IN THE SUPREME COURT OF FLORIDA

GEORGE WALLACE BROWN,

Appellant,

v.

Case No. 78,007

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Dr. Melamud, the medical examiner testified that autopsy of Horace Brown revealed three stab wounds, two in the upper abdomen and one in the chest (R 594). As a result of decomposition, the body was partly skeletonized (R 602). The cause of death was multiple stab wounds causing liver damage and bleeding (R 604).

Deputy Richard Lee Hess with the Arapahoe County, Colorado Sheriff's Office testified that on May 1, 1990, he was assigned to booking and receiving at the jail facility (R 623). At that time he came into contact with appellant George Wallace Brown (R 625). Hess took custody of the property Brown had, including a watch, two wallets. One of the wallets contained credit cards of Horace D. Brown (R 630). Hess asked appellant about the different names (Horace D. and George Wallace) and appellant stated they were his father's and his father knew all about them. Hess left it at that but informed his sergeant who told Hess that department policy required that credit cards with another person's name be kept until the owner was contacted (R 633).

When Hess related this to Brown the latter responded that he didn't want to hurt the old man who knew that he had the credit card (R 633). Hess asked if there were a way for him to contact Horace Brown and appellant replied that he lived in Florida and didn't have a home phone and couldn't be contacted until the next day at work. When Hess said he'd have to keep the card, appellant began to cry and said he had something to tell him: that Horace Brown was dead, murdered eight days ago (R 634 - 35).

Brown added that he didn't' do it but was the only witness to it. He said Horace was not his father, only a friend. Brown asked to speak to an investigator (R 635 - 36).

Sheriff's investigator Roland Lackey contacted appellant at the Arapahoe County jail on May 1, 1990, at 7:40 p.m. (9:40 p.m. in Florida) (R 645). Appellant said he wanted to tell him something and did not want to be interrupted; he said he was a witness to a murder and kind of involved (R 647). Lackey then gave Miranda warnings (R 648). Brown signed a waiver of rights form and stated that he met Horace D. Brown at Sam's Bar and had asked Horace if he would take him to Polk City (R 654). Horace Brown allegedly made a phone call and told appellant he needed to meet someone on the way to Polk City. They stopped on a dirt road near I-4 and Highway 33 and appellant related that he saw a Chrysler-type vehicle with a male subject named Danny (R 655). Horace got out of the gray Honda and went and sat in the car with Danny. Appellant waited for approximately thirty minutes and yelled out to Horace that he needed to go to Polk City. Horace came over, told him to take his car and return in an hour. Appellant did so (R 656) but the other car was gone. He found a wallet and watch and papers belonging to Horace Brown, drove down the canal and found Horace's body lying on its stomach in the weeds. He got scared and left in Horace's car and did not notify the authorities, fearing he would be hit with a murder rap (R 657 - 58). On April 23, the next Monday morning, he forged one of Horace's checks for $650 and cashed it at a First Union Bank

of Orlando, bought a 1980 or 81 Dodge Colt and decided to drive to Nashville, Tennessee. At Nashville he was leery of being caught and decided to drive to Denver He was arrested on an outstanding Osceola County warrant for auto theft (R 659).

Appellant also gave information regarding miscellaneous papers belonging to Horace Brown under a plastic panel in the car that had to be taken off with a screwdriver (R 661). Deputy Lackey notified the Polk County Sheriff's Department and gave the possible location of the body (R 662 - 663). He also had the appellant's vehicle impounded and sealed (R 663). Lackey talked to Detective Ore at 11:00 p.m., Colorado time. Detective Ore flew out to Colorado the next day and they conversed with appellant on May 2 (R 666). The witness then identified a number of exhibits taken from the car.

F.D.L.E. handwriting analyst James Outland opined that appellant wrote the name Horace Brown on various documents (R 694, 702).

Polk County Sheriff's sergeant Davis Kite received a phone call on May 1, 1990 from Detective Lackey in Colorado relating that appellant said he had knowledge of a homicide that occurred eight days earlier and described the area and requested somebody check it out (R 711 - 712). He got this call at 11:30 p.m. They arrived at the site about midnight (R 714) and smelled something dead. They discovered the body (R 719). Kite could not have seen the body at night without his flashlight (R 722).

The officer put a rock there so that he could find the body when he returned again (R 724).

Deputy Sheriff Kenneth Powers, a K-9 officer, joined Sergeant Kite in the effort to locate the body. The dog was not cadaver-trained (R 735 - 736). They found the body by smell, not by flashlight (R 739).

Margaret Rohner, a fingerprint expert, opined that appellant prints on a business card, a Texaco credit card slip, a bank withdrawal slip and the check endorsed by George Brown (R 765 - 772).

Judy Etherington who knew appellant for about a month last saw him on April 22; he had been living with her for about three weeks (R 775). Appellant did not own a car (R 776) and mentioned using a stage name K.C. Cannon when he wrote and recorded songs. He also used the name Carl (R 776). Appellant mentioned going out for a walk on April 22 and possibly getting in touch with "Bobby" about driving a truck with him; he left about 6:00 p.m. (R 780). At about ten o'clock he phoned and said he was calling from a Haines City bar; he was able to get the truck driving job from his friend (R 781). Brown said he had borrowed a car from Bobby. Appellant returned home about 11:00 (R 784). He had a small grayish Toyota-type car; he said Bobby had loaned it to him so he could pick up his clothes and leave for work the next morning (R 785). He also told her he had gotten into a fight before coming home, mentioning blood all over him; she had not noticed blood before he said it (R 786). Appellant said the

fight occurred at the Crossing in Haines City (R 787). Appellant left with his things about 1:00 or 1:30. He appeared to make a phone call asking over the phone what time he needed to be back in Haines City; he also said the car drove well (R 789 - 90). She next heard from appellant Wednesday night but he had left a message Tuesday night. Two collect calls, received by her baby-sitter from appellant were made from Cullman, Alabama and Nashville, Tennessee (R 791 - 792). When she did talk to him Brown stated that he was in Nashville and that he was going to pursue his singing and writing career rather than drive a truck with Bobby. Appellant also mentioned that he'd prefer her not letting anyone know where he was (R 793 - 94). Appellant never mentioned knowing a Horace Brown (R 795). A pocket knife that she owned disappeared when appellant left (R 795 - 96).

Lynn Pollock, a former employee of First Union National Bank in Orlando identified Exhibit 46, the check she cashed on August 23, 1990. The check on the account of Horace D. and Jeanene Brown was paid to the order of George Brown in the amount of $650 (R 816 - 817). Mr. Brown gave her an Orlando address of 1607 Texas Avenue and his drivers' license, Exhibit 89 (R 818). Her records also showed that thirty-nine minutes prior to the check cashing, there was an inquiry made as to the amount in the account ($7377.71) (R 819 - 821).

Douglas Wood, employee of Credit World Auto Sales, sold a car to appellant Brown on April 23, 1990 (R 824 - 25). Appellant claimed to be a construction worker driving back and forth to

Haines City (R 826). He purchased a 1980 Dodge Colt for $318 cash (R 827).

Bobby Dobbins, self-employed in the trucking business, knew a Carl Kent for a short period. He denied getting a call on April 22, 1990 from George Brown or Carl Kent (R 831 - 832).

Jeanene Brown, widow of the victim testified that her husband was retired but worked part-time at Scotty's. She last saw him at 8:30 a.m. on April 22, 1990 (R 835 - 36). She identified his billfold and testified he had a number of credit cards (R 840 - 41). She did not recognize the handwriting on check number 4206, Exhibit 46 (R 843). To her knowledge her husband did not know George Wallace Brown and she did not know appellant. She was married to him for 37 years and she was unaware of any friend named Danny (R 844). Her husband would loan his auto to a family member in need but not others. If an acquaintance were to ask to borrow the car he would probably take them himself and not loan the car (R 845). He did pick up hitchhikers.

Deputy Joe Benavides became involved in the Horace Brown homicide investigation on May 3. He found the victim's vehicle next door to an Eckerd's drug store at the Orange Blossom Trail area in Orlando (R 867).

Nancy Shipman, a crime scene technician, went to the crime scene in the early morning hours of May 2, 190 and photographed the whole area at different angles (R 875). Exhibit 40 was the videotape she made of the crime scene (R 902).

The jury was informed of several stipulated matters including the identity of the deceased as Horace Brown (R 933 - 937).

Emma West, an employee of Sam's Tavern in Lakeland, had never seen appellant there or Horace D. Brown (R 938 - 39). Sam Turpin the owner of Sam's Tavern had not seen appellant nor Horace Brown (R 940 - 41). Bonita Brennan, an employee at Siesta Lounge knew Horace Brown as the Peanut Man (R 944). She had not seen appellant there as far as she could recall (R 945). Lee Ann Boughner, another Siesta Lounge employee knew Horace Brown, the Peanut Man, a patron who stayed to himself a lot. She didn't recall seeing appellant there (R 951 - 52).

Homicide Detective Robert Ore became involved in the investigation at 12:35 on May 2 (R 957). He called Detective Lackey in Colorado prior to arriving at the crime scene (R 958). Detective Lackey had described the position he should expect to find the body, lying on the front side or stomach, feet first down into a ditch (R 966 - 67). He flew to Denver, Colorado and arrived at 11:00 p.m. Mountain Time (R 968). Ore interviewed appellant in the presence of Detective Lackey. Ore's understanding at that time was that George Brown had been some sort of witness to the events surrounding the death (R 970. Appellant told Ore he met the victim at Sam's Bar, had a few beers and asked for a ride to Polk City. On the way they stopped to make a phone call, then continued on. Horace pulled off into the dirt road area to meet someone named Danny (R 971 - 973).

Horace parked and entered a waiting Chrysler. After 30 minutes, appellant called out to Horace that he still needed to go to Polk City and Horace told him to take the car and return in an hour. Appellant claimed he drove to Polk City, purchased a beer, drove to a girlfriend's residence who was not home and returned (R 975).

The Chrysler was gone and Brown found Horace's wallet and papers in the dirt road (R 976). Appellant drove on a little further and found the victim's watch lying on the side of the road (R 976). He walked fifty feet down the road, lit a cigarette and saw Horace's body (R 977) Appellant claimed that when he returned to Judy Etherington's house she noticed he had a lot of blood on him and he told her he'd been in a fight at a bar. Appellant did not tell Ore that in fact he had gotten in a fight or got a truck driving job (R 979). Appellant admitted cashing one of the victim's checks for $650 (R 980). He left the victim's car in a parking lot and purchased a car for $300. He claimed he drove to Nashville and stayed for several days (R 981 - 982). Fearful of being arrested he drove to Denver (R 983). Appellant did not tell Ore he killed Horace Brown (R 984).

On the trip back from Colorado appellant mentioned a shooting incident at his next door neighbor's residence and Ore was able to locate the next door neighbor Bobby Dobbins (R 995). The officer investigated and found that the address of 1607 North Texas Avenue in Orlando did not exist (R 1002).

Appellant declined to testify (R 1060 - 1062), and the jury returned a guilty verdict (R 1257).

At the penalty phase the state offered testimony of Dr. Melamud that the victim did not die instantaneously (R 1300 - 04) and evidence of appellant's prior violent criminal background. The defense offered the testimony of Dr. Henry Dee regarding mental mitigating circumstances and Juanita Lamey, appellant's mother, regarding Brown's childhood (R 1306 - 1359).

The jury recommended death by a vote of 8 - 4 (R 2093). The trial court imposed a sentence of death finding three aggravating factors and no mitigating factors (R 2114 - 2119).

Brown now appeals.

SUMMARY OF THE ARGUMENT

I. The trial court did not err in denying the motion for directed verdict because of the state's alleged failure to prove premeditation. Quite apart from premeditation, there was sufficient evidence to support a felony-murder first degree murder verdict. But there was sufficient evidence of premeditation as can be seen in the cause of death (multiple stab wounds), and there is no other reasonable hypothesis of innocence.

II. The lower court did not abuse its discretion in denying the defense motion to suppress certain video and photographs of the body and crime scene.

III and IV. The lower court did not err in failing to grant the defense motion to compel discovery of Gainesville Task Force officers or in granting the state's motion in limine prohibiting defense argument about the Gainesville murders.

V. The lower court did not err reversibly in failing to sustain defense counsel's objection to testimony by Hess, Lackey, Kite, and Ore regarding appellant's arrest on an unrelated warrant. Most of the now-complained of comments were not objected to below and thus not preserved for appellate review. The single instance to which there was an objection, there was no attempt by the prosecution to show bad character by commission of an unrelated offense -- only to establish appellant's admissions of his reasons for his actions (why he did not notify police when he discovered the victim's body); and it was clearly harmless given appellant's arguments and questions.

VI. The lower court did not err in failing to grant the defense motion in limine or in ruling on defense objections to the prosecutor's voir dire questions as the record amply demonstrates proper inquiry by the prosecutor to obtain a jury that could follow the law.

VII. The lower court did not err in failing to grant appellant's motion to suppress statements to Colorado and Florida authorities. Appellant initially volunteered a statement to Deputy Hess. When appellant told Officer Lackey, "I was kind of involved, Lackey immediately gave Miranda warnings and had Brown read and sign an Advisement Form. When Detective Ore arrived the next day, appellant was readvised that the advisement still applied and appellant need not talk to Ore. The trial court's ruling is correct.

VIII. The lower court did not err in denying appellant's speedy trial discharge motion. Appellant twice requested and received a continuance waiving the speedy trial time constraints.

IX. The lower court did not err in failing to appoint separate counsel to represent appellant during the penalty phase. There was no demand or request for a change in counsel and the necessity for one should not be presumed. To the extent that appellant is urging that trial counsel rendered ineffective assistance, appellee denies the claim and suggests that Rule 3.850 is the appropriate vehicle.

X. The lower court did not err by instructing the jury on the "HAC" factor. The instruction given was the amended one, not

the one found infirm in Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (1992) and the evidence supported the finding.

XI. The lower court did not erroneously draw inferences to imply a "CCP" finding. The order recites the reasons for finding "HAC".

XII. The lower court's order properly reflects a consideration of the proffered mental mitigating circumstances and the reasons for its rejection. No error is present.

XIII. The imposition of a sentence of death in the instant case is not disproportionate where there are three valid aggravators, no mitigators and the jury recommended death by a vote of eight to four.

XIV. The lower court did not err by failing to consider nonstatutory mitigating circumstances; it considered and found it insubstantial.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT BECAUSE THE STATE ALLEGEDLY FAILED TO PROVE PREMEDITATION.

Before appellee proceeds to the discussion of the instant issue, we wish to point out that even if it were true that the state failed in its burden to prove premeditation (which we do not concede), affirmance would still be required because appellant brown is guilty of first degree murder on a felony-murder theory. There is no question that appellant committed a robbery in the perpetration of Horace Brown's homicide. Appellant Brown showed up at the residence of his girlfriend Judy Etherington in the victim's auto which he explained as having borrowed from the friend who was going to give him a job. He subsequently drove the car to Orlando where he abandoned it and withdrew over $600 from the victim's checking account forging his name in the process. Thereafter, Brown bought a used car and fled to Colorado using victim Brown's credit card along the way until he was apprehended.

Mr. Brown told Officer Hess that the Horace Brown credit cards belonged to his father who knew that appellant had them and therefore didn't need to be contacted. Appellant stole the victim's checkbook, wallet and watch. Appellant was charged by indictment with armed robbery (R 1425), the jury convicted him of robbery and appellant herein presented no challenge to the

robbery conviction. Appellant's conviction for first degree murder -- at the very least on a felony-murder basis -- must stand.

In Sireci v. State, 399 So.2d 964 (Fla. 1981), the victim as in the instant case had sustained multiple stab wounds (fifty-five in that case, three in the instant case) and this Court held that premeditation can be shown by circumstantial evidence and that evidence from which premeditation might be inferred included such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. The stabbing and taking the victim's wallet in supported a determination of a premeditated killing. Cf. Hall v. State, ___ So. 2d ___, 18 F. Law Weekly S 63, 65 (Fla. 1993) (CCP aggravating factor can be shown by circumstantial evidence as where victim is transported to another area and killed).

Appellant concedes that the stabbing of Horace Brown would support the hypothesis of premeditation or guilt (Brief, p. 28), but insists there is a reasonable hypothesis of lack of premeditation; he hypothesizes a situation in which the assailant may have intended to quiet him and to stop before causing death. But the evidence does not support this scenario.

Killer and victim already were in a deserted, isolated area -- indeed investigating officers had to discover the body by smell, they couldn't see it and there were at least three stab

wounds to the upper body causing liver damage and exsanguination. Appellant's girlfriend was missing knife she had in her residence after the appellant -- boyfriend left. Appellant says that it is not "unreasonable to suggest that the defendant's own weapon was used against him by the defendant" (Brief, p. 28) citing Taylor v. State, 22 So.2d 639 (Fla. 1945). We assume appellant meant to say that the victim used a weapon on the defendant. There is no evidence to support the thesis that victim used a knife or had a knife, appellant did not so testify and indeed Brown's statements to police were only that he found the body. In Taylor, cited by Brown, the Court merely concluded that the evidence showed a fight, an excess of self-defense and therefore no premeditation.

Appellant mentions that the victim was sixty-two years old and abused alcohol and his liver could have been diseased and more easily injured. Thus, he reasons, the homicide may have been effected almost instantly.

Dr. Melamud did testify that the victim had consumed alcohol before he died but could not tell the level of alcohol in the body or how much was consumed (R 621). This testimony does not make the victim an "abuser" of alcohol, the autopsy protocol did not list any liver disease (R 1906) and it is difficult to see why appellant in any event, is not responsible for taking his victim as he finds him. And contrary to appellant's suggestion, Dr. Melamud testified that the stab wounds were not immediately fatal to Horace (R 1300).

Appellant relies on Miller v. State, 332 So. 2d 65 (Fla. 1976) and Jones v. State, 332 So. 2d 615 (Fla. 1976). In both cases, the judgment of guilty of murder in the first degree was affirmed. That the sentences may have been vacated for one reason or another has little importance to the guilt issue here under consideration.

Appellant's attempt to compare his situation with that of the defendant in Jackson v. State, 575 So. 2d 181 (Fla. 1991) is without merit. First of all, the Court in Jackson found sufficient evidence of felony-murder to sustain the judgment in a robbery that Clinton committed with his brother Nathaniel.

Second, the Court in Jackson concluded there was no evidence to indicate an anticipated killing in a hardware store robbery (here appellant in need of a car apparently took his girlfriend's knife, met the victim, killed him and took his automobile and personal property); the evidence in Jackson was consistent with the victim resisting the robbery inducing a single gunshot fired reflexively (the victim sub judice was stabbed three times, not shot reflexively) and there was no evidence that Jackson killed the victim.

Essentially, appellant contends that the jury was compelled to believe appellant's ridiculous contention that his multiple lies to Judy Etherington after he returned with the victim's auto and subsequent phone calls from Tennessee and advice not to tell anyone where he was and other subsequent conduct (taking money from the victim's account, use of his credit cards, etc.) show merely that he was "confused and upset".

This Court in Cochran v. State, 547 So. 2d 928 (Fla. 1989), reiterated the standard to be used: in reviewing the challenge to the legal sufficiency of circumstantial evidence on the element of premeditation so as to exclude a verdict for first degree premeditated murder.

> "Appellant correctly points out that in order to prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. *McArthur v. State*, 351 So.2d 972, 976 n. 12 (Fla. 1977). Where the element of premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the state must be inconsistent with every other reasonable inference. *Wilson v. State*, 493 So.2d 1019 (Fla. 1986); *Hall v. State*, 403 So.2d 1321 (Fla. 1981).
>
> But 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 verdict, the verdict will not be reversed no appeal. *Heiney v. State* 447 So.2d 210, 212 (Fla.), *cert. denied*, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); Williams *v. State*, 437 So.2d 133 (Fla. 1983), *cert. denied*, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984); *Rose v. State*, 425 So.2d 521 (Fla. 1982), *cert. denied*, , 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983). The circumstantial evidence standard does not require the jury to believe the defense version of facts on which the state has produced conflicting evidence and the state, as appellee is

> entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. *Buenoano v. State*, 478 So.2d 387 (Fla. 1st DCA 1985), *review dismissed*, 504 So.2d 762 (Fla. 1987)."

Cochran at 930.

Appellant suggests the instant case is only a "heat of passion" killing. That is true only in the sense that heat of passion is more broadly defined to include the lust for the victim's automobile, watch, wallet, checkbook and credit cards.

Appellant contends that the prosecutor's theory that the death resulted from a hitchhiking incident where victim drove aggressor to the secluded spot in the woods ignores the evidence that George and Horace mutually searched for inebriation. It is true that appellant George Brown told law enforcement officers Detective Lackey and Detective Ore that he had met or had a conversation with the victim in Sam's Bar (R 654, 97), but since appellant has demonstrated that he is a consistent liar (he told Hess the Horace Brown credit cards belonged to his father who knew appellant had them, he lied to Judy Etherington about the car and new job he had), there is no particular reason why a fact finder should accept as gospel his version of the circumstances surrounding the ride with Horace (especially since the victim's widow insisted that her husband would not allow a non-family member to drive away with the car and never knew her husband to have a friend named Danny).

Appellant next asserts in disjointed fashion that the photos and videotapes were not probative of the main issue, who killed Horace Brown. Appellee submits that the evidence was relevant and helped refute appellant's self-serving statements to authorities that he with relative ease had discovered Horace's body the night he fled with his auto and property. The photos and video helped establish that indeed George Brown did have extensive knowledge of the place and details of the homicide and that the body was more hidden than he would have wanted to admit.

Appellant also takes the prosecutor to task for the closing argument portion wherein the state urged that it was unnecessary to kill the victim -- that appellant being younger and stronger than his victim could have taken the victims' property without killing him. Brown then reasons that since the state itself was urging a felony-murder theory that is a reasonable hypothesis that the stabbing was not premeditated. Appellant overlooks that it is not a reasonable hypothesis of innocence that he killed Horace Brown in the perpetration of a robbery; that is merely another manner of committing first degree murder. Moreover, a killing by premeditation and a felony-murder are not mutually exclusive. Garcia v. State, 492 So. 2d 360, 366 (Fla. 1986). Appellant relies on Hardwick v. State, 461 So. 2d 79 (Fla. 1984), but the excerpt of that opinion quoted at page 39 of his brief refers to the Court's discussion of the cold, calculated and premeditated aggravating factor at the penalty phase. The same is true of his citation to Geralds v. State, 601 So. 2d 1157

(Fla. 1992). Neither Hardwick nor Geralds nor any other case suggest that the commission of a felony-murder is a reasonable hypothesis of innocence to the offense of first degree murder requiring the overturning of the judgment.

Appellant next seems to take issue with the given jury instructions. The instructions given to the jury were correct (R 2038 - 2062; R 1225 - 1246). That appellant submitted other instructions which were not given (R 2084 - 92) reflects only that they already were covered by the given instructions or were erroneous and confusing and need not be given (R 1096).

For example, appellant has noted that the instructions on burden of proof and reasonable doubt negated the need for instruction on circumstantial evidence. In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So. 2d 594 (Fla. 1981).[1]

Finally appellee notes that missing body parts were not caused by stabbing and that animals could have eaten portions of it. That does not render appellant innocent. Appellee argues that "he did not have the emotional or mental capacity to report his death because he was in serious financial trouble and there was no alleged outstanding warrant for his arrest." There was no

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[1] Apepllee also notes that when defense counsel moved for judgment of acquittal at the conclusion of the state's case he did not urge a failure by the state to prove premeditation; rather, he argued that defendant was not shown to be the one who caused Horace Brown's death (R 1058).

evidence that appellant "lacked the emotional or mental capacity to report" the death and the state agrees that Brown's serious financial trouble provided a motivation to rob and kill the victim, to obtain his property. The prosecutor's closing argument was not improper.

ISSUE II

WHETHER THE LOWER COURT ERRED IN DENYING THE DEFENSE MOTION TO SUPPRESS CERTAIN VIDEO AND PHOTOGRAPHS OF THE BODY AND CRIME SCENE.

In this point appellant argues that the lower court erred in denying the motion to suppress certain video and photographs of the body and crime scene. He asserts that trial counsel objected only to the videotape depicting the decomposed body and the area surrounding because the video was confusing, inaccurate and misrepresentative of the area where the body was found (R 861 - 864). With respect to that objection which was raised below, appellee responds that the trial court viewed the video depicting where the body was found and ruled:

> "THE COURT: All right. It's going to be the Court's ruling that the film taken in its total is admissible. The argument can be made for weight on the portions that appear to be somewhat blurred, but the total film offers the viewer several different objects, the trucks, the lamps, the trees, the background and so forth with which to gain a perspective that could or could not support a jury's finding. Therefore, I think it's a weight problem more than an admissibility problem."

(R 864)

Appellant has failed to demonstrate an abuse of discretion in the trial court's ruling on admissibility of evidence.

Appellant now urges in this forum ab initio a totally new contention not presented below that the photos or video are gruesome. Since he did not assert this below, it is not subject

to appellate review. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990)[2]

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[2] Even if the point had been preserved it would be meritless. Testimony regarding the photos was helpful in explaining the medical examiner's testimony about the wounds and cause of death. Burns v. State, 609 So.2d 600, 18 Fla. Law Weekly S 35 (Fla. 1992). The videotape was also relevant on the issue of how easily discoverable or not the body was.

ISSUE III

WHETHER THE COURT ERRED IN FAILING TO GRANT DEFENSE MOTION TO COMPEL DISCOVERY OF GAINESVILLE TASK FORCE OFFICERS.

ISSUE IV

WHETHER THE COURT ERRED IN GRANTING THE STATE'S MOTION IN LIMINE PROHIBITING THE DEFENSE FROM ARGUING THE GAINESVILLE MURDERS.

The record reflects that on February 28, 1991, appellant filed a Notice of Intention to Schedule Depositions and Demand for Supplemental Discovery (R 1858 - 60). The state filed an Answer to Defendant's Notice of Intention to Schedule Depositions and Demand Second Supplemental Demand for Discovery (R 1861 - 63). Appellant also filed a Motion to Compel Discovery and to Authorize Depositions as well as an Affidavit in Support of this Motion (R 1864 - 58, R 1869 - 1942).

At a hearing on March 1, 1991, defense counsel requested the court authorize him to issue subpoenas for the key investigators in the Gainesville Task Force (R 1946). The prosecutor responded that he could not furnish or disclose that which he did not have and that there was an ongoing criminal investigation not subject to discovery in this case (R 1947 - 48). The prosecutor added that he had talked to state attorney Register who said he'd never heard of George Brown (R 1949). The prosecutor also complained that under the overly broad motion filed by the defense they could depose any investigator of any person named Danny who may be suspected of murder in the United States (R 1951). The

prosecutor also argued that all the stories about "Danny" came from appellant and there is no credible evidence any of it exists (R 1955). On March 5, 1991, the trial court denied the Motion to Compel Discovery and to Authorize Depositions (R 1964).

Appellant filed a Second Motion to Compel Discovery on March 12, 1991 (R 1965 - 1968), and a hearing was held on March 15, 1991 (R 1973 - 94). The prosecutor represented that with respect to the ten questions on defense counsel's attachment, the State Attorney's Office in the Tenth Judicial Circuit had no information on questions 1 through 8 and question 10 and with respect to Question 9 was that Glen Edwin Hicks gave some information to a police officer which he did not feel was valuable and he did not intend to use at trial and so Hicks was not listed as a witness. Subsequently, based on defense counsel's motion regarding the Gainesville slayings he had provided Hicks' name to the defense because appellant told Hicks he killed this guy Danny (R 1984). The prosecutor reiterated that he had spoken with the elected State Attorney in that circuit and had been assured he would not provide the prosecutor with the information to anyone -- that it was an ongoing criminal investigation (R 1986 - 87). Moreover, the prosecutor argued the material requested was not discoverable (R 1988) and that defense counsel could investigate his own case without the state doing it for him (R 1990). The motion was taken under advisement (R 1996).

At the next hearing on April 5, 1991, the prosecutor announced that he intended to call Hicks as a witness at trial

and would rather he give a deposition. Mr. Toward, who had represented Hicks in an earlier matter was appointed to represent him (R 2009 - 2012). The motion to compel deposition testimony of Glenn Hicks was granted (R 2017). On April 17, the state filed a motion in limine to prohibit the defendant from alluding to the "Gainesville murders" and that motion was granted (R 2018 - 19, 2023)[3] on the day of trial.

After selection of the jury and prior to the beginning of testimony, defense counsel stated that "it may turn out during the course of the trial that something will come up that would cause me to ask the Court to reconsider" the Gainesville witnesses issue (R 522). The Court heard argument on the motion. Defense counsel stated that Brown had told investigators that when he last saw Horace Brown alive he was with a person named "Danny". Several months after the fact the prime suspect in the Gainesville deaths has become a person named Danny. Also, defense counsel explained, the body of Horace Brown was missing some organs, specifically the tongue (R 524). The court ruled that no evidence was proffered showing a connection between the instant homicide and the Gainseville murder but that should there

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[3] Prior to the introduction of testimony at trial, defense counsel furnished a supplemental witness list adding someone who might be able to testify that Glenn Hicks was a known liar. The prosecutor did not object because Hicks was one of the people who had received one of appellant's different stories and would only be useful as an impeachment witness against appellant Brown (R 538 - 39). Hicks did not testify at trial.

be a development that would lead to relevant admissible evidence then it would be taken up (R 528).[4]

Appellant argues that the lower court's ruling denying his motion to compel discovery and authority to take depositions of Gainesville task force officers regarding serial murders and suspect Danny Rolling denied him the constitutional right to present a defense (i.e. that Danny Rolling was the perpetrator). Appellant relies on Moreno v. State, 418 So. 2d 1223 (Fla. 3d DCA 1982) and Rivera v. State, 561 So. 2d 536 (Fla. 1990). In Moreno, the appellate court reversed for multiple error including the refusal to permit cross examination relating to bias and motivation of the witnesses and the conducting of a hearing in the presence of the jury on the voluntariness of a statement given to the police. Also the court determined that the court erroneously excluded evidence of a crime subsequently committed by the state's key witnesses so similar in method and circumstances to the events surrounding the offense that if heard by the jury could raise a reasonable doubt as to the defendant's guilt. This Court has approved the use of so-called "reverse

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[4] When the trial court below inquired of defense counsel whether the pathologist said the missing parts were due to deterioration, defense counsel responded that the pathologist assumed it and "I wasn't looking into that in the deposition" (R 524 - 525). Counsel did however, ask Detective Ore in a deposition about missing body parts and the witnesses responded that it was normal, not some kind of ritual (R 1646).

Williams-Rule" evidence. See Rivera v. State, 561 So. 2d 536 (Fla. 1990), State v. Savino, 567 So. 2d 892 (Fla. 1990).

In Rivera, the Court noted that the admissibility of this evidence must be gauged by the same principle of relevancy as any other evidence offered by the defendant and the dissimilarity of one abduction and murder was sufficient to preclude its admissibility as relevant evidence in the murder being tried; the trial court did not abuse its discretion in excluding the proffered evidence. 561 So. 2d at 540. In Savino, the Court further explained:

> [2-5] The test for admissibility of similar-fact evidence is relevancy. *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). When the purported relevancy of past crimes is to identify the perpetrator of the crime being tried, we have required a close similarity of facts, a unique or "fingerprint" type of information, for the evidence to be relevant. *Drake v. State*, 400 So.2d 12117 (Fla. 1981); *State v. Maisto*, 427 So.2d 1120 (Fla. 3d DCA 1983). *Sias v. State*, 416 So.2d 1213 (Fla. 3d DCA), *review denied*, 424 So.2d 763 (Fla. 1982). If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense. Evidence of bad character or propensity to commit a crime by another would not be admitted; such evidence should benefit a criminal defendant no more than it should benefit the state. Relevance and weighing the probative value of the evidence against the possible prejudicial effect are the determinative factors governing the admissibility of similar-fact evidence of other crimes when offered by the state. These same factors should apply when the defendant offers such evidence.

> The district court suggests that the similarity of conduct should be less when a defendant seeks to introduce *Williams* rule evidence because there is a lessened chance of prejudice. Section 90.402, Florida Statutes (1987), provides that all relevant evidence is admissible except as provided by law. Section 90.403, Florida Statues (1984), however, provides that relevant evidence is inadmissible when outweighed by prejudice, confusion of issues, misleading the jury or presenting of cumulative evidence. One does not reach prejudice until relevancy is established; to be relevant similar-fact evidence of other crimes must be of such nature that it would tend to prove a material fact in issue. Thus, we disagree that the degree of similarity for such crimes to be relevant should be modified when identity is sought to be proved event thought it is less likely that prejudice would occur when evidence of other crimes is sought to be introduced by a defendant. Only after the relevance requirement is satisfied is prejudice or confusion determined.
>
> (567 So.2d at 894)

The court agreed with the trial court and found no abuse of discretion (the alleged abuse of a one month old child in a different state, in a different marriage and in a different manner was not sufficiently similar to be admissible in a trail for the death of a six year old child).

In the instant case, appellant had no evidence to proffer that would meet the Rivera-Savino test. What suggests that Danny Rolling is the perpetrator sub judice? Appellant told law enforcement officers that he left victim Horace Brown with a "Danny" -- no surname -- and found Horace's body on his return an hour later. Appellant told Ore "Horace was supposed to meet a friend named Danny" (R 974 ; see also R 655). Appellant

apparently made a statement to jail cell inmate Glen Hicks that he killed "Danny" and the description he furnished matched that of the Horace Brown homicide (R 1888 - 97). Obviously appellant's admission to killing "Danny" cannot refer to Danny Rolling since he was, and is, alive. Nor is there anything from Hicks to suggest that appellant is innocent of Horace's homicide (and if there were, appellant could have had Hicks testify).

Appellant apart from his own "Danny" recital to the police urged below that another connection to the Gainesville slaying was that Horace Brown's tongue and some fingers were missing when the body was discovered and that the defense argued was similar to the female victims in the Gainesville matter (R 524 - 25). Medical examiner Dr. Alexander Melamud testified at trial that when he was presented with the victims' body it was markedly decomposed, covered with multiple live maggots and bugs (R 593). There was a hole ten inches in diameter, possibly the result of decomposition and insects working there. The skin and underlying tissue fat and muscle was missing due to maggots or animals which ate it. Part of the face was missing, the middle portion of the chest was missing; the right forearm with hand and right lower leg was skeletonized. The middle portion of the neck including the hyoid bone was missing (R 602 - 603). None of this, appellee, submits, is similar to or comparable to the alleged decapitation of one of the victims in the Gainesville slayings.

Appellant concedes that in the lower court defense counsel admitted not having shown a photo of the Gainesville suspect to

appellant (R 524), but urges as an appellate rationale and one not advanced below that it was "probably because the state had not provided one" (Brief, p. 48). Obviously, the defense had two investigators -- one in state and one out of sate (R 1477, R 1608), who might have obtained a photo of Danny Rolling if the defense team thought that important.

Appellant criticizes the prosecutor's closing argument at R 1186 - 87 which appellee submits is a proper response to the argument previously advanced by the defense at R 1133 and R 1143:

> Mr. Ore's fatigue doesn't explain why he failed to look for Danny. He said he talked to 25 witnesses, something like that, to try to corroborate George's statement, if trying to corroborate was what he was really trying to do He didn't look for Danny. I asked him about that. What did he say? I don't know a Danny. Well is that a very good answer to you, I don't know a Danny? I give up. Who cares. I don't know him.
>
> What about Bonita Brennan? She said that there was a Danny who was a regular at the Siesta, the same place that Horace Brown was a regular. And she said that Ore didn't ask her about Danny, about any Danny. Recall with me, if you can, I don't recall it very accurately myself, I don't recall exactly what Mr. Ore said. But it's my recollection that he indicated that he had asked those people about Danny. Who's telling the truth?
>
> Well I don't know, the girl -- excuse me for using that term, but the lady who was the bartender, I tried to ask her one of those questions and she just blurted out, that detective is a liar. I don't know She indicated in any event that he didn't' ask her about Danny. I don't know why.
>
> Danny. Who was Danny? I mentioned this and I'll say it in passing. There was a Danny, a Danny Lynnville that Bonita Brennan mentioned

> that said frequented the Siesta and was there when -- I don't know if he was there when Horace was there, but at least he attended the same place. I don't know what the testimony was as to whether they were ever there at the same time. But at least he was a regular at the same place that Horace was a regular.[5]

It is not clear to appellee whether appellate counsel for Mr. Brown is attempting to make the argument that Gainesville suspect Danny Rolling should be regarded as the likely perpetrator of the Horace Brown homicide or whether, as argued below to the jury, whether pool player Danny Lynnville should be implicated.

One final observation on the mythical "Danny" character. Despite George Brown's insistence that victim Horace Brown was the one desirous of meeting his friend Danny in the isolated area where Horace's body was found, the victim's wife Jeanene Brown who had been married to Horace for thirty-seven years testified that to her knowledge Horace did not have any friend named Danny, she knew most of Horace's friends and he had never mentioned any friend named Danny to her (R 844).

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[5] Detective Ore had testified that he didn't know where to find a "Danny" but that he had asked at Sam's Bar, the Siesta, Patch's Lounge (R 1031 - 32). Waitress Bonita Brennan at the Siesta Lounge knew a pool player named Danny Lynville (R 948).

ISSUE V

WHETHER THE LOWER COURT ERRED BY FAILING TO SUSTAIN DEFENSE COUNSEL'S OBJECTION AND CURE THE ERROR WHEN STATE WITNESSES HESS, LACKEY, KITE AND ORE EACH ALLEGEDLY SAID BROWN WAS ARRESTED FOR AN UNRELATED OUTSTANDING WARRANT.

Appellant next complains of the following testimony given by witnesses Hess, Lackey, Kite and Ore and the prosecutor's closing argument at R 1164 - 65:

> Q. How was it that you came into contact with Mr. Brown in your job at the receiving facility?
>
> A. He was arrested by a city department, Englewood Police Department and brought to the detention facility on a warrant for ---
>
> Q. That's OK. What was your job with regard to him once he got there?
>
> A. As soon as he came in, I checked for the appropriate paperwork, which was a warrant, and then I received him into our facility.
>
> Q. OK. About what time of day was it in Colorado when you first saw Mr. Brown?
>
> A. Approximately 6:45 p.m.
>
> Q. Now what was your procedure, what did you do with him once you got him there? You made sure you had a warrant to hold him there, then what did you do?

(R 625 - 626)

* * *

> Q. Did he tell you how he found the body; whether he was still in the car when he found the body or anything of that nature?
>
> A. He didn't specify to me.

Q. He just said he drove down the canal and found the body?

A. Found the body and the body was approximately 25 feet off the side of the road feet first in the weeds lying on its stomach. He said that at the point he saw blood on the body and that he approached the body to attempt to find a pulse and put his ear next to the torso. At that time he got scared and said he left in Horace Brown's car and said he did not notify authorities because he had warrants for his arrest and he was, quote, afraid they were going to hit me with a murder rap, unquote.

He then stated that he was going to get rid of the car. And on April 23rd, which would be a Monday morning, he took one of Horace Brown's checks --

Q. Let me stop you again. He's now telling you that on April 23rd in the morning, that's a particular date he told you?

A. That's correct.

Q. In the conversation, had you learned then when this supposed activity with Danny and everything and finding the body took place?

A. That is correct.

Q. When?

A. It was a week ago Sunday from the day I interviewed him, which would be April 22nd.

Q. OK. So at some point in this conversation he had told you all this stuff happened a week ago Sunday.

A. That's correct.

Q. All right. And then he says then on April 23rd, which is going to be the next Monday morning --

A. Right, that he forged one of Horace Brown's checks in the amount of $650.00,

cashed that check at the First Union Bank of Orlando, bought a, according to him, '80 or '81 Dodge Colt and decided to drive to Nashville, Tennessee. He said that once he got to Nashville he became somewhat leery that he was going to be caught because he told me that everybody that's on the run gets caught in Nashville. And he also told me he went to visit a friend there, however he did not provide me with that friend's identification.

He said then he decided to drive to Denver and went to 4301 South Santa Fe Drive, which was the Mark Claim Motel. At that point he advised me that he was approached by Englewood officers and arrested on an outstanding Osceola County warrant for auto theft. At that time the interview was completed.

MR. DOYEL: Your Honor, may we approach the bench?

THE COURT: Yes.

(The following occurred at the bench)

MR. DOYEL: I think that John has been trying to be careful not to ask the people about warrants and what they were for, and that's what this guy has just said. That's introduced another crime of auto theft which is not involved in this case, he said it was Osceola County. I don't know how to cure the problem, but that's another act that is not -- another crime that is in no way involved in this case, the fact that was the reason they stopped him.

THE COURT: Well apparently the defendant allowed that he was on the run from a warrant. It would seem to me the defense would rather the jury know it's for auto theft then for another homicide or something like that.

MR. DOYEL: I believe actually it was for failure to appear for an auto theft, but ---

MR. AGUERO: Judge, they both are not talking about proof of that crime. We're talking about some kind of statement by the defendant where he just says that. I'm not even offering it to prove it's true.

THE COURT: I can't clean up the defendant's statement.

MR. AGUERO: Yeah. I mean that was all part and parcel of the statement and the defense has been aware we were going to introduce that.

THE COURT: I not the objection but it's overruled.

(R 657 - 660)

* * *

Q. Did you have occasion on May the 1st of 190 to become involved in an investigation into the death of Horace Brown?

A. Yes, I did.

Q. How did you first become involved in that situation, Sergeant Kite?

A. I was at my office in Lakeland reviewing reports and I received a telephone call form a Detective Lackey from the Denver, Colorado area. And he advised me that they had arrested a subject by the name of George Wallace Brown and that -- for grand theft, auto, and that Mr. Brown had told them that he had knowledge of a homicide that had occurred approximately eight days prior. And he requested -- he described the area to me and requested that I send somebody out to check it.

Q. All right. Now did you ever have any direct contact with this Mr. Brown on the phone or did you just speak to Detective Lackey?

A. Just Detective Lackey.

(R 711 - 712)

* * *

Q. And what eventually did Detective Lackey tell you during that phone call?

A. Detective Lackey advised that Mr. George Brown had been arrested by another police agency and in turn was taken to his agency's detention facility. During the booking process, several items were found on -- or in George's possession which belonged to Horace Brown.

In the course of finding out who this property actually belonged to, George advised that Horace Brown was dead. Eventually Detective Lackey interviewed Mr. Brown at his request and he gave the location of Horace Brown's body.

(R 958 - 959)

* * *

But he takes off out of the state with all these different stories, even calls Judy Etherington and says if anybody is asking about me don't tell them where I'm at. What was he scared of; a grand theft warrant? Not reasonable.

(R 1165)

With respect to the Hess testimony (R 626), Kite testimony (R 711 - 712), Ore testimony (R 958 - 59) and the closing argument (R 1165), excerpted above there was neither defense

objection nor any request for relief and consequently any complain ab initio here is untimely, improper and remains unpreserved for review. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990).

To the extent that appellant may be complaining that this testimony and closing argument constitutes fundamental error, he is mistaken. See Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970) (appellate court should exercise its discretion under the doctrine of fundamental error very guardedly).

The unobjected-to Hess testimony which did not articulate the basis for the outstanding warrant was proper and important to place into context his conversation with appellant at the jail regarding the possession of the Horace Brown credit card and why Hess had to maintain possession of it rather than return it to appellant who was in custody in jail and that appellant's surprising disclosure of knowledge about the Horace Grant homicide led to the involvement of Lackey and Ore since up to that time the fact of a murder was not known.

Similarly the unobjected to testimony of Kite and Ore (R 711 - 12, R 958 - 59) that they had learned of appellant's arrest and the booking procedure discovery from Detective Lackey explained that Brown's comments led to the discovery of the victim's body and to Ore's subsequent trip to Colorado. These brief statements were hardly of extraordinary damage to appellant especially in light of the testimony of appellant's girlfriend Judy Etherington that Brown returned to her residence and left

the next day in a vehicle subsequently identified as that belonging to the murder victim. Especially is this true when one considers that defense counsel's strategy with the jury was to portray George Brown as a thief not a murderer.

With respect to the now-challenged prosecutor's comment in closing argument at R 1164 - 65, suffice it to say that defense counsel had previously argued to the jury:

> " . .. I told you when I talked to you in opening statements just the other day that Mr. Brown took some things that belonged to Horace Brown, and among those was his car. It's very simple when it comes to grand thefts. If you believe that Mr. Brown stole Mister -- if you believe George Brown stole Horace Brown's car, then because it is a car, that makes it grand theft." . . . "I have not from the first day contested that Mr. George Brown is guilty of grand theft of the auto."
>
> (R 1105 - 06)

Indeed defense counsel even suggested the jury could return a verdict of grand theft (R 1148).

Thus, there was no impropriety for the prosecutor to respond that it didn't make sense for appellant to flee the state and to tell Judy Etherington not to tell anyone where he was; being frightened of a grand theft warrant was not sufficient explanation of his conduct (R 1165).

In addition to the prosecutor's remark being a fair response to defense argument, it was also a fair comment on the evidence at trial. Investigator Lackey testified that appellant admitted that "he did not notify authorities because he had warrants for

his arrest" (R 658). Additionally, the defense in its cross-examination of Detective Ore asked about the other charge a hearing on which Ore attended:

> "Q. What was that hearing for that you attended?
>
> A. It would be similar to a first appearance hearing which we have here.
>
> Q. And what charge was that on?
>
> A. That was on the arrest where he was arrested for auto theft warrant and also the auto theft warrant which I had issued."

(R 1036)

Any claim that the prosecutor's comment in closing argument constituted fundamental error is frivolous.

With respect to appellant's challenge herein to the Lackey testimony mentioning an Osceola County warrant -- the only incident to which appellant objected below -- the prosecutor correctly observed that "the defense has been aware we were going to introduce that" (R 660). The defense was aware because the pretrial deposition of Detective Lackey revealed that appellant had admitted being frightened because of a warrant for auto theft (R 1572) and that he was arrested for an outstanding auto theft warrant out of Osceola County, Florida (R 1573).

Quite apart from that belated complaint, however, it is abundantly clear that this testimony was not an attempt by the state either to impermissibly demonstrate Brown's bad character or even to show the commission of a similar fact crime to help prove a material issue pursuant to Florida Statute 90.404 or the

Williams-rule. As the prosecutor acknowledged, he was not attempting to prove that Brown committed an auto theft in Osceola County or was arrested for it (R 660). In Malloy v. State, 382 So. 2d 1190 (Fla. 1979), this Court declared that the circumstances of a prior incident "do not establish all the elements of a crime and consequently, the question of the admissibility of prior criminal acts is not present." 382 So. 2d at 1192; Lackey's testimony was admissible because the admission that "everybody that's on the run gets caught in Nashville" is probative of appellant's guilt in the robbery and murder of Horace Brown and Brown's historical account of being arrested by Englewood officers "on an outstanding Osceola County warrant for auto theft" adds nothing more prejudical than the previously admitted, and unobjected to, testimony of Brown's admission to Hess of the fear of being blamed for the murder when he was wanted on other charges.

The trial court correctly noted that since appellant had acknowledged being on the run from a warrant it would be less damaging to know it was for auto theft rather than a more serious crime such as homicide (R 660). Appellant erroneously urges that the state either intentionally or inadvertently, elicited testimony to establish nothing more than criminal propensity. This is not true. That appellant Brown was arrested in Colorado for an offense distinct and unrelated to the Horace Brown murder merely helps explain that Colorado authorities were not holding or interrogating appellant for this murder and in

fact were surprised to be apprised of a murder of which they were not aware. Appellant's admission of being wanted for another offense(s) constitutes a partial explanation of his admission (whether credibly or not) of why he did not notify authorities of a murder eight days earlier.[6]

Appellee also notes that appellant sought no particular relief after objecting to witness Lackey's comment. He did not request a mistrial; should the trial court have ordered on undesired mistrial sua sponte with the attendant double jeopardy consequences when there was not an absolute necessity therefore? Salvatore v. State, 366 So. 2d 745 (Fla. 1978). Defense counsel did not ask for a curative instruction and did not disagree with the judge's comment that he couldn't clean up the defendant's comment. And the truth is it was no unduly prejudicial or the defense would not have exacerbated the matter by inquiring of witness Ore the details of the other warrant (R 1036).

Appellee maintains that appellant's admission to Lackey of being afraid of being blamed for the homicide when he was wanted on other charges was not improperly admitted, that the testimony mentioning Osceola County as the source of the warrant added

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[6] Appellant cites Geralds v. State, 601 So. 2d 1157 (Fla. 1992), a case which is clearly distinguishable from the case sub judice. There, the state improperly impeached a defense witness during the penalty phase by bringing out multiple convictions after having agreed not to offer penalty phase evidence. No such impropriety occurred here and appellant's admissions help explain his conduct.

nothing unduly prejudicial and no error is presented. Even if error it was certainly harmless in context.

Cf. Richardson v. State, ___ So. 2d ___, 17 Fla. Law Weekly S 614 (Fla. 1992); Mann v. State, ___ So. 2d ___, 17 Fla. Law Weekly S 571 (Fla. 1992); Marshall v. State, ___ So. 2d ___, 17 Fla. Law Weekly S 459 (Fla. 1992); Thompson v. State, __ So.2d ___, 17 Fla. Law Weekly S 342 (Fla. 1992); Gore v. State, ___ So. 21d __ 17 Fla. Law Weekly S 247 (Fla. 1992).

ISSUE VI

WHETHER THE LOWER COURT ERRED BY FAILING TO GRANT COUNSEL'S MOTION IN LIMINE AND OBJECTIONS REGARDING PROSECUTOR'S DEATH QUALIFYING QUESTIONS.

Prior to trial appellant filed a motion in limine seeking to limit the prosecutor's death qualifying questions to the jury (R 1682 - 1685). At the hearing on the motion, appellant argued that he was relying on United States Supreme Court decisions pertaining to excusals for cause and the court inquired whether a complaint about peremptory challenges would be mixing apples and oranges. The Court also pointed out that the prosecutor's question might elicit an answer helpful to the defense in utilizing a peremptory challenge. The Court rejected an "ignorance is bliss" approach and the prosecutor expressed a concern about subsequent challenges to defense counsel's competence for failure to explore the areas appellant wanted prohibited (R 1723 - 30). The Court ruled that it would serve the purposes of both the state and the defense to have full voir dire and denied the motion (R 1731, 1752).

Prior to jury selection the defense objected to the prosecutor asking question relating to premeditation and felony-murder. The prosecutor responded that in the past some juries have felt uncomfortable with the death penalty in a felony-murder situation and it was important to explore those attitudes. The Court denied the defense motion (R 12 - 13).

During voir dire the prosecutor made the comments and question listed in appellant's brief at pages 73 and 74 with one exception. The excerpt at R 47 does not include the last sentence inserted in appellant's brief at page 73. The record recites:

> MR. AGUERO: Ok. If Mr. Brown was here charged with drunk driving and killing somebody, DUI manslaughter, and suppose you, as you sit there today, had been in an accident with a drunk driver and been seriously injured or had had some person close to you seriously injured or killed by a drunk driver. You may sit there and say, look, Judge, I could sit on any kind of case, murder, rape, anything, but not this one because of my background.
>
> And that's where we're going with all of our questions today. When we ask you something, whether we actually voice the follow-up question, the follow-up question is always, would that fact, whatever we're asking you about, influence you to the point you don't think you could be fair and impartial either to Mr. Brown or to the State of Florida in this particular case.

(R 48)

Appellant cites Waters v. State, 486 So. 2d 614 (Fla. 5th DCA 1986), which involved multiple error including the prosecutor's incomplete and improper definition of premeditation, the inability of the defendant to see certain testimony, the eliciting of a statement made by the defendant not disclosed in discovery without a Richardson inquiry and improper cross-examination and closing arguments.

The prosecutor's comment at R 48 was not improper; it merely set the stage for voir dire inquiry that questions would be posed

and the reason for the questions would be to determine the jurors' fairness and impartiality to sit.

The now challenged comment by the prosecutor that first degree murder could be proved either by premeditation or felony murder at R 95 - 97 was accurate and not improper.

With respect to the inquiry at R 98 the prosecutor responded to defense counsel's objection:

> MR. AGUERO: I didn't ask them about murder. I asked them about throwing a pen. My question only goes to the jurors views on how long it takes to make a conscious decision to do something. I didn't say anything about murder.
>
> THE COURT: I think it's distinguishable, so I'll overrule the objection.
>
> MR. AGUERO: I'm sorry?
>
> THE COURT: I think it's distinguishable, so I'll overrule it.

(R 99)

That no one was confused or misled is confirmed by the colloquy:

> MR. AGUERO: All right. Ms. Willis, my question was this. Do you think that it's possible that as I've been standing here for the few minute right before I asked you that question that I consciously made up my mind to throw this pen at Mr. Hutchinson; do you think I can do that in a short amount of time?
>
> PROSPECTIVE JUROR NANCY WILLIS: I think you could.
>
> MR. AGUERO: Ok. Do you think that act then on my part would be conscious, intentional?

PROSPECTIVE JUROR NANCY WILLIS: If you thought about it ahead of time.

(R 99 - 100)

Unlike Waters, the prosecutor did not undertake to give an incomplete and erroneous definition of premeditation and the juror understood that an act could be intentional if there were time for reflection.

Additionally, defense counsel also was allowed to voir dire the jury regarding premeditation and the juror agreed not to make up her mind until the judge provided instructions (R 198 - 200).

Appellant perfunctorily urges that there were objections and adverse court rulings at R 128 - 30, R 217 - 18, R 431 - 35, R 443 - 444, and R 479 - 81. The trial court correctly denied a mistrial request at R 128 - 30, noting that the prosecutor's questions were based in the context of illustrations and needed no instruction to the jury. The trial court sustained a defense objection at R 431, there were no objections or rulings at R 443 - 444, and the Court felt a mistrial was not required at R 480.[7]

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[7] Appellant offers a footnote observation at page 73 of his brief that State v. Singletary, 549 So.2d 996 (Fla. 1989), teaches that it is illegal to use a different judge for jury selection than the one who presides at trial. Actually footnote 2 at page 999 of that decision unambiguously states that "the judge conducting voir dire need not be the one before whom the case is tried. The presence of a judge, not any particular judge, is what is required."

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY FAILING TO GRANT THE MOTION TO SUPPRESS STATEMENTS MADE TO COLORADO AUTHORITIES AND SUBSEQUENT STATEMENTS TO COLORADO AND FLORIDA AUTHORITIES AFTER MIRANDA WARNINGS.

Appellant filed a pretrial motion to suppress statements due to alleged Miranda violations (R 1678) which was denied (R 1853 - 54) following an evidentiary hearing at which the trial court heard the testimony of Deputy Sheriff Richard Hess, Investigator Roland Lackey and Homicide investigator Robert Ore (R 1790 - 1851).

On this appeal he complains that Detective Ore did not give Miranda warnings prior to questioning. The suppression hearing testimony reflects that after appellant told Deputy Hess that "Horace Brown was murdered eight days ago" (R 1806), Investigator Lackey went to the jail on May 1 and when Brown said he was "kind of involved I found the body" (R 1821), Hess gave Miranda warnings and had Brown read and sign an Advisement Form (R 1821)

Brown then proceeded to give his statement. Detective Ore came out the next day (May 2). Lackey introduced appellant to Detective Ore and:

> " . . . advised him that he arrived to interview him about what he told me about. I explained to Mr. Brown that under any circumstances, he did not need to speak to Detective Ore, that he was still under advisement and that advisement still applied.
>
> (emphasis supplied) (R 1827)

Brown agreed to talk to Ore at that time (R 1827). Detective Ore confirmed that when he met Brown Detective Lackey reminded him of his rights and showed appellant the Miranda form Brown had signed the previous evening (R 1840).

A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness. McNamara v. State, 357 So.2d 410 (Fla. 1978); Savage v. State, 588 So.2d 975 (Fla. 1991); Owen v. State, 560 So.2d 207 (Fla. 1990); Henry v. State, 586 So.2d 1033 (Fla. 1991); Medina v. State, 466 So.2d 1046 (Fla. 1985); R. Jones v. State, 612 So. 2d 1370 (Fla. 1992). If appellant is complaining about the initial admissions to Hess there was no custodial interrogation -- the officer was not even aware there had been a homicide; if appellant is complaining about admissions to Lackey, that officer did give Miranda warnings and had Brown sign the advisement form; if appellant is complaining about the admission to Ore, Brown was readvised by Lackey of the advisement form.[8]

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[8] It is not clear to appellee what Brown is referring to when he says at page 77 of his brief that "subsequent statements from the defendant must also be suppressed." As appellee reads the record the trial court entered its order granting a motion to suppress statement given subsequently to Investigator Spate (R 1747 - 48; R 1784) and it was not presented to the jury.

ISSUE VIII

WHETHER THE LOWER COURT ERRED IN DENYING APPELLANT'S SPEEDY TRIAL DISCHARGE MOTION.

At a hearing on several motion held on March 15, 1991, the prosecutor pointed out that at the last hearing on September 27, 1990 Brown had signed a written waiver of speedy trial. The court commented that defense counsel's motion seemed to rely on an alleged custom within the jurisdiction (that one cycle means four or five weeks) and that the court was not acquainted with that custom (R 1974 - 75). The state argued that once speedy trial was waived it was always waived and defense counsel urged it was waived for two "trial blocks" (R 1978). The trial court agreed with the state and ruled that appellant had waived speedy trial (R 1982, R 1996).

The record also reflects that following appellant's indictment, on July 12, 1990) (R 1425 - 28), a status hearing conference was conducted on September 27, 1990 wherein defense counsel requested a motion to continue "one cycle" (R 1437) which request was granted (R 1442). On that motion for continuance the form which was signed by both appellant George Brown and assistant Public Defender Robert Norgard the box was checked noting that the defendant waives speedy trial (R 1443).

Subsequently, the Public Defender's office moved to withdraw and attorney Robert Doyel filed a notice of appearance as counsel for Brown (R 1463 - 65). The motion to withdraw was granted and Mr. Doyel was appointed October 26, 1990 (R 1467). Attorney

Doyel requested a continuance on November 1, 1990, observing that he had recently been appointed, little discovery had been done and no depositions had been taken (R 1472). The motion for continuance and motion for appointment of an investigator was granted (R 1476).

On January 16, 1991, the state filed a motion for continuance requesting rescheduling of the trial from February 11, 1991 to April 22, 199 (R 1691 - 92). The trial court granted the state's motion (R 1775).

Appellant filed a motion for discharge due to denial of speedy trial on March 12, 1991 (R 1969 - 1971) and as stated above, that motion was denied. Brown field a Second Motion for Discharge on April 1, 1991 (R 2001 - 2002) and that motion was denied (R 2015, 2017).

Subsequently, Brown filed a petition for writ of prohibition (R 2127 - 2138), which was denied by this Court. Brown v. Strickland, 581 So. 2d 163 (Fla. 1991).

Appellant observes in his brief that this Court "should reconsider his petition for writ of prohibition" (Brief p. 81). Appellee submits that if this Honorable Court has already considered and rejected the claim in its April 3, 1991, order denying prohibition reported at 581 So. 2d 163 (Fla. 1991), there is no need to revisit the point and the law of the case doctrine should be applied.

Florida Rule of Criminal Procedural 3.191(i)(3) provides:

> (3) No later than 5 days from the date of the filing of a motion for discharge, the court shall hold a hearing on the motion, and unless the court finds that one of the reasons set forth in section (d)(3) exists, shall order that the defendant be brought to trail within 10 days. If the defendant is not brought to trial within the 20 day period through no fault of the defendant, the defendant shall be forever discharged from the crime.
>
> (emphasis supplied)

While appellant seeks to focus on the portion of the rule requiring a hearing on the motion for discharge within five days and a possible trial within ten days thereafter, the real emphasis here must be on the emphasized portion of the rule quoted above. Rule (d)(3)(ii) lists as an exception to the granting of a motion for discharge "the failure to hold trial is attributable to the accused." In the instant case, the trial court was well aware that on two occasions the failure to hold a trial earlier was attributable to the accused -- first when Assistant Public Defender Norgard requested a continuance in September of 1990, and second when newly-appointed trial counsel Mr. Doyel sought and received a continuance in November of 1990 because little discovery had been done and no depositions taken. See Baxter v. Downey, 581 So. 2d 596 (Fla. 2d DCA 1991) (if trial court finds evidence of waiver of speedy trial requirements, defendant's motion for discharge for violation of speedy trial rule may be denied; if not, trial must be set within ten days); State v. Brown, 527 So. 2d 209 (Fla. 3d DCA 1988), rev. denied, 534 So.2d 398 (Fla. 1988), appeal after remand 561 So. 2d 607

(Fla. 3d DCA 1990) (defendant twice successfully moving for a continuance within the speedy trial period established her unavailability and effecting a conclusive waiver of her rights under the speedy trial rule); Haliburton v. State, 476 So. 2d 192 (Fla. 1985) this Honorable Court held that a defense continuance constitutes a specific waiver of the speedy trial rule. See also Stewart v. State, 491 So. 2d 271 (Fla. 1986) (when a defendant requests a continuance prior to the expiration of the applicable speedy trial time period for the crime with which he is charged, defendant waives his right as to all charges which emanate from same criminal episode); Hill v. State, 467 So. 2d 695 (Fla. 1985) (where defense counsel's abrupt departure from case because of conflict of interest among defendant not only led to redocketing of pretrial conference but also to continuance of defendant's trial to facilitate appointment of substitute counsel and his preparation for trial, failure to hold trial within speedy trial period was attributable to defense counsel's withdrawal and the resulting continuance necessitated by it and defendant waived protection of 180 day speedy trial rule as result of continuance).

Appellant cites without discussion a number of appellate decisions. State v. Freeman, 520 So. 2d 110 (Fla. 2d DCA 1988) (where defendant had not moved for continuance or in any way waived right to speedy trial he was entitled to discharge because of crowded docket his case was not set within speedy trial period); Ariza v. Cycmanik, 548 So. 2d 305 (Fla. 5th DCA 1989);

Massey v. Graziano, 564 So. 2d 287 (Fla. 5th DCA 1990); Baxter v. Downey, 581 So. 2d 596 (Fla. 2d DCA 1991) (if the court finds evidence of a waiver the motion for discharge may be denied and if not the trial must be set within ten days; here record demonstrates that defendant by his own actions caused the applicable time period to be extended). Cook v. Snyder, 582 So. 2d 1239 (Fla. 3d DCA 1991). These cases are either inapposite or supportive of the state's position. None hold that a criminal defendant is relieved of the consequences of speedy trial waiver by defense request for continuance. And in the instant case the trial judge did hold a hearing within five days and determined that Brown's claim was meritless.

ISSUE IX

WHETHER THE LOWER COURT ERRED BY FAILING TO APPOINT SEPARATE COUNSEL TO REPRESENT APPELLANT DURING THE PENALTY PHASE.

Appellee is having difficulty understanding appellant's complaint; on the one hand he seems to be urging that the trial court committed error by failing to appoint separate counsel for appellant at the penalty phase and on the other seems to be making a premature ineffective assistance of counsel claim. Whatever his claim, as explained, infra, he is entitled to no relief.

Brown first asserts that trial defense counsel failed dot file a pretrial motion requesting the appointment of separate counsel for the penalty phase. Appellant is certainly correct that the record does not reflect such a request by trial counsel. If there were no request, the trial court could not commit judicial error (Unless the failure sua sponte to appoint separate counsel when appointed counsel is already representing the accused constitutes fundamental error).

As this Court well knows it is almost always the case that the same trial counsel who represents the accused at the guilt phase continues with representing him at the penalty phase. Appellant cites no authority requiring the appointment of separate counsel for penalty phase just to have a different attorney than for guilt phase. He does cite Klokoc v. State, 589 So. 2d 219 (Fla. 1991) and Durocher v. State, 604 So. 2d 810 (Fla. 1992). In Klokoc the defendant refused to allow counsel

active participation in the penalty phase and refused to allow counsel to present family member mitigation testimony. The trial court denied counsel's motion to withdraw but appointed special counsel to bring forth the mitigating factors. In Durocher as in Klokoc the defendant instructed counsel not to present mitigating evidence and this Court explained:

> [1] The first argument presented on appeal is that the trial court should have appointed special counsel to present mitigating evidence and conduct the penalty phase in an adversarial manner. This claim relies on *Klokoc v. State, 589* So.2d 219 (Fla. 1991), where, on its own motion, the trial court appointed special counsel for the penalty phase when Klokoc pled guilty, waived a sentencing jury, and refused to cooperate with his original counsel on the presentation of mitigating evidence. In considering Klokoc's appeal, however, we did not rule on the propriety of appointing special counsel.
>
> Reliance on *Klokoc* is misplaced both because Durocher or his counsel did not request the appointment of special counsel and because we rejected the requirement for special counsel when a defendant waives the presentation of mitigating evidence in *Hamblen v. State*, 527 So.2d 800 (Fla. 1988). Instead, we have consistently held that a defendant may, if done knowingly and voluntarily, waive participation in the penalty phase. *E.g. Pettit v. State, 591* So.2d 618 (Fla. 1992); *Henry v. State*, 586 So.2d 1033 (Fla. 191); *Anderson v. State*, 574 So.2d 87 (Fla.), *cert. denied*, __ U.S. ___, 112 S.Ct. 114, 116 L.Ed.2d 83 (1991); *Hamblen*. Here, the trial court swore in Durocher, had him take the stand, and questioned him closely on two different days on his understanding of what he was giving up and what he was risking by pleading guilty and waiving the presentation of mitigating evidence. The record shows that Durocher understood the consequences of his decision and that he freely, voluntarily, and knowingly waived participation in the penalty

> phase. We therefore hold this issue to be without merit.
>
> (text at 811 - 812)

The case for appointing separate counsel sub judice is less compelling then the argument rejected in Durocher. Here, there was no complaint by the appellant, he did not prohibit counsel from acting as an advocate in the penalty phase -- in fact the record shows trial counsel utilized the testimony of Dr. Henry Dee and appellant's mother Juanita Lamey (R 1306 -1356). Neither the Constitution nor any judicial precedent required a trial judge to interject and impose an unrequested second attorney on the defense when the appointed counsel can and is doing his job.

To the extent that appellant attempts herein prematurely to suggest that trial counsel rendered ineffective assistance, violative of the Sixth Amendment, appellee suggests that the more appropriate vehicle is a Rule 3.850 motion where, rather than engage in idle speculation on the instant record, trial counsel may be examined under oath and subject to cross-examination and can defend his conduct and explain why he did what he did and why he didn't' do what he didn't do. Suffice it to say that the instant record shows that trial counsel requested and received the appointment of an investigator (R 1468 - 69, 1476 - 77 a mental health expert (R 1613 - 15) and an out of state investigator (R 1616 - 18). Appellant concedes that family background and mental health testimony was presented.[9] The

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[9] While there was testimony regarding a number of relatives the

instant record does not support any thesis that trial counsel rendered ineffective assistance.

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testimony was not that they were available to testify. Indeed, Ms. Lamey stated there was a "lot of resentment toward each other" (R 1350).

ISSUE X

WHETHER THE LOWER COURT ERRED BY INSTRUCTING THE JURY ON THE "HEINOUS, ATROCIOUS OR CRUEL" FACTOR.

The record reflects that at a charge conference the prosecutor relied on the new, amended HAC instruction which defense counsel still urged was unconstitutional (R 1285 - 86). The trial court then gave the following instruction which was approved by this Court in In re Standard Jury Instructions Criminal Cases 90-1, 571 So. 2d 75 (Fla. 1991):

> "Three, the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and violent. Cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included in heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was consciousless and pitiless and was unnecessarily torturous to the victim."

(R 1395 - 96)[10]

The instant instruction does not suffer from the same infirmity condemned in Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (1992); see Preston v. State, 607 So. 2d 404; Hall v. State, ____ So.2d ___, 18 Fla. Law Weekly S 63 (Case No. 77,563, January 14, 1993).

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[10] Appellant did not subsequently object to this instruction.

Appellant also complains that the trial court erroneously found this factor because there was insufficient evidence to support it. He is mistaken. This Court has previously recognized that multiple stab wounds can qualify for a finding of "HAC". See Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987); Nibert v. State, 508 So. 2d 1 (Fla. 1987); Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Johnson v. State, 497 So. 2d 863 (Fla. 1986); Hardwick v. State, 521 So. 2d 1071 (Fla. 1988); Floyd v. State, 569 So. 2d 1225 (Fla. 1990); Haliburton v. State, 561 So. 2d 248 (Fla. 1990).

In the instant case testimony was presented by Dr. Melamud at penalty phase that there were three stab wounds -- none were immediately fatal, it took time for the victim to bleed to death, the victim was conscious and capable of feeling pain (R 1300 - 1303).

ISSUE XI

WHETHER THE COURT ERRED BY DRAWING INFERENCES TO IMPLY COLD, CALCULATED AND PREMEDITATED.

The trial court's written findings include:

> 3. As an aggravating circumstance, the commission of the First Degree Murder of Horace D. Brown was especially heinous, atrocious, or cruel.
>
> From the record, the Court finds that the State proved beyond and to the exclusion of every reasonable doubt that Horace D. Brown experienced conscious pain and suffering before death as a result of being stabbed three times by the Defendant with a knife. The Court further finds that the victim experienced apprehension of impending death even absent physical pain while bleeding to death after having been left to die by the Defendant.
>
> THE COURT concludes from these facts that the Defendant **GEORGE WALLACE BROWN**'s action in murdering Horace D. Brown was especially heinous, meaning extremely wicked or shockingly evil; that it was especially atrocious, meaning outrageously wicked or vile; and that it was especially cruel, meaning designed to inflict a high degree of pain with utter indifference to, or even with enjoyment of, the suffering of others.

(R 2115)

If appellant is complaining that the trial court improperly found the "CCP" aggravator, it did not. The Court's order explains why it was finding "HAC".

If appellant is complaining that the evidence does not support a finding of heinous, atrocious or cruel (HAC), he is mistaken since the evidence included Dr. Melamud's testimony that death was not instant and the Court could properly conclude that

even absent the accompanying physical pain the apprehension of impending death resulting from loss of blood added to the correctness of finding such a factor.

ISSUE XII

WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND AND WEIGH THE TWO STATUTORY MENTAL MITIGATING CIRCUMSTANCES.

The trial court's sentencing findings provide:

> 1. That the First Degree Murder for which the Defendant is to be sentenced was not committed while the Defendant was under the influence of extreme mental or emotional disturbance, nor was it mitigated by the use of alcohol as suggested.
>
> To the contrary, the Court finds the Defendant (a) armed himself with a knife which he took from his girlfriend's home, (b) encountered the victim and got him to drive his car with the Defendant therein to I-4 and SR 33 in northern Lakeland, Florida, (c) at this location, Defendant got the victim to exit his car on a dark, lonely dirt road surrounded by trees and brush, (d) there the Defendant stabbed the victim without detection, and (e) then took the victim's wallet and watch.
>
> The Defendant disposed of the body by dragging it off the road and into some bushes to cover up the crime, and then stole the victim's car, subsequently arriving at his girlfriend's home.
>
> There is not one shred of evidence to indicate the Defendant was under the influence of alcohol such that his faculties were impaired. There is also a total lack of evidence indicating any mental or emotional disturbance prior to, during or after this killing. Although Defendant's expert testified to the contrary, the Court finds little evidence other than the Defendant's own self serving remarks to that expert, and the expert's testing to support the opinion that the Defendant was under extreme mental or emotional disturbance at the time of the murder.
>
> 2. The Court finds the assertion, as a mitigating circumstance, that the Defendant's

> capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired, was not supported by sufficient evidence in the record. The credibility of Defendant's mother's testimony was questionable under the circumstances. The majority of her testimony about the Defendant's life and problems was hearsay and not from her own personal knowledge.
>
> Again, the opinion of Defendant's expert on this mitigating circumstance was based upon testing, the Defendant's own remarks, and hearsay. Furthermore, no direct evidence of brain damage was produced.
>
> The relationship of the Defendant's difficulties while growing up, as well as the supposed brain damage to the act of murder in this case was not sufficiently explained in the Court's judgment.
>
> These two major mitigating circumstances, as well as all other mitigating evidence in the record, taken in a light most favorable to the Defendant are found by the Court to have no actual connection to the deliberate, cold-blooded murder committed by the Defendant, **GEORGE WALLACE BROWN**, in this case.

(R 2116 - 2118)

As is so common in these cases, appellant argues that because he proffered some mitigating evidence that the trial court was compelled (a) to find it and (b) to give it the same weight desired by appellant, i.e. outweigh all in aggravation.

This Court has consistently declined to engage in second-guessing of trial judges when they consider the matters presented to them and disagree with the weight that the defense would attribute to them. See Nixon v. State, 572 So.2d 1336 (Fla. 1990) (clear that trial court considered and rejected all mitigating

evidence offered); Robinson v. State, 574 So.2d 108 (Fla. 1991) (no error in failing to find additional mitigating factors; trial court's comprehensive order discussed all mitigating presented and reflected it considered and weighed it); Gunsby v. State, 574 So.2d 1085 (Fla. 1991) (trial judge considered conflicting testimony of mental health professionals and as an appellate court we have no authority to reweigh that evidence); Engle v. Dugger, 576 So.2d 696 (Fla. 1991) (mental health experts often reach different conclusions); Sanchez-Velasco v. State 570 So.2d 908 (Fla. 1990) (failure to find extreme mental or emotional distress and inability to appreciate the criminality of conduct not error; judge could appropriately reject it since the evidence was not without equivocation and reservation); Zeigler v. State, 580 So.2d 127 (Fla. 1991) (judge explained why he was giving little or no weight to the mitigating evidence); Sochor v. State, 580 So.2d 595 (Fla. 1991) (OK for trial judge to reject mitigating factors; although several doctors testified as to defendant's mental instability, one testified he had not been truthful and another that he had selective amnesia and deciding about the family history as mitigation is within the trial court's discretion); Jones v. State, 580 So.2d 143 (Fla. 1991) (while a poor home environment in some cases may be mitigating, sentencing is an individualized process and the trial court may find it insufficient); Ponticelli v. State, ___ So.2d ___, 16 F.L.W. S669 (Fla. 1991) (rejecting defense argument that court failed to consider unrebutted mitigating evidence; trial court

found doctor's testimony "speculation" and there was competent, substantial evidence to support rejection of the mitigating evidence); Sireci v. State, 587 So.2d 450 (Fla. 1991) (the decision as to whether a particular mitigating circumstance is established lies with the trial judge; reversal is not warranted simply because an appellant draws a different conclusion; since it is the trial court's duty to resolve conflicts in the evidence, that determination should be final if supported by competent, substantial evidence); Pettit v. State, ___ So.2d ___, 17, F.L.W. S41 (Fla. Case No. 75,565, January 9, 1992).

See also Hall v. State, ___ So. 2d ___, 18 Fla. Law Weekly S 63 (January 14, 1993) (record supports trial judge's conclusion that mitigators either were not established or entitled to little weight).

With respect to defense witness Dr. Lee the trial court could reject his testimony -- the witness did not know anything about the crime because Brown denied committing it (R 1324), and he admitted that appellant was manipulative (R 1326).

ISSUE XIII

WHETHER THE SENTENCE OF DEATH IS DISPROPORTIONATE.

Appellant herein complains that the imposition of a sentence of death is disproportionate; that only three aggravating factors were found (prior felony conviction involving force, committed during a robbery and HAC) and cites cases like Holsworth v. State, 522 So. 2d 348 (Fla. 1988), Marshall v. State, 604 So. 2d 799 (Fla. 1992) (Justice Barkett dissenting), Wilson v. State, 493 So. 2d 1019 (Fla. 1986) and Irizarry v. State, 496 So. 2d 822 (Fla. 1986).

Wilson supra, unlike the instant case involved a heated domestic confrontation; here the victim was a stranger or at most an acquaintance who was robbed. Irizarry was an override of a life recommendation, the defendant lacked a criminal record (unlike appellant Brown) and the crimes resulted from "Passionate obsession", hardly a circumstances sub judice. Holsworth was another jury override case where the jury could have concluded that the conduct was caused by the use of drugs and alcohol (no such evidence was added sub judice). Marshall too, was a jury override whose death sentence was nonetheless approved by this Court.

Justice Barkett's dissenting view that the jury's life recommendation should have counted more heavily, while thoughtful and articulate, did not command a majority view and cannot be viewed as a precedent requiring reversal here where the jury

recommended death by an 8 to 4 vote, the trial court found three valid aggravating factors and no mitigating factors, and the instant case reflects no domestic passion fray but a murder for money.

This claim is meritless.

ISSUE XIV

WHETHER THE TRIAL COURT ERRED BY FAILING TO FIND NONSTATUTORY MITIGATION.

The record reflects that the trial court did consider the nonstatutory mitigation presented by the defense. Appellant filed a post-jury recommendation memorandum, urging in pertinent part:

> "**NONSTATUTORY MITIGATION**
>
> Quite clearly George Brown has had a miserable life. He thought he was abandoned by his mother before age 3. He was, in fact, separated from her from age 3 to age 15. He thought she was dead because his father told him so. He felt branded as Willie Brown's bastard son, reflecting his feelings of resentment for both parents. Willie brutally beat George. Willie shot George. Willie caused George great embarrassment by his life-style -- including stints in prison and jail. In short, Willie was a no-account criminal. Willie sexually abused George's sisters. Willie was married to one woman while keeping another woman in the same house with her, George, and the rest of the kids. Willie fathered children indiscriminately. He put them to work to make money for his alcohol consumption. He also shuffled them off to foster homes and moved them around because of his, and their, work as migrant farmworkers.
>
> With the environment and example Willie Brown provided George, it is no wonder George developed the emotional conditions described by Dr. Dee. It is no wonder he became an alcoholic. It is no wonder he is sensitive and easily hurt.
>
> Not everything about George is bad. He was very protective of his sister, Anita. He especially protected her from Willie -- earning himself more abuse. When was the only person with whom he ever had a lasting relationship (he's had 5 broken marriages). She is now dead and he has no relationships.

> George has provided entertainment to many people. Judy Etherington said he played guitar and sang for her and her children. He worked and helped support Judy and her children. His mother said he played and sang for her. He even writes lyrics and composes music. He was occasionally in country bands, entertaining lots of people. So all that he did was not bad.
>
> (R 2100 - 2102)

And the sentencing transcript reveals:

> MR. DOYEL: Your Honor, I have submitted to the Court, a written memorandum in support of the life sentence and know that the Court has reviewed that, and would just urge the matters set forth in there, particularly with the -- with regard to the inadequacy of the State's evidence on the aggravating circumstance of heinous, atrocious, or cruel.
>
> THE COURT: For the record, I would state that I did review your memorandum shortly after I received it. And does the Defendant desire to speak for any reason?
>
> THE DEFENDANT: Yes, Your Honor, I do.
>
> THE COURT: All right.
>
> THE DEFENDANT: Your Honor, no one knows what happened out at that place on April 22nd, 1990 except myself, Horace and one other individual, and Horace is not here. There's been a lot of pain caused over this. I haven't been able to adequately tell my side of the story. That's neither here nor there.
>
> I'm not going to beg, I'm not going to plead. All I'm going to do is apologize to this Court and to Mr. Brown's family for the pain they've suffered. And to my own mother for the pain she's suffering now.

> So whatever the Court feels is justified in this case, I'm man enough to take it and that's all I've got to say, Your Honor.
>
> (R 2107 - 08)

That the trial court failed to find or to weigh as heavily as appellant would desire the nonstatutory mitigating proffered does not mean that the lower court erred. Appellee will refer the Court to the cases cited in Issue IX, supra, acknowledging that the weight to be accorded such factors is for the trial judge.[11]

With respect to that which is now urged by appellant, the trial court could (and did) give little weight to Mrs. Lumey's testimony because "the majority of her testimony about the defendant's life and problems was hearsay and not from her own personal knowledge" (R 2117). The trial court with a unique advantage of seeing the witness' live testimony, in contrast to perusal of a written transcript, could aptly conclude "the credibility of defendant's mother's testimony was questionable under the circumstances." (R 2117)

Appellant argues here that the trial court should have found Brown's remorse as a mitigating factor. Not only did appellant feel such remorse to be so inconsequential that it was unmentioned in the post-jury recommendation memorandum (R 2095 -

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[11] See trial judge' findings at R 2118 articulating the view that the relationship of appellant's difficulties while growing up as well as supposed brain damage to act of homicide was not sufficiently explained. See Hall v. State, supra.

2102), but Brown's own statement at sentencing appears more to be arrogant self-pitying comments that "I haven't been able to adequately tell my side of the story" (R 2108) rather than acceptance of his personal responsibility in the Horace Brown homicide.

Even his apology for the pain to the victim's family and to his mother lacks an awareness of the guilt for past wrongs which distinguishes remorse from sadness. Indeed he appears to continue to blame some unidentified party for the crime (" . . . no one knows what happened out at that place on April 22, 1990 except myself, Horace and one other individual and Horace is not here . . . ") (R 2108).

This claim is meritless.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Ronald E. Smith, 4404 South Florida, Avenue, Suite 11, Lakeland, Florida 33813, this 17th day of June, 1993.

Robert J. Landry

OF COUNSEL FOR APPELLEE.