IN THE SUPREME COURT OF FLORIDA

OLEN CLAY GORBY,

Appellant,

v. CASE NO. 79,308

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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## STATUTES AND CONSTITUTIONS



## OTHER AUTHORITIES

## STATEMENT OF THE CASE AND FACTS

Appellee generally accepts Appellant's statement of the facts, but finds such largely incomplete. Accordingly, the State would supplement such as follows:

On April 26, 1990, Robert Jackson met Appellant in El Paso, Texas (T 539).[1] When Appellant found out that Jackson was driving to Tennessee, Gorby asked him if he could have a ride also, because he wanted to see his mother in West Virginia (T 540). Jackson agreed, although he testified that he later regretted it, and, when they arrived in Tennessee, the witness stated that he did not even wish to visit his own mother with Appellant along (T 541). Accordingly, Jackson suggested a trip to Florida, and Appellant volunteered to come along, stating that he wished to visit someone in Jacksonville (T 542). The two traveled south, and arrived in the Panama City area on or about May 1, 1990, checking into the Reba Motel (T 542). Jackson and Gorby went to the bar next door, The Sip'N Cue, where Appellant "became familiar with some young woman." (T 542). Jackson agreed to drive the young woman home, he and Appellant got into an altercation, and Jackson went off to stay in another motel by himself (T 545). Appellant eventually ended up at the Rescue Mission, where records indicate that he stayed on May 4-6 (T 621-625).

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[1] As in the Initial Brief, (T __) represents a citation to the trial transcript, whereas (R __) represents a citation to the formal record on appeal.

The victim in this case, W.J. Raborn, lived in Mexico Beach. According to his neighbor, Mary Zagorski, he was crippled, and sometimes picked up persons at a Rescue Mission to help him around the house and do odd jobs for him (T 714, 721). Mrs. Zagorski testified that Raborn had called her on the morning of May 6, 1990, and had told her that he was going into Panama City to get someone to help him fix a broken commode seat (T 714). The witness stated that she saw him back out of the driveway and drive off, and that that was the last time she saw him alive (T 715).

Just before it got dark that day, Fred Grice and Michael Bennet, were fishing at the Panama City Marina when they came into contact with Mr. Raborn, whom they knew, and Appellant. They testified that the two drove up in Raborn's car, and that Appellant got out and went into a convenience store to buy something (T 631, 680). Both witnesses described Appellant as unshaven and "scroungy looking", and specifically testified that he did not appear intoxicated at this time (T 633, 639, 680, 705). When Raborn drove off, this was the last time that he was seen alive.

Robert Jackson had similarly ended up at the Rescue Mission. He testifed that he had been attending a religious service at around 7:30 that evening, when Appellant came into the room (T 552-553). According to the witness, Appellant stated that he was checking out and that he just wanted to express thanks for all of the help which he had been given; he then left (T 554). This testimony was corroborated by Mike Broadway (T 708-712).

The next day, Mrs. Zagorski noticed a note on Raborn's door, and went over to investigate (T 715); the note said, "Will be back Tuesday." (T 717). Mrs. Zagorski became suspicious and used her key to unlock the door. She walked down the hallway and noticed a blood stain on the rug; opening the closed bathroom door, she found the victim lying face down on the floor (T 717-718). She then called the police, who immediately secured the scene. Gorby's fingerprint was found on a glass jar in the kitchen, and a handwriting expert testified that he had written the note left on the victim's door (T 1218, 1259). The pathologist testified that Raborn had been murdered in the hallway, and had then been dragged into the bathroom (T 1373). He had been hit in the head seven (7) times with a claw hammer, and various cords were tied around his neck, although he had not been strangled (T 1377, 1380). A hammer was found on the floor of the master bedroom between the bed and closet, and there was a bloodstain on the closet door in the bedroom (T 1120, 1141). The telephone was off the hook (T 1142), and many of the drawers in the bedroom were open. The victim's car, a 1985 silver Buick Park Avenue, was missing, and a BOLO was issued for it, as well as an "alert" for his credit cards (T 1189-1192).

Indeed, the alert indicated that Raborn's credit cards were being used throughout Louisiana and Texas, with specific charges being made in San Antonio, Texas (T 737-748). Dora Perez, the night clerk at the Downtowner Motel in San Antonio, testified that she had rented a room to Appellant on May 7, 1990; at this time, Appellant had registered as W.J. Raborn, paid with Raborn's

Discover card and had used a doctored driver's license for identification (T 1103-1108). Appellant's friend, Allan Brown, testified that he came into contact with Appellant on May 8, 1990, at his home in San Antonio (T 788-792). At this time, Appellant told him that he had committed a murder in Florida, and that he had stolen a car and credit cards (T 792).[2] At this time, Appellant was driving a grey Buick, and Brown watched Gorby as he removed the Florida license plates from the car and replaced them with Louisiana plates (T 791-793). Brown's wife, Marisa, also saw Appellant change the car's license plates (T 856). Several days later, Appellant sold Raborn's vehicle to Cleo Calloway, and, on June 19, 1990, Calloway was arrested as a result of the BOLO (T 999).

Appellant was subsequently arrested in San Antonio, and gave a statement, in which he claimed that Robert Jackson had introduced him to the victim, that he had done some odd jobs for the victim and left him while he was still alive, and that he had later come into contact with Jackson, who was in possession of the victim's car and credit cards (T 1202-1210). While awaiting trial in the Bay County Jail, however, Appellant told another inmate that he did not like homosexuals, and that he had "beat a dude down with a hammer." (T 1302).

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[2] As Appellant notes in his brief, Brown is a deaf mute, and admits to being a crack cocaine addict (T 788, 796). While Brown stated, on cross-examination, that he had used cocaine, marijuana and alcohol on the day that he encountered Gorby (T 798-799) (Initial Brief, pg. 5, n.2), he had stated, on direct, that he had not taken any drugs at that time (T 794).

At trial, Appellant contested the State's case as to identity, and, further, raised a defense of voluntary intoxication. The defense called seven (7) witnesses. Appellant's mother, Wanda Garrison, testified that when Appellant was four years old, he had been hit by a car and dragged forty-five feet (T 1409). She stated that Gorby went in and out of consciousness for several days, and that the doctor told her that he had brain injury; she stated that he suffered headaches afterwards and seemed more nervous (T 1412). She also said that Appellant had called her on May 6, 1990, from a bar, and that he had sounded as if he had been drinking (T 1413-1414). The defense also called Michael Krall, a bartender, who testified that Gorby had been at the establishment where he worked in Panama City on the night of May 6, 1990, and that he had been drinking at the time (T 1418). The defense also called a number of witnesses to rebut the testimony of Jerry Wyche, such witnesses stating that Appellant had a sign in his cell to the effect that he did not wish to talk to anyone about his case (T 1517-1531).

A primary defense witness at trial was Dr. Goff, a clinical neuropsychologist, licensed in Alabama, who, on cross-examination, acknowledged that he was neither a neurologist nor a physician (T 1425, 1495). Goff stated that he had interviewed Gorby, and had talked with his mother and reviewed certain records (T 1432-1433); Goff also administered a variety of psychological tests, including an MMPI and a Halstead-Reitan (T 1433, 1487). In Dr. Goff's opinion, Gorby suffered from organic

personality disorder and alcohol dependency, which he characterized as chronic conditions (T 1434). The neuropsychologist stated that these conditions would have made Appellant's actions "hair-triggered" or spontaneous, as well as rendered him suggestible (T 1434, 1438). He stated that Gorby had told him of a number of head injuries, including "a couple of instances where he had been hit in the head with beer bottles in bar fights." (T 1436-1437).

On cross-examination, however, Dr. Goff admitted that he had not evaluated Gorby for his mental status at the time of the offense, in that Gorby had stated that he was not there (T 1438). Accordingly, the doctor had no opinion as to what Gorby's mental status had been on May 6, 1990, "outside of his general presentations." (T 1438-1439). Goff also testified that the EEG and CAT Scan had shown no indication of brain damage (T 1495-1496). The expert testified that Gorby had told him that he had a steel plate in his head, although Goff failed to find any evidence to support this (T 1440). Dr. Goff stated that Gorby's long-term memory was largely intact (T 1441).

At the penalty phase, the State relied on the evidence presented at trial, and introduced only documents pertaining to Gorby's prior conviction for robbery in Texas (T 1760-1761). The defense called three witnesses - Appellant's mother, Wanda Garrison, and two of his sisters, Garnet Butcher and Mary Jane King (T 1764-1788). Mrs. Garrison testified that Appellant, whom she referred to as "Bucky", had grown up in a small town in West Virginia (T 1765). She stated that the family had not been

wealthy or poor, rather, "kind of between." (T 1765). She testified, however, that the area was generally a "pretty poor" one, and that Appellant had not really "had much as a child when he was brought up." (T 1765-1766). She again revealed that Appellant had become more nervous and quick tempered after his accident (T 1767). She also described Appellant's father, Ernie Gorby, as quick tempered, "nervous all the time" and "pretty close to an alcoholic." (T 1767). Mrs. Garrison testified that she divorced her husband in 1958, and that the two had fought over the custody of Appellant; although Ernie was awarded custody of Appellant, Appellant did not wish to go with him (T 1768). The witness stated that she had never seen Appellant's father beat him, although she had heard that such occurred (T 1769).

Mrs. Garrison testified that Appellant had been married and was presently divorced from his wife; she also stated that he had a son and daughter from the marriage (T 1769). The witness described her son as an alcoholic, and stated that he had become very upset when two of his sisters were accidentally shot by the police (T 1770-1771). The two, Mary Jane and Wilma, survived, but were permanently injured (T 1774). Mrs. Garrison testified that she had not seen Appellant in the last five years and that his children had not seen him for the last eight years (T 1776). Appellant's sister, Garnet Butcher, testified that Appellant had been very helpful when her husband had heart surgery in 1982 (T 1778-1779, 1780-1781). Another sister, Mary Jane King, testified that she had been shot accidentally in 1971 (T 1783-1784). She also testified that Appellant's ex-wife mistreated his children and that he had not seen them for several years (T 1786-1788).

The jury voted to recommend a sentence of death by a vote of 9-3. In sentencing Gorby to death, Judge Sirmons found four aggravating circumstances - that Gorby had been under sentence of imprisonment; that Gorby had a prior conviction for a crime of violence; that the murder had been committed for pecuniary gain, and that the murder had been especially heinous, atrocious or cruel. The judge found that no statutory mitigating circumstances had been established, but expressly found as non-statutory mitigation such factors as: (1) Appellant's love for and love by his family; (2) the effects on Gorby from a car accident when he was four years old; (3) Gorby's childhood development and the poverty he was exposed to; (4) Gorby's prior failed marriage, and (5) the effect on Gorby of his sisters' shooting by the police. The sentencer concluded that Dr. Goff's testimony established only the existence of non-statutory mitigation, in that Gorby had provided the expert with no direct testimony as to his mental state or state of intoxication at the time that he committed the crime. The judge did, however, weigh in mitigation Goff's diagnosis that Appellant suffered from organic personality syndrome and alcohol dependence (T 2624-2626).

## SUMMARY OF ARGUMENT

Appellant Gorby presents thirteen (13) points on appeal, in regard to his convictions of first degree murder, burglary with a battery, robbery and grand theft auto. Nine relate to the convictions and the remaining four to the death sentence. Of the claims presented as to the convictions, the State suggests that the primary claims relate to the admission of identification testimony from state witness Cleo Calloway and the court's denial of Appellant's motion for mistrial, following the prosecutor's reference to Appellant's lack of remorse at closing argument. As to the first point, the State would contend that Judge Sirmons did not err in allowing Calloway to make an in-court identification of Gorby, as well as to testify as to the prior out-of-court photo identification. Although the trial court, after considering live testimony, deposition testimony and witness statements, concluded that the photo line-up had been conducted suggestively, his conclusion that such had not been impermissibly suggestive, and that the resultant identification remained reliable, is supported by the record; alternatively, any error was harmless in that Calloway's testimony served only to link Gorby to the victim's vehicle, and a number of other witnesses offered testimony to this same effect. As to the denial of Appellant's motion for mistrial, the State suggests that the court below did not abuse its discretion. Defense counsel's objection to this comment was sustained, and a curative instruction was given; this one comment did not render Appellant's trial fundamentally unfair under all of the circumstances of this case.

Appellant's other challenges to his convictions do not merit extended discussion. The trial court did not abuse its discretion in denying Appellant's successive motion for continuance; a prior continuance had already been granted, and the reasons presented for the motion at issue, which was filed on the day that trial was to begin, were simply unconvincing. Likewise, error has not been demonstrated in regard to the trial court's resolution of the claim involving Jerry Wyche, a state witness. Defense counsel announced that, at most, a possible conflict of interest existed in regard to this former client of his law firm, and counsel never formally moved to withdraw; further, Wyche had previously been listed as a defense witness, and the record indicates that defense counsel subsequently subjected Wyche to a searing cross-examination. As to the claim of error involving Karen Smith, Gorby's allegation of improper "bolstering" is not well-taken; the defense had attacked the credibility of this expert on cross-examination, and the State was entitled, in closing argument, to refer to some of the testimony regarding her experience which had come in, without objection, during her qualification as an expert. Likewise, mistrials were not required during the testimony of state witnesses Grice and Jackson. Jackson, at most, made an irrelevant reference to the fact that he had once scuffled with Appellant; this testimony hardly rose to the level of prejudicial "collateral crime evidence", and the court's curative instruction alleviated any harm. Similarly, while Grice's hearsay reference to Appellant's prior incarceration was both inadvertant and

irrelevant, this Court, under virtually identical circumstances, has held that a mistrial is not required; again, defense counsel's objection was sustained, and the jury was specifically instructed to disregard this unresponsive testimony. Appellant's claim in regard to the admission of the video-tape of the crime scene is not well-taken; the judge's finding that the video-tape was not duplicative of the photos introduced, and was likewise not prejudicial, is supported by the record. As Appellant notes, his final attack upon his convictions, in regard to his having to display his tattoos in open court, has been resolved against him by this Court's precedents.

As to the sentence of death, Appellant attacks only two of the four aggravating circumstances found in support thereof. Appellant's attack upon the finding of the aggravating circumstance relating to prior conviction of a violent felony is not well-founded, in that documentary evidence clearly established that Gorby, using the alias Freddie Leon Banks, was convicted of robbery in Texas in 1987; it should be noted that Appellant has never expressly disputed this fact. Likewise, Appellant's claim that the jury should have been instructed on the penalties for the non-capital offenses of which he had been convicted has been conclusively resolved against him by this Court's precedents. Appellant's primary attack upon his death sentence relates to the finding of the heinous, atrocious or cruel aggravating circumstance and the jury instruction thereon. Appellant's constitutional challenge to the jury instruction is procedurally barred, in that no objection was made on this basis

below; any error would, in any event, be harmless. Further, it was not error for Judge Sirmons to have found that this aggravating factor applied. The victim in this case was rendered helpless and brutally beaten to death with a claw hammer. This was a conscienceless, pitiless crime which was unnecessarily torturous to the victim. Under all of this Court's precedents, death is the appropriate sentence. The instant convictions and sentence of death should be affirmed in all respects.

## ARGUMENT

### POINT I

DENIAL OF APPELLANT'S FOURTH MOTION FOR CONTINUANCE WAS NOT ERROR

As his first point on appeal, Gorby contends that Judge Sirmons abused his discretion in denying the defense's fourth motion for continuance. Such motion was filed on June 24, 1991, and was predicated upon the fact that the penalty phase investigator chosen to assist defense counsel had been unable to do her job, that two Texas witnesses were unavailable and that the defense neuropsychologist required more time to "confirm" his diagnosis (R 2459-2462). The motion was denied after arguments of counsel (T 2-5). The State respectfully submits that, based upon all of the circumstances of this case, reversible error has not been demonstrated.

The record in this case indicates that Gorby was arrested on the instant charge on June 5, 1990, and the Office of the Public Defender was appointed to represent him the next day; Gorby was formally indicated on first degree murder and the three other charges on June 27, 1990 (R 1839, 1842, 1849). On November 5, 1990, the Office of the Public Defender certified a conflict of interest and moved to withdraw (R 1878); such motion was granted, and, on November 19, 1990, private counsel Komarek was appointed (R 1883). The next day, counsel asked for, and received, a continuance, given his recent appointment (R 1884-1886).

On December 12, 1990, defense counsel moved for the appointment of an expert to assist in the development of mitigating circumstances at the penalty phase; such motion was

granted, and Dr. Clell Warriner was appointed (R 1940-1941; 1998). Likewise, on December 20, 1990, defense counsel moved for appointment of an independent investigator to assist in preparation; this motion was also granted, and Gene Ray and Lee Norton were appointed (R 1945-1946; 1998-1999). On February 11-13, 1991, defense counsel traveled to Texas and deposed several witnesses (R 2082). On April 24, 1991, defense counsel moved for the appointment of a neuropsychologist for use at the penalty phase (R 2181); counsel had previously requested the appointment of experts to determine Gorby's competence to stand trial and sanity at the time of the offense, and such had been appointed and found him competent and sane (R 2064, 2068, 2178).

On May 1, 1991, counsel moved for a continuance on a number of bases: (1) the neuropsychologist had not yet been appointed; (2) the defense had not yet received the results of various scientific tests; (3) Lee Norton, the investigator for the penalty phase, had advised that she would be unable to complete her investigation by the time of trial, and (4) counsel had not yet traveled to West Virginia to investigate Gorby's background for presentation at the penalty phase (R 2193-2194). Following a hearing on May 15, 1991, the court denied Gorby's second motion for continuance (R 2219). The court did, however, grant the motion for appointment of the neuropsychologist, and granted counsel leave to travel to West Virginia to investigate (R 2216-2218); on May 20, 1992, counsel was authorized fifteen hundred dollars ($1,500.00) in travel expenses (R 2220).

On June 4, 1991, defense counsel filed another motion for continuance (R 2351-2354). The grounds for this motion were: (1) the need to retain a defense handwriting expert; (2) the fact that counsel had still not yet received the results of certain scientific tests; (3) the fact that investigator Lee Norton's schedule prevented her from assisting in preparation for the penalty phase, and (4) the fact that defense counsel could not travel to West Virginia until June 8, 1991; the motion also contained the representation that the neuropsychologist who had been appointed, Dr. Goff, had indicated that he believed "he can be prepared and available for the scheduled trial date so long as the trial does not continue through the latter part of the following week." (R 2353). Judge Sirmons formally granted counsel's motion to appoint Dr. Goff, and also granted the request for a handwriting expert, but denied the continuance (R 2394-2395). Likewise, the court granted defense counsel's motion to allow Gorby to have skull X-rays, an EEG and a CAT scan performed at county expense, so that Dr. Goff could "complete his report and make his final diagnosis." (R 2396-2403).

Finally, on the day that trial was to begin, June 24, 1991, defense counsel filed the instant motion for continuance, which recited the following grounds: (1) that, due to other commitments, the penalty phase investigator had been unable to offer any assistance or to "assimilate and follow up on" information already obtained; (2) that two Texas witnesses, who would allegedly testify that it was their car that Gorby had driven in Texas, were not available and could not be located, and

(3) that the court-appointed neuropsychologist needed more time to "confirm" his findings (R 2459-2462). The motion was heard immediately prior to trial and denied (T 2-5). It should be noted that subsequently, at trial, a full defense was presented both at trial and during the penalty phase. Thus, at trial, the defense contended that the State had failed to establish either that Gorby had committed the crime or that, if he had, he had been able to premeditate, due to his alleged intoxication and his mental state, including organic personality disorder; in support of these defenses, defense counsel called Dr. Goff, the neuropsychologist, as well as Gorby's mother, who testified as to a head injury which he had suffered as a child (T 1425-1507, 1407-1417). At the penalty phase, defense counsel reminded the jury of this testimony, and also re-called Gorby's mother and called two of his sisters, all of whom offered detailed testimony as to Gorby's early life in West Virginia (T 1764-1791).

As Appellant correctly notes in his brief, motions for continuance are addressed to the sound discretion of the trial court, and a trial court's ruling thereon will not be reversed on appeal, unless a palpable abuse of such discretion has been demonstrated; this abuse of discretion must clearly and affirmatively be demonstrated on the record. See, e.g., Magill v. State, 386 So.2d 1188, 1189 (Fla. 1980); Lusk v. State, 446 So.2d 1038, 1040 (Fla. 1984); Bouie v. State, 559 So.2d 1113, 1114 (Fla. 1990). Gorby has failed to demonstrate such palpable abuse of discretion sub judice. This case does not represent an instance in which the defense was forced to proceed to trial in

an unreasonable amount of time, see Valle v. State, 394 So.2d 1004 (Fla. 1981), or one in which, due to the denial of a continuance, critical defense witnesses were unavailable for the penalty phase. See Wike v. State, 596 So.2d 1020 (Fla. 1992). Instead, it is clear from the record that Gorby's counsel was prepared for trial. Counsel had been appointed some eight months previously, and had already been granted one continuance; further, counsel had the assistance of at least one investigator, as well as a mental health expert and neuropsychologist. Cf. Grossman v. State, 525 So.2d 833, 836 (Fla. 1988) (not abuse of discretion to deny defense counsel continuance, where prior continuance is granted and counsel had assistance of co-counsel).

In this case, the grounds asserted on behalf of the continuance motion were simply insufficient, and it should be noted that two of the grounds related solely to the penalty phase, as opposed to the trial. Counsel's first proffered reason - that his penalty phase investigator had been unable to help "assimilate and follow up on" information already received - is a far cry from a contention that the defense was unprepared for the penalty phase, a contention which would be soundly refuted by the record in this case. Here, counsel had been afforded two investigators, and had personally traveled to West Virginia to investigate Gorby's background; as noted, defense counsel called three family members to testify at the penalty phase. This case is completely distinguishable from Wike. Cf. Williams v. State, 438 So.2d 781 (Fla. 1983). Additionally, counsel's representation that the neuropsychologist needed more

time to "make his opinion more broadly based and credible" (R 2461), is likewise an insufficient basis for a continuance. Initially, it should be noted that when counsel requested a prior continuance, he had represented that Dr. Goff would be prepared for trial (R 2353). Dr. Goff, of course, had plenty of time to prepare for trial, and had the opportunity to perform a battery of tests upon Gorby. While Dr. Goff did not testify at the penalty phase, he did testify at trial and counsel reminded the jury of his testimony during closing argument (T 1817, 1821); it should also be noted that the penalty phase did not commence until July 5, 1991, eleven days after the denial of the continuance and, the State would submit, a more than adequate time period for the expert to "firm up" his conclusions. Error has not been demonstrated. Cf. Stewart v. State, 420 So.2d 862, 864 (Fla. 1982) (denial of continuance to seek additional psychological examination of defendant prior to sentencing not error, where counsel had sufficient psychological evaluations to work with).

Gorby's final request related to the trial itself. Counsel contended that a continuance was necessary because two Texas witnesses had evaded service by subpoena and could not be located (R 2460-2461). As the State correctly pointed out below, however, there was no allegation, or showing, that these witnesses would ever be available; in Wike, it should be noted that defense counsel specifically alleged that all of his missing witnesses would be available to testify within one week. Accordingly, the judge did not abuse his discretion in denying

counsel's motion, and it should be noted that those witnesses who claimed to have seen Gorby in possession of the victim's car in Texas were subjected to extensive cross-examination at trial (T 795-820, 831-839, 1008-1145). Reversible error has not been demonstrated, and the instant convictions should be affirmed in all respects.

## POINT II

### DENIAL OF APPELLANT'S MOTION TO SUPPRESS IDENTIFICATION WAS NOT ERROR

As his next point on appeal, Gorby contends that his convictions must be reversed because the trial court erred in denying his motion to suppress identification testimony of Appellant by Cleo Calloway, on the grounds that the photo line-up, in which Calloway had identified Appellant, had been conducted in a suggestive manner. Defense counsel moved, prior to trial, to exclude testimony as to this prior out-of-court identification by Calloway (R 2367-2368), but, at trial, specifically moved to suppress any in-court identification of Appellant by the witness (T 971-972). Judge Sirmons heard the tesitmony of Calloway (T 990-995), and also considered depositions of Calloway, Officer Escalante, Officer Smith, Sergeant Mosqueda, as well as two written statements by Calloway, and the photo line-up itself (State's Exhibits #1 & 2 at suppression hearing).

Gorby specifically contended that the photo line-up had been unduly sugggestive because the picture of Gorby which had been used had included his name as well as a notation which said "Bay

County CCA"; Judge Sirmons, after hearing all arguments of counsel, denied the motion to suppress, and made the following specific findings:

> . . . It's unnecessarily suggestive, I should say, to have the Bay County CCA, Bay County Sheriff's Office, and PCPD with the date of June 6, 1990, prominently displayed on the photograph in Number 3. However, in response to the questions of the State and in reviewing the depositions of the officers and witness's testimony here in court, it appears that that display of Bay County CCA and Bay County Sheriff's Office would not - did not figure in his identification of the photograph in Number 3 and although there was a - unnecessarily suggestive procedure used by having Bay County CCA and Bay County Sheriff's Office and PCPD displayed in the photograph, in considering all the circumstances that that suggestive procedure does not give rise to a substantial likelihood of irreparable misidentification based upon the nature of the way the witness had the chance to observe the defendant and the circumstances surrounding that.

(T 996) (Emphasis supplied).

Citing to such precedents as Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), and Edwards v. State, 538 So.2d 440 (Fla. 1989), Gorby contends that reversible error has been demonstrated. The State disagrees.

It is, of course, necessary to review the evidence presented below, both at trial and through deposition. The depositions of the police officers indicate that a BOLO had been issued for the vehicle stolen from the victim in this case, a 1985 silver-gray Buick Park Avenue, and, on June 19, 1990, various authorities in Houston, Texas were on the lookout for this vehicle. On such date, the car was spotted, parked illegally along the street, and

a surveillance was set up, which subsequently resulted in the arrest of Cleo Calloway, who claimed that he had purchased the car from another individual. When Officer Smith informed Calloway that the car was stolen, Calloway told him that he had purchased it from "a crack head in south Houston" named Charles Knott. Smith stated that he then arrested Calloway and took him to the police station, where a records check indicated that there was an outstanding warrant for his arrest on a Texas charge of armed robbery (Deposition of Darrell Smith).

At this point, Calloway came into contact with Sergeant Mosqueda, who took a statement from him that night. According to Mosqueda, Calloway stated that he had purchased the vehicle from a white male within the previous month; Mosqueda stated that Calloway told him that he could identify the person who had sold him the car if saw him again (Deposition of Mosqueda, pg. 11). The Officer stated that the Florida authorities faxed to him a photograph of a suspect in this murder, but it had been so distorted that he requested that the authorities send a better photograph; he specifically testified that he did not show this faxed photograph to Calloway (Deposition of Mosqueda, pg. 15-16). In his written statement, which is likewise included in the record, Calloway stated that he had purchased the car, which he described as a grey 1985 Buick Park Avenue with Louisiana plates, from an individual named Knott, whom he described as being "about thirty to thirty-five years, 5'10" to 5'11" in height, one hundred and seventy-five pounds, brownish hair, combed back, sort of a push comb, hair around his collar, clean cut, hazel eyes";

Calloway ended the statement by saying, "If I see this dude again, I'm sure I can identify." (Statement of June 19, 1990; T 1016).

It was, apparently, not until July 4, 1990, that a legible photograph of Gorby was supplied to the Houston authorities, and, at such time, Officer Escalante, who had had no prior involvement in this case, presented a photo line-up to Calloway. Escalante stated that he had obtained five other photos of white males with similar characteristics to Gorby and that he had prepared a photo spread, using a manilla folder (Deposition of Escalante, pg. 6-7). Escalante testified that his meeting with Calloway was tape recorded in its entirety (Q: But everything that you did and everything you said is on the tape recording? A: Yes, sir.) (Deposition of Escalante, pg. 8-9). Escalante testified that Calloway identified the individual in photo number 3 as the person who had sold him the car, and that he had indicated that he was positive (Deposition of Escalante, pg. 12). Escalante likewise stated that Calloway had not expressed any hesitation in making this identification and stated that he himself had not suggested to Calloway in any manner which photograph he should pick (Deposition of Escalante, pg. 17-18). A tape recording of this photo identification session indicates that Calloway did in fact identify the individual in photo number 3 as the person who had sold him the car. During such interview, Calloway also recounted his contact with Appellant, and indicated that he was "positive" in his identification (Defense Exhibit G, Suppression Hearing, Interview of Cleo Calloway, July 4, 1990).

The record also contains Calloway's deposition of February 12, 1991. In such deposition, Calloway related how he had come to purchase the vehicle; his car had broken down and he had been picked up by an individual who offered to sell him the vehicle in which he was riding (Deposition of Calloway, pg. 12-14). Calloway stated that he had handed over seven hundred dollars ($700.00) in cash, and had then dropped the former owner off at a bus stop. Calloway testified that he had been in the company of this individual for about thirty (30) minutes (Deposition of Calloway, pg. 14). The witness stated that the individual had been dressed in a t-shirt, with a "beige denim look" and jeans (Deposition of Calloway, pg. 16). He further described the individual as being somewhat unshaven, and his eye color as "not bluish, not brownish"; he said that his hair was "not blonde" and had been "combed up" and was to the nape of the neck in length (Deposition of Calloway, pg. 16-18). He stated that the individual had given his name as Charles Knott, and that he had seemed to be between twenty-five and thirty years in age and around 6'1" in height (Deposition of Calloway, pg. 19-20).

Calloway estimated that he had purchased the car around May 9 or 11, and had been arrested a little over a month later (Deposition of Calloway, pg. 39). He stated that the arresting officer had taken him to the station and that, while sitting in the police car, he had heard something on the radio to the effect that the car had been involved in a homicide; Calloway stated that he did not hear the name of the victim or where the homicide was supposed to have occurred (Deposition of Calloway, pg. 9-11).

Calloway also seemed to suggest that, contrary to the statements of Escalante and Mosqueda, that he had been shown the faxed photograph which was, apparently, too dark to allow for any identification (Deposition of Calloway, pg. 20-23, 25). Calloway also suggested that he had been told that the police had someone in custody based upon his description (Deposition of Calloway, pg. 20).[3] Calloway stated that, apparently a week after having been shown the "print-out photo", he had been shown the photo line-up; he stated that when he had seen the picture of Appellant, he had remembered that the individual who had sold him the car had had a tattoo on the upper portion of his right arm (Depositon of Calloway, pg. 23). Calloway stated that he had picked photograph number three because of the way that the individual had had his hair combed (Deposition of Calloway, pg. 26). Calloway testified that, while he had noted that the photograph which he picked had some "writing on it", he had not understood "what it was", and that, apparently, the writing did not catch his attention (Deposition of Calloway, pg. 29, 30). The witness said that there was no doubt in his mind that he had selected the photograph of the person who had sold him the vehicle (Deposition of Calloway, pg. 41). He also stated that he had not made this identification due to any fear of being

[3] At trial, however, Calloway stated that he had been mistaken when he said this during the deposition and that, in fact, he was not told anything about anyone having been arrested until after he had seen the photo line-up and made his identification (T 1024-1027). Additionally, the transcript of the tape recorded identification session contains no remark by Officer Escalante to this effect (Transcript of July 4, 1990, Interview; Defense Exhibit G).

arrested for the instant homicide or any other charge (Deposition of Calloway, pg. 45-46).

At trial, Calloway testified during the proffer that he had identified photograph number three as the individual who had sold him the car, and that Officer Escalante had not indicated to him which photograph to select (T 990-991). Calloway stated that he had selected the photograph because he remembered the way the individual looked and stated that he had also remembered the tatoo, as well as the way in which the individual had had his hair combed (T 991-992). He reiterated that the individual had been wearing a kind of beige denim shirt and jeans (T 993). He again stated that he had been shown a facsimile photograph which was too dark for him to "tell who it was"; he had testified that this prior illegible photograph had not come to mind when he had identified photograph number three (T 994).

Likewise, at trial, Calloway made an in-court identification of Appellant as the individual who had sold him the car and also reaffirmed his selection of photograph number three (T 1001, 1006). Gorby was directed to exhibit his tattoo to this witness, and Calloway expressly testified that he remembered that tattoo, which was in the shape of a tiger (T 1001-1002). On cross-examination, Calloway acknowledged that, at the time that he had given his statement to the police on June 19, 1990, he had no mention of this tattoo (T 1017). Calloway also acknowledged that he had been wrong about the defendant's eye color, in that Gorby's eyes were in fact dark brown; he stated that, however, he had described them as hazel because they had seemed "bright" (T

1017). Calloway reiterated that he had spent about thirty minutes with the individual who had sold him the vehicle (T 1021). Calloway also specifically denied that the police had told him, prior to his identification of Appellant, that the Florida authorities had locked anyone up, and stated that any suggestion in his deposition testimony to that effect was incorrect (T 1024-1026). The witness likewise denied that Officer Escalante had suggested to him that man they were looking for had a tatoo (T 1027-1028). He also denied that his identification had been motivated by desire not to be charged or arrested for any offense (T 1029-1030). After some confusion, Calloway stated that, prior to his selection of photograph number three, he had not been informed of Appellant's true name or that the crime had occurred in Bay County, Florida (T 1040-1041). Calloway also testified that he had not paid attention to the sign present in photograph number three, which had included the notations, "Bay County CCA, BCSO, PCPD, 06-06-90 Olen Clay Gorby, 90-4389, Charge 1), and expressly stated that he had no idea what "Charge 1" meant (T 1038-1041, 1045). Calloway testified that the facsimile photograph had been "blotted out" of his mind, and that such had had nothing to do with his in-court identification of Appellant (T 1044). Calloway also testified that, when he made his photo identification, he had been "picturing in his mind" the person who had sold him the car, and that he had no doubt that he had identified the right person (T 1049-1050).

The State respectfully suggests that the above facts clearly support the judge's finding that the identification testimony of

Cleo Calloway did not merit suppression, and it is important to note that, in denying Gorby's motion, Judge Sirmons made a specific finding of fact, to the effect that the display of the "Bay County CCA and BCSO" legend on Appellant's photograph "did not figure in [Calloway's] identification of the photograph in Number 3" (T 996). Not only does a trial court's ruling on a defendant's motion to suppress come to this court with the presumption of correctness, see Shapiro v. State, 390 So.2d 344, 346 (Fla. 1980), but the findings or conclusions of fact made in pursuance thereof, are likewise accorded deference on appeal, and the evidence and all reasonable deductions and inferences therefrom must be interpreted in the light most favorable to the court's ruling. Id. The above finding is supported by Calloway's testimony, both at deposition and at trial, to the effect that he did not pay any attention to the "writing" on any of the photographs (Deposition of Calloway, pg. 29, 30; T 1038-1041, 1045), and obviously justifies the denial of Appellant's motion to suppress, in that the finder of fact found that any suggestiveness in the photograph display played no part in Calloway's identification of Appellant. Cf. Johnson v. State, 438 So.2d 774, 777 (Fla. 1983) (denial of motion to suppress identification not error, where, inter alia, sheriff's investigator testified that none of the witnesses indicated at the line-up that the allegedly suggestive items, i.e., the fact that the defendant had a different personal appearance and uniform from the others in the line-up, had influenced their identifications). Denial of Appellant's motion to suppress should be affirmed.

Appellee would likewise contend that the cases relied upon by Appellant, Brathwaite, Biggers and Edwards, do not dictate a different result, and that Gorby's reliance upon them would seem largely misplaced; Edwards primarily concerned an identification made at an illegal line-up. The State further questions Appellant's view of the applicable law, "An in-court identification should be excluded if the police have obtained it by means of an unnecessarily suggestive procedure." (Initial Brief, pg. 18). The usage of an "unnecessarily suggestive" practice in securing an identification does not establish a per se basis for suppression. As this Court observed in Holsworth v. State, 522 So.2d 348, 352 (Fla. 1988), citing to Brathwaite, Biggers and Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968):

> The test for a evaluating such claims [i.e., of unreliable identification] is whether the police employed a procedure so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.

Holsworth, of course, is in accord with many other Florida cases on this subject. See, e.g., Rose v. State, 472 So.2d 1155, 1157 (Fla. 1985) ("Even if we would have found that the pretrial identification was conducted in an unnecessarily suggestive manner, evidence of the identification did not have to be excluded because under the totality of the circumstances there was no substantial likelihood of misidentification." (citing Neil v. Biggers)); State v. Sepulvado, 362 So.2d 324, 327 (Fla. 2d. DCA 1978) (mere suggestiveness of identification procedure does not mandate suppression; rather, procedure must have been

impermissibly suggestive); Brown v. State, 397 So.2d 320, 322 (Fla. 2d. DCA 1981) ("Identification procedures, although suggestive, are not impermissibly so unless they indicate that the identification is unreliable."). Here, although Judge Sirmons found that usage of the particular photograph at issue had been unnecessarily suggestive, he never found that such had been impermissibly suggestive, and expressly found that no substantial likelihood of irreparable misidentification existed (T 996). As will be demonstrated below, these findings were not error.

As the controlling precedents make clear, "Reliability is the lynchpin in determining the admissibility of identification testimony", Brathwaite, 432 U.S. at 114-115, and confrontation evidence, despite its suggestive aspects, will be admissible if the identification itself possesses certain features of reliability. Grant v. State, 390 So.2d 341, 343 (Fla. 1980) (citing Manson v. Brathwaite). In determining the reliability of an identification, the factors to be considered include: (1) the opportunity of the witness to view the individual at the time of the incident; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the individual; (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length in time between the confrontation and incident. Id. No specific factor is determinative, and, indeed, the totality of the circumstances must be considered. Neil v. Biggers, supra. The degree of danger of misidentification required for exclusion of

identification evidence is appropriately high, so as not to deprive the jury of evidence which is reliable; once threshhold reliability is established, the accused may employ the traditional methods for testing the weight of the evidence, such as cross-examination and impeachment. See Baxter v. State, 355 So.2d 1234 (Fla. 2d. DCA), cert. denied, 365 So.2d 708 (Fla. 1978); Simmons, supra. In fact, in order to merit exclusion of evidence of identification, the identification procedure must have been so suggestive, and the witness's unassisted ability to make the identification so weak, that it can reasonably be said that the witness has lost or abandoned his mental picture of the individual and has adopted the identity suggested. Id.

Applying the above standards, the judge's ruling allowing both an in-court identification of Appellant, and testimony as to the prior out-of-court identification, was undoubtedly correct. Calloway had a significant opportunity to observe Gorby at the time that he purchased the vehicle. Instead of merely catching a fleeting glimpse of the defendant, Calloway was in Gorby's company for up to thirty minutes. While there was no express testimony presented as to the lighting conditions, the two were sitting next to each other in a car for half an hour. As to the witness's degree of attention, it would appear to have been relatively high, in that, in his statement of June 19, 1990, Calloway was able to describe the clothing that Gorby wore, as well as his approximate height, weight, age, hair color and style, facial hair and eye color. While it would seem that Calloway was wrong as to this latter matter, in that Gorby's eyes

were actually brown as opposed to hazel, Calloway sought to explain the descrepancy, by stating that Appellant's eyes had seemed "bright" at the time of their encounter; no other aspect of Calloway's physical description of Gorby was challenged below. As to the level of certainty demonstrated, Calloway has always been "positive" in his identification of Gorby, and, at the time of his statement in June of 1990, expressly stated, "If I see this dude again, I'm sure I can identify"; Calloway has never identified any other individual or failed to identify Gorby in any other confrontation. Finally, the length of time between the incident and the photo identification was a little less than two months, and cases have previously held that periods of time even longer are not sufficient to render an identification unreliable. See, e.g., Biggers (seven month lapse between incident and identification no basis for suppression); Bundy v. State, 455 So.2d 330 (Fla. 1984) (three month lapse between identification and incident insufficient to render identification unreliable).

In his brief, Appellant attacks the judge's findings on several bases, claiming that Calloway had initially only given a "vague" description of Gorby, that he had not observed Gorby during "criminal activity, which would heighten one's sense of awareness", that he identified Gorby primarily because of his tattoo, which one of the officers had suggested to him existed, and that Calloway had been under considerable pressure simply to identify someone (Initial Brief, pg. 18-20). None of these contentions is convincing. As noted, Calloway's description of Gorby was not "vague"; instead, he gave a detailed description in

his statement of June 19, 1990, as to the individual's height, weight, race, age, clothing, hair color and style, and eye color. As to the fact that Calloway was not a victim of a violent crime committed, the State cannot see why such fact, or omission, should militate in Appellant's favor. Here, Calloway and Gorby were together for a period of half an hour, during which time period Calloway purchased a vehicle for cash; there has been no showing that Calloway customarily purchases his vehicles from persons who pick him up while hitchhiking, such that this transaction would appear "routine" and unmemorable for the witness. As to the tattoo, Calloway expressly testified that Officer Escalante had not suggested to him that such existed, and the witness stated that he had based his identification of Gorby not only on the tattoo, but also on "the way he looked", including his hair (T 992). Finally, Calloway similarly denied that he had ever felt pressure to make this identification (T 1029-1030).

Having stated the above, Appellee would simply observe that Judge Sirmons was entirely correct in concluding that it had been "unnecessary" and "suggestive" for the State to have utilized what was apparently Gorby's booking photograph in the line-up, and that, under different circumstances, such action could clearly have tainted an identification. Yet, in this case, this action did not create a substantial likelihood of irreparable misidentification, so that either the out-of-court or subsequent in-court identification merited suppression. As noted, Calloway expressly testified that he did not consider the various

annotations on this photograph in making his identification (T 1038-1041, 1045; Deposition of Calloway, pg. 29, 30), such testimony expressly credited by Judge Sirmons (T 996). Further, the fact that the picture bore Appellant's name, "Olen Clay Gorby", probably reduced the likelihood that Calloway would select such photograph, in that Calloway did not know Appellant by his true name, but rather as "Charles Knott", and the witness expressly testified that he did not know Appellant's true name prior to selecting the photograph (T 1024, 1026). Likewise, the fact that the individual in the photograph may have been in the custody of "Bay County CCA, BCSO and PCPD" is not likely to have drawn Calloway's attention. Calloway and Appellant encountered each other in Texas, not Florida, and the photograph makes no express reference to the state of Florida; Calloway expressly testified that he did not know that any individual had been apprehended in Florida until after he made his identification (T 1026).[4] It should be remembered that when Calloway purchased the vehicle from Gorby, the car had Louisiana license plates on it. Further, the fact that photograph number three appears to be a

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[4] Although Officer Escalante had "believed" that Calloway had known at this time that the homicide had been in Florida, it is clear that this was simply an assumption on his part (Deposition of Escalante, pg. 8). Escalante stated that everything that he said to Gorby was tape recorded, and the transcript of their interview contains no reference by Escalante to either Florida or Panama City (Deposition of Escalante, pg. 8-9; Transcript of July 4, 1990, interview). It is clear that Judge Sirmons placed great reliance upon this transcript, in that when the prosecutor suggested that there might have been a portion of the interview between Escalante and Calloway which was not transcribed, the judge disagreed, and read a lengthy portion of Escalante's deposition, including the part in which Escalante stated that everything that he said and did was on the tape recording (T 987-998).

booking shot is not overly suggestive, in that at least five of the six photographs in the line-up were booking shots, and two others included case numbers or other information about the individual's picture; two of the individuals had been arrested in Texas, one in Houston, and there is no reason to believe that Calloway might not have assumed that the individual who sold him this car had been apprehended by the Texas authorities, at least at some point.

Accordingly, the admission of testimony as to Calloway's prior out-of-court identification of Gorby was not error, in that, despite any suggestive aspect of the photo line-up, such identification remained reliable, based on a consideration of all of the circumstances. Such being the case, the State questions whether the burden shifted to the prosecution in any regard. See Lauramore v. State, 422 So.2d 896, 898 (Fla. 1st DCA 1982), cert. denied, 426 So.2d 27 (Fla. 1983) (where identification procedures were unnecessarily suggestive, but not impermissibly so, burden did not shift to State to overcome presumption of taint by clear and convincing evidence). To the extent that the State bore any such burden in this case, it met it, given, inter alia, the witness's prior opportunity to observe Appellant at the time of their encounter and his ability to give a full description. Cf. Baxter, supra (admission of testimony as to prior identification at photo line-up not error, where, even though suggestive procedure used, identification still reliable); Bundy, supra (admission of testimony as to prior identification at photo line-up not error, even though officer made remark to witness implying

that suspect's photo was in line-up and witness had previously seen photo of defendant in newspaper).

Given the fact that evidence as to the prior out-of-court identification was properly admitted, it cannot be said that there was "taint" to the in-court identification. Further, to the extent necessary, the State would suggest that the record would support a finding that, even if the prior photo identification was tainted, a sufficient, independent basis existed for the subsequent in-court identification, given, again, Calloway's opportunity to "form a mental impression" of Gorby at the time of their initial encounter. See Baxter, 355 So.2d at 1238 ("The in-court identification by prosecutrix was not tainted by the photo identification procedure. The trial court could have reasonably found that prosecutrix' identifications were based upon a mental image of the assailant formed prior to, and not supplied by, the photo pak and other photographs of appellant."). This case is, thus, distinguishable from Edwards v. State, relied upon by Appellant, in that in such case the witness, who had identified the defendant at an illegal line-up, had only initially observed Edwards for "three or four seconds", and, apparently, had expressed some doubt as to his own identification. Denial of Appellant's motion to suppress identification was not error.

To the extent that this Court disagrees with any of the above, the State would suggest that admission of the instant identification testimony was harmless error, under the standard set forth in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Calloway's testimony, while not without some importance, was hardly critical to Gorby's conviction. Calloway was not an eyewitness to this offense nor did his testimony place Appellant at the scene. Rather, he testified that, several days after the murder, he had purchased what turned out to be the victim's car from Gorby in Texas. Calloway was not the only witness to link Gorby to the vehicle, in that both Allan and Marisa Brown testified that they had seen Appellant with a grey Buick, at their home in San Antonia, Texas in May of 1990, and, indeed, had seen Gorby remove a Florida tag from this car, and replace it with one from Louisiana (T 790-794; 853-857). Likewise, Dora Perez, a clerk at a San Antonio motel, testified that Appellant had had what appeared to be a light grey car at the time that he checked in on May 7, 1990; at such time, Appellant had used one of the victim's credit cards and had registered as W.J. Raborn, using a doctored driver's license for identification (T 1104-1109, 1115). It would not appear that any evidence recovered from the vehicle was introduced against Appellant at trial.

Additionally, Gorby's subsequent possession of the Buick was hardly his only link to the victim. Gorby's fingerprints were found on a glass jar in the victim's home, and a handwriting expert testified that he had written the note on the victim's door, to the effect that the victim would "Be Back Tuesday" (T 1218, 1259). Further, Gorby had been seen in the victim's company shortly before the murder (T 631, 680), and Appellant subsequently made damaging admissions to both Allan Brown and Jerry Wyche concerning his complicity in this murder (T 792,

1300-1302); Gorby also gave a patently untrue exculpatory statement to Deputy McKeithen, in which he suggested that another person had committed the crime (T 1202-1207). Admission of this identification testimony was harmless error beyond a reasonable doubt, in that no reasonable possibility exists that any error in this regard effected the verdict. Cf. McKenney v. State, 529 So.2d 367 (Fla. 1st DCA 1988) (admission of victim's in-court identification of defendant harmless error, at best, given physical evidence and other testimony linking defendant to crime). The instant convictions should be affirmed in all respects.

## POINT III

### APPELLANT HAS FAILED TO DEMONSTRATE ANY BASIS FOR REVERSAL OF HIS CONVICTIONS, DUE TO DEFENSE COUNSEL'S ANNOUNCEMENT OF A POSSIBLE CONFLICT OF INTEREST IN REGARD TO A STATE WITNESS

As his next point on appeal, Gorby contends that he is entitled to a new trial because Judge Sirmons did not appoint other counsel for him after attorney Komarek advised the court of a possible conflict of interest, in regard to state witness Jerry Wyche. Appellant contends that, under Florida law, the "mere risk of a conflict" or the "smell of a taint" mandated the appointment of new counsel (Initial Brief, pg. 8, 24). The State cannot agree with Appellant's statement of the law, and would contend that reversible error has not been demonstrated in this regard.

The record in this case refutes any suggestion that Judge Sirmons was insensitive to allegations of conflict of interest.

It should be remembered that the Office of the Public Defender was originally appointed to represent Gorby. Five months later, the Public Defender moved to withdraw due to an unspecified conflict of interest; this motion was granted, and attorney Komarek was appointed (R 1878-1883). Four months after his appointment, attorney Komarek filed a formal motion to withdraw, alleging two grounds: (1) counsel's status as City Attorney for Mexico Beach might affect his cross-examination of any Mexico Beach officers, and (2) a paralegal with counsel's law firm had sat on the grand jury which indicted Gorby (R 2075-2076). The court appointed an attorney to advise Gorby of these conflicts and the option of waiver, and Gorby formally waived any objections which he might have as to these potential conflicts of interest (R 1086-1089). The court then denied counsel's motion to withdraw (R 1088-1089).

Three months later, on the day that trial was to begin, and following the denial of several defense motions for continuance, See Point I, supra, attorney Komarek stated on the record that his firm had previously represented Jerry Wyche, a state witness (T 14). Counsel observed that it would make him "uncomfortable" to cross-examine Wyche, because he had had access to his confidential files, and pointed out that, if he did not cross examine Wyche, he would not be rendering effective assistance to Gorby (T 14). Counsel then concluded, "Just wanted to bring that to the court's attention that Mr. Wyche was a client and I have a possible conflict of interest there" (T 14). The prosecutor then pointed out, entirely correctly, that Wyche had originally been

listed as a defense witness (T 14-15); in fact, the record indicates that attorney Komarek listed Wyche as a potential defense witness on June 18, 1991, subsequently withdrew his name on June 21, 1991, and that the State formally listed Wyche as a potential state witness on June 24, 1991 (R 2418, 2455, 2589).

The following exchange later took place:

> THE COURT: All right. On the conflict of interest that was raised by Mr. Komarek. I need to clarify, Mr. Komarek, for the record the situation you find yourself in with Jerry Wyche. My understanding is that Ms. Martinec-Clyatt had represented Mr. Wyche in the past; is that correct?
>
> MR. KOMAREK: That's correct.
>
> THE COURT: And there are files in your office that pertain to that representation.
>
> MR. KOMAREK: That's correct.
>
> THE COURT: Okay. Have you reviewed those files?
>
> MR. KOMAREK: I have not.
>
> THE COURT: So you're not aware of the contents of these files.
>
> MR. KOMAREK: No. Well, trying to be honest, Judge, I hate to say it like this, but I believe that I've represented Mr. Wyche when it was inconvenient for Mrs. Martinec to represent him. I can't swear that under oath, but that name is familiar. When I saw the man's face, I believe I've even attended some hearings for him, although it was Mrs. Martinec's case. So I think I have seen those files in the past, but I didn't go review the file after his name was brought up in this case.
>
> THE COURT: Okay.
>
> MR. KOMAREK: That's about all I can honestly say.

(T 22-23).

Defense counsel then affirmed that Wyche had, indeed, previously been listed as a defense witness (T 23). Judge Sirmons ruled that he did not see "an actual conflict of interest", and advised attorney Komarek not to review any of Wyche's files (T 24-25). The judge then went on to add, ". . . I do not see at this point in time taking any further action other than making sure that the record reflects Mr. Komarek is ordered not to review the files of Mr. Wyche that are in his office's possession." (T 25) (emphasis supplied). It should be noted that defense counsel never raised this matter again, and that, in fact, he subjected Wyche to a searing cross-examination, impeaching him with inconsistent statements from his deposition and bringing his seven prior convictions to the jury's attention (T 1302-1310); counsel also called two other inmates to specifically impeach Wyche's testimony (T 1517-1528).

On the basis of this record, it is difficult to find fault with the manner in which the trial court resolved this matter. While Appellant asserts that Judge Sirmons "erred in refusing to appoint other counsel for Gorby" (Initial Brief, pg. 22), it must be recognized that this was never requested and, indeed, defense counsel never even formally moved to withdraw. Rather, counsel simply alerted the court to a "possible conflict of interest" (counsel's words) (T 14), involving a former client; as noted, attorney Komarek had already listed this former client as a defense witness. Considering defense counsel's characterization of this situation, it would simply appear that the court below treated the matter with the gravity which it deserved. The judge

advised counsel not to review the files of his former client, and clearly left the door open for counsel to request further relief, if he deemed it necessary; counsel never brought the matter up again, and Judge Sirmons could quite well have concluded that the solution offered had solved any problem. Further, the judge could quite well have believed that if counsel perceived an actual conflict of interest to exist, he would formally move to withdraw, as he had done previously; at that time, the judge did all the things which Gorby now asserts were critical, i.e., appointed counsel to advise Gorby of the potential conflict and secured a formal waiver thereof. Reversible error has simply not been demonstrated. Cf. Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979) (reversal not warranted in regard to state discovery violation, where defense counsel failed to allow the court to specifically rule on the issue, and instead simply deferred to trial court's statement of the law; "This court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law."); Ventura v. State, 560 So.2d 217, 219-220 (Fla. 1990) (trial court conducted sufficient inquiry into defense counsel's motion to withdraw, and defendant's motion to fire counsel, where, despite defendant's earlier allegation of conflict of interest involving former client, matter never subsequently raised).

Additionally, Appellee cannot agree with Appellant's statement of the law. This case does not involve the simultaneous representation by one attorney of two codefendants

or two individuals with pending cases and potentially conflicting interests. Rather, it involves, at most, a situation in which an attorney is called upon to cross-examine a former client, to whom he owes no continuing duty of loyalty. Such being the case, Appellant's reliance upon either Foster v. State, 387 So.2d 344 (Fla. 1980), or Bellows v. State, 503 So.2d 1330 (Fla. 2d. DCA 1987), is simply misplaced, and, instead, Gorby's case should be resolved in accordance with Bouie v. State, 559 So.2d 1113 (Fla. 1990). Bouie involved virtually identical facts to those sub judice. In Bouie, the State, as it did below, called an inmate to the stand and to testify as to certain incriminating admissions made by the defendant. Bouie was represented by the Public Defender's Office, and his counsel moved to withdraw from his representation, because his office had previously represented the inmate called by the State. This Court held that the denial of counsel's motion to withdraw was not error, and, in language highly pertinent to the instant controversy, wrote:

> On Monday, January 25, 1988, the day Bouie confessed to him, Edwards pled guilty to an escape charge without reserving the right to appeal. Because he did not appeal, the Public Defender's representation of Edwards effectively ended at that point. In essence, therefore, no one represented Edwards when he testified at Bouie's trial. Bouie's counsel cross-examined Edwards extensively and, if anything, zealously guarded Bouie's interests at the expense of Edwards'. Edwards and Bouie were not codefendants, and their interests were neither hostile nor adverse to one another. Webb v. State, 433 So.2d 496 (Fla. 1983). Bouie's counsel did not have a conflict of interest, and the court did not err in denying the motion to withdraw.

Bouie, at 1115.

All of these conclusions are applicable sub judice. At the time that Wyche testified against Gorby, he was serving a sentence in state prison and not represented by Komarek. Further, attorney Komarek extensively cross-examined Wyche and zealously guarded Gorby's interests; as in Bouie, Komarek also called witnesses to specifically impeach Wyche's testimony. Gorby and Wyche were not codefendants and their interests were neither hostile nor adverse. As in Bouie, defense counsel below simply had no conflict of interest, and no reason existed for his withdrawal; of course, in contrast to Bouie, defense counsel below did not even make a formal motion or request to withdraw. As in Bouie, it was incumbent upon Gorby to show an actual conflict of interest which adversely affected his lawyer's performance, in order to demonstrate, under Cuyler v. Sullivan, 446 U.S. 335, 110 S.Ct. 1708, 64 L.Ed.2d 333 (1980), a violation of the right to conflict-free counsel. He failed to do so, and, accordingly, is entitled to no relief. See also Trotter v. State, 576 So.2d 691 (Fla. 1990) (not error for court to deny motion to disqualify prosecutor who had previously represented defendant on unrelated matter). For the same reason, any allegation of ineffective assistance of counsel in this regard is without merit. See Mills v. State, 476 So.2d 172, 175 (Fla. 1985) (defense counsel did not render ineffective assistance of counsel, due to conflict of interest, where counsel had withdrawn from representation of accomplice, who became state witness, prior to Mills' trial); Smith v. White, 815 F.2d 1401, 1405-1406 (11th Cir. 1987) (mere proof that defense counsel previously

represented state witness insufficient to establish "inconsistent interests", in absence of showing that earlier representation related to defendant's case or that particular confidential information involved). The instant convictions should be affirmed in all respects.

## POINT IV

APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR, IN REGARD TO THE PROSECUTOR'S REFERENCES TO THE HANDWRITING EXPERT DURING CLOSING ARGUMENT

Appellant next contends that his convictions must be reversed because, during closing argument at the guilt phase, the prosecutor improperly "bolstered" the testimony of Karen Smith, the State's handwriting expert; specifically, the State referred to the fact that Smith had been employed by the Lottery Department to verify the signatures on winning tickets. Gorby argues that this comment was impermissible, because the defense had never specifically attacked Smith's character and because evidence of specific "good character" is inadmissible. The State suggests that no basis for reversal has been demonstrated.

The record in this case indicates that the State called Karen Smith, an examiner of questioned documents, with the Florida Department of Law Enforcement (T 1253). In the course of qualifying this witness as an expert in handwriting analysis, the prosecutor questioned her as to her experience (T 1253-1255). Thus, after establishing that the witness had served apprenticeships with the Escambia County Sheriff's Department and the Alabama Department of Forensic Science, as well as taking

courses with the FBI and Secret Service, counsel for the State asked Ms. Smith if she had previously been employed by the Florida Lottery Department (T 1254). The witness replied that she had, and that she had, in fact, been the first investigator hired and that her responsibilities had included examination of all signatures on winning lottery tickets, prior to their being paid (T 1254-1255). The following exchange then took place:

> Q: So if somebody won forty million dollars you would have to make sure it was not a --
>
> A: That's correct. There was a computer check and there was also a visual check by myself.

(T 1255).

No objection was interposed in regard to this question or answer, and defense counsel interposed no objection when Ms. Smith was qualified as an expert (T 1255-1256).

On direct examination, Ms. Smith testified that, based upon a comparison study, she had concluded that Gorby had written the note left behind at the victim's residence (T 1259); she testified in detail as to the points of similarity between the handwriting in the note and that from a sample supplied by Gorby (T 1259-1269). Defense counsel cross-examined the witness extensively (T 1269-1283). Thus, on cross examination, counsel brought out the fact that the State's expert witness did not belong to certain "prestigious organizations that most experts who are employed as document examiners belong to" (T 1270-1271). Likewise, defense counsel questioned Ms. Smith as to whether her analysis was consistent with that set forth in an authoritative text on the subject by one Hilton (T 1281-1282). Defense counsel

pressed the witness as to whether there were any differences between Gorby's handwriting and that on the note, and further questioned her as to how sure she was as to her own conclusions (R 1273-1281).

During the prosecutor's initial closing argument at the guilt phase, the following took place:

> MR. MEADOWS [Prosecutor]: You heard from Karen Smith, the lab analyst with Florida Department of Law Enforcement, who is a handwriting expert, and that the State of Florida trusted her whenever it was going to hand out forty million dollars worth of lottery funds in her expertise.
>
> MR. KOMAREK: Object, Your Honor. Improper bolstering.
>
> THE COURT: I'll overrule that particular objection.

(T 1556).

Defense counsel made no request for a curative instruction or a motion for mistrial in regard to this comment.

On appeal, Gorby contends that the court's overruling of his objection constituted reversible error because: (1) the State improperly bolstered Smith's trustworthiness, rather than her reputation for trustworthiness; (2) this comment was allowed "even though Gorby had never attacked her character" (Initial Brief, pg. 26), and (3) the State was allowed to establish her trustworthiness by specific evidence of her good character rather than by reputation testimony. In support of reversal, Appellant cites to such precedents as Whitted v. State, 362 So.2d 668 (Fla. 1978), General Telephone Co. v. Wallace, 417 So.2d 1022 (Fla. 2d. DCA 1982), Buford v. State, 403 So.2d 943 (Fla. 1981), and

Farinas v. State, 569 So.2d 425 (Fla. 1990). The State would suggest that all of the above cases are inapposite and that, under the particular facts of this case, reversible error has not been demonstrated.

Initially, it should be noted that Karen Smith testified as an expert witness, and that, as part of her qualifications, the State elicited testimony to the effect that she had been employed by the Department of Lottery and, as part of her duties therein, had validated the signatures on winning lottery tickets, prior to payment. No objection was interposed in regard to the admission of this testimony, nor would it appear that any objection would have been well-taken, in that the testimony as to the witness' prior experience was surely relevant as to her qualification as an expert under §90.702, Fla.Stat. (1989); the situation is completely distinguishable from that in Whitted, in which evidence was presented to validate the testimony of two lay witnesses as to their reputations for truth and veracity. Further, the prosecutor's reference to this testimony in his closing argument was not improper.

In his cross-examination of Karen Smith, defense counsel had sought to cast doubt upon her qualification as an expert, her expertise in her field and her conclusions as to the specific exhibits in question. In the remarks at issue, the prosecutor was simply drawing the jury's attention to evidence already in the record, see White v. State, 377 So.2d 1149 (Fla. 1979), to the effect the expert witness had been retained by the state Lottery Department and had been responsible for validating

lottery tickets prior to their payment. The danger which occurs when a prosecutor vouches for the testimony of a witness or seems to "bolster" such is that the jury may believe that the prosecutor has additional information about the case which was not disclosed at trial. See Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982). Here, as noted, the prosecutor simply drew the jury's attention to evidence which it already knew, and did so only after defense counsel had attacked the qualifications of the expert on cross-examination. Acordingly, the trial court did not err in overruling defense counsel's objection, on the basis of "impermissible bolstering" at trial. Reversible error has not been demonstrated.

To the extent that this Court disagrees, Appellee would contend that any error herein was harmless beyond a reasonable doubt under State v. DiGuilio, supra. Prosecutorial error does not warrant reversal of a conviction unless the error is so basic to a fair trial that it can never be treated as harmless. See State v. Murray, 443 So.2d 955, 956 (Fla. 1984). Here, any overemphasis upon Karen Smith's qualifications did not affect the verdict. While Smith's identification of Gorby as the author of the note left behind at the victim's home was not without importance, there was more than "precious little evidence" tieing Gorby to the crime scene or the case itself (Initial Brief, pg. 28). There was, of course, Gorby's fingerprint on a glass jar in the victim's kitchen (T 1218); there was also the fact that Gorby was sighted with the victim immediately prior to the murder. Additionally, Gorby used the victim's credit cards and his car in

Texas, and made incriminating statements to Allan Brown and Jerry Wyche. Reversal is not warranted. See Mohorn v. State, 462 So.2d 81, 82 (Fla. 4th DCA 1985) (improper admission of testimony as to state witness's good character harmless error under circumstances of case). The instant convictions should be affirmed in all respects.

## POINT V

### DENIAL OF APPELLANT'S MOTION FOR MISTRIAL, DURING THE PROSECUTOR'S CLOSING ARGUMENT AT THE GUILT PHASE, WAS NOT ERROR

As his next point on appeal, Gorby contends that his convictions and sentence of death must be reversed due to the prosecutor's reference to lack of remorse during his closing argument at the guilt phase. Appellant's objection to this remark was sustained, and the court specifically instructed the jury to disregard the prosecutor's comment (T 1583); Judge Sirmons, however, denied Appellant's motion for mistrial (T 1583). On appeal, Appellant maintains that this ruling constituted an abuse of discretion, and that this comment tainted both the guilt and penalty phases. Gorby also argues that the court's curative instruction was too "anemic" to do any good, and that, in a capital case, the judge should openly rebuke a prosecutor for an error of this nature. The State disagrees.

The record in this case indicates that the prosecutor did indeed refer to Gorby's "no remorse" during his closing argument, and, of course, under this Court's precedents, such remark was error; likewise, it would appear that this claim is properly preserved for review, given the objection and subsequent motion

for mistrial. Accordingly, the issue to be decided is whether this one comment was so prejudicial as to vitiate Gorby's chance for a fair trial. Cf. Duest v. State, 462 So.2d 446, 448 (Fla. 1985) (mistrial, based upon remark by prosecutor, only appropriate where error committed was so prejudicial as to vitiate the entire trial). As noted, this Court held in State v. Murray, 443 So.2d at 956, "Prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless." Cases involving improper prosecutorial argument must each be considered on their own merits and within the circumstances surrounding the complained of remarks. See Darden v. State, 329 So.2d 287, 291 (Fla. 1976); Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982). Just as the trial court enjoys sound discretion in ruling upon a motion for mistrial, see Johnston v. State, 497 So.2d 863, 869 (Fla. 1986), the control of comments in closing argument is within the trial court's discretion, and the court's ruling thereon will not be overturned unless a clear abuse is shown. Davis v. State, 461 So.2d 67, 70 (Fla. 1984). As this Court observed in Jackson v. State, 498 So.2d 406, 411 (Fla. 1986), the trial judge is in the best position to monitor the conduct of the attorneys in his presence, and, presumably, is also in the best position to determine the effect of any improper comment upon the jury.

Although Appellant largely deprecates the fact that Judge Sirmons sustained Gorby's objection to this remark, and specifically instructed the jury to disregard it (T 1583), the

fact remains that this court has attached significance to such actions on the part of the trial court. See, e.g., Buenoano v. State, 527 So.2d 194, 198 (Fla. 1988) (witness's gratuitous reference to uncharged criminal conduct on part of defendant improper but, where court sustained objection and instructed jury to disregard comment, denial of mistrial proper; "the curative instruction was sufficient in this case to dissipate any prejudicial effect of the objectionable comment."); Mason v. State, 438 So.2d 374, 377-378 (Fla. 1983) (denial of motion for mistrial not error, in regard to prosecutor's comment during closing argument that defendant would commit further crimes if not convicted; court held, "Also worth noting is that appellant's attorney objected to the statement made during the guilt phase of the trial, the court sustained the objection and the jury was instructed to disregard the comment. While such an instruction alone does not eliminate fundamental error, it is further evidenced that the relatively immaterial comment does not require a reversal.").

While the trial judge sub judice did not affirmatively rebuke the prosecutor for this misstatement, as Appellant maintains that he should have, the State would contend that his giving of a curative instruction to disregard the comment at issue clearly indicated to the jury that the court did not place its imprimatur of approval upon the prosecutor's argument. While, as Appellant correctly notes, there are situations in which a curative instruction will simply be insufficient to remedy the harm, see, e.g., Geralds v. State, 601 So.2d 1157,

1162 (Fla. 1992) (jury told at sentencing of defendant's prior eight convictions which were inadmissible; death sentence reversed), Jackson v. State, 545 So.2d 260 (Fla. 1989) (jury told at retrial of defendant's prior conviction for same offenses; conviction reversed), this case is not comparable. The State would contend that this case is, in all relevant respects, identical to Randolph v. State, 562 So.2d 331 (Fla. 1990).

In Randolph, the State specifically elicited testimony from a state witness at the guilt phase to the effect that the defendant had expressed no remorse "for what he had done." Defense counsel objected and moved for a mistrial, and, as occurred here, the trial court sustained the objection and denied the motion for mistrial; it would not appear, however, that the trial court in Randolph delivered any curative instruction or directed the jury to disregard the reference to the defendant's lack of remorse. On appeal, this Court concluded that the trial court had not abused its discretion in denying the motion for mistrial, and held that the lone reference to the defendant's lack of remorse constituted harmless error. In reaching this conclusion, this Court noted that the judge had specifically directed the prosecutor not to broach the subject again, and that the prosecutor "heeded the court's warning." Randolph, 562 So.2d at 338.

A similar result should obtain here. The instant matter was raised only once, during the prosecutor's initial closing argument at the guilt phase. From its context, it would certainly appear that the prosecutor was not seeking to draw any

adverse inference from any exercise of a constitutional right by Gorby. Cf. Pope v. State, 441 So.2d 1073 (Fla. 1983) (improper to infer lack of remorse from exercise of constitutional rights). Rather, it would appear, from the context of the remarks, that the prosecutor was simply arguing that whoever committed this crime had been "merciless" and without remorse at the time, because the perpetrator had hit the victim in the head no less than seven times with a claw hammer. Immediately prior to the reference to lack of remorse, the prosecutor had said, "He was merciless in the way he killed W.J. Raborn" (T 1582); immediately after denial of counsel's motion for mistrial, the prosecutor continued,

> As I said, the defendant was merciless. When you go back there and look at these photographs I want you to think about the time it took him to inflict this damage. Because we've got a series of blows and three different groupings. Think about that. How long did it take him to pound Mr. Raborn's head in? One - two - three - four - five - six - seven. What was his mental state? What was he thinking? Was there a decision in his mind to take Mr. Raborn's life? You bet there was.

(T 1583-1584).

During his closing argument, defense counsel advised the jury that Gorby had not taken the stand because he (defense counsel) "did not feel that it was necessary." (T 1591). No mention was made of lack of remorse in the second portion of the prosecutor's closing argument at the guilt phase, and, in his instruction to the jury, the judge specifically directed the jury that they were to draw no inference from the defendant's decision not to testify (T 1710).

Under all of these circumstances, the State would contend that this one reference to Gorby's lack of remorse, such reference effectively expunged from the record by the judge's instruction, did not deprive Gorby of a fair trial. The State must disagree with opposing counsel's characterization of the strength of the evidence against Appellant. While a great deal of the State's case against Gorby was circumstantial - including physical evidence linking him to the scene, such as his fingerprints and his handwriting on a note left behind, as well as Gorby's possession of various items belonging to the victim, such as his car and credit cards - there was also direct evidence of guilt. Allan Brown testified that Appellant had told him that he had committed a murder in Florida and had stolen a car and some credit cards (T 792); although Brown was the object of extensive cross-examination, he never wavered from this testimony, and it was up to the jury to afford his testimony the weight which they felt it deserved. Likewise, after the murder, Appellant told another inmate, Jerry Wyche, that he did not like homosexuals and that he had "beat a dude down with a hammer." (T 1302). The jury heard a more than adequate basis to convict Gorby of first-degree murder, and the trial court did not err in denying Appellant's motion for mistrial. Cf. Watts v. State, 593 So.2d 198, 203 (Fla. 1992) (denial of defendant's motion for mistrial not error, in capital case, where State began its closing argument at the guilt phase with irrelevant appeal to jury's sympathy for dead victim); Holton v. State, 573 So.2d 284, 288-289 (Fla. 1990) (reversal not warranted where, during closing

argument at the guilt phase, prosecutor commented upon defendant's "courtroom demeanor" and his "twisted mind"). The instant conviction should be affirmed in all respects.

Appellant also contends that this comment tainted the penalty phase. The State disagrees. It would appear that in all instances in which this Court has reversed a death sentence due to prosecutorial argument involving the defendant's lack of remorse, the testimony or comment has actually taken place during the penalty phase itself, see Robinson v. State, 520 So.2d 1 (Fla. 1988), Jones v. State, 569 So.2d 1234 (Fla. 1990), Colina v. State, 570 So.2d 929 (Fla. 1990); it would further appear, that in all of the above cases, an additional basis for reversal existed. In this case, the prosecutor heeded the judge's admonition and made no reference to lack of remorse at the penalty phase itself, which, it must be noted, took place three days after the conclusion of the trial. There is no reason to think that the jury, in making their advisory recommendation, paid any mind to this one remark made in the prosecutor's closing argument in an earlier phase of the proceedings, which, as noted, the judge had specifically directed them to disregard. This Court has previously found inadvertant or isolated references to a defendant's lack of remorse to constitute harmless error in a capital penalty phase. See, e.g., Valle v. State, 581 So.2d 40, 46 (Fla. 1991); Sireci v. State, 587 So.2d 450, 454 (Fla. 1991) (testimony at penalty phase, to the effect that defendant seemed "rather proud" of murder, impermissible testimony on lack of remorse, but harmless error under facts of case). A similar result is warranted sub judice.

This Court has previously held that in the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant the vacation of the death sentence imposed. See Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985). Inasmuch as Gorby's claim is essentially based upon speculation, it cannot be said that he has made the above showing. As will be discussed more fully infra, the instant sentence of death is premised upon the finding of valid aggravating circumstances, which considerably outweigh the non-statutory mitigation presented. The jury was specifically instructed that the factors which they could consider in aggravation were limited (T 1824), and there is no reason to believe that they did not follow this instruction. See Riley v. State, 413 So.2d 1173, 1174-1175 (Fla. 1982) (even if prosecutorial argument included reference to improper factors at penalty phase, no question that jury was properly instructed and no basis for reversal of sentence, where no showing that jury considered such factors). The instant sentence of death should be affirmed in all respects.

## POINT VI

### APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR, IN REGARD TO A WITNESS'S INADVERTANT REFERENCE TO HIS PRIOR INCARCERATION

Appellant next contends that his convictions must be reversed because the State introduced improper "bad character" and "propensity" evidence. Appellant bases his argument upon the fact that state witness Grice, during examination by the State,

unresponsively stated that the victim had told him that he intended to help Appellant "because he just got out of jail." (T 633); the court sustained defense counsel's objection, denied his motion for mistrial, and specifically instructed the jury to disregard the witness's testimony (T 633-636). As in the prior point, Appellant contends that this curative instruction was insufficient, and maintains that this error was very prejudicial, in that it cast "Gorby as the man who had killed the Good Samaritan." (Initial Brief, pg. 34). The State would contend that reversible error has not been demonstrated.

It is clear from the record that, although the State later asserted a theory of admissibility for this testimony, the prosecutor did not deliberately elicit any testimony concerning Gorby's prior incarceration. Fred Grice was called as a witness because he, and Michael Bennett, had seen Appellant with the victim several hours before the murder. Thus, at trial, Grice specifically identified Appellant as the individual whom he had seen with Raborn in the late afternoon of May 6, 1990 (T 631). Grice stated that he had seen the two together in Raborn's vehicle, until Appellant had gotten out and gone in to purchase something at a convenience store (T 631-632). The prosecutor asked the witness if the victim had indicated that he was trying to help Gorby, and when the witness started to relate what Raborn had said, defense counsel objected on hearsay grounds; the objection was sustained (T 632). Grice then described Gorby's physical appearance, i.e., "kind of scroungy looking", and the prosecutor asked what happened "after you got finished talking to Jay [the victim]" (T 633). Unresponsively, the witness answered,

> Well, Jay got where he, like I said, he told me he needed to go and he needed to help this fellow out because he just got out of jail.

(T 633).

Defense counsel immediately objected and moved for a mistrial (T 634). Judge Sirmons denied the motion for mistrial, and specifically directed the witness to confine his answers to the questions asked (T 635-636). The judge then delivered the following curative instruction:

> Members of the jury, at this time I'll instruct you to disregard the last comment of the witness. That was not in response to the questions asked by the lawyer. You're not to consider that, any comment made by the witness that's not responsive to the lawyer's question.

(T 636). This matter was never raised again at trial, either through subsequent testimony or prosecutorial argument; of course, at the penalty phase, the jury was properly advised of Gorby's prior convictions, in relation to the appropriate aggravating circumstance.

As in the prior point, the issue is whether this unresponsive answer of the witness so tainted the proceedings that Gorby was denied a fair trial. See Duest, supra; Buenoano, supra. The State would suggest that it did not. Although this Court, in Czubak v. State, 570 So.2d 925 (Fla. 1990), reversed the defendant's conviction when a state witness revealed that Czubak was an escaped convict, this Court has previously affirmed convictions in circumstances comparable to those sub judice. Thus, in Ferguson v. State, 417 So.2d 629, 642 (Fla. 1982), this Court held that a witness's reference to the defendant's prior

incarceration had not been so prejudicial as to merit a mistrial; in contrast to the situation in this case, it would not appear that the court in Ferguson gave a curative instruction to the jury. This Court confronted a similar claim of error in Johnston v. State, 497 So.2d 863 (Fla. 1986), when a state witness similarly offered an unresponsive answer to a question, and stated that the defendant had told him that he was scared because "he had already gone to jail for two years for something." Id. at 869. As occurred here, the trial court sustained the defendant's objection and denied a motion for mistrial; the court, again as here, delivered a curative instruction. This Court specifically held,

> Having carefully reviewed the record, we conclude that any alleged prejudice which may have resulted from a reference to prior incarceration was fully alleviated by the curative instruction.

Id. In reaching this conclusion, this Court cited with favor Williams v. State, 354 So.2d 112 (Fla. 3rd DCA 1978), in which that court had rendered a similar holding, to the effect that the judge's curative instruction had sufficiently alleviated any harm caused by a witness's "inadvertant" reference to the defendant's previously having been in prison. Finally, in Harmon v. State, 527 So.2d 182 (Fla. 1988), this Court likewise concluded that a mistrial had not been required when a witness irrelevantly testified that he had previously met the defendant "while in jail". Citing to Johnston, this Court held that any prejudice had been "alleviated by the curative instruction." Harmon, 527 So.2d at 186.

Thus, contrary to the implications of the Initial Brief, it is clear that the giving of a curative instruction in regard to claims of error of this nature has been regarded as a significant factor by this Court in the past and that, under Johnston and Harmon, such instruction can alleviate the prejudice arising from the jury's finding out that the defendant has previously been incarcerated. The State would suggest that the curative instruction given sub judice was forceful enough to impress upon the jury that they were not to consider the unresponsive testimony of Fred Grice, and yet not so overly specific so as to compound any error. As noted in Point V, the evidence against Gorby was not as insubstantial as opposing counsel posits, involving both direct and circumstantial evidence of his responsibility for this murder. Under all of the circumstances of this case, the judge did not abuse his discretion in concluding that Gorby could still receive a fair trial, especially given the curative instruction. See Johnston, supra; Harmon, supra. Accordingly, denial of Appellant's motion for mistrial was not error. See also Davis v. State, 461 So.2d 67, 70 (Fla. 1984) (improper reference to possibility of polygraph examination no basis for mistrial, where "trial court's curative cautionary instruction to the jury cured any problem with this witness's inadvertant reference."); Marshall v. State, 17 F.L.W. S459 (Fla. July 16, 1992) (wrongful admission of evidence concerning fact that gambling stubs found in defendant's cell, as well as fact that defendant's nickname was "Uzi" harmless error). Finally, Appellant's suggestion that the instant testimony was

prejudicial because it conveyed to the jury the fact that the victim had been a "good samaritan" is not well-taken; it was defense counsel who elicited testimony, on cross-examination of Mary Zagorsky, to the effect that the victim had picked up persons at the Rescue Mission to do odd jobs for him (T 719-721). The instant convictions should be affirmed in all respects.

## POINT VII

### APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR, IN REGARD TO THE DENIAL OF HIS MOTION FOR MISTRIAL DURING THE TESTIMONY OF ROBERT JACKSON

Gorby next contends that his convictions must be reversed because, during the testimony of Robert Jackson, the witness stated that several days before the murder, he had had a fight with Appellant and that Appellant had attacked him in the car while he was driving (T 543). Defense counsel objected to this testimony and moved for a mistrial (T 544). Judge Sirmons sustained the objection, denied the motion for mistrial, and gave a curative instruction, specifically directing the jury to disregard the testimony (T 544-545). On appeal, Appellant again contends that this testimony constituted improper "collateral crime" evidence which affirmatively prejudiced him; likewise, Gorby maintains that the court's curative instruction was too "tepid" to accomplish its purpose (Initial Brief, pg. 36). Again, the State disagrees.

As in the prior points, the issue before this Court is whether the trial court abused its discretion in denying defense counsel's motion for mistrial, and in concluding that the

curative instruction had been sufficient to alleviate any prejudice from the witness's unresponsive answer. Gorby's burden is to show that Robert Jackson's reference to a prior altercation between himself and Jackson was so prejudicial as to render the trial below fundamentally unfair. Duest, supra. Gorby has failed to meet that burden, and, as in the prior points, the trial court's giving of a curative instruction alleviated any prejudice resulting from the victim's remark. Cf. Johnson, supra; Buenoano, supra; Mason, supra.

The record indicates that Robert Jackson was the State's first witness and that it was he who drove Gorby to Panama City from Texas, by way of Tennessee. Jackson testified, without objection, that during the course of the trip, he decided that he did not want Gorby riding with him anymore (T 541). Nevertheless, Jackson drove Appellant to Panama City, and, apparently, checked into a motel with him on May 1, 1990 (T 542). The two then went to the bar next door where Gorby "became familiar" with a young woman whom he met there (T 542). Gorby asked Jackson to give the woman a ride home and Jackson dropped off Appellant and the woman at "a dark place" (T 543). Jackson stated that he and Gorby did not part "in a very friendly fashion" (T 543). He then went on to suggest that they had had a fight, and that he was "attacked in the car" (T 543). That was the last time that Jackson saw Gorby, prior to the murder.

No reasonable possibility exists that the jury in this case convicted Gorby of first degree murder because they found out that he and Jackson might have scuffled, and any error in this

regard must be regarded as harmless beyond a reasonable doubt under State v. DiGuilio, supra. Jackson's testimony was fragmentary in the extreme, and from its context, it is likely that the jury simply surmised that the two had had a falling out over the attentions of the young woman at the bar. As the prosecutor correctly noted, the relationship between Gorby and Jackson, including any hostility, was relevant, especially given the fact that Gorby later gave a statement in which he sought to implicate Jackson for these crimes (T 1202-1205); during this statement, Gorby gave a different account of the altercation between himself and Jackson, claiming that Jackson had pulled a gun on him after they had left the lounge and had told him that he would kill Gorby if he had to (T 1204). In Grossman v. State, 525 So.2d 833, 837 (Fla. 1988), this Court held that the State had properly admitted evidence that the defendant had threatened to kill another individual who participated in the offense, on the grounds that such evidence was relevant to the witness's "motivation in notifying the police." A similar result should obtain here. See also Heiney v. State, 447 So.2d 210, 212-214 (Fla. 1984) (evidence that defendant shot confederate in argument prior to murder relevant to show entire context out of which criminal conduct arose); Jackson v. State, 522 So.2d 802, 806 (Fla. 1989) (evidence that defendant had earlier committed assault upon unnamed person prior to meeting victim relevant to show entire context out of which criminal conduct arose).

To the extent that this Court disagrees as to relevancy, the State would note that, in gauging the extent of any harm, it is

important to note that no specific collateral "crime" is even allegedly present. In Malloy v. State, 382 So.2d 1190 (Fla. 1979), the defendant contended on appeal that it had been error for the court to have admitted testimony concerning the fact that he had told two persons to "shut up" and had begun to pull out his rifle, when they did not do so; this Court held that the circumstances of the incident did not "establish all the elements of a crime" and that, consequently, "the question of the admissibility of prior criminal actions is not present." Id. at 1192. Additionally, this Court has found the erroneous admission of collateral crime evidence to constitute harmless error, under circumstances comparable to those sub judice. See, e.g., Smith v. State, 424 So.2d 726, 731 (Fla. 1982) (evidence that defendant stole rifle unrelated to offense irrelevant, but harmless); Jackson, supra (evidence that defendant possessed weapons and bullet proof vests wrongfully admitted, but harmless error); Bryan v. State, 533 So.2d 744, 747 (Fla. 1988) (evidence concerning defendant's prior bank robbery not relevant, but harmless error). In conclusion, whether considering the errors alleged in the instant point on appeal, as well as those in Points V and VI, supra, in isolation or cumulatively, see Jackson v. State, 575 So.2d 181, 189 (Fla. 1989), it is clear that reversible error has not been demonstrated. The instant convictions should be affirmed in all respects.

## POINT VIII

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE TRIAL COURT'S ADMISSION OF A VIDEOTAPE OF THE SCENE AND CERTAIN PHOTOGRAPHS

As his next point on appeal, Gorby contends that he is entitled to a new trial because the State introduced "numerous photographs of the deceased depicting the wounds inflicted and the surroundings in which the murder occurred," as well as a videotape of the scene (Initial Brief, pg. 37). Appellant argues that the court would not have erred if it had admitted either the photographs or the videotape, but that the admission of both was error. It is apparent that, of the two, Gorby finds admission of the videotape to be the more prejudicial, in that he devotes most of this point on appeal to attacking it, on the basis that the tape contained depictions of irrelevant matters (Initial Brief, pg. 37-39). The State suggests that reversible error has not been demonstrated, in that the record clearly indicates that Judge Sirmons was cognizant of the dangers of overkill in this regard and took steps to prevent the very result complained of by Appellant.

Prior to the admission of any photographs of the scene, the judge required the State to proffer all photographs to him in a conference attended by defense counsel (T 1073-1101). The State originally intended to offer seventy-three (73) photographs of the victim's residence. During the course of the proffer, however, the State withdrew a number of these photographs, due to the objections of defense counsel (T 1073-1101); the court also sustained defense counsel's objection to a certain photograph (T

1088), and, in ruling upon defense counsel's objections, repeatedly directed the State to demonstrate that the particular photograph at issue was not duplicative of another (T 1077-1080, 1082, 1083, 1085, 1086, 1096-1097, 1099). At one point, the FDLE lab analyst, who was present, also testified as to the difference between certain photographs (T 1092-1095). A similar proffer was held prior to the testimony of the medical examiner, at which all parties examined the autopsy photographs and slides which the witness proposed to use (T 1314-1366). The medical examiner, Dr. Sybers, was present during this proffer, and testified, at times, as to the purposes for which he would use each exhibit (T 1315-1365). During this proffer, the court sustained many of defense counsel's objections to certain physical exhibits (T 1320, 1322, 1324, 1325, 1327, 1329, 1330, 1333, 1335, 1339, 1360). The primary thrust of defense counsel's objections was the contention that certain photographs or slides were duplicative of one another, and the court, again, constantly pressed the State, and the witness, to particularly justify the need for each of the individual exhibits.

The videotape was similarly proffered to the court prior to its admission (T 1173-1180), and the police officer who shot the video, Investigator Ciota, was likewise present, and testified, at times, as to the significance of various portions of the videotape (T 1175-1180). In viewing the videotape, the judge paid close attention to those portions of the exhibit which showed the victim's body, stating, "I need to see that in light of the other photographs of the victim being shown to the jury."

(T 1175). At the conclusion of the proffer, defense counsel objected to the admission of the videotape, on the grounds that it contained "gruesome details" and also "duplicated" the photographs (T 1179-1180). Judge Sirmons overruled the objection, finding:

> THE COURT: I'll note the defense objection, but find that the cumulative effect of the video is not duplicitious to the photographs and that any - their probative value outweighs any prejudicial impact that may be attributable to the video by virtue of showing the decedent, the victim, in a - I note that the video did not dwell at length on close ups of the victim, just a shot where the victim was located and some focusing in on specific instances of the knot, the blood smear pattern, and the location of the cord, and those items were not necessarily covered in the same way as the photographs have shown. And I'll overrule the objection and allow the video in.

(T 1180).

The judge's finding, to the effect that there was no impermissible overlap between the photographs and the videotape, and that each showed matters which were not on the other, is supported by the record; likewise, the judge's finding that the victim's body was not displayed "at length" on the videotape is an accurate statement. Cf. Gardner v. State, 480 So.2d 91, 93 (Fla. 1985) (appellate court should defer trial court's findings of fact). It is, of course, well established that admission of photographic evidence is within the discretion of the trial court, and that a court's ruling thereon will not be disturbed on appeal unless a clear abuse has been shown. Duest, 462 So.2d at 449. In light of these standards, it is clear that Gorby is entitled to no relief in this regard. As in Henry v. State, 586

So.2d 1033, 1036 (Fla. 1991), "the court carefully limited the admission of photographs to only those relevant to the state witness' testimony." Likewise, as in Davis v. State, 586 So.2d 1038, 1041 (Fla. 1991), where both a videotape showing the victim's wounds and the scene of the crime, and a photograph of the victim, were admitted, the photos admitted sub judice depicted matters not visible on the videotape and vice versa.

The videotape in this case depicts both the inside and outside of the victim's residence. It tracks, room by room, the interior of the home, and, as Judge Sirmons expressly noted, the amount of time devoted to the victim's body is relatively brief; the body, in any event, was lying face down. While Appellant apparently believes that allowing the jury to view all of Raborn's home was somehow prejudicial, in that the tape included depictions of such "irrelevant" and "prejudicial" matters, as "a child's doll placed on a pillow on a bed in the trailer" (Initial Brief, pg. 33), it is difficult to seriously credit such contention as a basis for reversal. It was appropriate to show the jury what Raborn's home looked like, both inside and out; as to the exterior, it was appropriate to show the location of the tool shed, from which the murder weapon, i.e., the claw hammer, might have been taken. As to the interior, it was relevant for the jury to see the victim's bedroom (which had been ransacked), the kitchen (in which Gorby's fingerprint was found), the hallway (in which the murder was actually committed), and the bathroom (into which Gorby dragged the body). The location of the bloodstains on the hall carpet and the splatters on the air

conditioning duct were important for the jury to see, given the testimony of the blood splatter analyst, Jan Johnson (T 1285-1296). Inasmuch as the videotape depicted relevant evidence, whose probative value far outweighed any prejudice, the trial court did not abuse its discretion in admitting it. Davis, supra.

The trial court likewise did not abuse its discretion in admitting the photographs at issue, either. The photographs were, as the court below correctly found, not cumulative to the videotape, in that they often focused upon details of the victim's residence which the tape had not specifically depicted or had not depicted in sufficient detail; the tape, of course, had not included any autopsy shots of the victim's body, which would clearly have depicted the number and appearance of the wounds inflicted. While it certainly can be said that the sight of the victim's battered body was not an appealing one, as this Court held in Henderson v. State, 463 So.2d 196, 200 (Fla. 1985), "those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." The number of photographs depicting the victim's wounds was not excessive nor was their content so inflammatory that they lost their relevance. Compare Czubak, supra (gruesome photographs of victim's decomposed and discolored body improperly admitted, where inflammatory nature outweighed any relevance) with Nixon v. State, 572 So.2d 1336, 1342-1343 (Fla. 1990) ("extremely gruesome" photographs of victim's charred body properly admitted, where such relevant to prosecution). Accordingly, reversible

error has not been demonstrated. See also Thompson v. State, 565 So.2d 1311 (Fla. 1990); Engle v. State, 438 So.2d 803 (Fla. 1983). The instant convictions should be affirmed in all respects.

## POINT IX

### REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE FACT THAT GORBY WAS DIRECTED TO DISPLAY HIS TATTOOS IN OPEN COURT

As his final attack upon the convictions, Gorby contends that the trial court erred in directing him to display his tattoos in open court. The record reflects that the prosecutor asked the court to direct Gorby to do so, so that state witness Cleo Calloway could state whether or not those tattoos were comparable to the ones which he had seen on the individual who had sold him the victim's car (T 997). Defense counsel objected to this proposal, contending that such would be "highly prejudicial," and further noting that the witness previously failed to mention the tattoos and that there was "no positive identification link." (T 997-998). The court overruled defense counsel's objection, and, during the testimony of Calloway, Gorby displayed his tattoos; the witness stated that he recognized the tattoo in the shape of a tiger on Appellant's arm (T 998-1002).

Appellant argues on appeal that the judge's ruling was error, and that his Fifth Amendment right against compelled testimony is implicated. Appellant also argues that this Court's opinion in Macias v. State, 515 So.2d 206 (Fla. 1987), "controls this issue", although opposing counsel urges this Court to re-examine its holding and "adopt Justice Barkett's dissent."

(Initial Brief, pg. 40). The State would contend that Gorby's claim is not preserved for review, and is otherwise without merit.

The record in this case indicates that, while defense counsel did object to Gorby's displaying his tattoos in open court during the testimony of Cleo Calloway, counsel interposed no objection on constitutional grounds at this time (T 997-998). It is well established that, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception or motion below. See, e.g., Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982); Tillman v. State, 471 So.2d 32, 35 (Fla. 1985). An objection made on one basis at trial will not preserve a different claim for appellate review. Bertolotti v. State, 565 So.2d 1343, 1345 (Fla. 1990). Accordingly, the instant claim of error was not preserved for review.

To the extent that this Court disagrees, the State would still contend that this claim is without merit, and that even the dissenting opinion in Macias is of no benefit to Gorby. In Macias, the issue before this Court was whether, in a prosecution for drunk driving, a defendant could be compelled to perform a roadside sobriety test in open court. A majority of this Court held that the defendant's rights under the Fifth Amendment were not violated thereby. Macias, 515 So.2d at 209. Justice Barkett, in her dissent, disagreed with this conclusion, on the grounds that the in-court demonstration by the defendant had to be considered compelled testimony. Justice Barkett, however,

drew a distinction between a defendant having to perform a demonstration of this nature before a jury, and a defendant compelled to exhibit some "immutable physical characteristic", and noted that Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), specifically authorized a defendant's display of objective physical evidence. Macias, 515 So.2d at 209 (Barkett, J, dissenting). The display of a tattoo on the defendant's body is the exhibitation of an immutable physical characteristic and involves objective physical evidence. Thus, even were this Court to adopt the dissent in Macias, Appellant would still be entitled to no relief. See also United States v. Wade, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967). Reversible error has not been demonstrated, and the instant convictions should be affirmed in all respects.

## POINT X

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE SENTENCER'S FINDING THAT GORBY HAD A PRIOR CONVICTION FOR A CRIME OF VIOLENCE, UNDER §921.141(5)(b)

As his first attack upon his sentence of death, Appellant contends that Judge Sirmons erred in finding that the aggravating circumstance pertaining to prior conviction of a violent crime, under §921.141(5)(b), Fla.Stat. (1989), applied in this case, in that the State allegedly failed to sufficiently link Gorby to the Texas prior conviction admitted. In sentencing Appellant to death, the judge found that four (4) aggravating circumstances had been established - that Gorby had been under sentence of imprisonment at the time he committed this murder,

§921.141(5)(a), Fla.Stat. (1989); that Gorby had previously been convicted of a felony involving violence, §921.141(5)(b), Fla.Stat. (1989); that the murder had committed for pecuniary gain, §921.141(5)(f), Fla.Stat. (1989), and that the homicide had been especially heinous, atrocious or cruel, §921.141(5)(h), Fla.Stat. (1989) (R 2622). On appeal, Appellant attacks only the judge's findings in aggravation as to the prior conviction and as to the heinous, atrocious and cruel aspect of the murder. See Points X and XII, infra. Appellee would contend that the reversible error has not been demonstrated in regard to the instant sentence of death.

The record indicates that, prior to trial, the State filed documents pertaining to Gorby's prior convictions (R 2254-2333). Included among these documents were several from Texas, including an indictment, rendered on June 2, 1987, charging one Freddie Banks with one count of aggravated robbery with a deadly weapon (R 2309), as well as plea documents, reflecting a plea of guilty to the lesser offense of robbery threats on August 18, 1987 (R 2310-2314); also included was a commitment form, representing a sentence of eight (8) years, imposed on August 18, 1987, in Case No. 87-CR-2102 in the One Hundred and Eighty Seventh District Court, Bexar County, Texas (R 2315-2316). The State also introduced an indictment for burglary, rendered by the grand jury of Bexar County in Case No. 88-CR-5158, on November 16, 1988, in the name of Olen Clay Gorby; this indictment contains the following allegation:

> Before the commission of the offense alleged above, on the 18th day of AUGUST, A.D., 1987,

> in Cause Number 87-CR-2101, in BEXAR COUNTY, TEXAS, the Defendant was convicted of the felony ROBBERY THREATS; against the peace and dignity of the State

(R 2299). Appellant pled guilty to this offense, and was sentenced to fifteen (15) years incarceration on December 4, 1988 (R 2300-2306).

At the beginning of the penalty phase on July 5, 1992, a charge conference was held, at which the court decided which aggravating circumstances would be presented to the jury (T 1728-1751). Defense counsel objected to the court instructing the jury on this aggravating circumstance, not because counsel contended that a prior conviction did not exist, but rather because, allegedly, the State had failed to prove that, under Texas law, the prior robbery had involved violence (T 1731-1732). The court overruled this objection, when the State pointed out that it had a certified copy of a conviction for robbery by threat from Texas (R 1732). At the conclusion of the charge conference, the court announced the following ruling:

> As a preliminary matter, there's been a question raised concerning the identity of Mr. Gorby as it pertains to the prior conviction out in Texas and the court's determined that instead of going through a process of exposing the jury to testimony concerning other convictions of Mr. Gorby, which would involve burglary, I believe, that the court will allow the State to present to the court evidence to show to the court that the records that they wished to introduce concerning the prior conviction in Texas in the name of --
>
> MR. MEADOWS: Freddie Banks.
>
> THE COURT: -- Freddie Banks is in fact a conviction that involves Mr. Gorby and then the court will instruct the jury the court's

> determined that the defendant is the same person as the Freddie Banks shown in that indictment.

(T 1753-1754).

Defense counsel interposed no objection to this ruling, and the prosecutor stated that he would proffer records from the Texas Department of Criminal Justice, which included the indictment for burglary under the name of Olen Gorby which made reference to the prior robbery under the name of Freddie Banks (T 1754).[5]

The State also proffered the testimony of Captain McKeithen of the Bay County Sheriff's Department (T 1754-1757). The witness testified that he had run a criminal history check on Gorby, and had discovered that he had used aliases in the past (T 1754-1755). McKeithen testified that Gorby's original booking sheet in the Bay County Sheriff's Office listed the alias of Freddie Banks (T 1756). The witness further stated that he had examined the records from the Texas Department of Corrections, and that such records reflected the name of Freddie Leon Banks "as being the same person as Olen Gorby." (T 1756). Defense counsel interposed a running objection to this testimony, on the basis that such constituted hearsay and on the grounds that the documents presented were not properly authenticated; counsel acknowledged that the documents had the seal of the court upon them, but complained that there was no "certificate with the seal on it saying that the person who put the seal on those is the

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[5] These documents are identical to those introduced pretrial, including the burglary indictment which alleged that Gorby had previously been convicted, as Freddie Banks, in Case No. 87-CR-2102, in Bexar County, Texas. These documents have been supplied to this Court in a supplemental record (See Supplemental Record).

person who that purports to be." (T 1755). Judge Sirmons overruled this objection, and directed that State's Composite Exhibit #1 be admitted (T 1755) (See Supplemental Record).

At the conclusion of McKeithen's testimony, the judge made the following finding:

> The court will find that the state has shown looking at these records the court will note the indictment issued to Mr. Gorby and refers to on the second page, Case No. 87 CR 2102 in Betzar (phonetic) County, Texas the defendant was convicted of the felony of robbery directed against the peace and dignity of the state, that that case number is shown as 87 CR 2102, we have a copy of the indictment, which is in the name of Freddie Leon Banks. And supporting documentation. And the State has shown that Freddie Leon Banks and Olen Clay Gorby are one and the same person for purposes of this conviction being used against Mr. Gorby in this particular case.

(T 1757-1758).

The judge announced that he would instruct the jury that the individual referred to as Freddie Leon Banks in the judgment of conviction was in fact the defendant, Olen Clay Gorby (T 1758). Defense counsel's only objection to all of this was that the jury's learning that Appellant had used an alias would be prejudicial; this objection was overruled (T 1758). At the penalty phase itself, the State announced that it would stand on the case previously submitted, as well as State's Exhibits #1 & 2 for the penalty phase; the judge then advised the jury, without objection, as to State's Exhibit #2, that the name of Freddie Banks on the judgment form "is the defendant Olen Clay Gorby," as they were "the same individual." (T 1761).

Following the jury's return of an advisory sentence of death, the court ordered the preparation of a presentence investigation report, as well as a guidelines scoresheet for the non-capital offenses (T 1835). At the sentencing hearing of August 30, 1991, defense counsel made the following representation:

> MR. KOMAREK: May I also note, Judge, at this point if it's convenient that both myself and my client have reviewed the presentence investigation report and have no objections or amendments to offer.

(T 2734). The scoresheet prepared for use in sentencing Gorby for his non-capital offenses lists a prior conviction for the crime of robbery (R 2632). The presentence investigation report indicates that Gorby has used no less than eleven (11) aliases, including Freddie Leon Banks, and includes among Gorby's prior convictions the conviction for robbery by threat in Bexar County, Texas, Case No. 87-CR-2102 on August 18, 1987 (See Presentence Investigation Report; See Appendix).

As noted, Appellant contends on appeal that the State failed to prove the existence of this aggravating circumstance beyond a reasonable doubt; Appellant also argues that it was error for the court to have instructed the jury that Freddie Banks and Gorby were one and the same, in that identity was a matter of fact for the jury to resolve (Initial Brief, pg. 42). The State would contend that Appellant's point on appeal in regard to the court's instruction to the jury is not preserved for this Court's review. Defense counsel below objected to this instruction, only on the grounds that it was prejudicial for the jury to learn that

Appellant had used an alias (T 1758). It is well established that a defendant cannot assert one ground as a basis for objection at trial, and another on appeal. See Steinhorst, supra; Bertolotti, supra. Accordingly, this portion of Gorby's claim is procedurally barred. See also Mann v. State, 17 F.L.W. S571 (Fla. August 27, 1992) (defendant could not complain on appeal that trial court instructed jury, as matter of law, that prior conviction involved violence, where defendant failed to interpose objection on such basis at time of trial).

Appellee would also note, as to Gorby's primary contention, that Appellant has never expressly contended that he is not in fact Freddie Banks or that the 1987 Texas robbery conviction is not, in fact, one of his own prior convictions. Defense counsel's objection below, to the testimony of Captain McKeithen, was that such testimony was hearsay. Such objection, of course, is unavailing, in that §921.141(1), Fla.Stat. (1989), specifically provides that hearsay is admissible at a capital sentencing proceeding, as long as the defendant has an opportunity to rebut it. Gorby had such opportunity sub judice, but essentially failed to rebut it. Captain McKeithen testified that his study of records from both Texas and Florida indicated that Appellant had used the alias, "Freddie Leon Banks", and that the 1987 Texas conviction for robbery was a prior conviction of Olen Gorby's. Appellant adduced nothing to call into question the reliability of this testimony, and it was not error for the judge to have accredited it. Further, the judge's finding that the State proved identity, through the documents from Texas, is

supported by the record. The indictment charging Gorby with burglary in 1988 specifically alleges that he had been previously convicted of robbery by threat in Bexar County, Texas, on August 18, 1987, in Case No. 87-CR-2102, under the name of Freddie Leon Banks (R 2298-2306; 2309-2316; Supplemental Record). While it might, perhaps, have been better for the State to have adduced more specific documentation from Texas, such as was utilized in Gorham v. State, 454 So.2d 556 (Fla. 1986), such omission was not fatal. The testimony and documentary evidence established beyond a reasonable doubt that Olen Gorby had a prior conviction for a crime of violence.

The State would also contend that the prosecution below could simply have relied upon the PSI in establishing this aggravating circumstance. As noted, the presentence investigation report in this case lists as a prior conviction of Appellant's a robbery in Texas in Case No. 87-CR-2102 on August 18, 1987; defense counsel interposed no objection to the PSI and challenged none of its contents. In Gorham, this Court found this omission significant,

> . . . We note that the defendant was provided a copy of the presentence investigation the trial court considered before sentencing the defendant. The North Carolina conviction was included in the report, and the defendant neither voiced any objection to its being considered against him nor took issue with it.

Id. at 560.

This approach is comparable to that utilized by this Court in Brown v. State, 473 So.2d 1260 (Fla. 1985). In Brown, the defendant contended that the State had failed to establish that

he had in fact been on parole at the time he committed the homicide at issue, so as to qualify under §921.141(5)(a). Brown contended that the factual support for the finding was insufficient, inasmuch as it was "based on a presentence investigation report rather than direct documentary evidence." Brown, 473 So.2d at 1266. This Court held,

> Appellant's argument that his having been on parole could only properly be established by court or corrections documents is also without merit. The purpose of the requirement that presentence investigation reports be supplied to capital defendants before sentencing is to enable them to explain or refute any inaccurate or misleading information contained in the reports. See Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Appellant did not and does not now dispute the fact that he was on parole at the time of the offense. It was proper for the sentencing judge to rely on information from the presentence investigation report in finding the aggravating circumstance.

Id. The reasoning of both Brown and Gorham is applicable sub judice, and the sentencer did not err in finding that the aggravating circumstance pertaining to prior conviction of violent crime applied to Gorby. The instant sentence of death should be affirmed in all respects.

## POINT XI

### THE SENTENCER'S FINDING THAT THE INSTANT HOMICIDE WAS HEINOUS, ATROCIOUS OR CRUEL, UNDER §921.141(5)(h), WAS NOT ERROR

Appellant next contends that the trial court erred in finding, as an aggravating circumstance, that the homicide had been especially heinous, atrocious or cruel, under §921.141(5)(h), Fla.Stat. (1989); Appellant also contends that,

because the evidence was insufficient, it was error for the court to have even instructed the jury on this aggravating factor. Gorby contends that there was insufficient evidence of the victim's suffering to justify this finding, and that the victim may not have known of his own impending death. The State disagrees.

In his sentencing order, Judge Sirmons included a lengthy and detailed finding as to this aggravating factor:

> 4. The crime for which the Defendant, Olen Clay Gorby, is to be sentenced is especially heinous, atrocious or cruel. The evidence establishes that the victim was attacked by the Defendant while the victim was in the hallway of his home. The victim received seven (7) blows to his head with a claw hammer. One (1) blow was near the front top of the victim's head, one (1) blow was on the left back of the victim's head and five (5) blows were to the right side of the victim's head. Several of these blows were sufficient to punch holes through the victim's skull and cause fracture lines to the skull. The medical examiner's testimony establishes that any one of these blows could have been sufficient to cause the victim's death by hemorrhage to the surface of the victim's brain. The victim also had abrasions on the nose, left cheek and left eye which were not counted in the blows to the head. The physical evidence from the blood spatters indicates that several blows to the victim's head were delivered when the victim was lying on the floor in the hallway. This was not an instantaneous death. The medical examiner's testimony, based upon the amount of blood in the hallway, indicates the victim was alive in the hallway lying down for at least ten to fifteen minutes before being moved to the bathroom. The medical examiner indicated that the victim <u>could</u> have been conscious after the first <u>or</u> second blow (emphasis supplied) but there is no way to tell how much time passed between blows being delivered to the victim's head and exactly when the victim became unconscious. The victim was found with a shirt with one knot

> wrapped around his neck with a phone cord containing a complex pattern of knots tied around his neck over the shirt. Over the top of all of that was a red extension cord around the victim's neck which was looped through a handle of a drawer in the bathroom where the victim's body was found and extending into the hallway. All of these items were tied tightly around the victim's neck but none were tied tightly enough to produce strangulation. There is nothing from the physical evidence to determine when these items were placed around the victim's neck in relation to when the blows were delivered. Other than the physical evidence, the only evidence as to what happened at the time of death is from the defendant, Olen Clay Gorby's, perspective in a statement made by the defendant to his cellmate that "he didn't like homosexuals and he beat the dude down with a hammer". These factors, plus the victim's lack of mobility due to his bout with polio, support a finding that this killing indicates a consciousless (sic) and pitiless regard for the victim's life and this homicide was especially heinous, atrocious or cruel.

(T 2622-2624).

The State suggests that the judge's findings are more than adequately supported by the record, and that his finding of this aggravating circumstance is in accordance with Florida law.

Initially, Appellant's claim that it was error for the judge to have even instructed the jury on this aggravating factor (Initial Brief, pg. 48) is without merit; Appellant's claim that the instruction itself was unconstitutionally vague is presented in Claim XII, infra. There was unquestionably enough evidence to support the submission of this factor to the jury. See Haliburton v. State, 561 So.2d 248, 252 (Fla. 1990) (evidence sufficient to present jury question as to this aggravating factor). This case is distinguishable from either Jones v.

State, 569 So.2d 1234 (Fla. 1990), or Omelus v. State, 584 So.2d 563 (Fla. 1991), in which this aggravating factor was insufficient as a matter of law. Accordingly, error has not been demonstrated in this regard.

As to the finding of this aggravating circumstance by the sentencing judge, Appellant's primary concerns in this regard center around an alleged lack of direct evidence that the victim was aware of his impending death, in that Raborn may have been rendered unconscious after the first hammer blow to the skull. It is true that, in this case, there is no direct evidence of how long the victim was conscious and, in contrast to a number of other cases, it would not appear that the medical examiner expressly identified any wounds on the victim's body as "defensive wounds"; there were, however, as noted by Judge Sirmons, abrasions on the victim's face (R 2623), as well as abrasions on the inside of the left forearm or elbow and on the right knee (T 1382). As this Court observed in Gilliam v. State, 582 So.2d 610, 612 (Fla. 1991), in arriving at a determination of whether an aggravating circumstance has been proven, the trial judge may utilize a "common-sense inference from the circumstances." Significantly, the aggravating circumstance at issue in Gilliam was the heinous, atrocious or cruel circumstance, and, as here, the defendant contended that the State had adduced insufficient proof that the victim had been conscious during her ordeal; likewise, in Gilliam, the medical examiner could not say whether the victim had been conscious at the time that various wounds had been inflicted. This Court held

that the aggravating circumstance had been proven, and, in reaching such conclusion, looked to the number of wounds inflicted, as well as the fact that a scream had been heard.

Here, there obviously was no evidence of any scream, but a common-sense inference from the circumstances supports the finding that Mr. Raborn was conscious during at least part of his ordeal, that he suffered and that he was aware of his impending death. There were, as the medical examiner testified, seven (7) separate blows to the head with the claw hammer (T 1380); apparently, at one point, the hammer got stuck in the victim's scalp and tore the skin (T 1381). Dr. Sybers said that, although he could not say which blow had been inflicted when, he suggested that not all of the blows had been inflicted at the same time, inasmuch as five (5) were inflicted in something of a circle on the right side of the head, whereas there was a single blow to the top of the head and one to the left rear side of the head (T 1392). Apparently, some of the wounds were inflicted at different angles (T 1380), and it should be noted that the blood spatter expert testified that the victim's head had been nine inches from the floor at one point (T 1293). According to Dr. Sybers, the victim would have been bleeding copiously after the second or third blow, but not after the first (T 1374). While the medical examiner testified that the various cords tied around the victim's neck had not caused strangulation (T 1377), the State suggests that these cords could have been used to immobilize Mr. Raborn, thus explaining the lack of more obvious defensive wounds. As noted by the judge, Raborn was a cripple,

and the polio from which he suffered had resulted in the loss of muscle mass in his thighs, waist and legs (T 1385); at the time that he was found, a phone cord, a large industrial extension cord and his own shirt were tied around his neck (T 1377).

The record in this case clearly indicates that the victim was immobilized, rendered helpless and then brutally beaten to death; the abrasion on the inside of his left forearm can be considered a "defensive wound". This murder was conscienceless, pitiless and unnecessarily torturous to the victim. See Richardson v. State, ___ So.2d ___ (Fla. October 8, 1992); Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992). Olen Clay Gorby is not the first death row inmate whose weapon of choice was a claw hammer, and this Court has consistently upheld the finding of this aggravating factor under comparable circumstances. See Penn v. State, 574 So.2d 1079 (Fla. 1991); Bruno v. State, 574 So.2d 76 (Fla. 1991) (crow bar); Cherry v. State, 544 So.2d 184 (Fla. 1989) (victim beaten to death with hand, fist or blunt instrument); Lamb v. State, 532 So.2d 1051 (Fla. 1988); Muehleman v. State, 503 So.2d 310 (Fla. 1987) (victim beaten on head with frying pan, partially strangled and suffocated with plastic newspaper wrapper; prosecutor's reference to "feeble, sickly, ninety-seven year old man" not improper as such "bore on the aggravating circumstances set out in 921.141(5))"); Wilson v. State, 493 So.2d 1019 (Fla. 1986) (victim beaten with hammer before being shot); Heiney v. State, 447 So.2d 210 (Fla. 1984). Judge Sirmons' finding of this aggravating circumstance was not error, and the instant sentence of death should be affirmed.

To the extent that this Court disagrees, Appellee would contend that the erroneous finding of this aggravating circumstance was harmless beyond a reasonable doubt under State v. DiGuilio, supra, and Rogers v. State, 511 So.2d 526 (Fla. 1987). As noted, Judge Sirmons found the existence of four (4) aggravating circumstances, and Appellant has not challenged two on appeal - that Gorby had been under sentence of imprisonment at the time that he committed this murder and that the murder had been committed for pecuniary gain. Further, in his order, Judge Sirmons explained in detail why he concluded that none of the proffered statutory mitigating circumstances had been established by the evidence (R 2625-2626). The judge found, as non-statutory mitigation, such factors as the fact that Gorby came from a poor background, had an abusive father and a failed marriage; likewise, the court considered the fact that Gorby had been affected by the shooting of his sisters and the fact that he had been a victim of a car accident while young (R 2626). Judge Sirmons found as non-statutory mitigation that Gorby suffered from organic personality syndrome and alcoholic dependence, but noted that, such factors could not be afforded significant weight, given that the expert could not testify with any certainty as to what Gorby's mental state had been at the time of the offense (R 2625-2626). The mitigation proffered, thus, was nowhere near "weighty", and any error as to the finding of this aggravating circumstance was harmless. See, e.g., Bassett v. State, 449 So.2d 863 (Fla. 1984); Hamblen v. Dugger, 546 So.2d 1039 (Fla. 1989); Rivera v. State, 561 So.2d 536 (Fla. 1990);

Holton v. State, 573 So.2d 284 (Fla. 1990); Robinson v. State, 574 So.2d 108 (Fla. 1991); Shere v. State, 579 So.2d 86 (Fla. 1991) (citing Clemons v. Mississippi, 494 U.S. 738 (1990)); Capehart v. State, 583 So.2d 1009 (Fla. 1991); Watts v. State, supra; Pace v. State, 596 So.2d 1034 (Fla. 1992); Gore v. State, 599 So.2d 978 (Fla. 1992).

Finally, the instant death sentence, both with and without the contested aggravating circumstance, is not disproportionate. Olen Gorby was clearly no stranger to the judicial system. He committed this crime while on parole for the Texas burglary and, as noted, had a prior conviction for armed robbery in Texas. Additionally, the PSI, as well as the guidelines scoresheet, indicate a persistent course of criminality, including prior convictions for burglary, conspiracy and forgery (T 2632-2633; Presentence Investigation Report; See Appendix). The instant homicide was committed simply so that Gorby could obtain the wordly goods of the victim - his car and his credit cards, which Gorby then proceeded to utilize to the max. Regardless of the fate of the heinous, atrocious or cruel aggravating circumstance per se, this was a particularly brutal and callous murder, in which a helpless man was beaten to death with a claw hammer. The victim's only "crime" was that he sought to help Gorby and to pay him for various odd jobs. Further, as noted, the mitigation presented was simply not compelling. Gorby's mental health expert could not testify with any certainty as to Appellant's mental state or state of intoxication at the time of the offense, given the absence of direct testimony from Gorby himself (T 1438-

1439); while the sentencer did expressly find as non-statutory mitigation all of those circumstances which the record would support, the sum total of mitigation in this case is simply minimal, when compared with other capital cases which this Court has reviewed.

The State would respectfully contend that this Court has previously found the death sentence proportionate in cases involving similar facts and a similar balance of aggravating and mitigating circumstances. See, e.g., Adams v. State, 341 So.2d 765 (Fla. 1976) (defendant, under sentence of imprisonment and with prior conviction for crime of violence, bludgeons victim to death in his own home, in order to steal jewelry; no mitigation found); Scott v. State, 411 So.2d 866 (Fla. 1982) (defendant, under sentence of imprisonment and with prior conviction for crime of violence, bludgeons victim to death so that he could steal victim's car and jewelry; non-statutory mitigation regarding defendant's difficult early life found); Heiney v. State, supra (defendant, who was under sentence of imprisonment, beat victim to death with claw hammer, so that he could steal victim's car and credit cards; no mitigation found, but jury override affirmed); Cherry v. State, supra (defendant, who had prior conviction for crime of violence, beat victim to death during residential burglary; no mitigation found); Freeman v. State, 563 So.2d 73 (Fla. 1990) (defendant, who had prior convictions for crimes of violence, murdered victim during residential burglary; non-statutory mitigation found). This case involves an interesting contrast with Gilvin v. State, 418 So.2d

996 (Fla. 1982). The facts in Gilvin are virtually identical to those sub judice. The victim, an Episcopal priest, had picked up the defendant, who was hitchhiking, and offered him help in finding a job. The defendant, however, subsequently beat the victim to death with a claw hammer, stole his car and credit cards, and left a note on the victim's door asking callers to come back later. Gilvin claimed that the victim had made homosexual advances to him, something which Gorby apparently tried to suggest occurred here. Although the trial court found a number of valid aggravating circumstances, this Court, over the dissent of three justices, reversed the death sentence, finding that the judge's override of the jury's recommendation of life could not be squared with Tedder v. State, 322 So.2d 908 (Fla. 1975). In this case, the jury, by a vote of 9-3, voted for death, and, accordingly, the Tedder standard is inapplicable. The death sentence in this case is not disproportionate, and should be affirmed in all respects.

## POINT XII

APPELLANT HAS FAILED TO DEMONSTRATE ANY BASIS FOR REVERSAL, IN REGARD TO HIS PROCEDURALLY-BARRED CLAIM BASED ON ESPINOSA v. FLORIDA, ___ U.S. ___, 112 S.Ct. 2926 (1992)

As his next claim for relief, Gorby contends that his sentence of death must be reversed on the basis of Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926 (1992), in that the instruction given his penalty phase jury was allegedly unconstitutionally vague. Given the absence of contemporaneous objection on this basis at the time of trial, the State would

contend that this claim is procedurally barred; alternatively, any error was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Appellant is entitled to no relief on this claim.

The record in this case indicates that the instruction given in Espinosa was not given in this case, and that, indeed, it was the prosecutor who suggested that further definition of the term be provided (T 1738-1739). When the court asked defense counsel his position on this, at the charge conference, counsel replied,

> MR. KOMAREK: I don't know, Judge. I have basic objection to the entire aggravating circumstance being presented to the jury in that the medical examiner's testimony is that the first blow very likely rendered the victim unconscious and he had no suffering whatsoever. Therefore, it's misleading and prejudicial to give the jury this jury instruction in that there is no evidence of the killing in this case being wicked, evil, atrocious, or cruel. We don't get to the definition, they aren't necessary, and I would request the court to rule as a matter of law that there's not sufficient evidence in this case to give this aggravating circumstance instruction to the jury. It allows them to speculate.

(T 1739) (emphasis supplied).

This objection was overruled (T 1739), and defense counsel interposed no specific objection to the instruction as given (T 1828). It should also be noted that, while defense counsel filed a pretrial motion attacking the constitutionality of the cold, calculated and premeditated aggravating circumstance (R 1913), he did nothing comparable as to this aggravating circumstance, and, likewise, would proposed no jury instruction dealing with the heinous, atrocious or cruel aggravating circumstance, although he did proffer other requested instructions (R 2531-2534).

Under this Court's precedents, this claim is clearly procedurally barred. In Sochor v. State, 580 So.2d 595, 602-603 (Fla. 1991), this Court found an identical claim of error, i.e., that the jury instruction on the heinous, atrocious or cruel aggravating circumstance was unconstitutionally vague, to be procedurally barred, given the absence of contemporaneous objection on this basis at trial. In its opinion on certiorari, Sochor v. Florida, supra, the United States Supreme Court specifically honored this procedural bar, thus conclusively putting to rest any notion that this claim was fundamental in nature. Sochor, 112 S.Ct. at 2119-2120. Further, this Court applied a procedural bar to a claim of this nature, based upon Espinosa, in Kennedy v. Singletary, 17 F.L.W. S464 (Fla. July 16, 1992). While Kennedy represented a collateral proceeding, this Court's finding of procedural bar was apparently based upon a lack of contemporaneous objection at trial; as occurred here, Kennedy's counsel objected to the fact that the judge was instructing the jury on this aggravating factor, rather than "the wording of the instruction itself." Id. On the basis of Kennedy and Sochor, this claim is procedurally barred.

This Court made an alternative finding of harmless error in Kennedy, and the State would not oppose such action in this case. Initially, Appellee must state its disagreement with the United States Supreme Court's characterization of Florida law in Espinosa. While this Court has, of course, commented upon the importance of a jury's recommendation, cf. Tedder, supra, Grossman, supra, it has never held, as the United States Supreme

Court did in Espinosa, that the jury must be considered a "co-actor" in our capital sentencing structure, or that the sentencing judge must, as part of his sentencing responsibility, weigh the jury's recommendation, almost as if it were a non-statutory aggravating factor. This construction of §921.141, of course, completely undermines the clear legislative intent that the sentencing judge's sentence be "independent", §921.141(3), and can be said to move our statute towards Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), rather than away from it. This construction also ignores many precedents of this Court, such as Combs v. State, 525 So.2d 853, 857 (Fla. 1988), in which this Court held:

> Clearly under our process, the court is the decision-maker and the sentencer - not the jury. This Court had no intention of changing the clear statutory directive that the jury's role is advisory when we held that, before a judge may override a jury recommendation of life imprisonment, he must find the facts are 'so clear and convincing that virtually no reasonable person could differ,' Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

Because this Court's construction of Florida law is binding upon all other courts, cf. Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983), the State would respectfully request this Honorable Court to correct and clarify the characterization of Florida's capital sentencing structure set forth by the United States Supreme Court in Espinosa.

Additionally, any alleged error in the jury instructions on this aggravating circumstance was harmless beyond a reasonable doubt under DiGuilio and Chapman; of course, seeing as the United

States Supreme Court has never stated what a constitutionally adequate instruction on this aggravating circumstance should say, it is difficult to determine how wide of mark the present instruction is. The instruction in this case did draw the jury's attention to the crime's pitilessness or cruelty, defined as involving the infliction of a high degree of pain, utter indifference to, or enjoyment of, the suffering of another (T 1825). This terminology is certainly comparable to the language, "a conscienceless or pitiless crime which is unnecessarily torturous to the victim," apparently approved in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). While the jury in this case was also instructed on definitions of the terms "heinous" and "atrocious", a practice apparently now disfavored by the United States Supreme Court, the State cannot see how such action can be said to have tainted the verdict in this cause. Both the prosecutor and defense attorney, in arguing for and against this aggravating factor, focused upon the victim's suffering, or alleged lack thereof, and the pitiless nature of this killing (T 1795-1797; 1815-1816).

Further, even if the language of this jury instruction was somehow prejudicial, any error was harmless, because, under the facts of this case, it can be said that a properly instructed jury would have concluded that this aggravating circumstance existed. Cf. Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); Stringer v. Black, ___ U.S. ___, 112 S.Ct. 1130 (1992). Additionally, it must be noted that the sentencing judge in his order applied the appropriate narrowing

construction, in finding this aggravating circumstance, and it must be presumed that this Court will do likewise. Cf. Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 571 (1990); Bertolotti v. Dugger, 883 F.2d 1503, 1526-1527 (11th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 3296 (1990). Finally, it would not appear that the "primary evil" condemned in Espinosa occurred sub judice, inasmuch as Judge Sirmons, in his sentencing order, never states that he afforded any weight to the jury's recommendation of death (R 2621-2629). Acordingly, even should any claim be preserved for review, any error was harmless.[6]

## POINT XIII

### APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR, IN REGARD TO THE DENIAL OF HIS REQUEST THAT THE JURY BE INSTRUCTED ON THE PENALTIES FOR THE NON-CAPITAL OFFENSES

As his final point, Gorby contends that his sentence of death must be reversed, because the trial court denied his request that the jury be instructed on the maximum penalties for his non-capital offenses. Appellant cites to this Court's recent decision, Wright v. State, 596 So.2d 456 (Fla. 1992), and argues that this was important information for the jury to know,

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[6] The State would maintain this position, even should this Court strike the heinous, atrocious or cruel aggravating circumstance itself, as urged by Appellant in Point XI. This aggravating circumstance was one of four submitted to the jury, and cannot be said to have been the focus of the State's presentation at the penalty phase. Cf. Clemons, supra. Further, as noted above, Judge Sirmons, in his sentencing order, never expressly stated that he afforded any weight to the jury's recommendation (R 2621-2629). Thus, the judge's sentencing determination was truly independent, and any error arising from this jury instruction was harmless beyond a reasonable doubt, for the reasons set forth in Point XI, supra.

claiming that the jury might "recommend death because even those prison terms inadequately safeguard the people of the state." (Initial Brief, pg. 54). The State respectfully suggests that Gorby himself has demonstrated the fallacy of his argument, and that no relief is warranted as to this claim.

The record in this case indicates that defense counsel submitted a proposed jury instruction, to the effect that the maximum penalty for burglary was life imprisonment, for robbery fifteen years, and for grand theft auto five years (R 2532). At the penalty phase charge conference, the State objected to this instruction, but suggested that it would be proper for counsel to make these arguments in his closing argument to the jury, if he wished (T 1745); the judge denied the instruction (T 1745). The record in this case further indicates that, during his examination of Gorby's mother at the penalty phase, defense counsel specifically elicited testimony from her to the effect that Gorby was presently forty-one (41) years old, and that he would sixty-six (66) after serving a minimum term of twenty-five years (T 1766). The following exchange, without objection, then took place:

> Q: That does not include the additional sentence he would receive for robbery, burglary, and theft; is that true?
>
> A: Far as I know, Paul.

(T 1766).

Counsel utilized this testimony, again without objection, to make the following argument in closing argument:

> He's 41 years old. When he gets his 25 years he'll be 66 years old, by the time he does

> his 25. You also found that he was guilty of burglary. And if I'm not mistaken, the penalty for that is life. On top of the 25 years. You also convicted him of robbery, which I think the level of robbery that you convicted him of is 15 more years on top of that. For the grand theft auto, that's 5 more years on top of that.
>
> Olen Gorby will never see the outside light of day. He'll spend the rest of his life in prison. And that's a punishment. You don't have to count killing as a punishment. He'll spend 25 years in the state penitentiary. Plus all the other years he's going to get on top of that. Because that's not the only thing he was found guilty of and I'm quite sure that those penalties will be put consecutive, one after the other, after the other, after the other.

(T 1808-1809).

The judge specifically instructed the jury that they could consider in mitigation, "any other aspect of the defendant's character or record, and any other circumstance of the offense." (T 1826).

Appellee would contend that this claim should be resolved in accordance with Nixon v. State, 572 So.2d 1336 (Fla. 1990). In Nixon, this Court rejected an identical claim of error. This Court specifically held that Fla.R.Crim.P. 3.390(a) had been expressly construed to mean "that the jury need only be instructed as to the possible penalty when it is faced with the choice of recommending either the death penalty or life imprisonment," and that, "[a]s to offenses in which the jury plays no role in sentencing, the jury will not be advised of the possible penalties." Nixon, 572 So.2d at 1345. This Court then went on to reject Nixon's claim under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), holding, "The fact

that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime." Nixon, 572 So.2d at 1345. Finally, in language highly pertinent to the situation sub judice, this Court held,

> Even if it had been appropriate for the jury to be instructed on the maximum penalties for the other crimes, the requested instruction merely set forth the maximum sentences for each of the non-capital offenses. The instruction did not inform the jury that it could consider the maximum sentences for the non-capital offenses as a mitigating factor. The jury was aware of the non-capital offenses for which Nixon was convicted, counsel urged those convictions as mitigation, and the jury was instructed that the factors which it could consider in mitigation were unlimited.

Id.

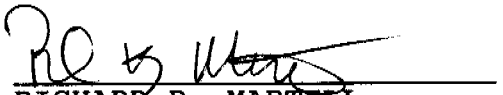
Thus, Nixon specifically rejects the merits of Gorby's claim, and this Court's decision in Wright certainly indicates no retreat from Nixon. Further, as in Nixon, Appellant's proposed jury instructions were deficient, in that they contain no express suggestion that the matters contained therein could be considered as mitigation. Likewise, as in Nixon, defense counsel fully argued these matters to the jury as mitigation, and the court's instruction did not prevent the jury from considering them as such. There is no requirement that the jury be instructed as to specific non-statutory mitigation, see Jackson v. State, 530 So.2d 269, 273 (Fla. 1988) (not error for court to refuse to instruct jury on "written list of non-statutory mitigating circumstances provided by appellant"), and Appellant's sentence of death was imposed in accordance with the Constitution. The instant sentence of death should be affirmed in all respects.

## CONCLUSION

WHEREFORE, for the aforementioned reasons, the instant convictions and sentence of death should be affirmed in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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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 Mr. David A. Davis, Esq., Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 14th day of October, 1992.

RICHARD B. MARTELL
Assistant Attorney General