state countered appellant's argument by conceding that the prints were taken without appellant's consent and that the person taking the prints was acting as a agent and therefore had the authority to do so. (R 1832). The state further argued that the fingerprints were admissible under the inevitable discovery doctrine. (R 1833). Appellant was then invited to submit any case law to rebut the state's argument. (R 1833). He was unable to do so. (R 1833). Regardless of the testimony the fingerprints were admissible. (R 1830-1833). Consequently the proffer of the evidence would not have been helpful to the court

in deciding the issue. Reaves v. State, 531 So. 2d 401 (Fla. 1988); Williams v. State, 353 So. 2d 956 (Fla. 1st DCA 1978).

ISSUE VIII

THE MEDICAL EXAMINER DID NOT GIVE SPECULATIVE TESTIMONY

Appellant claims that the trial court allowed the medical examiner to answer questions that assume facts not in evidence and amount to speculation. The prosecutor asked the medical examiner if there was any way to discern the position of the victims and the murderer when they were shot. (R 1473-1475). The medical examiner made it abundantly clear that there is no way of actually knowing the exact position of the bodies at the time of shooting. (R 1474). There are a number of reasonable possibilities of which Dr. Edwards was giving an opinion. (R 1475, 1522, 1547-1548). During cross-examination defense counsel was able to elicit from Dr. Hobin again that there is no way of knowing the actual position of any of the victims. (R 1560, 1562-63, 1566). Appellant has failed to establish that the jury was ever mislead as to the nature of Hobin's testimony. Contrary to appellant's assertions otherwise, the state never conceded prejudice, the prosecutor stated that prejudice is not the issue. (R 1475).[10] Appellant has failed to establish that the questions posed to Dr. Hobin were anything but routine opinion testimony.

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[10] Ironically the defense asked questions of different witnesses regarding possible explanations for various occurences. For instance defense counsel asked various witnesses to give a possible explanations for different events, i.e., blood splatters in the back office, (R 1133-1135), possible explanation for the bruise on Mrs. Edwards leg, (R 1562), and the possible explanation that there was alot of debris in the stolen car that would account for it's complete burning. (R 1631).

ISSUE IX

THE JURY WAS PROPERLY INSTRUCTED REGARDING FLIGHT, PREMEDITATION AND REASONABLE DOUBT

Relying on Fenelon v. State, 549 So. 2d 292 (Fla. 1992), appellant claims that the trial court erred in instructing the jury on flight. Appellant's argument is without merit as this Court has stated that Fenelon is prospective only. At the time of appellant's trial a flight instruction was permissible. Taylor v. State, 18 Fla. L. Weekly S643, 645 (Fla. December 16, 1993). If it was error to give such an instruction it must be considered harmless given the overwhelming evidence of guilt.

Appellant also challenges the trial court's instruction regarding premeditation and reasonable doubt. This portion of the issue is not preserved for appeal as there was no objection to the instructions at trial. Sochor v. State, 619 So. 2d 285, 290 (Fla. 1993).

The instruction given regarding reasonable doubt is correct. In Woods v. State, the Fourth District recently rejected an identical claim:

> Nothing in the Cage opinion . . . causes us to question a reasonable juror's ability to properly interpret the Florida instruction as requiring that the jury find the defendant not guilty if there is a reasonable doubt as to guilt. Nor does Cage place in doubt the effort in the Florida instruction to assist a juror in evaluating the circumstances in which a doubt may not be reasonable. We also note that just prior to the U.S. Supreme Court opinion in Cage, Florida's reasonable doubt instruction was again examined and upheld by the Florida Supreme Court in Brown v. State, 565 So.2d 304 (Fla.), cert. denied, ___ U.S. ___, 111 S.Ct. 537, 112 L.Ed. 547 (1990).

596 So.2d 156, 158 (Fla. 4th DCA 1992), rev. denied, 599 So.2d 1281 (Fla. 1992), cert. denied, 113 S.Ct. 256 (1993). As noted in Woods, this Court recently rejected a challenge to the "reasonable doubt" instruction in Brown: "According to Brown the standard instruction dilutes the quantum of proof required to meet the reasonable doubt standard. We disagree. This Court has previously approved use of this standard instruction. The standard instruction, when read in its totality, adequately defines 'reasonable doubt,' and we find no merit to this point." Brown, 565 So.2d at 307. Thus, based on Brown, which Appellant fails to acknowledge, and Woods, the trial court did not abuse its discretion in giving the standard reasonable doubt instruction over Appellant's revised instruction. Consequently, Appellant's convictions should be affirmed. Trepal v. State, 18 Fla. L. Weekly S327, S329 (Fla. June 10, 1993).

Appellant also challenges the standard instruction regarding premeditation, claiming that the instruction "impermissibly relieves the state of the burdens of persuasion and proof as to an element of first degree murder." To support his argument, Appellant relies principally on McCutchen v. State, 96 So.2d 152 (Fla. 1957), wherein this Court defined the phrase "premeditated design." Since 1957, however, this Court has adopted and revised the standard jury instructions in criminal cases numerous times. To a great extent, Appellant's proposed instruction mirrors the standard instruction on first-degree murder as amended in 1976.

In 1977, this Court requested the Supreme Court Committee on Standard Jury Instructions in Criminal Cases to revise the

instructions. These revisions, which were adopted by this Court in 1981, resulted in an instruction that has remained unchanged to this date. See In re Jury Instr. in Crim. Cases, 431 So.2d 594 (Fla. 1981). As the instruction reads now, the defendant must "consciously decid[e]" to kill, and "[t]he premeditated intent to kill must be formed before the killing." **Fla. Stand. Jury Instr. in Crim. Cases** 63 (Oct. 1981). This is a correct statement of the law. Thus, the trial court did not abuse its discretion in rejecting Appellant's modifications. See Parker v. State, 456 So.2d 436, 444 (Fla. 1984) ("[T]he requested instructions were encompassed within the standard jury instructions which were properly given."). Consequently, Appellant's convictions should be affirmed.

ISSUE X

THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT IMPROPER

Appellant claims that the prosecutor's closing argument constituted fundamental error. In order for this court to review this issue, appellant must demonstrate that fundamental error has occurred given that there was no objection to any of the remarks. Crump v. State, 622 So. 2d 963 (Fla. 1993). The standard of review for appellate review of prosecutorial comments is whether the error committed was so prejudicial as to vitiate the entire trial. Jones v. State, 612 So. 2d 1370 (Fla. 1992). Wide latitude is permitted in arguing to a jury. Breedlove v. State, 413 So. 2d 1 (Fla. 1982).

A review of the record reveals that much of the prosecutor's comments were a fair reply to appellant's closing arguments. Appellant attacked the necessity of the state to bring in all the witnesses that it did accusing the state of over kill. (R 3391-3393). The state in response mentioned the enormity of the task force that was needed to solve this crime. Many witnesses had to be called by the state in order to establish various chains of custody regarding physical evidence, as well as to establish the appellant's movements throughout the episode. Appellant also attacked the state's DNA presentation of experts regarding DNA evidence. (R 3394-3397). Reference to the fact that the state tried to obtain the most qualified experts in the field was a fair reply to appellants' attack on the DNA expert.

(R 3393). Appellant also challenged the state's evidence regarding the arson charge, (R 3398), consequently the state was allowed to comment on appellant's knowledge and motivation to have that car burned. (R 3457).

Any comments regarding a conflict in the evidence was a permissible comment on the evidence. (R 3461). Craig v. State, 510 So. 2d 857 (Fla. 1987). Also permissible is the prosecutor's comments regarding appellant's testimony and his demeanor. (R 3477-3480). Given appellant was a witness, the prosecutor is permitted to comment on his testimony and draw any logical inferences therefrom. Mann v. State, 603 So. 2d 1141, 1143 (Fla. 1992); Muehleman v. State, 503 So. 2d 310, 317 (Fla. 1987). Given that none of the remarks were objected appellant has failed to overcome his procedural hurdle and demonstrate fundamental error. This claim should be denied.

ISSUE XI

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR CONTINUANCE CONDUCTED THE SENTENCING HEARING

Appellant alleges that the penalty phase was conducted in an unconstitutional manner depriving him of his right to present mitigating evidence. Specifically he claims that the trial court erred in denying him a continuance at the sentencing phase before the jury. Appellant has failed to demonstrate error.

The decision to grant or deny a continuance is within the sound discretion of the trial court. Gore v. State, 599 So. 2d 978, 985 (Fla. 1992). Appellant requested a continuance on January 29, 1991. He claims that his mother and sister were unavailable to testify and that there testimony was necessary. (R 3591-3593). The state argued that appellant should not have waited to until the last minute to bring this to the court's attention as other arrangements could have been made to present the testimony through video. (R 3594). The trial court noted for the record that appellant had previously decided not to present any mitigating evidence. (R 3594). The court was amenable to discuss the situation and the reasons for delay. (R 3594-96). The court was also aware that appellant had made very little effort to secure the appropriate witnesses. (R 3601). Appellant was asking for an indefinite continuance based on the unavailability of appellant's sister, who cannot travel while pregnant and his mother, who is psychotic. (R 3602). The

sister's physical problem would not be resolved for five months and the prognosis for appellant's mother's condition was unknown. (R 3602, 3632-33).

The state offered to allow the sister/mother to appear in any number of ways, i.e., telephonic interview without any questions from the state, a video tape or an affidavit. (R 3598-99, 3603). The mother's condition has been known to all parties for months, she has stated herself that she would not be able to testify. (R 3603).[11] Appellant refused that request. (R 3595-3596). Appellant claims that his refusal was based on a misunderstanding of penalty phase evidence. The record makes it clear that appellant refused the offer because the state would not agree to present their witnesses in the same fashion, that is hardly evidence of a misunderstanding of the nature of the proceedings. (R 3595-3596). It is simply a strategical move that failed.

Appellant also claims that a continuance was needed so that he could be reexamined by Dr. Rifkin. (R 3597). There was no intention to present Dr. Rifkin as a penalty phase witness, there was no explanation as to why a second evaluation was

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[11] Appellant argues that the state withheld his own mother's condition from the defense. There is no record support for this absurd allegation, furthermore, how is the state in any position to conceal any information regarding appellant's own family. The state has spoken to the mother with appellant's knowledge. (R 3600). The state was aware of appellant's mother's condition as was appellant himself. (R 3603-3604).

needed, nor an explanation as to why an additional evaluation was not already conducted. (R 3597).

The trial court denied the continuance in part because of the defendant's lack of cooperation in making his witnesses available.[12] (R 3601). The penalty phase was then set for January 31, 1991, two days following the request for continuance. (R 3602-3605). Prior to the commencement of that hearing defense counsel again asked for a continuance based on the same reasons.(R 3630-3631). Again there was no indication how long the continuance would be for, nor why Rifkin needed a second evaluation. (R 3631-33). The state went as far as to offer appellant the option of having the defense's investigator testify as to what appellant's mother would have said on behalf of her son. (R 3634). Appellant again declined the state's offer based on the fact that the state would not present their evidence in a similar fashion. (R 3637-3638). The court again denied the motion based on the fact that the continuance was to indefinite. (R 3637). The trial court's ruling was correct. This is not a situation were the continuance was for a definite short period of time as in Wike v. State, 596 So. 2d 1020, 1025 (Fla. 1992). The trial court did not abuse its discretion.

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[12] The judge's ruling was correct. During litigation of the motion for new trial, trial counsel made it clear that appellant never wanted any witnesses called in mitigation. (R 3927-3935). It was not until the night before the penalty phase did appellant change his mind and request that his mother and sister testify, knowing that they were unavailable. (R 3930-3932).

At the actual sentencing hearing held almost a month later, February 22, 1991 appellant claims that the trial court precluded presentation of testimony of his mother and failed to inquire as to the appropriateness of his waiver of presentation of mitigating evidence. The record belies that contention. The trial court reminded appellant that he was the one who waived presentation of his mother's testimony that had been offered by the state prior to the sentencing proceeding before the jury. (R 3919-3922). Appellant made a passing reference to the availability of his mother. Such was not stated in the context that he wanted her present, but rather that the court should have granted the continuance prior to the penalty phase before the jury. (R 3920). If appellant sincerely wanted his mother to testify, he could have made arrangements to have her at sentencing on February 22, 1991 or he could have provided the court with any affidavit or taped statement. Appellant never notified the court prior to February 22, 1991 that he wanted the court to consider her testimony. Again appellant waived presentation of such evidence. The court then made a sufficient inquiry into the availability of mitigating witnesses and the appellant's waiver of such evidence. (R 3927-3935). It is clear that trial counsel fully investigated, subpoenaed and was prepared to present witnesses in mitigation. (R 3927). Counsel traveled to North Carolina and South Carolina and obtained statements from potential witnesses including non family members. (R 3932, 3934). Defense counsel has at least twelve witnesses

prepared to testify. (R 3930). The record is clear that appellant waived presentation of mitigating evidence before the jury and the judge. (R 3637-3639, 3921-3936). The sentencing hearing was conducted in a fair manner.

Appellant claims that the judge did not consider his sympathy over the victims loss, he failed to order a mental health evaluation and he failed to order a PSI. First of all appellant's sympathy for the victim's family cannot in any way outweigh the strength of the aggravating factors. Secondly, it was appellant who did not want to present the report of Dr. Rifkin in mitigation at sentencing. Lastly the court asked specifically why a PSI would be helpful. Appellant did not respond why one should be considered as mitigation. Nor does appellant demonstrate what would be helpful to the court in either the PSI or a mental evaluation.

A review of the trial court's order reveals that the court considered in mitigation what was presented by appellant in the way of mitigation, Section 921.141 (6)(d) Fla. Stat., (1987), that the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor and the 921.141(6)(g), the age of the defendant.[13] (R 4489-4503). The trial court properly considered all the evidence that was appropriate, appellant has failed to demonstrate otherwise.

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[13] The court also considered but gave little weight to appellant's mother's statement to another victim of appellant that he had a tough life growing up. (R 4491).

Clark v. State, 613 So. 2d 412 (Fla. 1993); Henry v. State, 586 So.2d.1033 (Fla. 1991); Durocher v.State, 604 So. 2d 810 (Fla. 1992).

Lastly simply because appellant's counsel told the judge what efforts they made to investigate and pursue mitigating evidence does not mean appellant was deprived of his right to counsel. Henry, 586 So. 2d at 1038.

ISSUE XII

THE PREMEDITATION AND HEINOUSNESS CIRCUMSTANCES ARE CONSTITUTIONAL

Appellant's attacks the constitutionality of the aggravating factors of "cold calculated and premeditated"[14] and "heinous, atrocious and cruel"[15] He further argues that the trial court erred in instructing and finding these two factors.

The constitutionality of the aggravating factors has repeatedly been upheld. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); Henry v. State, 586 So. 2d 1033, 1037 n. 11 (Fla. 1991); Sochor v. Florida, 504 U.S. __ (1992); Klokoc v.State, 589 So. 2d 219, 222 (Fla. 1991).

The trial court correctly found that the murders were "heinous, atrocious and cruel. It is clear from the evidence that all three victims were within a very short distance of one another. Mr. Boornoosh was confined in the bathroom, a very short distance from where Mrs. Edwards was being raped. Mr. Edwards was in the office also a short distance from where his wife was being raped. Mr. Boornoosh, in an attempt to save his weeding ring, placed it in the waste basket. He was told to listen very carefully as he would be able to hear the bullet enter his head. (R 2758-2768, 4488-4489). All three were aware of their impending death, as Mr. Edwards begged for his life, and was shot in front of his wife. Mrs. Edwards began to cry, was

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[14] 921.141 (5)(i), Fla. Stat. (1987)

[15] 921.141 (5)(h), Fla. Stat. (1987).

forced to strip and was raped. Mr. Boornoosh prayed before he was finally shot. (R 22758-2768, 4488-4489, 4493, 4498).

Mr. Edwards begged that his wife's life be spared because they had a little child at home. He watched as appellant raped his wife. All three were executed in front of each other and laid dying on top of one another. All three victims were subjected to the thirty minute ordeal involving their kidnapping, sexual battery and robbery, and undoubtedly anguished over their impending death. All three murders were especially heinous atrocious and cruel. Chandler v. State, 534 So.2d 701 (Fla. 1988); Smith v. State, 424 So. 2d 726 (Fla. 1983); White v. State, 403 So. 2d 331, 338 (Fla. 1981).

Appellant's attack on the applicable jury instructions to these aggravators has not been preserved for appeal consequently, review if precluded. Kennedy v. Singletary, 602 So. 2d 1285 (Fla.), cert. denied, 113 S. Ct. 2, 120 L. Ed. 2d 931 (1992); Johnson, supra; Sochor v. State, Thompson v. State, 619 So. 2d 261 (Fla. 1993). To the extent that the there was error regarding the instruction it must be considered harmless given the overwhelming evidence to establish that factor. Thompson v. State, 619 So. 2d 261 (Fla. 1993).

If this court should find that the evidence did not establish that the murders were "heinous atrocious and cruel any error must be considered harmless. The jury was not exposed to any otherwise inadmissible evidence. The remaining aggravating factors clearly outweigh the mitigating evidence offered. Ragsdale v. State, 609 So. 2d 10, 14 (Fla. 1992).

The trial court properly found that all three murders were "cold calculated and premeditated". The cases relied upon by appellant are all distinguishable. This is not a situation were a sexual battery escalated to a murder as in Sochor v. State, 619 So. 2d 285 (Fla. 1993) and Power v.State, 605 So. 2d 856 (Fla. 1992). Appellant and his accomplice both armed decided to rob a Domino's restaurant. Both men had recently escaped from prison in North Carolina. Neither man ever attempted to hide their identity during the criminal episode. Appellant told Patrick McCoombs that he could not afford to leave any witnesses. (R 2767). Nor is this a situation where it can be inferred that a struggle took place resulting in murder as in Gore v.State, 599 So. 2d 978 (Fla. 19920 or Gerald v. State, 601 So. 2d 1157 (Fla. 1992). After a thirty minute crime spree, (R 1040-1041, 1054), which included two armed robberies, three kidnapping, and one sexual battery, all three victims were herded into a small bathroom and executed. All three were each shot twice at close range. All three victims were found together in a human pile. Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988); Valle v. State, 581 So.2d 48 (Fla. 1992); Eutzey v. State, 458 So. 2d 755 (Fla. 1984).

If this court should find that there was insufficient evidence to establish this factor, any error must be considered harmless. The jury did not hear any otherwise inadmissable evidence as well as the fact that the strength of the remaining aggravating factors in balance with the weakness of the

mitigating evidence.[16] Herring v. State, 580 So. 2d 135, 138 (Fla. 1991); Sochor, supra.[17]

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[16] Appellant does not challenge the sufficiency of the remaining aggravating factors nor does he challenge the court's findings with respect to the mitigating evidence. The jury voted for death twelve to zero. (R 3779).

The trial court found that the defendant was previously convicted of a felony involving use or threat of violence to the person. 921.141 (5)(b); the capital felony was committed by a person under sentence of imprisonment, 921.141 (5)(a); the capital felony was committed while defendant was engaged in the commission of any robbery, sexual battery, arson or kidnapping, 921.141 (5)(d); the capital felony was commited for purpose of avoiding or preventing arrest, 921.141(5)(e); the capital felony was committed for pecuniary gain, 921.141(5)(f); the capital felony was especially heinous, atrocious and cruel, 921.141 (5)(h); the capital felony was committed in a cold, calculated and premeditated manner, 921.141(5)(i).

[17] Although not challenged by appellant, appellee asserts that the three capital sentences are proportional. Cook v. State, 581 So. 2d 141 (Fla. 1991); Jones v. State, 411 So. 2d 165 (Fla. 19820; Stein v. State, 19 Fla. L. Weekly S32 (Fla. January 13, 1994).

ISSUE XIII

THE TRIAL COURT PROPERLY ALLOWED IN EVIDENCE OF APPELLANT'S ESCAPE FORM PRISON

Appellant claims that trial court erred in admitting into evidence information regarding a burglary and grand theft during his escape from a prison road crew. The evidence was properly admitted. Evidence of appellant's character is a proper consideration during the penalty phase. The standard for admissibility is different at the penalty phase given that the focus is on the defendant's character. Hildwin v. State, 531 So. 2d 124, 127 (Fla. 1988).

The state as conceded by defense counsel is entitled to bring in evidence of appellant's escape. (R 3664). This is especially relevant given that one of the aggravating factors is that appellant was under sentence of imprisonment. Facts to support an aggravating factor are admissible. Long v. State, 610 So.2d 1268 (Fla. 1992); Clark v. State, 613 So. 2d 4123 (Fla. 1992). The jury heard that appellant affected their escape by stealing a canoe and than a car to leave the state. (R 3657-3670). There were no details of the burglary, (R 3663), simply that a canoe was taken from a residence while no one was home. Similarly, theft of the of the Camaro was also relevant to establish how they left the state. No details of how the car was obtained was admitted, it was simply that a car was stolen. (R 3668- 3670). The evidence was properly admitted.

If this Court finds that the evidence was inadmissible it must be considered harmless beyond a reasonable doubt. The jury heard that appellant stole a canoe and a car in his escape attempt can did not contribute to the sentence of death. This jury had already convicted appellant of three counts of first degree murder, sexual battery and other various thefts. Hearing about two additional thefts after considering all the other evidence of appellant's violent acts was innocuous.

ISSUE XIV

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE REGARDING APPELLANT'S PRIOR VIOLENT FELONY

Appellant claims that the trial court erred in allowing a witness to testify about injuries he received during a robbery perpetrated against him by appellant. (R 3673-3689). The evidence was clearly admissible to establish the aggravating factor of prior violent felony. Chandler v. State, 534 So. 2d 701 (Fla. 1988), cert. denied, 490 U.S. 1075, 109 S. Ct. 2089, 104 L. Ed. 2d 652 (1989). If this Court finds that the evidence was inadmissible, any error must be considered harmless beyond a reasonable doubt. The jury was properly made aware of the prior violent crimes. The fact that they would hear some details is simply cumulative.

ISSUE XV

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY REGARDING DETAILS OF PRIOR VIOLENT FELONY

Appellant claims that the trial court erred in allowing testimony of a deputy about statements a victim made to him through an interpreter. Appellant concedes that such evidence is admissible. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Hodges v. State, 595 So. 2d 929 (Fla. 1992); Clark v. State, 613 So. 2d 412 (Fla. 1993). Appellant was able to cross-examine the deputy, consequently there was no error. (R 3701-3708).

ISSUE XVI

THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT IMPROPER

Appellant claims that the prosecutor made several impermissible statements during closing argument. Most of the comments were not objected to, consequently those portions are not preserved for appeal. Crump v. State, 622 So. 2d 963 (Fla. 1993). Wide latitude is permitted in arguing to a jury. Control of comments is within the trial court's discretion, an abuse of that discretion must be shown in order to demonstrate reversible error. Crump.

The only portion of this claim that is preserved for appeal deals with the statement that the victims unlike appellant did not have the benefit of a trial.(R 3760) and that the death penalty was created for this kind of murder. (R 3758).

Appellant's alleges that the prosecutor's comment comparing appellant's rights to the lack of rights afforded the victims (R 3760) was an impermissible attempt to elicit sympathy for the victims. Such is not the case. The statement was made in the context of telling the jury that the they were in a position to decide the fate of the appellant. (R 3759, 3761). That is clearly a comment on the obvious. Bush v. State, 461 So. 2d 936, 941-942 (Fla. 1984). If error it must be considered harmless given that the statement was brief, and the evidence in aggravation clearly outweighed the minimal mitigating evidence presented. Jennings v. State, 453 So. 2d 1109 (Fla.), cert.

granted, vacated on other grounds, 470 U.S. 1002, 105 S.Ct. 351, 84 L. Ed. 2d 374 (1984).

Equally without merit is the challenge to the prosecutor's comment that this is the type of murder for which that the death penalty was created. The prosecutor was allowed to draw conclusions from the evidence presented. Mann v. State, 603 So. 2d 1141, 1143 (Fla. 1992). The state presented the testimony of seven penalty phase witnesses in order to establish seven aggravating factors. The prosecutor's comment that this case was appropriate for the death penalty is an obvious conclusion that can be drawn from the state's presentation. The comment was proper.

A review of the entire closing argument demonstrates that the prosecutor was simply outlining the evidence presented and making logical inferences and arguments. Appellant had failed to demonstrate any error, fundamental or otherwise. Breedlove v. State, 413 So 2d. 1 (Fla.), cert. denied, 459 U.S. 882 , 103 S. Ct. 184, 74 L. Ed. 2d (1982).

ISSUE XVII

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant attacks the constitutionality of Florida's death penalty statute. The only portion of this claim that is preserved for appeal is that portion which attacks the constitutionality of the aggravating factors of "heinous atrocious and cruel", "cold calculated and premeditated", and "capital murder was committed during the course of a felony,"(R 3857-3860), and that the statute impermissibly creates a presumption for death. (R 3861). This Court as well as the United States Supreme Court has has repeatedly rejected these arguments. Thompson v. State, 619 So. 2d 261, 267 (Fla. 1993); Ragsdale v. State, 609 So. 2d 10, 14 (Fla. 1992); Robinson v. State, 574 So. 2d 108, 113 n.6 (Fla. 1991); Jackson v. State, 530 SO. 2d 269, 273 (1988), cert. denied, 488 U.S. 1051, 109 S.Ct. 882, 102 L. Ed. 2d 1008 (1988). Mills v. State, 476 172 (Fla. 1985); Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988); Boyde v. California, 494 U.S. 370 (1990); Blystone v. Pennsylvania, 494 U.S. 299 (1990); Sochor v. Florida, 504 U.S. __, 119 L. Ed.2d 326, 112 S. ct. __ (1992).

To the extent that this Court reviews the unpreserved portion of this claim, all of appellant's constitutional attacks have been rejected. Tompson; Ragsdale.

CONCLUSION

WHEREFORE, based on the above articulated facts and relevant law, appellant's conviction for first degree murder and sentence of death should be **AFFIRMED.**

Respectfully submitted,

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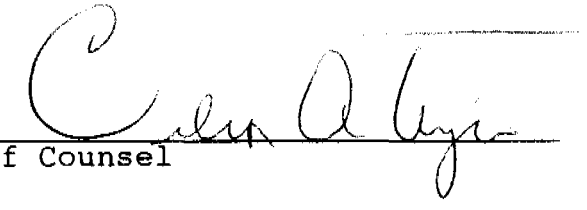
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been forwarded by courier to: **GARY CALDWELL, ESQUIRE,** Assistant Public Defender, 421 Third Street, West Palm Beach, Florida 33401, this **22nd** day of February, 1994.



Of Counsel

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