IN THE SUPREME COURT OF FLORIDA

CHADWICK WILLACY,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

Case No.: 79,217

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

ANSWER BRIEF OF APPELLEE/ INITIAL BRIEF OF CROSS-APPELLANT

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PRELIMINARY STATEMENT

Appellee/Cross-Appellant, the State of Florida, the prosecuting authority in the trial court, will be referred to in this brief as the state. Appellant/Cross-Appellee, CHADWICK WILLACY, the defendant in the trial court, will be referred to in this brief as Willacy. Any record references to the record on appeal will be noted by the symbol "R," and will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

The state objects to Willacy's statement of the case and facts as it is unduly argumentative. See Appellant's Initial Brief at 13 ("The result of this laborious and inefficient process was a lengthy and somewhat tedious jury selection.") (emphasis supplied); id. at 14 ("the court again expressed its frustration . . . ."") (emphasis supplied); id. at 16 ("the court continued with its pressure to complete jury selection . . . ."") (emphasis supplied); id. at 22 ("The error in the way Mr. Payne was handled . . . ."") (emphasis supplied); id. at 23 ("The information concerning Mr. Clark's record was easily available to the state at the time of voir dire.") (emphasis supplied); ("In order to show the discriminatory nature of the challenge to Mr. Payne . . . ."") (emphasis supplied). As is readily apparent, the emphasized portions of Willacy's statement of the case and facts constitute opinions by opposing counsel, which should be located strictly in the argument section of Willacy's brief. See Thompson v. State, 588 So. 2d 687, 689 (Fla. 1st DCA 1991) ("An appellant's statement of the facts must . . . be objective . . . ."") (emphasis supplied). Because the state disagrees

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This Court also should note that Willacy's Initial Brief fails to comply with **Fla.** R. **App. P.** 9.210 in two ways: (1) improper typeface in violation of **Fla.** R. **App. P.** 9.210(a)(2); and (2) no summary of the argument in violation of **Fla.** R. **App. P.** 9.210(b)(4).

with opposing counsel's statement of the case and facts, it provides the following.

Issues on Direct Appeal

As to Issue I:

The court initially propounded some questions to prospective jurors about their views on the death penalty: "Are there any among you who have an opinion or a feeling with respect to capital punishment that would make it impossible for you as a matter of conscience to return a verdict of guilty in the guilt phase of the case just because it could result in the imposition of the capital penalty?" "Do any of you have a feeling with respect to capital punishment that might result in substitution?" (R **154).** Defense counsel then questioned several prospective jurors about their views on the death penalty -- whether they could follow the law as instructed by the court and whether they had set views on the death penalty (R 424-26, **431-33).**

After the court called prospective juror Maria Josefina Cruz, the following dialogue occurred:

> [Prosecutor]: Is there anything that you know of that would make it impossible or difficult [for ydu] to serve on this jury?

[Cruz]: The same as the first gentlemen. If it ever came to the penalty part, I will not be able to give a death penalty sentence.

[Prosecutor]: You realize from all the questions that the law is, if you are to serve here, you should consider the death penalty under the applicable rules and law that the Court gives you. Are you saying that you cannot abide by that law?

[Cruz]: Right.

* * * *

[Prosecutor]: Well, your Honor, with regard to Miss Cruz, it's the state's position that she's announced that under her beliefs, religious or conscientious or whatever, she could not abide by the law with regard to penalty in this case, and for that reason we would ask the Court to excuse her.

[Court]: Very well. Miss Cruz, you may step on down and return to the jury pool area.

Juror number --

[Defense]: Your Honor, we would like a brief opportunity to try to rehabilitate.

[Court]: The Court has ruled, Mr. [defense].

(R 489-91).

Long after the court excused Ms. Cruz, defense counsel moved for a "mistrial to strike the panel'' based on the court's alleged refusal to permit rehabilitation (R 698-99). The court denied the motion as untimely, noting that it

should have been made at the time the juror was excused (R **699**).[2]

As to Issue 11:

During voir dire, prospective juror Alvin Payne indicated that he knew Oscar Restrepo and James Symonette (R **311-12**). The prosecutor recognized that they were witnesses in this case and Palm Bay police officers (R **467**). As a result, the prosecutor called the case officer, Detective Santiago, and requested that Santiago contact Restrepo and Symonette to ask what they knew about Payne (R **467**). Santiago suggested a records check of Payne, and although the prosecutor said there was no need for that, Santiago did a records check (R **467-68**).

Payne also stated during voir dire that he had been a defense witness in a criminal drug case (R **367-68, 388**). The following dialogue occurred later:

> [Prosecutor]: Mr. Payne, I need to pick on you just a moment. I apologize for this.
>
> You didn't tell us how old you were, but you graduated from high school in '**85** or so?

---

[2] "It's after the fact. What can I do about it now, sir? Whether I'm right or wrong, there's no point in belaboring the point. It's on the record, and the juror is gone." (T **698**).

[Payne]: '84.

[Prosecutor]: It makes you approximately the same age as the defendant. Okay? So I guess we could call both of you young, black males.

Do you feel that that fact would in any way affect your ability to listen to the evidence, listen to the Court's instructions on the law and deliberate with the other jurors in this case recognizing that it's not unlikely that you would be seated on a jury with eleven white people?

[Payne]: Well, maybe. Maybe. I don't know.

It might make me feel different about it.

[Prosecutor]: Do you think it might make you feel uncomfortable?

[Payne]: It sure[ly] will.

[Prosecutor]: I appreciate your candor.

. . . .

(R 395-97).

When the state moved to strike Payne, the following dialogue occurred:

[Defense]: We would lodge an objection to striking Mr. Payne on the basis of Neil vs. State, and I believe the striking of Mr. Payne is racially motivated. The predicate would show that the defendant is black. Mr. Payne is also black. Mr. Payne is at present the only black on the panel.

We had a conference in chambers, and if we can recap what was said in chambers, nothing has ever been

presented on the record here which shows any disqualifications for Mr. Payne. The basis of the State's strike appears to be a police report that they had received that was never prosecuted, nor an arrest was ever made and which would appear from anything he said does not -- is not contrary to anything that he testified to. There's been no evidence presented in this record that shows he could not be fair and I would ask the Court --

And there is nothing different about Mr. Payne that has not been testified to by other jurors of which the State has not exercised a peremptory, and based on that showing I submit that the State should be required to explain the basis of striking Mr. Payne.

[Court]: All right. I believe with that the burden shifts to the State under Neil, does it not, to show there's not --

[Prosecutor White]: Yes, sir.

[Prosecutor Craig]: Judge, I think first off the Court has to make a preliminary ruling that the motion is founded, I believe, and then the burden shifts.

[Court]: All right.

[Prosecutor White]: We'd prefer you make that finding so we can make the record absolutely clear.

I think there is more than adequate record for a peremptory challenge of him that is non-racially motivated, and it would be our request that you make that finding and allow us to voir dire Mr. Payne additionally as to the police report and as to records that we obtained through the computer showing that he actually was charged for the offense [defense] spoke about and pled

nolo contendere to disorderly conduct and also to resisting without violence.

I'd point out to the Court that also when he was asked about his employment, he skipped over his employment at Dip Stix where this event occurred; and while perhaps he didn't out and out lie to us, he misrepresented by not telling us that he had been employed there.

Furthermore, in the jury questionnaire there are questions designed to elicit information about any prior charges against the defendant. He never made that known to us. He withheld that all along, and also he offered in his voir dire that he testified on behalf of a defendant in a drug charge.

Now, all of those are not racially motivated. All of those are facts which we assert to the Court are substantially different than any other juror in this particular case.

[Court]: All right. I think the better course would be for the State to put their evidence on the record. Then I'll rule upon the challenge.

* * * *

[Prosecutor White]: And we wish to strike him for the reasons that during voir dire he volunteered that he had participated in court as a witness, and it was further developed that he had testified for the defendant in a criminal case involving charges of drugs. Drugs will be involved in this case. This particular defendant was involved with drugs to one extent or another. How much it is going to come out, I don't know, but there is evidence that it's possible the defense may at some point want to develop his use of cocaine perhaps as a defense in the death penalty phase. I don't know.

Also, Mr. Payne did not advise us of an employment with the company --

[Prosecutor Craig]: Dip Stix.

[Prosecutor White]: Well, I want to give a full name.

-- Dip Stix Enterprises, Inc. When asked about employment, I distinctly recall him talking about working for Pennzoil and prior to that he worked for Harris Corporation. He omitted to tell us about his employment with Dip Stix Enterprises which is a lack of candor on his part with the State that would bother us in and of itself.

The reason that he didn't do that apparently is that on **5-22-91** there was a complaint made against him to the Palm Bay Police Department involving allegations that his white, female supervisor was assaulted by him at work and she requested police assistance to remove him from the premises as a result of that, and that case number for Palm Bay P.D. is **91-12328**.

It is the same Alvin Payne we believe as noted by the Court. The name and the address shown on the jury list match the report that we previously provided to the Court.

As a result of that he appeared in court on Case No. **90-21696-MMA** and pled no contest to those charges for which adjudication was withheld. We understand he was given community control, and a further check of the computer shows that he's failed to comply with the requirements of that which were community service.

[Defense]: Wait. A '**90** case that occurred in **1991?**

[Prosecutor Craig]: I think you're in error, [White]. I don't think there was

ever any charges filed against him for the '**91** complaint.

[Prosecutor White]: Perhaps you're correct.

Looking at this number then, it would appear that in addition to the charge that we referred to in the report there's another case which is **90-21696** which is an entirely separate incident that he failed to tell us about where he apparently was charged with resisting without violence and disorderly conduct and pled no contest to.

There's also another complaint on his record for a battery charge which was no[t] filed, and as I pointed out, he failed to share any of this information with us during the course of voir dire, and the questionnaire the Court handed out would seem to indicate that a person should relate to us any sort of connection they may have had with the law and certainly if any charges have been filed against them.

I recall the Court asked that specific question to the first group. I don't know for sure if you asked the second group, "Have you ever been the subject of any criminal charges?'' So I can't stand here and tell you that he didn't answer that truthfully or failed to tell you about that in your own questioning, Judge, but those are the reasons, and we would ask that we be allowed to further establish for the record that Mr. Payne is, in fact, the same person that our records indicate has had these various involvements with the law.

[Court]: All right.

[Defense]: Judge, if I could respond briefly to that, I'd submit at this point the peremptory challenge has been exercised and that the State should not be allowed to supplement the record with

> further record testimony from Mr. Payne. Because if they didn't do it before they exercised the challenge, it cannot now be used as a basis to support what they've already done. If they didn't do it then, they can't do it now.
>
> Now, the other matters that they brought up, they obviously knew before, at least some of them, before the challenge was exercised.
>
> * * * *
>
> [Prosecutor White]: I would point out to the Court that the timing of this was Detective George Santiago brought us this information about this case report right after we broke at mid-morning when Mr. Craig had tendered the jury to the defense and the Court took a recess. They then brought that to us. We brought it up to the Court during that recess and advised the Court of the problem and asked for your guidance in the matter, and you suggested that we go ahead in this fashion.

(R 443-46, 450-55, 456–57).

Thereafter, the court conducted a brief voir dire examination in chambers, during which Payne stated that he had worked for Dip Stix which also carried the Pennzoil name (R **460**); that he was not fired because he "left" first (R **460**); that he was not aware that his supervisor at Dip Stix had brought charges against him (R **460**); that he had been charged with disorderly conduct and resisting without violence (R **460-61**); that he had pled no contest and received a community service sentence (R **461**); that he had completed his community service requirements (R **461**); and that he did not recall a **1989** complaint for battery (R **461**).

The court then heard argument:

> [Defense]: Your Honor, I think it would be appropriate as well to inquire of the State whether they checked on criminal history, checked on residence, checked on any other information regarding Susan Klenck, Shirley Masseron, Frank Mancuso, all of the other white jurors. It appears that Mr. Payne has been singled out for this treatment, and the State did not inquire of --
>
> His explanation here about his employment has been sufficiently explained. Saying that he was a witness for the defendant in a criminal drug case is -- you know, when there was no further evidence presented, you know, it could have been -- it could have been about, you know, where this man -- where a man lives, you know, a person that he saw, and have absolutely no relevance whatsoever, and the State didn't develop that in any way. They developed in no way anything about his participation as a witness for a defendant in a drug case that would in any way affect his ability.
>
> You know, likewise, we have people who were plaintiffs who have otherwise been involved in cases as witnesses, but to single him out and say it's correct that there's been no other witnesses for defendants in criminal drug cases is correct. There's been a number of other people, white people, on this jury who have not been challenged by the defense who have been involved in the criminal system in various manners.
>
> I also want to make sure the record is clear that I'm not waiving my objection to the further inquiry of Mr. Payne here. I would submit that Mr. Payne, even if the facts that the State has dug up here are a sufficient basis to make a peremptory challenge, the fact that the State did it only to Mr. Payne

and did it to no other prospective jurors here, that fact alone is evidence -- in addition to Mr. Craig's inquiry of Mr. Payne, whether him being the only black roughly contemporary of the defendant on this jury would make him uncomfortable, those facts alone right there show this peremptory has been exercised on the basis of race.

If the State can show they ran these same checks on these other prospective venire persons, then I would concede that I'm in error, but I don't believe that they're going to do that.

[Court]: Well, let me ask them.

Were similar checks run as to any of the other venire?

[Prosecutor White]: No, sir, there weren't. There was a reason for that which I told [defense] which he chooses not to accept.

This particular prospective juror is the juror who told us he happened to know three people who are witnesses in the case, two of whom are Palm Bay police officers. As a result of that -- both of them are witnesses in our case. As a result of that yesterday afternoon I called the case officer in this case, George Santiago, and requested that he contact those persons and ask them what they know about this man, why he knows them, what their contact is of him, which they did provide me; and that information that we got back there generally was that, well, they know him from school; he seems like an okay guy. Okay?

However, Mr. Santiago of his own volition said, "Mr. White, why don't I run a records check on him?"

I said -- well, what I told him actually, foolish me, was: "There.s really not a need to do that."

And he said, "I'll go ahead and do it anyway."

And he went ahead and ran a records check under the name I had given him.

[Court]: Excuse me for interrupting.

Let us assume that everything we have here is true, that he has been, in fact, arrested for this, that and the other, that he got into a brawl over at Dip Stix that led to his discharge. Let's assume that all your concerns are well-founded --

[Prosecutor White]: Yes, sir.

[Court]: -- for purposes of this hearing.

What difference does it make as far as his qualifications to serve as a juror is concerned?

[Prosecutor White]: Well, we have to keep this in context, Judge. We're talking about the State's right to exercise a peremptory challenge. Now, a peremptory challenge doesn't address pure and simple the qualification issue. Under the law a prospective juror can be qualified to serve in that they have answered all of the questions right. They have not said that they're bias[ed] in any respect about anything pertaining to the case. Nonetheless, the State and the defense ha[ve] the right to peremptorily excuse a juror who for reasons that they find make a difference to them they feel they should excuse them. Sometimes it might because the defense has --

* * * *

[Prosecutor White]: I think the focus at that time becomes: Is there a race-neutral reason for the State to peremptorily challenge this particular

juror? The State cannot peremptorily challenge someone for racial reasons. That is the law so now the inquiry becomes --

[Court]: No. The inquiry becomes -- and this is what I want to focus upon, and I ask you gentlemen to give me an answer to. To get back, I'll put my question again.

We heard all of this testimony and all of these things. Now, tell me directly, succinctly and in simple non-lawyer terms how that affects his qualifications to sit upon the jury. It it does not affect his qualifications, I don't have to assume it's racially motivated. I'm asking for some help on those lines.

[Prosecutor White]: My answer to that, your Honor, is there's no other prospective juror that we examined in this case who has this particular factual background.

[Court]: You're still not answering my question.

[Prosecutor White]: I'm sorry.

[Court]: My question is: How do these facts -- I'm not talking about how he got here and how you got this, but how do these facts that you now have affect his qualifications to serve as a juror? If they do not, then you have the racial motivation there. That's my knowledge of it.

[Prosecutor White]: All right, Judge.

It's the State's position that we would peremptorily challenge any person, white, black or of any race, who had these things in his background as to qualifications. Also, we would challenge him on the basis that he's admitted that, as a black person who sat alone on the jury, he would feel

uncomfortable and that it might affect how he might look at this case as opposed to the rest of the jury. He's also told us that he had been a witness in a criminal case for the defense involving drug charges, and drugs are also involved in this case. He's told us that he has been charged with by the police several different offenses, and there are numerous police officers who will be testifying both from the Melbourne Police and also from the Palm Bay Police, and the Melbourne Police Department also is the department that arrested him on the charges off disorderly conduct, but again the focus as I see it under the law --

There are some cases here that I'd like the Court to look at. . . .

* * * *

[Prosecutor White]: [T]he question is: Is the State exercising a peremptory challenge for a racial reason, or does the State have race-neutral reasons for exercising its peremptory challenges?

I would submit that I would not, nor Mr. Craig, nor would Mr. Rappel ever allow any juror, white or black or any other race or sex or whatever, to sit on a case who has been to misdemeanor court and has pled guilty --

I'm sorry.

-- nolo to disorderly conduct and resisting with [sic] violence, who also had an incident report in which he assaulted a white female in his background and also testified as a witness for the defense in a criminal case involving drug charges given the nature of this case, and those are race-neutral reasons which more than merit his challenge peremptorily and I suggest rise to the level of challenging his qualifications as a juror considering all of that background.

I'd ask that you read these cases, Your Honor.

[Court]: All right, sir.

Okay, [defense].

[Defense]: I would ask that you also consider what Mr. White said as one of the bases, being that he felt uncomfortable about being the only black on an all-white jury, otherwise being an all-white jury. That itself is obviously racially motivated. If that plays a part in the State's consideration in striking Mr. --

[Court]: Excuse me. How do you explain that? How does that play a part, or how does it indicate it's racially motivated?

I'm not arguing with you. I need some help.

[Defense]: I believe what he mischaracterized what Mr. Payne said, but among the bas[e]s that Mr. White just gave was that he felt uncomfortable being a young, black male on this jury if the others were all white. Now, the record obviously speaks for itself as to what Mr. White said, but I would submit that has nothing whatsoever to do with his qualifications to sit on the case and likewise is a racially based reason for exercising -- in part based on his explanations for exercising this peremptory challenge.

I think it's only common sense. Whenever you're going to have one black person -- if you had an all-black jury, one white person you ask, ''Will you be uncomfortable?"

"Well, maybe so. Maybe not."

And using that as a basis, any part of a basis, to exercise that strike

> makes that strike racially based, and that's exactly what Neil and Slappy and the other cases seek to eliminate.
>
> * * * *
>
> [Court]: During the noon recess the Court has read and studied the citations of authority submitted by counsel for the parties upon the issue raised by the challenge by the State of Alvin Payne, a juror. I find that the State's explanation for [its] challenge [of] Juror Payne was reasonable, race neutral and non-pr[etextual], and, therefore, the State's challenge is sustained. All right.

(R 464-77).

Subsequently, defense counsel accepted the jury as constituted, noting only his exception to the excusal of prospective juror Cruz (R **699**).

As to Issue 111:

At the October **12, 1992**, hearing on Willacy's motion for a new trial (R **3633-37**), Clark testified that he did not recall being asked whether he or any other prospective juror was under prosecution for any crime in state or federal court (R **3520**). Clark also stated that, upon acceptance into the pretrial intervention program, he did not consider his case as still pending prosecution (R **3527-28**). Further, Clark testified that, during trial, he was unaware that prosecutor White had involvement with the pretrial intervention program; that his placement in pretrial

intervention played no part in his jury deliberations; and that he did not feel he owed the state anything for placing him in pretrial intervention (R **3528-29**). Finally, Clark acknowledged that he was the jury foreman in Willacy's trial (R **3532**).

Jury Clerk Rich testified that Clark was present on October **7, 1991**, the day jury selection began in Willacy's case (R **3536**). She also testified that one of the nine questions she posed to all prospective jurors was: "Are you at the present time under prosecution for any crime either in state or in federal court?" (R **3537**). Rich did not recall that Clark "came forward or spoke with" her with regard to answering this question (R **3539**).

Kurt Erlenbach, defense counsel at trial and in the instant matter, testified that no one told him that Clark was being prosecuted in the Eighteenth Circuit at the time of jury selection, and that he only learned of Clark's prosecution in July **1992** (R **3557-58, 3560**).

Joe Brand, who worked with the pretrial intervention program in Brevard County at the time that Clark was placed on the program, testified that he completed his investigation concerning Clark on September **24, 1991**, concluding that Clark was a "very suitable candidate" for the program (R **3564-65**). Brand stated that Clark had been

charged with grand theft, but returned the computer he had taken. Specifically,

> [i]t was a computer that was used in the business that was given to every one of the employees, and there was a dispute over salary so Mr. Clark did not return his computer to the company. The victim in the case, I asked him if he had a loss, and he said, Well, I didn't get back the manual nor the key for the computer and it's going to cost me *so* much to have another key made and replace the manual, and the total cost was $80.00.

(R 3565).

Brand recalled that he gave his recommendation to the State Attorney's Office on September 27, 1991 (R 3566). On October 4, 1991, the State Attorney's Office notified Brand of its approval of pretrial intervention for Clark (R 3567). On October 7, 1991, Brand sent Clark a letter, setting a "contract signing''date of October 18, 1991 (R 3568). Clark called Brand, stating that he was serving on a murder jury and was unsure that he could make the October 18th signing date (R 3568-69). Although Brand rescheduled the signing date to October 29th (R 3570), he also called prosecutor White; Brand understood that White handled a lot of murder cases and wanted to make certain that White was aware that a possible juror was selected for pretrial intervention (R 3569), because he thought "it was unusual that [Clark would] be on [a] jury . . . ." (R 3575).

Donna Wilmer, secretary to prosecutor White, testified that White approved pretrial intervention for Clark on October 2, 1991, but she did not notify Brand of this until October 4, 1991 (R 3585). After October 4th, Wilmer stated that she received a telephone call from Brand, who related that Clark had said he was on a murder jury in Melbourne (R 3586). Because Wilmer knew that White was involved in Willacy's murder trial in Melbourne, Wilmer called White and related the information (R 3586).

Prosecutor White testified that, after he received the call from Wilmer, he discussed it with prosecutor Rappel and then told either Kurt or Susan Erlenbach that he believed one of the jurors might be in the pretrial intervention program (R 3593). White was surprised that defense counsel did nothing regarding the information (R 3594). White acknowledged that he did not bring the information to the trial court's attention because he was unaware that prosecution was a statutory disqualification (R 3596). In fact, White did not learn of the statutory disqualification until Kurt Erlenbach mentioned it to him in July 1992 (R 3596).

White also testified that Clark's jury service had nothing to do with Clark's "formal" acceptance into the pretrial intervention program on October 29, 1991 (R 3597). Finally, White testified that he had no idea at jury

selection that Clark was the same person whose file he had review just the week before (R **3600**).

Prosecutor Rappel testified that, after White told him of his phone call from Wilmer, he suggested that White tell defense counsel (R **3608**). White then spoke with Susan Erlenbach, who was sitting at the defense table (R **3607-08**). Shortly thereafter, Kurt Erlenbach returned to the courtroom, and White and the two Erlenbachs moved to a different location, still conversing (R **3609**).

Co-defense counsel Susan Erlenbach testified that White never approached her during trial to relate the information regarding Clark (R **3612**). She stated that, on October **16**, **1991**, the day before the jury returned its verdict on October **17**, **1991** (R 3355–58), she and Rappel were having a casual conversation, during which Rappel related the information about Clark (R **3614**).

The state called Rappel in rebuttal, who stated that the conversation related by Susan Erlenbach never occurred (R **3616-18**). In fact, Rappel stated that he was at home on the day Susan Erlenbach alleged the conversation occurred (R **3619**).

The trial court took the motion for a new trial under advisement, requesting memoranda from both parties (R **3620**). Both parties submitted memoranda (R **3652-61**, 3663–73), and

on December 28, 1992, the trial court denied the motion, finding that the state had brought the Clark matter to the attention of defense counsel prior to the case being submitted to the jury; that defense counsel was on notice of Clark's status; and that Clark was not disqualified under Fla. Stat. § 40.013 (1991) because he was not under prosecution at the time he was selected for Willacy's jury (R 3674-79).

As to Issue IV:

Willacy filed a motion to suppress his statements made to Detective Santiago, alleging that Santiago had re-initiated contact with Willacy after Willacy had spoken with a lawyer (R 3308-09). At the hearing, Santiago testified that, after they had roped off the scene and videotaped the inside of the victim's house, Willacy drove up (R 2983). Willacy was unable to pull in his driveway, because the police had roped off the victim's house and Willacy's house, which was next door (R 2984). Santiago explained that they were investigating a crime, and thought someone might have broken into Willacy's house because there was a broken window (R 2984). Willacy said the window was broken before and had cardboard covering it (R 2984). Santiago pointed out that there was no cardboard there, and asked if they could look inside Willacy's home to make certain nothing was missing; Willacy "wasn't too happy with th[e] idea" of

having his house searched, but permitted it (R 2984). Santiago asked some general questions, and Willacy related that he had a girlfriend and where she worked (R 2985). Willacy also told Santiago that he had not seen the victim since Saturday, that he and his girlfriend were in Orlando on Sunday and did not return until early Tuesday morning, that he worked on Tuesday, but not on Wednesday (R 2991-92). Willacy also stated that he cut the victim's lawn, used her mower and gasoline, had never been in the victim's house, but had been in the garage to get the mower, and had not argued with the victim about money (R 2993-94).

Santiago spoke with the victim's across-the-street neighbor, who stated that the victim and Willacy had had an argument about Willacy wanting to be paid for mowing the victim's lawn before he had mowed the lawn (R 2986). A neighbor who lived behind the victim saw a muscular black male exit the wooded area next to the victim's house and get in a two toned, four door car (R 2986-87). Several other neighborhood people stated that they saw a black male walking in the area and driving a two toned car (R 2988).

Santiago instructed Detective Ciccone to interview Willacy's girlfriend at work. Walcott stated that Willacy went to Orlando on Monday and returned early Tuesday morning (R 2992). Walcott related that Willacy had cut the victim's lawn on Sunday (R 2992).

Santiago then scheduled an appointment with Willacy, based on the information he had, Willacy's admission that he had been in the victim's garage, and the fact that blood had been found in the garage (R **2994**). Specifically, Santiago asked for Willacy's fingerprints to "eliminate [him] from the crime scene''(R **2994**). Willacy refused, but admitted to having been arrested in New York (R **2995**). Santiago said he did not understand "this silliness," and advised that he would have New York fax Willacy's prints to him (R **2995**). They set an appointment for Willacy to come to the police station, but Willacy did not keep the appointment (R **2996**). Santiago then conducted an interview with Barton, who later identified Willacy (R **2996-97**).

After Barton's identification, Santiago asked Willacy about a statement and Willacy agreed to give one at his house, which Santiago recorded (R **2997**). After Santiago advised Willacy of his rights, Willacy related that he was in Orlando on Monday, came back on Tuesday, worked for Labor Force on Wednesday, and did not work on Thursday (R **2999**). Willacy stated that, on Thursday, he was on the roof cleaning off shrubbery, and that he had not seen the victim in several days (R 3000). Santiago also asked if Willacy had seen anyone at the victim's house around noon on Thursday, because a priest interested in buying the victim's car had shown up for a **12:00** appointment with the victim to see her car (R 3001-02).

Santiago then heard from Walcott, who related that her father had found a lady's checkbook in a trash can, and wanted Santiago to come and get it (R **3004-05**). Willacy showed Santiago the trash can and hands him the check book (R **3006**). Santiago recognized it as belonging to the victim because of the handwriting (R **3006-08**); further, Willacy and Walcott both stated that it was not theirs (R **3008**). Santiago then went to the victim's home to compare the handwriting, and according to Santiago, there was "no doubt in [his] mind" that it was the victim's check book (R **3009**). Santiago then arrested Willacy (R **3010**).

Santiago testified that Officer Williams took Willacy to the Palm Bay Police Department, while Santiago went to the station to complete an arrest form and search warrant (R **3014-15**). Santiago received a phone call from the booking officer that Willacy refused to give his fingerprints; Santiago said he would be "right over" (R **3015-16**). When Santiago arrived, Willacy was on the phone with the Public Defender's Office (R **3016-17**). After Willacy finished his phone conversation, Santiago convinced him to give fingerprints (R **3017**). Willacy told Santiago that the public defender told him not to say anything (R **3032**). Santiago then left to finish the arrest form and search warrant (R **3019**).

After completing the arrest form, Santiago went back to the police department to give the form to the booking officer for Willacy's transportation (R 3019) and to check on Willacy's welfare (R 3034).[3] The booking officer was not there, *so* Santiago checked on whether Willacy had had a meal (R 3020). When Willacy asked what he was being charged with, Santiago responded that Willacy was being charged with murdering his next door neighbor (R 3020-21). Willacy then asked what Santiago had in his hand, and Santiago responded that it was the arrest form and informed Willacy that it contained his name, date, address, and Santiago's version of events (R 3021). Willacy asked Santiago to read it to him (R 3021). After Santiago read it to Willacy, Willacy stated that "[i]t didn't happen that way. You need to know the whole truth." (R 3021). Santiago told Willacy he could not speak with him, and that Willacy need to talk to his public defender (R 3021, 3041). Willacy said no, that he wanted to tell Santiago (R 3021). Santiago told Willacy to wait while Santiago informed his sergeant that Willacy wanted to speak with him (R 3021). Santiago's sergeant said okay, and asked that Willacy be moved so that they could re-advise him of his rights and videotape him (R 3021).

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[3] Santiago testified that, as part of his job duties, he is required to be with the booking officer at all times for the prisoner's protection, and that when a booking officer is not available, the detective is required to be present (R 3034).

Santiago then cuffed Willacy's hands and legs, gave him a cigarette, and, while walking Willacy over to a different building, read Willacy his Miranda[4] rights (R 3022). Santiago stated that he made no promises or threats to Willacy (R 3023-25). Santiago stated that, at the beginning of the videotaped interview, Santiago re-advised Willacy of his rights (R 3025). During the videotaped interview, Willacy admitted that he was at the scene during the murder (R 3028).

Willacy testified that, after his arrest, he spoke with the public defender's office and was advised to give his fingerprints but not to speak with officers until he had spoken with a lawyer (R 3059-60). Willacy cooperated with the fingerprinting procedure, and informed Santiago that the public defender told him not to speak with anyone (R 3062). Willacy remembered Santiago returning when he was sleeping and asking him if he had had a meal (R 3063). According to Willacy, Santiago then asked if he wanted to talk about the incident, telling Willacy that he had an "M-1 hanging over [his] head" (R 3064). Willacy asked what an "M-1" was, and Santiago told him murder in the first degree (R 3064). Santiago then waved the arrest form and read from it (R 3064). Santiago next offered to remove the cuffs and to provide Willacy with a cigarette in a more comfortable

[4] Miranda v. Arizona, 384 U.S. 436 (1966).

setting (R **3065**). Willacy agreed, and they went to a room, where Santiago placed a cassette recorder on the table and started asking questions (R **3065**).

Willacy testified that Santiago did not tell him not to talk with him because Willacy had spoken with a public defender (R **3066**). Willacy also stated that Santiago had advised him of his rights only one time -- at Willacy's house (R **3066**). On cross examination, Willacy admitted that he understood from previous experiences that he did not have to talk with the police, that he had the right to remain silent, that he was entitled to speak with an attorney, and that, based on his attorney's advice, he did not have to speak with the police at all (R **3071**).

Assistant Public Defender Doug Reynolds testified that he spoke with Willacy after Willacy's arrest (R **3081**). Reynolds told Willacy not to say anything about the case to him or the police, and to use his own discretion about giving fingerprints but to be aware that the police could charge him with resisting arrest (R **3083**).

The trial court held:

> **1.** The Defendant exercised his right to counsel and silence after being arrested for homicide.
>
> 2. The police broke off interrogation at that time.

3. The defendant was baited with the 923.01 (Arrest Report) into "telling his side of the story."

4. In the ensuing statement made by the Defendant there is sufficient evidence of Defendant's uncertainty about making his statement to the officer.

5. No effort was made by the officer to have the Defendant waive those rights which he successfully exercised, and in fact, his exercise of those rights was totally ignored.

This Court finds that any reinstitution of police interrogation must be at the initiation of the defendant, and that once rights have been invoked, their waiver should be specific and unequivocal. Smith v. Illinois, 467 U.S. 91 (1984).

This Court further finds that there was sufficient probable cause for the Defendant's arrest without the need for validity of the tainted identification. Probable cause exists if a reasonable man, having the specialized training of a police officer, in reviewing the facts known to him, would consider that a felony is being or has been committed by the person under suspicion. Mayo v. [S]tate, 382 So. 2d 327 (Fla. 1st DCA 1980).

Wherefore, Defendant's rights having been denied, the Motion to Suppress Statements by the accused is granted.

(R 3338-39) (emphasis in original). The court made clear that

[t]he order which I entered obviously deals only with the constitutionality of the statement. I ruled that it was an

impermissible statement. Therefore, it couldn't be used because there was not a Miranda, a constitutional protection, offered or it was avoided in some manner.

I didn't rule in any way on the voluntariness or the reliability of the statement. That's always the State's burden. If the State is going to use that statement or feels the need to use that statement for purposes of impeachment during the course of the trial, then the State's burden would be to establish that, in fact, this was a free and voluntary statement having nothing to do with the order which speaks for itself. The freeness and voluntariness of that statement will be tested by the trial judge based on the evidence that's presented at that time.

I suppose I could do it now, but I don't know that there's a reason to do it at this point. I don't know that there should be a reason for me to tell the defendant whether or not there will be impeachment available when the defendant's obligation is like the obligation of other witnesses, to come forward and tell the truth.

I don't feel that I want to rule on that motion at this time. I think it should be reserved for the course of the trial, and the trial judge is the best person to determine whether that statement is offered as a free and voluntary statement of the defendant having no regard for the Miranda issue which is already resolved. I'll decline to rule on that at this time.

(R 3242-43) (emphasis supplied).

Subsequently, Willacy filed a motion in limine (R 3347-48), seeking to prevent the state from using the suppressed

statements to impeach Willacy if he chose to testify (R 2140-59; 3231-39). Because the trial court held that the state had to show by a preponderance of the evidence that the statements were made voluntarily (R 2159), the state called Santiago who testified as to the same information he testified during the motion to suppress hearing (R 2169-98).

Sergeant Danny Thomas testified that he assisted in gathering information for the arrest form and the search warrant (R 2223). Thomas also prepared the video camera for Willacy's statement (R 2226). Prior to the statement, Thomas told Santiago to make certain Willacy understood his rights (R 2227). Thomas also testified that, in the years he had known Santiago, he had never heard Santiago used the term "M-1" (R 2271). The parties next stipulated as to the testimony Doug Reynolds would have provided (R 2237).

Willacy then testified as to the same information he testified to during the motion to suppress hearing (R 2239-46). On cross examination, Willacy admitted to prior arrests in New York, but claimed that he was never advised of his rights with those arrests (R 2248-57). Willacy again admitted that he understood that he had the right to an attorney, and had exercised that right in speaking telephonically with the public defender's office and that he had the right to remain silent (R 2259). Willacy also admitted that the transcript of his statement reflected that

Santiago had reminded Willacy of his various rights before Willacy made his statement (R 2259-60). Although Willacy stated that Santiago made him give a statement by telling him, if he cooperated, he could get out of jail that night (R 2262), Willacy also admitted that he had never mentioned that "promise" by Santiago previously (R 2266). Willacy also admitted that, sometime during his statement, he changed his mind about speaking to Santiago without a lawyer and told Santiago that he wanted legal assistance; that Santiago said it was up to Willacy; that Willacy then said he wanted legal assistance; and that Santiago responded by saying he would stop based on that request (R 2267-69).

The trial court held:

> The Court finds from the evidence presented and a review of the transcript of the interview between Mr. Santiago and the defendant and from having reviewed the video cassette tape and having listened to the micro audio cassette and having heard the testimony presented here today and having heard the argument of counsel, the Court finds that the State has shown by a preponderance of the evidence that the defendant's statements in question were freely and voluntarily made. That conclusion I believe is supported by the case law of the State. Therefore, the statement can be used to impeach the testimony of the defendant should he testify contrary to the matters stated on the tape.

(R 2288).

As to Issues V through VIII:

Dr. Wickham testified that the victim's legs were bound with a plastic cord "which went around multiple times, and then just above that there was a wrapping with duct tape." (R **1030**). The victim's hands were bound behind her back with rope, cord, and duct tape (R **1030, 1070**). There was an electrical cord ligature around the victim's neck partially covered by duct tape (R **1030**).

Wickham testified that the victim had blunt force injuries inside her mouth (R **1058**), charring on the face (R **1071**) and other body parts (R **1072-74**), a laceration behind her right ear (R **1075**), a laceration in the back of her head (R **1076**) where a "divot" was displaced (R **1077, 1115**), two bruises on her head (R **1114**), a laceration on the top of her head (R **1115**), and a laceration on the left side of the back of her head (R **1115**). Wickham related that the wound on the top of the victim's head was consistent with her having been struck by a circular object (R **1115**), but the wounds on the sides of her head were consistent with her having been struck by a straight edged or long, round object (R **1116**). Wickham testified that a carpenter's hammer could have caused all of the head injuries:

> The hardness of the metal would be able to chip out a piece like that. The circular end of a hammer would correspond to the circular shape of the

> wound at the top of the head. Most hammers have straight edges on the side of the hammer, and that could have caused some of the linear lacerations which I observed.

(R 1116). Although these wounds could have caused the victim to lose consciousness, Wickham could not state whether she in fact did (R 1119).

Wickham recounted bruising on the back of the right arm and hand of the victim (R 1119). Wickham stated the cause of death as smoke inhalation following strangulation and blunt force injury to the head (R 1120). Wickham stated the blunt force injury to the head probably would not have caused the victim's death, but the strangulation could have (R 1121, 2719, 2728). Wickham stated that the victim could have regained consciousness after tightening of the ligature around her neck, depending on how tight it was. Thus, according to Wickham, she could have survived the strangulation but for the fire (R 2728).

Wickham also stated that he found black soot in the mucus of the victim's trachea, which indicated that she was alive during the fire (R 1108-09). Wickham testified that the victim continued to struggle/move during the time she was on fire (T 2724). Wickham found rather large hemorrhages in the victim's eyes, which indicated that the strangulation pressure was not constant (R 1112-14, 2718).

Wickham opined that the intermittent strangulation pressure was consistent with the victim having struggled (R **2732-33**).

The jury recommended the death penalty for Willacy by a vote of nine to three (R **3411**). In its written sentencing order, the sentencing court found the following as facts:[5]

> On September 5, **1990**, Marlys Sather was murdered by Chadwick Willacy, her next door neighbor, when she returned home from work unexpectedly and surprised him in the act of burglarizing her home. She was viciously and brutally assaulted during the court of which she was bludgeoned about the face and head with a squeegee and a hammer or other blunt instrument. She was choked with an electric cord removed from an iron; her hands were securely bound behind her back and her ankles were also tied rendering her completely immobile,

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Prior to imposing sentence orally, the sentencing court stated:

> The Court has considered the evidence, the arguments of counsel heard during the trial and during the penalty phase of these proceedings, the Presentence Investigation Report, advisory verdict of the jury, the sentencing memoranda that w[ere] submitted by counsel for each party, as well as the comments presented at this hearing. The Court must now determine what aggravating circumstances, if any, have been established beyond a reasonable doubt, whether any mitigating circumstances exist and what weight these aggravating and mitigating circumstances should be given if found to exist.

(R 2867-68).

> helpless, defenseless, and incapable of escape. Her bleeding head was swathed in a comforter and she was dragged into another room. Still alive, her body was doused with gasoline and set on fire. An oscillating fan was placed at her feet, aimed at her body and put into operation. She died of smoke inhalation. Her badly burned body was found the next day.
>
> Duct tape used to bind the victim's hands and feet came from the Defendant's home. Smoke detectors were removed from the ceilings. A hammer handled with human blood on it was found in a wooded lot adjacent to the victim's yard. The squeegee handle was found in a bathroom wastebasket. The head of the squeegee, with human blood on it, was found in the living room. Blood and bloodstains were found in the garage, foyer, living and dining room areas and on the comforter which had encased the victim's head.
>
> Her checkbook, coins and a large quantity of pennies were found in the Defendant's house. The victim's automatic teller machine card and her late husband's automobile were stolen. The Defendant used the automatic teller machine card to withdraw two hundred dollars from her bank account. The machine rejected attempts to make other withdrawals. Photographs taken by the automatic teller machine clearly showed the Defendant's face and the stolen car in the background. Other property of the victim, including a VCR player, a portable television set, a VCR tape rewinder and a shotgun were assembled on her porch, their removal thwarted by the victim's unexpected appearance.

(R 3462-63).

The sentencing court next found the following aggravating circumstances:

4. WHETHER THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF THE CRIME OF ARSON.

This aggravating circumstance was proven beyond a reasonable doubt. The victim was still alive when her body was doused with gasoline and set on fire. Arson was the ultimate cause of her death.

5. WHETHER THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

The victim and Defendant were next door neighbors and knew each other. Had he left her alive, she would have been able to identify him as her assailant and as the person who burglarized her home and who robbed her. These facts, standing lone, are not sufficient proof of this aggravating circumstance. But add these facts: The [victim] was burned alive after being bludgeoned into submission and securely bound thus rendering her incapable of interfering with Defendant's actions or preventing his escape. She could cause him no harm and did not pose a threat to him of any kind whatsoever.

Having considered all these facts, the Court concludes that the dominant motive for this murder was the elimination of Marlys Sather as a witness and to avoid detection and arrest. There was no other discern[i]ble reason to kill her.

The Court finds that this aggravating circumstance has been proven beyond a reasonable doubt.

6. WHETHER THE MURDER WAS COMMITTED FOR PECUNIARY GAIN.

The State has proven beyond a reasonable doubt that this crime was committed for pecuniary gain. In addition to the murder and arson, the Defendant was

found guilty of robbery and burglary during the course of which he took personal property of the victim, including her ATM card with which he obtained money, an automobile, her checkbook, coins and other items convertible into cash.

* * * *

8. WHETHER THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

In accomplishing the victim's death, Defendant bludgeoned, strangled and bound her rendering her incapable of resistance, defense or escape. He then applied a combustible liquid to her body and set it on fire while she was still alive. These actions by Defendant raise his conduct to a level setting this case apart from the norm of capital felonies bringing it well within the definition of "heinous, atrocious and cruel" found in Dixon v. State, **283** So. **2d 1** (Fla. **19[7]3).**

This aggravating element was proven beyond a reasonable doubt and the jury was instructed upon it.

9. WHETHER THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

There is no evidence of heightened premeditation, a lengthy or methodical killing or of planning, reflection or calculation by the killer. Rutherford v. State, **545** So. 2d **583** (Fla. **1989).**

This element was not established beyond a reasonable doubt and is not considered. The jury was instructed upon it.

(R **3464-65).**

Regarding mitigation, the sentencing court found as follows:

> 1. DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.
>
> Defendant has no significant record of prior criminal offenses. [H]e has admitted to the commission of relatively minor offenses in New York principally consisting of offenses relating to controlled substances for which he was placed on probation for terms of one year and three years respectively. Probation was ultimately revoked and he was resentenced to 90 days in jail.
>
> This mitigating circumstance was present and the jury was instructed regarding it.
>
> 2. WHETHER THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.
>
> This mitigating circumstance was not present. The jury was not instructed as to it.
>
> 3. WHETHER THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.
>
> This mitigating circumstance was not present. The jury was not instructed as to it.
>
> 4. WHETHER THE DEFENDANT WAS AN ACCOMPLICE IN THE MURDER COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATING WAS RELATIVELY MINOR.
>
> This mitigating Circumstance was not present. The jury was not instructed as to it.
>
> 5. WHETHER THE DEFENDANT WAS UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINION OF ANOTHER PERSON.

This mitigating circumstance was not present. The jury was not instructed as to it.

6. WHETHER THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENT OF LAW WAS SUBSTANTIALLY IMPAIRED.

This mitigating circumstances was not present. The jury was not instructed as to it.

7. THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

The Defendant's age was not presented as a mitigating factor and the jury was not instructed with respect to it.

NON-STATUTORY MITIGATING CIRCUMSTANCES[6]

The Defendant is accorded great latitude in presenting non-statutory mitigating factors. The Court must, and has, considered these non-statutory mitigating circumstances submitted by the Defendant.

A. That he has strong support of family.

This is not a mitigating circumstance.

B. That he has no history of violence nor has he shown a tendency toward violence.

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6 Before listing the nonstatutory mitigating factors, the sentencing court orally stated: "The defendant is accorded great latitude in presenting non-statutory mitigating circumstances or factors. This Court must, and has, considered these non-statutory mitigating circumstances submitted by the defendant." (R 2877-78).

> This was present and is accepted as a non-statutory mitigating circumstance.
>
> C. He has performed well in confinement prior to trial and has participated in self-improvement groups and classes while in jail.
>
> This circumstance is accepted as a non-statutory mitigating circumstance.
>
> D. He is educated and intelligent.
>
> This is not a mitigating circumstance.

(R 3465-67).

Finally, the sentencing court concluded:

> After weighing the evidence the Court finds four aggravating circumstances to exist. It further finds one statutory mitigating circumstance to exist and that two non-statutory mitigating circumstances are considered but given little weight.
>
> The aggravating circumstances are found to substantially outweigh the mitigating circumstances. In conclusion, the Court has not used the score card approach proscribed in Dixon v. State, 283 So. 2d 1 (Fla. **1973).**

(R 3467).

Issues on Cross Appeal[7]

As to Issue IX:

Pretrial, defense counsel moved to suppress the out-of-court, and any in-court (R 2906), identification of Willacy by John Barton, alleging that the identification procedure was unnecessarily suggestive and gave rise to a substantial likelihood of irreparable misidentification (R 3306-07). At the hearing on this motion, Barton testified that, on the first day of school in 1990, he saw a red and white Ford LTD (R 2921) in a drainage ditch "driving forward and reverse" (R 2918). Barton saw a black man in the vehicle and described the man as being about 25 years old (R 2927) and as having short hair on the sides, a skinny face, a tall muscular build (R 2920-21). Barton recalled having seen the car before it was in the ditch; he saw it in the Jiffy store parking lot, after which it pulled down a side street (R 2922-23).

Sometime later, the police contacted Barton; after they heard what Barton he seen that day, they took him to the police station to work on a composite (R 2926). In the midst of their work on the composite, they were interrupted with a phone call concerning a suspect they wanted Barton to

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[7] The state filed its notice of cross appeal on January 14, 1992 (R 3485-86).

see (R 2927). The police took Barton to a housing development where at least two black men were in custody (R 2927-28, 2940). Barton told the police that one of the men looked "a lot like" the guy in the red and white Ford LTD, but he "wasn't a hundred percent sure." (R 2929). On a scale of 10, Barton rated his identification as 8.5 (R 2929). Barton then testified that, if asked to give an in-court identification, he could base his identification solely on what he witnessed when he saw the man in the red and white Ford LTD (R 2931).

Detective Santiago testified that the victim owned two vehicles -- a blue Ford LTD and a maroon and beige Ford LTD (R 2950-51). Although the blue Ford LTD was found in the garage, the other was missing (R 2951). On the same day that police officers recovered the two toned Ford LTD, they contacted Barton about what he had witnessed (R 2953). In Santiago's opinion, the description given by Barton was consistent with the appearance of Willacy (R 2962). Willacy was "a very muscular man" who participated in weightlifting (R 2962).

Orally, the trial court ruled:

> We start out with an identification by Mr. Barton which is uncertain. That's followed by an ineffective attempt to make a drawing of the defendant with the assistance of the officer. Maybe it was the officer's fault and not his. I have

> no idea. That followed by the taint of an identification made by the officer and not necessarily by the witness should be sufficient for me to be concerned about his ability to identify this defendant. I'm going to grant your Motion to Suppress.

(R 2977). The trial court also entered a written order (R 3340).

At trial, when the state called Barton as witness, defense counsel objected based on the trial court's previous order (R 1133-36). The state explained:

> It's my understanding that what the Court's order suppressed was the fact of the showup identification. I cannot elicit any testimony regarding his being transported to the vicinity of the defendant's residence and his view of the defendant and his opinion that the defendant was the same person, nor can I elicit from him in examination or in court any testimony asking him to identify any person in court as being the person that he saw either driving the car or the person that he saw during the showup. That's been suppressed.
>
> Prior to the showup, which the Court has ruled it was an unconstitutional one-on-one showup, prior to that he had given to the police a detailed description of the events that he saw. Everything up until that time has not been suppressed, and I believe that the import of [defense counsel]'s argument is that it has been in some respects tainted by the subsequent confrontation.
>
> Judge Budnick did not rule on that, and we may need to look at his order to see specifically whether or not he ruled

implicitly on that point and whether he did not. *So* this Court may have to rule upon [defense counsel]'s objection, we may need to proffer some testimony *so* the Court can make a determination because the issue, as I see it, would be: Can he give the description of the events that he saw on September 5th?

And I would submit that he can because he did. He gave that to the police. He gave a detailed description to the police. [Defense counsel] has a copy of that *so* he'll be able to cross-examine the witness, and he can't go beyond that. I instructed him. He can't use anything he learned subsequent to the events on the fifth. He can't use the fact that he saw this person on the sixth.

It's worth noting, your Honor, when he saw the defendant on the sixth when the police conducted the showup, he did not with certainty say that this defendant was the person that he saw. He rated -- with the assistance of the police he rated it as an eight and one-half percent certainty on a scale of one to ten. He was pretty sure or very sure and not certain, and I submit that he should be permitted to testify about seeing a person park the car.

He should be able to describe that person not from anything, not from looking at him in the courtroom, not from seeing him on [the] sixth but from seeing him on the fifth. I talked to this witness at great lengths, and he can do that. I told him he can't use any of those other things.

* * * *

The suppression of evidence is basically a penalty that inures to the benefit of the defendant and to the detriment of the State for illegal police conduct, the police conduct being in this particular case the

> confrontation that they arranged between the witness and the accused person. That for all intents and purposes was conceded by the State and formed the basis for Judge Budnick's order for suppressing that showing identification and any subsequent identification that this witness could make in court. In other words, the Court found there was a likelihood of taint that would affect this witness'[s] ability to identify this defendant in court, and he's never been called upon in any court proceeding to identify the defendant, to say whether he could or not identify the defendant.
>
> What we're dealing with here, Judge, is something that happened prior to any illegal police conduct. We have a witness who observed certain events, related those events to the authority, and the issue is: Can he testify about those events without reference to any subsequent events that happened?
>
> And he's testified that he did, in fact, do that. He did, in fact, tell Detective Santiago the same description that he gave here in court, and Detective Santiago is prepared to confirm that, and I would submit that it would be basically an injustice to penalize the State by [not] allowing it to have a piece of relevant and material evidence, [not] let[ting] this jury have the benefit of that evidence, because of something the police did after the fact which I tried to demonstrate through the evidence that I proffered here had no effect and has no effect upon the witness'[s] testimony.

(R 1136-39, 1154-55).

After the state's proffer of Barton's testimony (R 1144-50), the trial court held that Barton could testify

only as to details of the car, not as to any description of the man inside the car (R 1162-63). The trial court based its decision on its belief that "what [Barton] testified to on the sixth was based upon the things that he witnessed and saw on the fifth." (R 1160). The court found it was "part and parcel of the same thing. You can't separate it as I see it." (R 1160).

As to Issue X:

In its sentencing memorandum, the state argued for the cold, calculated and premeditated aggravating factor:

> The murder of Marlys Sather was cold, calculated and premeditated such as to require this court to find that this aggravating circumstance exists. In this case there is more evidence of coldness and calculation than this court will see in any but the rarest of cases. Furthermore, it is without question the most morally debased of murders without any "pretense of moral or legal justification." See Williamson v. State, 511 So. 2d 289 (Fla. 1987); Ban[d]a v. State, 536 So. 2d 221 (Fla. 1988). Chadwick Willacy struck a defenseless older woman in the head with two separate weapons at least four times. There are also bruises and contusions on her face and inside her mouth indicating he hit her with his fists. He then tied her hand and foot and then manually strangled her. Finally, he dragged her down the hall to her den/office, took down the fire alarms, set up an oscillating fan at her feet, got gas and doused her with it, and then set her on fire. Each of these different methods by which he attempted to kill her reveals his premeditation.

> Certainly, by tying her, dousing her with gas, setting an oscillating fan at her feet, removing the smoke detectors and then setting her on fire, the Defendant demonstrated the calculation required to satisfy this aggravating circumstance.
>
> In Herring v. State, 446 So. 2d 1049 (Fla. 1984), the Florida Supreme Court held that the term premeditation, as used with this aggravating circumstance, means heightened premeditation, something more than the degree of premeditation required to prove premeditated murder. To calculate means "to plan the nature of beforehand: think out . . . to design, prepare or adopt by forethought or careful plan." Rogers v. State, 511 So. 2d 526 (Fla. 1987). The ceaseless efforts of this defendant constitute that type of premeditation and calculation. Swafford v. State, 533 So. 2d 270 (Fla. 1985); Phillips v. State, 476 So. 2d 194 (Fla. 1985); and Mills v. State, 462 So. 2d 1075 (Fla. 1985).

(R 3442-43). The state argued the factor to the jury (R 2818-19), and the sentencing court instructed the jury on it (R 2841-42).

After the jury returned its advisory sentence, the state again argued this aggravating factor to the court (R 2862-63). The sentencing court found the factor was not established beyond a reasonable doubt and did not consider it in imposing sentence (R 2875).

SUMMARY OF THE ARGUMENT

Issues on Direct Appeal

As to Issue I:

Willacy failed to preserve this issue for appellate review by neither objecting nor moving for a mistrial. In any event, the trial court's refusal to allow defense rehabilitation of prospective juror Cruz was correct, because her views on the death penalty made it impossible for her to serve as an impartial juror.

As to Issue 11:

Willacy failed to preserve this point for appellate review because he affirmatively accepted the jury prior to its being sworn, without reserving his previous objection. In any event, the trial court did not abuse its discretion in permitting the state to strike prospective juror Payne because the state offered several race neutral reasons for the strike, all of which are amply supported by the record.

As to Issue 111:

Willacy must be deemed as having waived this issue for appellate review, because, although defense counsel knew about juror Clark's alleged "pending prosecution" status before the jury returned its verdict, defense counsel took

no action. In any event, because Clark had been accepted into a pretrial intervention program, the state was not pursuing its prosecution against Clark. Further, even if Clark were under active prosection, Willacy has failed to show that Clark's status affected his ability to render a fair and impartial verdict.

As to Issue IV:

The trial court did not abuse its discretion in denying Willacy's motion in limine; the court fulled complied with state and federal precedent before determining that the state could use Willacy's statements to impeach him. After a full hearing on the point, the court concluded that, because Willacy rendered these statements voluntarily, the state could use them to impeach Willacy if he chose to take the stand. Because this determination is fully supported by the record, it must be presumed correct.

As to Issue V:

The sentencing court correctly found that Willacy committed the instant murder to avoid arrest. The state proved not only that Willacy knew the victim, but that the only possible motive for the murder was witness elimination. If this Court reaches a different result, there is no reasonable possibility that the sentencing court would have imposed a lesser sentence, given the strength of the remaining aggravating circumstances.

As to Issue VI:

The sentencing court properly found that Willacy committed the instant murder in an especially heinous, atrocious, and cruel manner. The state established not only that Willacy murdered the victim in her own home, but that, with the blows to the victim's head and face, Willacy hoped to render the victim unconscious. Willacy was unsuccessful, and continued striking the victim about the head. Although the victim struggled defensively, Willacy managed to bind her hands and feet, after which he attempted to strangle her. The victim continued to struggle, and Willacy continued his strangulation attempts. While the victim was still conscious and/or alive, Willacy moved the victim to a different room and set her on fire, during which the victim continued to struggle. The fire ultimately caused her death. Because the victim could have been conscious and in fact was alive until the fire, the victim would have suffered great pain.

As to Issue VII:

The sentencing court properly complied with Campbell in weighing the mitigating evidence and in setting forth its findings by written order. Defense counsel advised the sentencing court of mitigation and called witnesses during the penalty phase to establish the mitigating factors.

Thereafter, the sentencing court found that Willacy had established one statutory mitigating factor and two nonstatutory mitigating factors; although the court considered the two nonstatutory factors, it gave them little weight. If this Court reaches a contrary conclusion, any error was harmless beyond a reasonable doubt, as the nonstatutory mitigation presented by Willacy was weak, particularly in light of the strong evidence which supported the four aggravating circumstances.

As to Issue VIII:

Willacy's death sentence is proportionate to other death sentences affirmed by this Court in cases involving similar facts and a similar balance of aggravating and mitigating circumstances. The sentencing court found four well-supported aggravating factors, one statutory mitigating factor, and two weak nonstatutory mitigating factors.

Issues on Cross Appeal

As to Issue IX:

Judge Yawn abused his discretion in suppressing Barton's testimony concerning the events witnessed by Barton on September 5, 1990. Because the events witnessed by Barton on September 5th preceded the suggestive identification procedure used by police on September 6,

1990, Barton's testimony concerning September 5th would have been based on an indepedent recollection and thus been both probative and relevant.

As to Issue X:

The sentencing court abused its discretion in finding that the state failed to establish beyond a reasonable doubt that Willacy committed the instant murder in a cold, calculated, and premeditated manner. A review of the record reveals that Willacy demonstrated heightened premeditation in his elaborate planning and execution of the murder.

ARGUMENT

Issues on Direct Appeal

Issue I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING WILLACY'S ATTEMPT AT REHABILITATING PROSPECTIVE JUROR CRUZ.

Initially, this Court should be aware that Willacy failed to preserve this issue for appellate review, as he neither objected in those terms nor moved for a mistrial. In fact, Willacy stated only that he "would like a brief opportunity to try to rehabilitate" Cruz. Under replete precedent from this Court, this request was insufficient to preserve the issue. Instead,

> it was incumbent upon [Willacy] to raise a timely objection and thereby allow the trial court to specifically rule on the issue. The record shows that while defense counsel brought the [issue] to the attention of the court, he did not interpose an objection; but rather, he deferred to the trial court's statement of the applicable law. This court will not indulge in the presumption that the trial court would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law.

Lucas v. State, 376 So. 2d 1149, 1151-52 (Fla. 1979).

Willacy wholly failed in his duty to raise a timely objection and provide authorities which supported his position. In contravention of the contemporaneous objection

rule, Willacy waited until the end of jury selection to raise the issue once again, this time moving for a mistrial and citing to O'Connell v. State, 480 So. 2d 1284 (Fla. 1985). As the trial court noted, a proper objection at that juncture was too late to remedy any problem. After all, the purpose of the contemporaneous objection rule is to place the court on notice of any alleged problem contemporaneously so that the court may correct the problem at the earliest time possible. Nixon v. State, 572 So. 2d 1136, 1141 (Fla. 1990); Castor v. State, 365 So. 2d 701, 703 (Fla. 1978).

Should this Court find Willacy's request sufficient to preserve the point, it is well aware that "[t]he test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Lusk v. State, 446 So. 2d 1038, 1041 (Fla.), cert. denied, 469 U.S. 873 (1984). Deciding whether a prospective juror meets the Lusk test is within a trial court's discretion, Pentecost v. State, 545 So. 2d 861 (Fla. 1989), based upon what the court hears and observes. See Reed v. State, 560 So. 2d 203 (Fla.), cert. denied, 498 U.S. 882 (1990). A review of the instant record reveals that the court's refusal to allow defense rehabilitation of prospective juror Cruz was correct, because "the possibility of a death sentence rendered the juror unable to impartially

participate in the determination of guilt or innocence." Maxwell v. Wainwright, 490 So. 2d 927, 930 (Fla. 1986), cert. denied, 479 U.S. 972 (1987).

Again, the standard is

> whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions an his oath." We note that, in addition to dispensing with Witherspoon's reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Wainwright v. Witt, 469 U.S. 412, 424-26 (1985) (emphasis supplied).

In the instant case, Cruz never indicated that she could follow the law or that she could set aside her beliefs. Compare Johnson v. State, 608 So. 2d 4, 8 (Fla. 1992). Despite the fact that Cruz clearly could not have been an impartial jury, Willacy claims that he should have been afforded an opportunity to rehabilitate her. As the record makes clear, further rehabilitation by the defense would have proven fruitless.

Willacy predictably relies on O'Connell, where, upon telling the prosecutor that they were opposed to the death penalty, two jurors were excused for cause over defense counsel's objection that he had had no opportunity to examine or rehabilitate them. The trial court based the escusal on the jurors' responses that the jurors would not impose the death penalty under any circumstances.

This Court initially noted that trial courts are justified in curtailing voir dire based on their considerable discretion in this realm. Id. at 1286 (citations omitted). However, this Court found a due process violation based on the "double standard''applied by the trial court. Specifically, defense counsel never had an opportunity to ask either of the jurors a single question, but the prosecutor had the opportunity to question each juror individually and reexamine them, even after defense counsel had challenged them for cause. Thus, clearly O'Connell is grounded on its own unique factual scenario.

No such double standard was employed in the instant case. The prosecutor asked only two questions, Cruz's answers to which established unequivocally that she would never impose the death penalty. In any event, O'Connell must be interpreted in light of this Court's recent decision in Bryant v. State, 601 So. 2d 529 (Fla. 1992), in which this Court commented on rehabilitation: "The appropriate procedure, when the record preliminarily establishes that a juror's views could prevent or substantially impair his or her duties, is for either the prosecutor or the judge to make sure the prospective juror can be an impartial member of the jury.'' Id. at 532 (emphasis supplied). Because neither the prosecutor nor the judge in Bryant engaged in such. rehabilitation, this Court reversed solely for resentencing.

Here, however, based on Cruz's answer to the first question, the prosecutor asked a second, rehabilitative question. In her answer to that question, Cruz stated unequivocally that she would not be able to follow the law as instructed by the court if the death penalty was involved. Compare Foster v. State, 614 So. 2d 455 (Fla. 1992); Randolph v. State, 562 So. 2d 331 (Fla.), cert. denied, 498 U.S. 992 (1990).

As this Court is well aware, it provided no formulaic procedure for accomplishing the suggested rehabilitation in

Bryant, leaving this question to be answered on a case-by-case basis. The question as posed by the prosecutor in this instance was clearly sufficient, as it provided Cruz with the opportunity to clarify her views. Had Cruz believed that she could follow the law despite her personal views concerning the death penalty, she could have informed the court of this fact. Thus, Willacy's burden in establishing that the trial court abused its discretion in granting the state's motion to excuse Cruz for cause is insurmountable. See Sanchez-Velasco v. State, 570 So. 2d 908 (Fla. 1990), cert. denied, 111 S. Ct. 2045 (1991), the trial court disqualified only those venirepersons who indicated unequivocally that they could not put their personal convictions aside and vote to recommend the death penalty where the law required it.

Should this Court find that the trial court abused its discretion in denying Willacy's attempt at rehabilitation, Willacy's request for a new trial on this point is clearly unwarranted. In Bryant, this Court held unequivocally that this type of error "applies only to the penalty phase and not to the guilt phase of the trial." 601 So. 2d at 532. Accordingly, if Willacy is entitled to relief, he should receive only a new sentencing hearing.

However, resentencing is unnecessary. Any error by the trial court on this point was harmless beyond a reasonable

doubt because the state could have exercised a peremptory challenge on Cruz. At the time the parties accepted the jury panel, the state had used only seven strikes (R **678**). The state acknowledges this Court's Chandler v. State, **442** So. 2d **171** (Fla. **1983**), cert. denied, **490** U.S. **1076** (**1989**), decision, wherein the state made a similar harmless error argument. While this Court found "a certain logical appeal" to this argument, id. at **174**, it found a harmless error analysis could not apply under those facts, namely, the excused jurors

> never came close to expressing the unyielding conviction and rigidity of opinion regarding the death penalty which would allow their xcusal for cause under the Witherspoon[8] standard . . . . Both these venirewomen stated unequivocally that their feelings toward capital punishment would not affect their ability to return a verdict of guilty, if such a verdict were warranted by the evidence.

Id. at **173-74**.

In this case, however, because Cruz exhibited an "unyielding conviction and rigidity of opinion regarding the death penalty," her excusal for cause was clearly warranted under Witherspoon, and any error committed by the trial court concerning rehabilitation can be deemed harmless. After all, this Court made clear in Chandler that the error

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[8] Witherspoon v. Illinois, **391** U.S. **510** (**1968**).

could not be harmless there because the jurors were excluded in violation of Witherspoon.

Issue II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE STATE TO STRIKE BLACK PROSPECTIVE JUROR ALVIN PAYNE.

Initially, this Court should be aware that Willacy did not preserve this point for appellate review, because he affirmatively accepted the jury immediately prior to its being sworn without reservation of his prior objection.

> [C]ounsel's action in accepting the jury led to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection. It is reasonable to conclude that events occurring subsequent to his objection caused him to be satisfied with the jury about to be sworn. [Thus, Willacy] waived his Neil objection when he accepted the jury. Had [Willacy] renewed his objection or accepted the jury subject to his earlier Neil objection, [this Court shjould rule otherwise. Such action would have apprised the trial judge that [Willacy] still believed reversible error had occurred. At that point the trial judge could have exercised discretion to either recall the challenged juror for service on the panel, strike the entire panel and begin anew, or stand by the earlier ruling.

Joiner v. State, 18 Fla. L. Weekly S280 (Fla. May **13, 1993).**

Although Willacy stated that he accepted the jury "with the objections as noted" (R **699),** he did not specify which objections. Based on the fact that Willacy had moved for a mistrial regarding the disqualification of Ms. Cruz

immediately prior to his accepting the jury, his "conditional" acceptance was clearly based Cruz. Had Willacy intended his objections at this point to include both Cruz and Payne, he had a duty to make his objection specific for appellate review purposes. Because Willacy did not clarify his objection, he failed to preserve this point for appellate review.

Should this Court find the issue sufficiently preserved, it is clear that the trial court "necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended. Only one who is present at the trial can discern the nuances of the spoken word and the demeanor of those involved." Reed v. State, 560 So. 2d 203, 206 (Fla. 1990), cert. denied, 498 U.S. 882 (1991). Here, the trial court did not abuse its discretion in permitting the state to strike prospective juror Payne because the state offered several race neutral reasons for the strike, all of which were supported by the evidence.

The relevant inquiry concerning peremptory strikes is whether the proffered reasons are facially neutral, reasonable, and non-pretextual. State v. Slappy, 522 So. 2d 18, 22 (Fla.), cert. denied, 487 U.S. 1219 (1988). Here, the prosecutor offered several such explanations for the strike, i.e., Payne had been less than forthright about his

employment with Dip Stix, had not mentioned the offenses he had committed, and had been a witness for a defendant in a drug case.

Payne's arrest record standing alone was a race neutral, non-pretextual reason for striking him. The odds that Payne secretly harbored resentment or hostility towards police officers who routinely and necessarily testify for the state were increased significantly based on his prior arrests. This problem was further compounded by Payne's failure to disclose his prior record when posed an appropriate question.

This Court has held that a prior criminal conviction is a valid reason for peremptorily striking a juror, Tillman v. State, 522 So. 2d 14, 17 n.1 (Fla. 1988); see also Files v. State, 586 So. 2d 352 (1st DCA 1991), approved as modified, 18 Fla. L. Weekly S186 (Fla. May 18, 1993), and that a prior arrest is also a race neutral reason. Roundtree v. State, 546 So. 2d 1042, 1045 n.2 (Fla. 1989); see also Stephens v. state, 559 So. 2d 687 (1st DCA 1990), aff'd on other grounds, 572 So. 2d 1387 (Fla. 1991); Reynolds v. Benefield, 931 F.2d 506 (9th Cir. 1991), cert. denied, 111 S. Ct. 2795 (1992). Because the state's proffered reason of Payne's prior record is based clearly on non-racial considerations, and is supported by the record, the trial court committed no error in finding the state's explanation for the strike reasonable.

Willacy would have this Court focus not on the legitimate basis for the challenge, but on (1) the prosecutor's questions about Payne's potential status as the only black on the jury panel, and (2) the state's "singling out" of Payne for a criminal records check. As for Willacy's first concern, an examination of the full context of this line of questioning reveals that it was not premised on a racial bias, but on the very real possibility that Payne would not be able to be an impartial juror if he felt uncomfortable about being the only black among 11 other white jurors. As for the second, the prosecutor offered a completely legitimate, non-racial reason for the records check. Willacy has pointed to nothing in the record which refutes that reason.

Issue III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING WILLACY'S MOTION FOR A NEW TRIAL BASED ON HIS ALLEGATION THAT THE STATE KNEW THAT THE JURY FOREMAN WAS UNDER ACTIVE PROSECUTION AT THE TIME HE SERVED ON WILLACY'S JURY.

Based on precedent from this Court, Willacy must be considered as having waived this claim for appellate review. In Ex parte Sullivan, 19 So. 2d 611 (Fla. 1944), Sullivan argued that, because "[t]he fact of being a deputy sheriff is a legal disqualification for jury dury" under chapter 40, one of the jurors should been excused. This Court observed:

> The fact of being deputy sheriff is a ground of challenge for cause, but if the right to challenge for cause is not exercised before the juror is sworn to try the cause it is lost. If one of the jurors was in fact a deputy sheriff, it was a matter of record available to the petitioner at the trial and should have been seasonably raised. He should have been challenged for cause and exception taken on refusal of the challenge. The challenged error could have then been reviewed on appeal.
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> * * * *
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> When the statute fixes the grounds of challenges for cause and the limit under which they may be exercised, if not *so* exercised, they will be considered as waived. To hold otherwise would render trial interminable and impose an undue burden on the taxpayer.

Similarly, in Leach v. State, 132 So. 2d 329 (Fla. 1961), cert. denied, 368 U.S. 1005 (1962), the defendants

claimed that they were convicted by a jury panel, three members of which were not registered voters of the county at the time of trial, and that they did not learn of this fact until after their conviction. This Court observed:

> While this would have been a valid objection to the jurors when examined on voir dire, it comes too late after acceptance of the jury and the verdict. The jurors could have been challenged for cause during the examination, but having failed to assert the cause, the objection was waived when the appellants accepted the jury. The rule might be otherwise if the disqualification of the jurors, unknown to the defendant at the trial, was subsequently revealed to be one affecting their ability to render a fair and impartial verdict. For example, if after the trial it should develop that a juror was closely related by blood to deceased and had announced his conviction regarding the guilt of the accused and had misrepresented his position when examined, such a disqualification would enter into the very fundamentals of the trial itself. This is not *so* with reference to the failure of the juror to be a registered voter. The appellants make no contention that they were not fairly heard with an unprejudiced mind by the jurors in question.

Id. at 333. See also United States v. Bolinger, 837 F.2d 436, 439 (11th Cir. 1988) (Where "defense counsel knows of juror misconduct or bias before the verdict is returned but fails to share this knowledge with the court until after the verdict is announced, the misconduct may not be raised as a ground for a new trial."), cert. denied, 486 U.S. 1009 (1989).

The prosecutors' testimony at the hearing on Willacy's motion for a new trial clearly established that defense counsel was notified of Clark's alleged "pending prosecution" status durinq jury selection.[9] However, for unknown reasons, defense counsel took no action. Based on Sullivan and Leach, because defense counsel failed to object to Clark before he accepted the jury panel, he effectively waived any objection on this point.

Should this Court reach a different result on the waiver issue, it is well aware that "[t]he test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Lusk v. State, **446** So. 2d **1038, 1041** (Fla.), cert. denied, **469** U.S. **873 (1984).** Deciding whether a prospective juror meets the Lusk test is within a trial court's discretion, Pentecost v. State, **545** So. 2d **861** (Fla. **1989),** based upon what the court hears and observes. See Reed v. State, **560 So.** 2d **203** (Fla.), cert. denied, **498** U.S. **882 (1990).** A review of the instant record reveals that the court's denial of Willacy's motion for a mistrial

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[9] Although opposing counsel assert that they did not discover Clark's alleged "pending prosecution'' status until after his conviction, Susan Erlenbach's testimony at the hearing on Willacy's motion for a new trial makes clear that both defense counsel knew of Clark's status before the jury returned its verdict. Even so, defense counsel did nothing until long after the jury rendered its guilty verdict.

constituted a proper exercise of his discretion, because Willacy has failed to allege or show actual prejudice from Clark's service as jury foreman. See Thompson v. State, **300** So. 2d **301, 303** (Fla. 2d DCA **1974)** (''Thequestion which must be determined is whether juror [Clark] was prejudiced against [Willacy] at the time of his jury service by reason of being under prosecution . . . ."); see also Roqers v. McMullen, **673** F.2d **1185, 1188** (11th Cir. **1982),** cert. denied, **459** U.S. 1110 **(1983).**

It is clear that the state was not actively prosecuting Clark on the grand theft charge. Other than charging Clark, the only action the state took in Clark's case was approving Clark for the pretrial intervention program. Such actions do not indicate an active or pending prosecution. Prosecution is defined as "[t]he ***continuous*** following up, through instrumentalities created by law, of a person accused of a public offense ***with a steady and fixed purpose of reaching a judicial determination of guilt or innocence of the accused.***" Black's Law **Dictionary** Prosecution at **638** (5th ed. **1983)** (emphasis supplied). See Likens v. State, **16** So. 2d **158** (Fla. **1944)** (placing a prosecution on an absentee docket rendered that prosecution inactive; for it to be pending, the state would have had to taken an affirmative action). Because the state did not continuously pursue its case against Clark with a steadfast purpose of having a court or

jury determine his guilt, it cannot be said that Clark was under prosecution.

Even if Clark were under prosecution at the time he served as jury foreman, Willacy has not shown that he suffered actual prejudice from Clark's service, i.e., that Clark's status affected his ability to render a fair and impartial verdict.[10] Clark testified at the hearing on

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[10] This distinguishes the instant scenario from that in United States v. Perkins, 748 F.2d 1519 (11th Cir. 1984). There, because the juror deliberately misrepresented relevant facts during voir dire, i.e., that he and the defendant had served on a committee together, and that he had been involved in two prior cases, one of which involved the misapplication of funds which was the underlying action in Perkins, the court found actual bias could be inferred. Here, there can be no legitimate claim, based on the facts, that Clark deliberately concealed his pretrial intervention. As Clark explained, he believed that he was not "under prosecution" based on his pretrial intervention status.

For the same reason, Willacy's reliance on Mitchell v. State, 458 So. 2d 819 (Fla. 1st DCA 1984), is similarly misplaced. Although the state argued that the juror's untruthful response there was unintentional, the First District could not abide that argument because the juror could not claim that she was unaware of her nephew's employment status or that the question was susceptible of misinterpretation. To the contrary, there is ample evidence in this case that (1) Clark in fact was not "under prosecution," and (2) "under prosecution" was susceptible of misinterpretation based on Clark's pretrial intervention status. Mitchell is also unpersuasive precedent here as it involved a peremptory challenge, not a cause challenge like the one at issue.

Finally, to the extent that McDonough Power Equipment v. Greenwood, 464 U.S. 548 (1984), a civil case, can be said to apply here, it is clear that Willacy cannot establish that Clark failed to answer a material question honestly. Again, Clark explained that he honestly thought he was not "under prosecution" because he participated in pretrial intervention.

Willacy's motion for a new trial that his involvement in the pretrial intervention program played absolutely no part in his deliberations. Further, Clark's status as "under prosecution" did not enter into the "very fundamentals" of the trial itself. Willacy can point to no record evidence which shows any inclination on Clark's part to find Willacy guilty simply because Clark was in the pretrial intervention program, or which shows that Clark intentionally misrepresented his status by not answering the jury clerk's question about prosecution. Finally, Willacy makes no contention that he was not fairly heard with an unprejudiced mind by Clark.

Issue IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING WILLACY'S MOTION IN LIMINE.

The standard of review of a lower tribunal's ruling on a motion in limine is abuse of discretion. State v. Polak, 598 So. 2d 150, 152 (Fla. 1st DCA 1992). After all,

> [a] motion in limine is one in effect suppressing evidence, State v. Palmore, 495 So. 2d 1170, 1171 (Fla. 1986), and in matters concerning the suppression of evidence, the trial judge sits a both trier of fact and of law. The credibility of witnesses and the weight of the evidence presented are matters within the province of the trial judge, whose determinations of factual questions must be accepted by the appellate court if the record supports that finding.

Id. (citations omitted). Here, Willacy cannot show an abuse of discretion by the trial court. The court complied with precedent from this Court and the United States Supreme Court before determining that the state would be permitted to use Willacy's statements to impeach him,[**] by conducting a hearing on the question of voluntariness.

[**] Willacy does not challenge the propriety of the use of statements, although ruled inadmissible in a state's case in chief based on Miranda v. Arizona, 384 U.S. 436 (1966), or Edwards v. Arizona, 451 U.S. 477 (1981), violations, for impeachment purposes. State and federal case law firmly establishes the principle that, if the statements were given voluntarily, their use for impeachment is permissible. Nowlin v. State, 346 So. 2d 1020 (Fla. 1977); Walder v. United States, 347 U.S. 62 (1954); Harris v. New York, 401

Willacy's argument that his statements were not given voluntarily is unavailing. The trial court decided, after a full and fair hearing, that Willacy gave his statements voluntarily. This conclusion is presumed correct, Henry v. State, 586 So. 2d 1335 (Fla. 1991), and is amply supported by the record. Willacy's version of the record is incomplete because it is based solely on his own testimony. Further, contrary to his contention, "[t]he manner in which the statement was procured is largely []disputed." Appellant's Initial Brief at 39.

Santiago specifically testified that, when he checked on Willacy, Willacy asked what the charges were. After Santiago answered this question, Willacy asked what Santiago had in his hand. Santiago responded that it was an arrest form which contained Willacy's name and address and Santiago's version of events. Willacy then asked Santiago to read it to him. After Santiago complied, Willacy said things did not happen in the manner described by Santiago and told Santiago that he needed to know the truth. When Santiago reminded Willacy that he needed to speak with his lawyer before making a statement, Willacy declined, stating that he wanted to tell Santiago the truth. Santiago advised

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U.S. 222 (1971); Oregon v. Hass, 420 U.S. 714 (1975); United States v. Havens, 446 U.S. 620 (1980); Michigan v. Harvey, 494 U.S. 344 (1990).

Willacy of his Miranda[12] rights, and made no promises or threats. At the beginning of the interview, Santiago re-advised Willacy of his rights, after which Willacy made the subject statements.

Although Willacy testified that Santiago re-initiated contact by asking Willacy if he wanted to talk and by reminding Willacy that he had an "M-1" hanging over his head, and that Santiago did not advise him of his rights, the trial court permissibly concluded to the contrary. First, Santiago's testimony directly rebutted Willacy's version of events. And second, the state clearly established during its cross examination of Willacy that, due to his prior arrests and experience with law enforcement personnel, Willacy adequately understood his rights. See Routly v. State, 440 So. 2d 1257, 1260 (Fla. 1983) ("Th[is] issue[] ha[s] been resolved by the fact-finder in favor of the state, and [there is] nothing in the record that supports reversal on this issue."), cert. denied, 468 U.S. 1220 (1984).

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[12] Miranda v. Arizona, 384 U.S. 436 (1966).

Issue V

WHETHER THE SENTENCING COURT PROPERLY FOUND THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

Willacy claims that the sentencing court erred in finding that he committed the murder to prevent a lawful arrest because there was no evidence of this aggravating circumstance other than the fact that Willacy knew the victim. Willacy is wrong.

Admittedly, when a victim is not a law enforcement officer, the state must prove beyond a reasonable doubt that the dominant motive for the killing was witness elimination. Correll v. State, 523 So. 2d 562 (Fla. 1988), cert. denied, 488 U.S. 871 (1989). Here, the state did just that by showing that Willacy and the victim were well acquainted as next door neighbors and because Willacy mowed the victim's yard; that the victim surprised Willacy while he burglarized and robbed her home, when the victim came home from work early; and that Willacy beat and bound the victim before burning her alive so that she could not interfere with his illegal efforts. Thus, as the state argued, there was no reason for Willacy to kill the victim other than eliminating her as a witness, because Willacy had already subdued her, through beating and binding, so that she was no threat to his safety or activities. See (R 3433) ("[T]he only

possible motive for the murder was to eliminate her as a witness to avoid detection and arrest.").

Many cases have upheld this aggravating circumstance under similar facts. See Swafford v. State, 533 So. 2d 270 (Fla. 1988) (victim killed after sexual battery *so* she could not report it), cert. denied, 489 U.S. 1100 (1989); Harvey v. State, 529 So. 2d 1083 (Fla. 1988) (Harvey burglarized home of elderly couple who could identify him and then shot them to death), cert. denied, 489 U.S. 1040 (1989); Harmon v. State, 527 So. 2d 182 (Fla. 1988) (victim knew Harmon and victim, an elderly frail man, was in no position to thwart burglary and robbery); Correll, 523 So. 2d at 562 (Correll was well acquainted with victim, *so* she could have easily identified him; further, since relationship was cordial, there could be no other reason for the murder); Cave v. State, 476 So. 2d 180 (Fla. 1985) (defendant killed and silenced sole witness to robbery), cert. denied, 476 U.S. 1178 (1986); Clark v. State, 443 So. 2d 913 (Fla. 1983) (victim knew defendant through past employment; further, because of a physical condition, victim was helpless to thwart defendant's activities), cert. denied, 467 U.S. 1210 (1984); Routly v. State, 440 So. 2d 1257 (Fla. 1983) (by killing the victim, defendant eliminated only witness who could testify against him regarding burglary and robbery),

cert. denied, 468 U.S. 1220 (1984);[13] Lightbourne v. State, 438 So. 2d 380 (Fla. 1983) (Lightbourne burglarized victim's home, raped victim, stole various items, and then shot victim), cert. denied, 465 U.S. 1051 (1984); Martin v. State, 420 So. 2d 583 (Fla. 1982) (defendant destroyed chief witness against him by killing victim), cert. denied, 460 U.S. 1056 (1983).

Willacy predictably relies on Davis v. State, 604 So. 2d 804 (Fla. 1992), because the same aggravating factors were found there and because the victim and Davis knew each other from Davis doing yardwork for her. Willacy, however, overlooks the critical factor in Davis. There, the state failed to show that witness elimination was the dominant motive for the killing, because it showed only that the victim knew Davis and could have identified him. Here, the state proved witness elimination was the sole reason for the killing through evidence, and the trial court found this was the sole reason for the killing.

In any event, given the strength of the evidence supporting the remaining aggravating circumstances, i.e., murder committed during the commission of arson, murder committed for pecuniary gain, and murder committed in a

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[13] Both Swafford and Routly recognize that express statements that the crime is committed to avoid arrest are not required.

heinous, atrocious and cruel manner, and the minimal mitigating circumstances, there is no reasonable possibility that the sentencing court would have imposed a lesser sentence with the elimination of the heinous, atrocious, and cruel aggravating factor. See Sochor v. State, 18 Fla. L. Weekly S273, S276 (Fla. May 6, 1993); Maqueira v. State, 588 So. 2d 221, 224 (Fla. 1991), cert. denied, 112 S. Ct. 1961 (1992); Capehart v. State, 583 So. 2d 1009, 1015 (Fla. 1991), cert. denied 112 S. Ct. 955 (1992); Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988).

Issue VI

WHETHER THE SENTENCING COURT PROPERLY FOUND THE MURDER TO BE ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL.

Willacy claims that the trial court erred in finding that he committed the instant murder in an especially heinous, atrocious, and cruel manner because "there is not evidence to show that [the victim] was in a state of consciousness sufficient to recognize the fact of her impending death." Appellant's Initial Brief at 42. The record belies this claim.

In Gilliam v. State, 582 So. 2d 610 (Fla. 1991), this Court observed that, in arriving at a determination of whether an aggravating circumstance has been proven, a sentencing court may use a "'common-sense inference from the circumstances.'" Id. at 612 (quoting Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988), cert. denied, 489 U.S. 1100 (1989)). A common sense inference from the instant facts, as related by the medical examiner, is that, with the blows to the victim's head and face, Willacy hoped to render the victim unconscious. Willacy was unsuccessful, and continued striking the victim about the head. Although the victim struggled defensively, Willacy managed to bind her hands and feet, after which he attempted to strangle her. The victim continued to struggle, and Willacy continued his strangulation attempts. While the victim was still

conscious and/or alive, Willacy moved the victim to a different room and set her on fire, during which the victim continued to struggle. The fire ultimately caused her death. Because the victim could have been conscious and in fact was alive until the fire, the victim would have suffered great pain.

This Court has consistently upheld the finding of this aggravating factor under similar circumstances. In Sochor v. State, 580 So. 2d 595 (Fla. 1991), the victim struggled defensively as she was being dragged from a truck. This Court found the heinous, atrocious, and cruel factor applicable because the victim obviously experienced "[f]ear and emotional strain" based on her "horror and contemplation of serious injury or death." Id. at 603. Because the victim was strangled, it could be "inferred that 'strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear . . . .'" Id. (citing to Tompkins v. State, 502 So. 2d 415, 421 (Fla. 1986), cert. denied, 483 U.S. 1033 (1987)). See Preston v. State, 444 So. 2d 939, 946 (Fla. 1984) (the victim was "forced to walk at knifepoint [a] considerable distance speculating as to her fate and undoubtedly cognizant of the likelihood of death at the hands of her abductor. Clearly the victim must have felt terror and fear as these events unfolded."). See also Lamb v. State, 532

So. 2d 1051 (Fla. 1988) (victim had a defensive wound, was struck in the head six times with a claw hammer, and did not die instantaneously even though each blow was delivered with sufficient force to penetrate the skull); Perry v. State, 522 So. 2d 817, 821 (Fla. 1988) (Perry "tried and tried again" to kill the victim by brutally beating her in the head and face, choking her, stabbing her, and eventually killing her by strangling her, i.e., causing her to "drown[] in her own blood"); Roberts v. State, 510 So. 2d 885 (Fla. 1987) (defensive wounds with blows to back of head), cert. denied, 108 S. Ct. 1123 (1988); Tompkins, 502 So. 2d at 421 ("the victim was not only conscious but struggling and fighting to get away when appellant strangled her."); Wilson v. State, 493 So. 2d 1019 (Fla. 1986) (defensive wounds and brutal beating with blows to head); Bird v. State, 481 So. 2d 468 (Fla. 1985) (victim sustained four gunshot wounds and four deep scalp lacerations, none of which were fatal; victim died from strangulation), cert. denied, 476 U.S. 1153 (1986); Lemon v. State, 456 So. 2d 885, 888 (Fla. 1984) (victim could have died from either strangulation or repeated stabbing; although strangulation could have rendered the victim unconscious and unable to feel pain by the time the stabbing occurred, "the victim [was] fully aware of her impending doom" with the strangulation); Thomas v. State, 456 So. 2d 454 (Fla. 1984) (bludgeoned skull); Heiney v. State, 447 So. 2d 210 (Fla. 1984) (seven claw

hammer wounds to victim's head and defensive wounds), cert. denied, 469 U.S. 920 (1984).

Additionally, this Court should consider the fact that the victim was killed in her own home, as it has previously recognized this as a significant factor: "While pain and suffering alone might not make this murder heinous, atrocious, and cruel, the attack occurred while the victim lay asleep in his bed. This is far different from the norm of capital felonies and sets this crime apart from murder committed in, for example, a street, a store, or other public place." Breedlove v. State, 413 So. 2d 1 (Fla. 1982). See also Perry, 522 So. 2d at 817.

Issue VII

WHETHER THE SENTENCING COURT PROPERLY COMPLIED WITH CAMPBELL V. STATE, 571 SO. 2D 415 (FLA. 1990), IN WEIGHING THE MITIGATING EVIDENCE AND SETTING FORTH ITS FINDINGS BY WRITTEN ORDER.

Willacy claims two errors by the trial court regarding mitigation. "First, the court failed to find mitigation in the evidence presented, and, second, the court's order fails to set out in sufficient detail the weighing process used by the court in reaching its decision.'' Appellant's Initial Brief at 43. Neither of these claims is supported by the record.

This Court has

> previously held that a trial court need not expressly address each nonstatutory mitigating factor in rejecting them, Mason v. State, 438 So. 2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051 . . . (1984), and "[t]hat the court's findings of fact did not specifically address appellant's evidence and arguments does not mean they were not considered." Brown v. State, 473 So. 2d 1260, 1268 (Fla.), cert. denied, 474 U.S. 1038 . . . (1985). More recently, however, to assist trial courts in setting out their findings, [this Court has] formulated guidelines for findings in regard to mitigating evidence in Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 . . . (1988), and Campbell v. State, no. 72,622 (Fla. June 14, 1990). We have even noted broad categories of nonstatutory mitigating evidence which may be valid. Campbell, slip op. at 9 n.6. However, "[m]itigating circumstances must, in

> some way, ameliorate the enormity of the defendant's guilt." Eutzy v. State, 458 So. 2d 755, 759 (Fla. 1984), cert. denied, 471 U.S. 1045 . . . (1985). [This Court], as a reviewing court, not a fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in any particular case. Hudson v. State, 538 So. 2d 829 (Fla.), cert. denied . . . 107 L. Ed. 2d 165 (1989); Brown v. Wainwright, 392 So. 2d 1327 (Fla.), cert. denied, 454 U.S. 1000 . . . (1981). Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion. King v. Dugger, 555 So. 2d 355 (Fla. 1990); Scull v. State, 533 So. 2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037 . . . . (1989); Stano v. State, 473 So. 2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093 . . . (1986).

Lucas v. State, 568 So. 2d 18, 23 (Fla. 1990).

Willacy cannot legitimately claim that the sentencing court abused its discretion in this case. Defense counsel advised the sentencing court of mitigation -- no significant prior criminal history, strong family support, no history of violence, good performance in confinement, and intelligent -- in a memorandum (R 3449-53), and called witnesses during the penalty phase to establish these mitigating factors (R 2740-75). Thereafter, the sentencing court found that Willacy had established one statutory mitigating factor and two nonstatutory mitigating factors (R 3465-67); although the court considered the two nonstatutory factors, it gave them little weight (R 3467). Compare

Tompkins v. State, 502 So. 2d 415, 421 (Fla. 1986), cert. denied, 483 U.S. 1033 (1987).

If this Court were to find error on this point, such was unquestionably harmless beyond a reasonable doubt, as the nonstatutory mitigation presented by Willacy was at best weak, particularly in light of the strong evidence which supported the four aggravating circumstances. See Stewart v. State, 18 Fla. L. Weekly S294 (Fla. May 13, 1993); Pace v. State, 596 So. 2d 1034 (Fla. 1992); Wickham v. State, 593 So. 2d 193 (Fla. 1992), cert. denied, 112 S. Ct. 3003 (1992); Cook v. State, 581 So. 2d 141 (Fla. 1991), cert. denied, 112 S. Ct. 252 (1992); Echols v. State, 484 So. 2d 568 (Fla. 1985), cert. denied, 479 U.S. 871 (1986).

Issue VIII

WHETHER WILLACY'S DEATH SENTENCE IS PROPORTIONATE TO OTHER DEATH SENTENCES UNDER SIMILAR FACTS.

Under this issue, Willacy concedes the existence of two valid aggravating circumstances (committed during the course of an arson and committed for pecuniary gain), but claims that these two, when compared to the mitigation presented, indicate that death is not a proportionate sentence. Appellant's Initial Brief at **45**. This disingenuous argument overlooks the fact that there are four strong aggravating factors, which, when weighed against one statutory mitigating factor and two weak nonstatutory mitigating factors, clearly indicate the appropriateness of a death sentence on these facts.

In reviewing a death sentence, this Court "looks to the circumstances revealed in the record in relation to those present in other death penalty cases to determine whether death is appropriate.'' Watts v. State, **593** So. 2d **198** (Fla. **1992)**. Willacy's death sentence is proportionate to the death sentences affirmed by this Court in cases involving similar facts and a similar balance of aggravating and mitigating circumstances. See Roberts v. State, **510** So. 2d **885** (Fla. **1987)** (numerous blows to back of victim's head and defensive wounds; four aggravating factors -- prior violent felony, committed under sentence of imprisonment, committed

during sexual battery; and heinous, atrocious and cruel -- and no mitigating circumstances), cert. denied, 485 U.S. 943 (1988); Doyle v. State, 460 So. 2d 353 (Fla. 1984) (while aware of her impending death, victim strangled to death; two valid aggravating factors -- heinous, atrocious and cruel, and committed during the course of a sexual battery -- and no mitigating factors); Adams v. State, 412 So. 2d 850 (Fla. 1982) (victim killed by strangulation; three strong aggravating factors -- committed during the course of a sexual battery/kidnapping, committed to avoid arrest, and heinous, atrocious and cruel -- and three mitigating factors -- no significant history of prior criminal activity, committed while under extreme mental disturbance, and age), cert. denied, 475 U.S. 1104 (1983).

Issues on Cross Appeal

Issue IX

WHETHER THE JUDGE YAWN ABUSED HIS DISCRETION IN INTERPRETING JUDGE BUDNICK'S ORDER GRANTING SUPPRESSION OF BARTON'S SEPTEMBER 6, 1990, OUT-OF-COURT IDENTIFICATION OF WILLACY AS PRECLUDING BARTON'S SEPTEMBER 5, 1990, OBSERVATIONS OF A BLACK MALE IN A RED AND WHITE FORD LTD.

In his pretrial order, Judge Budnick made clear that he suppressed only Barton's September 6, 1990, out-of-court identification of Willacy and any in-court identification of Willacy based on the suggestiveness of the identification procedure and lack of Barton's certainty. Nevertheless, at trial, Judge Yawn interpreted this order as also suppressing the events Barton witnessed on September 5, 1990, inexplicably concluding that this testimony would not be reliable because the September 6th suggestive identification was premised on what Barton saw on the 5th. Because Willacy wholly failed to show that the September 5th "confrontation" was unreliable in any fashion,[14] Judge Yawn abused his discretion in suppressing this relevant testimony.

In Manson v. Brathwaite, 432 U.S. 98 (1977), the United States Supreme Court listed the deterrence of improper identification practice as one of the interests underlying

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[14] Defense counsel even admitted he had no case law supporting his point (R 1140).

the exclusion of evidence arising from unnecessarily suggestive identification procedures. Thus, cases construing Manson have addressed government/state action in the identification context. See United States v. Stevens, 935 F.2d 1380, 1390 n.11 (3d Cir. 1991) ("'[I]n order to establish that a pre-trial confrontation was unduly suggestive, the defendant must first show that the government's agents arranged the confrontation or took some action during the confrontation which singled out the defendant.'") (citations omitted); Albert v. Montgomery, 732 F.2d 865 (11th Cir. 1984) (even where the state takes some action, confrontation evidence is not impermissibly suggestive if the confrontation occurs by happenstance); Green v. Loggins, 614 F.2d 219, 222 (9th Cir. 1980) ("A witness who has been involved in an accidental encounter has generally seen a defendant in a seemingly innocent light . . . ."). Cf. Bundy v. State, 455 So. 2d 330, 343 (Fla. 1984) ("the holding in Simmons,[15] that a[n] . . . identification will not be admissible where the procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification, does not apply to situations where a witness had earlier observed a picture of the defendant in the news media."), cert. denied, 476 U.S. 1109 (1985).

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15 Simmons v. United States, 390 U.S. 377 (1968).

Under the instant facts, Willacy cannot show anything suggestive in Barton's September 5, 1990, "encounter" with Willacy; certainly, Willacy cannot show any state action. After all, on September 5th, Barton simply happened to be in the Jiffy Store parking lot and see a red and white Ford LTD in a nearby drainage ditch. He noticed it because it was going "forward and reverse" and observed that the driver was a young, muscular, black male.

Judge Yawn failed to recognize that, because the events witnessed by Barton on September 5th preceded the suggestive procedure employed on September 6th, Barton's testimony regarding the events on the 5th would have been an independent recollection based on his happenstance viewpoint on the 5th. In other words, what Barton saw on the 5th preceded any taint created by the suggestive procedure employed on the 6th. Judge Yawn erred in excluding relevant evidence on such a legally indefensible basis.

Issue X

WHETHER THE SENTENCING COURT ABUSED ITS DISCRETION IN FINDING THAT THE STATE DID NOT PROVE THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR BEYOND A REASONABLE DOUBT.

The trial court in this case abused its discretion in finding that the state failed to establish the cold, calculated and premeditated aggravating circumstance beyond a reasonable doubt. A review of the record reveals that Willacy demonstrated heightened premeditation in his elaborate planning and execution of the murder of the victim.

In Wickham v. State, 593 So. 2d 191 (Fla. 1992), cert. denied, 112 S. Ct. 3003 (1993), Wickham and others decided to obtain gas money through a robbery. They utilized a decoy of a woman with children and a broken down car to stop a passing motorist. When confronted by the armed Wickham, the victim turned to leave, at which point Wickham shot him in the back. This shot spun the victim around, whereupon Wickham shot him in the chest. While the victim pled for his life, Wickham shot him twice in the head. This Court upheld the cold, calculated and premeditated aggravating factor, observing:

> While the murder of [the victim] may have begun as a caprice, it clearly escalated into a highly planned, calculated, and prearranged effort to

> commit the crime. It therefore met the standard for cold, calculated premeditation established in Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 . . . (1988), even though the victim was picked at random.

Id. at 194.

Similarly, although the murder of the instant victim may have begun as an impulsive reaction to being caught burglarizing the victim's home, it evolved into a highly planned and carefully executed effort to commit the offense. Willacy began by striking the victim, but then advanced his actions to binding, strangling, dousing with gasoline, setting up a fan, and lighting the victim on fire.

Just as reloading a gun demonstrates more time for reflection and therefore heightened premeditation, Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988), cert. denied, 489 U.S. 1100 (1989), so too do the incremental planning steps in the instant matter. Willacy battered the victim about the head, then strangled her, then moved her to another room, then set up an oscillating fan at the victim's feet, and then doused her on gasoline and set her on fire. Between each of these actions, it is clear that Willacy had ample to time to plan each action carefully. See Robinson v. State, 574 So. 2d 108 (Fla. 1991) (victim was robbed, kidnapped, sexually battered and then killed), cert. denied, 112 S. Ct. 131 (1992); Phillips v. State, 476 So. 2d 194,

197 (Fla. 1985) (reloading gave Phillips "time to contemplate his actions and choose to kill his victim."); Mills v. State, 462 So. 2d 1075, 1081 (Fla. 1985) ("Not content to permit the bound and injured victim to escape into the woods, Mills took a shotgun and stalked the victim through the underbrush until he found and executed him.").

This Court has also upheld this aggravating factor where the defendant murders a victim to further his scheme to rob. See Jones v. State, 18 Fla. L. Weekly S11 (Fla. Dec. 7, 1992) (defendant decided to kill victims in order to steal their truck); Hall v. State, 18 Fla. L. Weekly S63 (Fla. Jan 14, 1993) (defendant intended to steal victim's car; while he could have taken the car and left the victim in the parking lot, he instead abducted, raped, beat, and killed her). Because the state proved beyond a reasonable doubt that Willacy killed the victim so that he could complete his plan to steal various items from her house, her bank card, money, and vehicle, and intricately planned each "phase" of the victim's murder, the trial court abused its discretion in failing to find this aggravating circumstance.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm Willacy's convictions and sentences.

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. Mail to KURT ERLENBACH, of ERLENBACH & ERLENBACH, P.A., 503 South Palm Avenue, Titusville, Florida 32796, this 13th day of September, 1993.

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