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IN THE SUPREME COURT OF FLORIDA

RICHARD WALLACE RHODES,

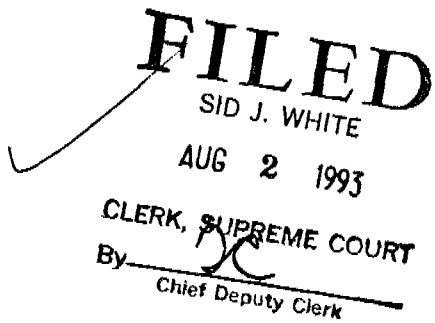
Appellant,

v.

Case No. 79,627

STATE OF FLORIDA,

Appellee.




# BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

PAGE NO.

## OTHER AUTHORITIES CITED

RULES OF CRIMINAL PROCEDURE:

## STATEMENT OF THE FACTS

Appellee generally accepts appellant's statement of the case and facts but adds the following:

Defense witness Dr. Donald Taylor opined that it was a "possibility" his ability to conform his conduct to the requirements of law was impaired (R 1019). He conceded that not everyone from an abused background kills someone (R 1025); he had no documentary corroboration for Rhodes' telling him he was sexually abused by both parents (R 1029). Appellant had no recollection of the events surrounding the instant homicide (R 1031). Rhodes did not tell Dr. Taylor that he had made numerous statements to law enforcement officers about the events taking place February 19, 1984 (R 1032). It was possible that appellant didn't want to tell the witness the truth (R 1035). Additionally, the documents Dr. Taylor reviewed contain accounts of him lying; a number of people refer to him as a pathological liar (R 1036).

Dr. Taylor saw no evidence for an opinion that his capacity to appreciate the criminality of his conduct was impaired (R 1067).

State rebuttal witness Dr. Sidney Merin opined that Rhodes was not under the influence of extreme mental or emotional disturbance (R 1084). He did not suffer from any kind of mental disturbance; his problems are more behavioral (R 1088). Rhodes had an antisocial personality. Merin opined that Rhodes was <u>not</u> under extreme duress when the crime was committed (R 1089). He

understood right from wrong and was capable of conforming his behavior to the requirements of law (R 1090). He noted that appellant's I.Q. score of 82 would place him at the lower end of the dull normal range but it could be appellant simply declined or refused to involve himself in the testing process; other documents suggest he's a very bright person (R 1091); Dr. Merin found no indication of history of blackout or alcohol abuse in the records (R 1093). He will tell you what you want to hear or whatever it takes to manipulate the listener. He gave different versions of the crime because they were self-serving for a "fantasy spinner" (R 1093 - 94).

The defense also introduced defense exhibit 2 which contained medical and prison records (Vol. 5). Included in that material was a questionnaire filled out by Don Betterley an Activity Specialist at the Napa State Hospital who described Rhodes as a pathological liar and also stated that Rhodes was imaginative and had a brilliant mind, and was a con artist.

## SUMMARY OF THE ARGUMENT

I. The lower court did not commit error in excusing juror Melissa Blackham. The juror expressed the inability to follow the law, the defense sought not to ask rehabilitating questions but only to keep the juror and recognized that an excusal for cause would be unchallengeable.

II. The lower court did not err reversibly in permitting hearsay evidence at the resentencing. He did not object on hearsay grounds to Rowlett's testimony and the issue is not preserved for appellate review. As to witness Gary Wright, the trial court did not abuse its discretion in denying a mistrial request when the witness opined he thought the defendant was faking. As to the reading of prior testimony of witnesses Duranseau, Allen and Cottrell, appellant interposed no specific hearsay objection to particular portions of the testimony. Appellant below only objected pro forma to the reading of the testimony and appears to have accepted that the court would allow it if the Court were satisfied as to the unavailability of the witness.

III. The lower court did not err reversibly in permitting allegedly irrelevant matters to be injected because they were not irrelevant, the facts and circumstances of appellant's prior conviction were properly admitted. The testimony regarding appellant's admissions about the Oregon robbery was proper and statements about his use of an insanity defense are relevant to rebut the mental mitigating factors urged on his behalf at this

sentencing. Moreover, any error must be deemed harmless in light of the defense's voluminous evidence regarding his manipulative and deceptive behavior. Any claim that the statements were involuntary is meritless.

IV. Appellant's claim of a Caldwell v. Mississippi, 472 U.S. 320 violation in the prosecutor's voir dire examination was unobjected to and unpreserved for appellate review. The claim is also meritless. The trial judge did not denigrate the jury's role. Appellant was satisfied with the written jury instruction given the jury and did not complain of any prior misstatement.

V. The lower court's finding of homicide committed during an attempted sexual battery is supported by the evidence and not merely a reliance on this Court's prior opinion.

VI. The trial court adequately provided an opportunity for appellant to speak prior to sentencing. Also, the court's analysis in its sentencing order is not defective.

VII. The imposition of the death sentence is not disproportionate in the instant case. Appellant has been convicted of prior felonies involving violence, the trial court gave appropriate consideration to the mitigating evidence proffered and correctly determined that death was the appropriate sanction.

VIII. Appellee submits that only one written judgment is appropriate; the subsequent declaration adjudicating appellant guilty is extraneous.

## ARGUMENT

### ISSUE I

WHETHER THE LOWER COURT ERRED BY EXCUSING FOR CAUSE A JUROR WHO WAS ALLEGEDLY QUALIFIED TO SERVE.

Appellant contends that the lower court erred in excusing for cause juror Melissa Blackham for her views on capital punishment. Ms. Blackham had expressed the view that:

> "I don't feel comfortable making a decision on life or death when I wasn't a party to the process beforehand."

(R 574)

This answer was in response to a question regarding the fact that this jury had not decided Rhodes' guilt since guilt had previously been determined by another jury.

Then this exchange ensued:

> "Mr. Mooney: . . .. Is that about imposing -- in other words, if you had to put yourself on one side you're more toward not imposing than imposing?
>
> Venirewoman Blackham: Probably."

(R 586)

Then:

> MR. MOONEY: Okay. One of the things that you undoubtedly will see in this trial are some pictures. And suffice it to say they're not going to be pictures of a enjoyable nature, okay. Is there anyone that feels as though because they may have to view these photographs, and you're going to have to look at them. Your know, you all want to hear the circumstances of the crime. We're going to give you the pictures and the testimony. Is there anyone that feels as though they couldn't look at pictures? And I really

can't come up with a nice artful word, but they're -- it's going to take some intestinal fortitude. Is that going to bother anybody?

VENIREMAN STONER: I've had some real experience and got over it, you know. Don't bother me any more.

MR. MOONEY: Miss Blackham, what do you think? Do you think that's going to upset you too much?

VENIREWOMAN BLACKHAM: Probably.

(emphasis supplied) (R 600)

* * *

MR. MOONEY: I'm going to sit down for now. Is there anything that we've talked about -- we haven't talked about that you want to bring to our attention? Here's your last chance to say it. The judge gave you all the opportunity at the beginning when we read to you the fact that he was convicted of first degree murder, of looking at life imprisonment with no possibility of parole for twenty-five years, or death by electrocution, and I was surprised that people didn't raise their hand. Are there people now that after they heard this and talked about it a little bit that basically just want to say no, I don't want make this decision?

VENIREWOMAN BLACKHAM: I don't. I thought I made that clear.

(R 600 - 601)

Defense counsel began to make inquiry of Blackham about her family background when the court asked if there were any reason to keep Blackham and Varellan. Defense counsel declared, "I want to keep her." and, "I'd like to keep her." The Court noted that it knew the defense would like to keep here since she said she didn't want to do it and defense counsel rejoined:

"MR. SWISHER: Judge, if you do that for cause I can't say anything about it."

(R 606)

Significantly, appellant below did not contend that the juror should be allowed to remain because she satisfied the criteria of Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841 (1985), nor did he contend that he desired to ask questions to rehabilitate the juror or otherwise clarify whatever the defense might deem to be ambiguous. Rather, the defense merely announced that it wanted the juror, not unexpected desire since venirewoman Blackham had already declared that looking at photos of the crime would upset here too much, and she did not want to be involved in the decision of life or death. We respectfully submit that any defendant would want to have such a reluctant juror since it effectively amounts to an automatic life vote and potential Tedder v. State, 322 So. 2d 908 (Fla. 1975) protection. Not only did appellant fail to seek to rehabilitate the juror by further questioning, but also acknowledged that an excusal for cause ruling would be unchallengeable (" . . . if you do that for cause I can't say anything about it.").

Both the United States Supreme Court in Witt, supra, and this Honorable Court in Green v. State, 583 So.2d 647, 652 (Fla. 1991) have recognized the primary vantage point occupied by the trial judge in seeing and hearing the prospective jurors to determine the candor and quality of the answers given to the questions presented. See also State v. Williams, 465 So. 2d 1229 (Fla. 1985); Randolph v. State, 562 So. 2d 331 (Fla. 1990).

Appellant argues that the lower court was not making a proper "Witherspoon-Witt" excusal because Blackham earlier in the questioning had indicated the her death penalty views would not impair her ability to make a decision. But she also conceded being "bothered" or uncomfortable participating in a decision when she had not been part of the guilt-determining process (R 574). Irrespective of what her initial earlier responses may have been, the point remains that the more venirewoman Blackham thought about the problems and tasks confronting her -- including review of photos not of an enjoyable nature (R 599 - 600), the more she realized she would not be able to follow the Court's instructions and perform the duties of a juror Adams v. Texas, 448 U.S. 38, 65 L.Ed.2d 581 (1980).

To the extent that appellant is also complaining about the excusal of juror Varellan, clearly, there is no error. Varellan had expressed the opinion that he had "weak tolerance for rape, of murderers and people who maim people . . . .I think we should get rid of them . .. .I don't believe in our rehabilitation process" (R 557). When asked if he could follow the law, he replied, "I don't know if I could honestly" (R 566). He also remarked about "an eye for an eye and a tooth for a tooth" (R 581) and "would have a hard time living after it" if serving as a juror in an murder trial (R 582). He nodded affirmatively when asked if he were a person that didn't want to make that decision (R 601). Significantly, when the court asked if there were any reasons to keep jurors Blackham and Varellan, defense counsel

sought only "to keep her" (Melissa Blackham) (R 606). He neither wanted Varellan nor sought to ask rehabilitating questions. See Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841 (1985) (J. Stevens concurring, the failure to object to dismissal of one juror when objecting to another lends credence to view that he did not want juror unobjected to to serve).

The instant case is distinguishable from O'Connell v. State, 480 So. 2d 1284 (Fla. 1985) relied on by appellant; there the trial court denied counsel the opportunity to examine or rehabilitate the jurors. Here, the defense sought not to rehabilitate but merely to "keep" Blackham and had no complaint at all about the removal of Varellan.

Appellant's claim is without merit.

## ISSUE II

WHETHER THE LOWER COURT COMMITTED REVERSIBLE ERROR IN PERMITTING HEARSAY EVIDENCE AT THE RESENTENCING.

Appellant cites as an example of the hearsay evidence he complains about the testimony from Jerry Rowlett that he was not an eyewitness to the attempted murder of Mrs. Adducchio and he relied on what people told him (R 862). But, appellant offered no hearsay objection below to Rowlett's testimony (R 840 - 864). So this claim is not preserved for appellate review. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Appellant alludes to the testimony of Detective Steve Porter who testified that he was surprised when Rhodes told him he knew why they were there to talk to him, i.e. about a murder investigation and Porter asked Detective Simpson if he had told Rhodes they were on a murder investigation. Simpson had not (R 883 - 885). Defense counsel first objected that the state was attempting to retry the guilt phase. The court ruled that since this was a new jury who didn't hear the guilt phase testimony, they were entitled to know it. The defense then objected on hearsay grounds and the prosecutor responded the issue was whether the defense could rebut the hearsay and the defense could do so by calling Simpson (R 884 - 855)[1] Appellant also

[1] Appellee notes that Simpson did testify in the original trial and stated he did not tell Rhodes that the detectives were coming to speak to him about a murder investigtion, that the detectives would explain why they needed to talk to him (OR 1803 - 04).

notes a complaint below when Porter testified about what Rebecca Borton told Detective Hastings about seeing Karen Nieradka with appellant Rhodes (R 909 - 911).[2] The prosecutor argued that the defense had the opportunity to rebut with Detective Hastings (R 911). While appellant notes these incidents of hearsay in passing, apparently he chooses to concentrate on the Gary Wright testimony and the prior testimony of three "jailhouse snitches" read to the jury. Brief, P. 53.

A review of Gary Wright's testimony -- this witness provided evidence of appellant's armed robbery in Oregon in 1973 -- shows that a defense objection on hearsay grounds was interposed when the witness testified about what a doctor's report contained. When appellant requested a mistrial, the court sustained the defense objection because the defense did not have an opportunity to rebut it. The defense asked for an instruction to disregard any reference to the doctor's report and the court responded that he didn't think there had been any reference to it, the defense argued the witness testified the doctor's report said Rhodes was faking. The court answered the witness said he thought he was faking (R 834). The witness had testified a page earlier: "But his actions on the 26th appeared to be faked to me." The trial court correctly denied any additional relief as the witness was only describing his reaction -- that he thought Rhodes was

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[2] Borton testified in the earlier trial seeing Karen and appellant on February 29, 1984) (OR 1620 - 21).

faking -- not describing the conclusion reached in a medical report by an expert. The trial court did not abuse his discretion in concluding that a mistrial was not necessary. Breedlove v. State, 413 So. 2d 1 (Fla. 1982).

Appellant next complains about the testimony of jail inmates Harvey Duranseau, Michael Allen, and Edward Cottrell which had been given in the former trial and now reread to this jury at resentencing. To the extent that appellant may now be offering a specific complaint about particular testimony of these three witness he may not do so since he did not raise that complaint below.[3] Steinhorst, supra; Occhicone v. State, 570 So. 2d 907 (Fla. 1990). Even if this point had been preserved for appellate review, it is meritless as this Court merely noted in a footnote that the claim was without merit. Rhodes v. State, 547 So. 2d 1201, 1203, n. 2 (Fla. 1989). While it is generally true to say that "guilt is not at issue in the penalty phase" Derrick v. State, 581 So. 2d 31, 36 (Fla. 1991), the Court has also recognized that comments deemed prejudicial and out of place in the guilt phase may be permissible at penalty phase. Muehleman v. State, 503 So. 2d 310 (Fla. 1987). Obviously, more leeway would seem appropriate in a context like the instant one where

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[3] Appellant cites as outrageous, the Michael Allen (not Duranseau as stated in appellant's brief) testimony that Rhodes threatened to kill anyone who snitched on him (PR 2083), but he did not urge the trial court in this proceeding that he had a particular problem with certain testimony and that some of it should be excised. The claim is procedurally barred.

the jury at a resentencing proceeding did not have the benefit of hearing most of the prior guilt phase testimony. Even if the Court deemed this remark to be error it would clearly be harmless as the prosecutor in closing argument did not urge or even refer to Allen's statement that Rhodes would kill a snitch (R 1123 - 45).[4]

Turning now to the trial court's permitting the reading of prior testimony of Duranseau, Allen, and Cottrell, appellant now complains, apparently, that the state failed to establish the unavailability of the witnesses and the steps taken to secure their appearance. The transcript below reflects that appellant submitted a pro forma objection predicated on *Rule 3.640(b)* ("I have to raise it for the record" -- R 950). The prosecutors responded to the objection:

> MR. MOONEY: Right. Joy is going to say they're out -- in custody out of state. One's in custody in Daytona Beach.
>
> MR. SWISHER: The only statement I would make, if they're in custody, they may be available. You have to decide. That's it.
>
> MR. MOONEY: Well, the one indicates out of state is a prerequisite, certainly in custody out of state would be the same thing, that's clear. The third one, I think Mr. Cottrell who is in custody in Daytona Beach. And I don't know that Mr. Cottrell would be happy

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[4] The testimony by the jail cellmates was relevant; Rhodes' admisssions to the killing and his attempt to have sex with the victim support the finding of the presence of aggravating factor 921.141(5)(d).

about coming back here. Mr. Hellickson could answer about that.

MR. HELLICKSON: Judge, my opinion is number one, that that particular rule doesn't apply. It's not a new trial per se. This is a sentencing hearing. And I think under 921.141(1) we can get hearsay in. There are a number of cases including this case, Rhodes versus State, also King versus State, 514 So2d 354, and Dragvich, D-R-A-G-V-I-C-H versus State, 492 So2d 350, all those cases indicated that hearsay is admissible as long as the defense has an opportunity to rebut that hearsay. These three testified at the last trial. Their testimony has been available for rebuttal since 1986.

MR. MOONEY: And they were cross- examined so --

MR. HELLICKSON: I think under the hearsay rule 90.804(1)(e) this testimony would be admissible. It's non-availability of the witness and the fact that they had gave testimony before trial.

THE COURT: Do you want to wait for this other witness?

MR. MOONEY: No.

MR. SWISHER: I don't question what they represent her to say.

(R 951 - 52)

The prosecutor then represented that Mark Allen was in the state prison in Michigan, that Harvey Duranseau was found yesterday in federal prison in Illinois and not to be released until 1994 and Cottrell was found in the state prison in Daytona Beach. The court opined that the witnesses were "unavailable" at this time and defense counsel volunteered to have the witness testify to unavailability after the witnesses' testimony was read (R 953).

After the reading of the prior testimony, state attorney investigator Joy Walker proffered that Michael Guy Allen is an inmate in the Ohio State Prison system and she found that out two weeks ago; he received a 15 to 25 year sentence in 1989. Edward Cottrell was located yesterday in the Florida State Prison in Dayton Beach, and Harvey Duranseau was located at the same time in Metropolitan Federal Penitentiary in Chicago (R 956 - 57). As appellee reads the record, Rhodes was not complaining below that it would be an abuse of discretion for the trial court to rule that the prior testimony could be read because of their unavailability. See Stano v. State, 473 So.2d 1282, 1286 (Fla. 1985); Outlaw v. State, 269 So. 2d 423 (Fla. 4th DCA 1972). Rather, appellant was acquiescing to the trial court's determination ("You have to decide" - R 951). In Lucas v. State, 376 So. 2d 1149 (Fla. 1974), this Court denied relief on a claim where defense counsel deferred to the trial court's ruling. Since appellant merely sought here for the trial court to satisfy itself with the propriety of reading former testimony and the trial court did so, he cannot urge error.

Moreover, there can be no question that for purposes of *Rule 3.640(b) Rules of Criminal Procedure*, witnesses Allen and Duranseau being imprisoned in Ohio and Illinois were "absent from the state"; nor can any serious assertion be maintained that Allen, Duranseau and Cottrell's being imprisoned elsewhere constituted "consent or connivance" by the state. See also, Pope v. State, 569 So. 2d 1240 (Fla. 1990) (declining to hold trial counsel

ineffective for stipulating that a witness was unavailable relieving the state of its burden to show due diligence in contacting the witness).

Additionally, the prosecutor observed that the court has relaxed the rules of evidence at penalty phase to permit hearsay evidence so long as the defense has the opportunity to rebut. See Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); King v. State, 514 So. 2d 354 (Fla. 1987); Dragovich v. State, 492 So. 2d 350 (Fla. 1986). Obviously, appellant could and did have the opportunity via cross-examination in the prior trial to rebut (and he did not seek on his own to have these witnesses brought in for his case).

Appellant also contends that even if the state had carried its burden of demonstrating the witnesses could not be brought to trial, it is questionable whether the former testimony rule should apply since these witnesses had testified at the prior guilt phase and different issues arise at a penalty phase. Thus, his argument proceeds, the motive to develop their testimony would be different at penalty than from the guilt phase. If this were a concern below, appellant certainly did not articulate it so that the trial judge could consider it and make a ruling; accordingly, it may not be advanced here ab initio. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). Additionally, whatever testimony was provided by the three witnesses at the prior trial, the defense would be sufficiently motivated to pursue and challenge in the cross-examination. See also Hitchcock v. State,

578 So. 2d 685 (Fla. 1990) (No confrontation clause violation by reading entire prior testimony at resentencing). Thompson v. State, 18 F.L.W. S212 (Fla. 1993).

And now a word about appellant's general complaint that guilt-phase testimony was improperly admitted in penalty phase. Appellee accepts the proposition that in a given case it is possible that introduction of guilt-phase evidence might be improper and prejudicial to the defense. For example, if the state had no evidence of any applicable statutory aggravating circumstance it would be improper to urge the death penalty simply by showing at penalty phase that the defendant killed the victim. But to the extent that the court has adopted a general pro se prohibition, that view should be reconsidered as it is not well-reasoned and the instant case provides an opportunity to recede from it.

The situation can occur in one of two ways. In most instances the same jury that has heard guilt phase testimony is called upon to make a penalty recommendation; and what they hear repeated at penalty from the guilt phase is not prejudicial or is harmless as it was a part of their guilt-determination process. It is an unrealistic attempt to antiseptic, laboratory-style sterilization to think that the jury will suddenly void its collective mind in phase two from what happened in phase one. Indeed, it is not uncommon for the prosecution in penalty phase simply to rely on the evidence earlier introduced.

The second situation occurs -- as in the instant case -- where on a resentencing remand an entirely new jury, different from the one that determined guilt, is impaneled to make a recommendation of life or death. If the prosecution seeks to rely on its aggravating factors of such historical factors as prior felony convictions involving the use of threat or violence or homicide committed while under a sentence of imprisonment and the defense seeks to rely in mitigation on equally remote factors such as abused childhood -- and if the jury is given no information about the circumstances surrounding the homicide which forms the predicate for the life-death recommendation -- how can such a recommendation be grounded in rationality if based only an ancient facts of the defendant's background? The result may be as arbitrary as the conditions which led to Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346 (1972).

If this Court should insist that a jury remain ignorant of the circumstances surrounding the homicide, it would merely exacerbate jury arbitrariness with judicial arbitrariness.

The trial court did not err in allowing the jury to hear circumstances surrounding the homicide which formed the predicate for the penalty recommendation.

## ISSUE III

WHETHER THE LOWER COURT ERRED IN PERMITTING THE STATE TO INJECT ALLEGEDLY IRRELEVANT MATTERS INTO THE PROCEEDINGS INCLUDING APPELLANT'S STATEMENTS FOLLOWING A ROBBERY IN OREGON.

The objection presented below was not well-taken. The objection below was that the state was limited to three things -- appellant's prior felony record, whether he was under a sentence of imprisonment and whether there was an attempted sexual battery; the defense argued that "HAC" and "CCP" were out because the Florida Supreme Court had ruled those factors were not appropriate on the last appeal (R 778 - 779). That objection could properly be overruled since, while this Court had previously found those factors inapplicable, a resentencing proceeding is a brand new proceeding and the trial court -- or prosecution -- is not bound by what happened previously. Preston v. State, 607 So. 2d 404 (Fla. 1992); Hall v. State, 614 So. 2d 473 (Fla. 1993). The prosecution correctly urged that they could talk about the cause of death -- strangulation -- especially as it is relevant to the aggravating factor found (homicide committed while engaged in the commission of or attempt to commit a sexual battery) and as it tends to rebut the mitigating evidence proffered relating to whether appellant was under the influence of extreme mental or emotional disturbance at the time of the crime or under extreme duress. If appellant is contending that the lower court should have recognized subsequently at the time of closing argument that the state was not relying on HAC

and CCP when the prosecutor did not request instructions thereon (R 1112 - 20) and taken corrective action regarding the opening statement to the jury, suffice it to say (that in addition to being meritless) defense counsel never requested any such relief by the trial court and the claim is not preserved. Steinhorst v. State.

Appellant also complains that during the testimony of Gary Wright the former police officer in Oregon, the defense objected on relevancy grounds to a question how appellant obtained the weapon in the 1973 armed robbery. Appellant argued below that the state was attempting improperly to prove CCP, the state argued it was showing that the calculated nature of the offense rebutted any inference of mental problems (R 799 - 801). The witness answered that appellant had utilized an accomplice, a sixteen year old to drive the borrowed vehicle and the accomplice was to get one-half the cut. Appellant wore a wig and test fired the weapon (R 800 - 802).

Appellant has failed to demonstrate that the trial court's ruling on the admissibility of evidence constitutes an abuse of discretion. The prosecutor could permissibly show the facts and circumstances of the prior offenses, the prior felony convictions involving violence so that the jury could engage in an appropriate weighing process as to whether they were of such a nature and quality as to outweigh whatever mitigating evidence might be proffered. See Brown v. State, 473 So. 2d 1260 (Fla. 1985); Mann v. State, 453 So. 2d 784 (Fla. 1984); Stano v. State,

473 So. 2d 1282 (Fla. 1985). Appellant is simply mistaken in urging that the sole basis for presenting evidence about the non-Florida convictions was to establish CCP (and he is equally wrong in thinking that the state was precluded from attempting to establish CCP). Further, the argument advanced suggesting a double jeopardy violation is meritless; if it were valid, the Florida capital sentencing scheme allowing consideration of prior felony convictions of violence as statutorily-allowed aggravators would not have passed muster in Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913 (Fla. 1976).

Appellant next contends that it was error to admit appellant's own statements made to the police after his arrest for the Oregon robbery. A proffer was made outside the hearing of the jury and former police officer Wright testified that he gave Rhodes Miranda warnings: Rhodes waived his rights and gave a taped statement (R 805 - 06). The witness described appellant's confession regarding the circumstances of the robbery (R 808). Rhodes was careful not to touch anything to leave fingerprints (R 808). During a second interview, appellant mentioned the possibility of using his previously being in a California mental institution as a defense to avoid prosecution and Rhodes admitted "he really wasn't crazy," only "crazy like a fox" (R 811). This "crazy like a fox," comment did not occur during questioning and Rhodes initiated the conversation (R 812). The trial court found that appellant's statements were freely and voluntarily made and were relevant (R 816).

The witness then testified in front of the jury that appellant had initiated a conversation in November of 1973 that he wasn't really crazy and had agreed he was crazy like a fox (R 818 - 819). The witness recited appellant's admission of the facts surrounding the 1973 armed robbery offense (R 820).

Appellant told Wright he wasn't nervous or scared but got kind of a high from this robbery. Rhodes added that he would defend himself if the police had entered during the commission of the robbery (R 822).[5]

Any claim that Wright's testimony about Rhodes' admissions to him was unduly prejudicial and harmful to him is belied by the exhibits introduced and relied on by the defense. For example in his Exhibit 2, Composite Medical Records (Vol. IV of the record on appeal), there is a letter dated December 28, 1973, from Dr. Weissert to Dr. Brooks noting that Rhodes "has demonstrated extensive impulsive, manipulative and deceptive behavior." There is a memo dated April 19, 1977 from Dr. Weissert noting that Rhodes "carried out a strictly manipulative mood to get out of a tough situation." The Parole Hearing Report dated May 19, 1976 contains the notation that "the writer got the impression that he more or less said what he thought the writer wanted to hear." The Oregon Corrections Division Supplemental Review Report dated

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[5] The Exhibit 37 transcript of the interview on November 23, 1973, between Wright and appellant Rhodes was identified but not introduced into evidence and appears in the appellate record in Vol. IIII. (R 438).

December 30, 1974, declares: "Past records indicate he is recognized as a pathological liar, will often feign mental illness if he believes it to be to his advantage, otherwise speaks quite rationally." An Admission Summary dated March 1, 1974 states: "Everywhere recognized as a pathological liar, will often feign mental illness if he believes it to be to his advantage." The Confidential Report of Arresting Officer Gary Wright dated January 23, 1974, recites that Rhodes "displayed fained [sic] mental disorders."[6] An After Sentence Report dated January 29, 1974, by an assistant district attorney declares: "He appears to me to have learned how to fake mental disorders if he thinks such action will be to his advantage." In Volume V of the appellate record defendant's Exhibit 2 continues. An Oregon Corrections Preliminary Review dated May 24, 1974 repeats that Rhodes is everywhere recognized as a pathological liar, will often feign mental illness if he believes it to be to his advantage. A correctional questionnaire filled out by appellant's wife lists his chief weaknesses as including "conning people". A confidential questionnaire by Don Betterley calls Rhodes "a pathological liar" who "has a brilliant mind and is imaginative," a con artist

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[6] How can appellant complain of Wright's testimony when his own exhibit supplies the same information?

Since that which has been submitted by appellant repeatedly reinforces Wright's testimony, the state's use of Mr. Wright -- if error -- cannot be anything other than harmless error. But we do not concede it to be error since the testimony pertaining to Rhodes' admissions abut the 1973 robbery and that he wasn't really crazy are relevant to rebut the defense testimony of Dr. Taylor regarding the applicability of statutory mental mitigating factors; it presented reasons why the jury should discredit self-serving statements made by appellant to Dr. Taylor.

A cursory review of defense counsel's opening statement demonstrates that counsel was going to emphasize appellant's psychological history ("You're going to learn from the psychologist and psychiatrist that testify that Mr. Rhodes was an abused child" - R 791; "He was in a psychiatric unit at a state hospital in California" - R 792; "Listen to the psychologist and psychiatrist tell when your basic behavior patterns are formed. Will that past justify your recommendation that he be executed or that he be warehoused for the rest of his life" - R 794).

Appellant is disingenuous to suggest that he might not have utilized Dr. Taylor or introduced defense exhibit 2 (R 1021) if Wright had not testified for the state concerning Rhodes' admission about the Oregon crime.

With regard to appellant's claim that the state failed to prove that Rhodes' remarks were made freely and voluntarily appellee disagrees. Wright testified that he gave Miranda warnings on November 20, 1973 (R 805). Wright reminded appellant

of his Miranda rights on the 23rd and Rhodes remembered them. No promises of psychiatric help were made (R 807). Appellant gave his confession (R 808). The statement concerning not being crazy did not occur during questioning and it was in a conversation initiated by Rhodes (R 812). The witness testified that questioning closed when Rhodes requested a lawyer (R 813). The trial court found the statements voluntary. A trial court's ruling on a motion to suppress is presumed correct. Jones v. State, 612 So. 2d 1370 (Fla. 1992); Owen v. State, 560 So. 2d 207 (Fla. 1990); Medina v. State, 466 So. 2d 1046 (Fla. 1985).

Appellant did not complain during the proffer of testimony by Wright that his alleged low I.Q. was a factor for determining involuntariness. Moreover, in appellant's subsequent cross-examination of Wright in front of the jury, appellant went into detail about the circumstances of the statement so that the jury could be aware and make a determination of whether it was voluntary and whether he had a state of mind to make the statement (R 824 - 827).

Finally, appellant voices unhappiness that on redirect examination the prosecutor asked if he knew appellant had been in mental institutions, in jail and arrested on numerous occasions (R 830). The defense objected that he had not gone into criminal arrests (R 830). The prosecutor responded that appellant had delved into the witness' knowledge of Rhodes' being in a mental institution and it was appropriate to pursue -- without highlighting that appellant had troubles with the law, another

indication of his familiarity with his rights and the police. The Court overruled the objection but instructed the prosecutor not to go further into this and he didn't (R 831).

Even assuming, only arguendo, that this "Been in trouble with the law a lot?" query would be improper, it cannot be anything other than harmless since appellant's case involved the testimony of his brother and Dr. Taylor detailing appellant's life and over two volumes of documentary evidence explicitly covering apparently every act of violence and disciplinary violation in prison involving Mr. Rhodes.

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

Appellant's contention is meritless.

## ISSUE IV

WHETHER THE JURY WAS MISLED REGARDING ITS ROLE IN THE SENTENCING PROCESS AND PERMITTED TO CONSIDER A NONSTATUTORY AGGRAVATING CIRCUMSTANCE.

Appellant claims that a violation of Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231 (1985) occurred during the prosecutor's voir dire examination at R 591 - 592. Appellee notes first of all that there was no defense objection to the prosecutor's comment and, therefore, the claim has not been preserved for appellate review. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Dugger v. Adams, 489 U.S. 401, 103 L.Ed.2d 435 (1989). Appellant acknowledges that there was no objection below at page 79 of the brief.

Secondly, even if the point could be reached, it is meritless because in context the prosecutor was urging that appellant was responsible for his actions, the jury was not. The prosecutor was not diminishing the sense of responsibility the jury should have in its role. Moreover, the trial court instructed the jury that their advisory sentence would be given great weight although the final decision would rest with the court (R 1158). The court further instructed the jury that:

> "the fact . . . [that a recommendation] . . . can be reached by a single ballot should not influence you to act hastily or without regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift, and consider the evidence and

> all of it, realizing that human life is at stake, an bring to bear your best judgment in arriving at, your advisory sentence."
>
> (R 1166)

The court did not denigrate the jury's sense of responsibility and even if some error occurred previously, it would clearly be harmless.

Appellant next contends that the jury considered a nonstatutory aggravator. He complains that in the oral instructions the court gave as the second aggravator:

> ". . . the Defendant has been previously convicted of a felony involving the use of threat or use of a firearm, the crimes of Armed Robbery, Assault, Attempted Robbery and Battery with a deadly weapon are felonies involving the use of or threat of use of violence to another person."
>
> (R 1159)

The prosecutor called the court's attention to the fact that the aggravating factor should refer to the use or threat of violence, not firearm (R 1168). After some discussion between the court and the parties (R 1169 - 1174), the court called the jury back and told them:

> THE COURT: I apologize for this delay, ladies and gentlemen, but we had to make sure that the copy of the instructions that is given to all of you conforms to the law and to the instructions as the Court gave them. We have done that. We have confirmed that. If you have any questions about the instructions as the Court has given them to you, please feel free to rely on the written copy of the instructions which each of you will be provided with when you go back to deliberate your advisory verdict in this case. Okay.

(R 1175)

Appellant offered no complaint below and was presumably satisfied by the submission of the written instruction to the jury (R 444) which stated:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> 1. The crime for which RICHARD WALLACE RHODES is to be sentenced was committed while he was under sentence of imprisonment.
>
> 2. The defendant has been previously convicted of a felony involving the use or threat of use of violence. The crimes of Armed Robbery, Assault, Attempted Robbery and Battery with a Deadly Weapon are felonies involving the use of or threat of use of violence to another person.
>
> 3. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission, or an attempt to commit the crime of Sexual Battery.

Appellant's failure to complain below or seek additional relief precludes consideration now. In any event, the trial court having corrected the matter with the written instruction, supra, requires rejection of appellant's claim.[7]

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[7] The cases relied on by appellant, Jones v. State, 569 So. 2d 1234 (Fla. 1990) and Omelus v. State, 584 So. 2d 563 (Fla. 1991) are clearly distinguishable. In the instant case, appropriate evidence was given to the jury to support evidentiary-wise the statutory aggravating factors.

## ISSUE V

WHETHER THE LOWER COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING IN AGGRAVATION THAT THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN THE COMMISSION OR ATTEMPT TO COMMIT A SEXUAL BATTERY.

The trial court correctly found the presence of this aggravating factor in his sentencing order:

> "This capital felony was committed while the Defendant was engaged in the commission of an attempted sexual battery. This aggravating circumstance was established beyond a reasonable doubt.
>
> During the Guilt Phase of this Defendant's trial, as well as the two Penalty Phases, evidence was introduced establishing that the victim's body was nude when discovered, with only her bra around her neck. In addition, virtually all of the varied stories told by the Defendant in his statements to investigators suggest some form of sexual activity in connection with her death. Although the condition of the victim's body was too deteriorated to determine if sexual activity occurred, this Court concurs with the Florida Supreme Court in finding that 'there was sufficient evidence of attempted sexual battery to support this aggravating factor'. Rhodes v. State, 547 So.2d 1201 (Fla. 1989)."

(R 489)

We disagree with appellant's judgment that there is insufficient evidentiary support for the finding. In addition to the testimony of Detective Steve Porter and Medical Examiner Dr. Joan Wood that the victim's body was found bereft of any clothing except for a brassiere (R 874, 942 - 43), appellant had confessed in jail to cellmate Michael Guy Allen that he had been out drinking with the girl he was alleged to have killed, that they'd

had sex, she fought him and he got scratches all over him (R 2080 - 81). Similarly, jail inmate Edward Cottrell testified:

> "And he wanted to show her the hotel and then evidently they were at the hotel and he tried to get into her pants, so to speak, make love to her, whatever, and she resisted and evidently it happened twice. So the second time to what I gather she hit him or something like that and he hit her back and choked her and hit her in the head in the neck with a board."
>
> (PR 2033)
>
> * * *
>
> "Q. But did he ever say he ever did it for any other reason [than wanting to have sex with her]?
>
> A. No."
>
> (PR 2035)
>
> * * *
>
> "Q. Did he mention whether or not there was a struggle and anything about her?
>
> A. He said that she resisted when he tried to get in her pants.
>
> Q. Did he say whether or not she put up a fight?
>
> A. Yeah. He did."
>
> (PR 2036)

Appellant complains that the trial court concurred with this Court's prior appeal in Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). Appellee is not prepared to concede that it is a crime or

otherwise inappropriate for a trial court to concur with a decision of this Honorable Court -- or whether it should be. While appellee concurs with the principle that a resentencing is a "completely new proceeding" Preston v. State, 607 So. 2d 404, 408 (Fla. 1992) or a "totally new proceeding" Hall v. State, 614 So. 2d 473 (Fla. 1993), that principle avails Rhodes nothing since the trial court's finding of this factor is supported by the evidence and does not rest, as appellant seems to imply, on the mere reliance on this Court's prior appellate ruling.

## ISSUE VI

WHETHER THE LOWER COURT FAILED TO AFFORD APPELLANT AN OPPORTUNITY TO BE HEARD PRIOR TO SENTENCING AND IN IMPOSING SENTENCE WITHOUT SUFFICIENT ANALYSIS.

Appellee submits that the lower court presented appellant with adequate opportunity to speak at the hearing on March 17, 1992 (R 1187):

> THE COURT: Mr. Rhodes, we had originally scheduled your sentencing for today, but in an abundance of caution in order to make sure that there is no additional evidence or witnesses or testimony to be presented, I have set this hearing for that purpose.
>
> Now, my understanding is that you had a discussion with your attorney and that at this time, there are no other witnesses, there is no other evidence or no other testimony that you wish to present prior to sentencing; is that true?
>
> THE DEFENDANT: This is true, Your Honor.
>
> THE COURT: Okay. In that case, I am going to go ahead and schedule the sentencing for the 20th of this month, which is Friday at eleven o'clock and sentence will be pronounced at that time.

Appellant also complains that the sentencing order is defective because the second paragraph therein recites that the trial judge considered the findings of this Court in the prior appeal as well as the evidence presented in the guilt phase trial conducted before Judge Helen Hansell (R 488). But it is not error for the trial judge to familiarize himself with the prior appellate opinion that remanded the case to him. How else can a trial judge comply with a remand order and avoid repeating the

error which occasioned the remand? To the extent that appellant implies or overtly states that the court was avoiding its independent obligation to engage in a weighing process of the submitted evidence in aggravation and mitigation that claim is unfounded and a review of the entire sentencing order demonstrates that the court considered and weighed what was before it (R 488 - 491). The trial court's review of the guilt phase proceedings before Judge Hansel was not improper and to fully familiarize itself with the case seems like an attempt to honor the spirit of Corbett v. State, 602 So. 2d 1240 (Fla. 1992), which encourages the trial judge to hear the same evidence a jury does. Corbett is not, however, identical to the instant case. There, the Court required the sentencing judge who did not hear the penalty phase evidence and was substituted for the judge who did to conduct a new sentencing proceeding. In the instant case Judge Baird sat for the entirety of the penalty phase and merely reviewed the transcript of the guilt phase.

Additionally, appellant's failure to complain about this at the hearing on March 20, 1992, constitutes a procedural bar precluding initiation of an argument on appeal. Steinhorst, supra.

Appellant also contends that the lower court's discussion of nonstatutory mitigating circumstances wherein the Court noted that the extreme mental or emotional disturbance at the time of the crime evidence "was essentially identical to that supporting mitigating circumstances two (2) above" (R 490). Rather than

reflecting that the Court refused to accept the notion of "non-extreme" mental or emotional disturbance, it would appear the Court was namely addressing the mitigation urged by the defense in his sentencing memorandum (R 458) which did not urge "non-extreme" mental or emotional disturbance and it is of course appellant's burden to identify nonstatutory mitigating factors relied on. See Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990) (Because nonstatutory mitigating evidence is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish).

Appellant complains about the wording in the order that "the mitigating circumstances were not outweighed by the aggravating." This is clearly scrivener's error and the context of the remark demonstrates the judge meant that aggravating outweighed the mitigating.

Appellant's complaint that the court failed to initially state that the aggravating circumstances merited the death penalty is insubstantial as the earlier articulation of three valid aggravators would render a repeated reference to it self-evident.

The contentions urged herein are meritless and should be rejected by the court.

## ISSUE VII

WHETHER THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH BECAUSE THE SENTENCE ALLEGEDLY IS DISPROPORTIONATE.

Appellant contends that the sentence of death imposed is disproportionate because one of the aggravating factors -- homicide committed during an attempted sexual battery -- should not have been found (Issue V); that aggravating factor (5)(d) is inherent in every felony-murder; that the under sentence of imprisonment factor constitutes an almost total lack of aggravation citing Songer v. State, 544 So. 2d 1010 (Fla. 1989) and that appellant's prior violent felony aggravator should be given little weight because having been committed some thirteen years ago are "too old" or stale to provide "any meaningful insight" into Rhodes' fitness for a life sentence. Appellee's initial reaction is that if the legislature's classification of aggravating factors 5(a), (b) and (d) are so insubstantial, one wonders why the United States Supreme Court sustained Florida's capital sentencing scheme in Proffitt v. Florida, 428 US. 242, 49 L.Ed.2d 913 (1976). Suffice it to say, that appellee disagrees with Rhodes that homicide during an attempted sexual battery should not have been found (issue V, supra) (and indeed this Honorable Court approved that finding on Rhodes' last appeal). With respect to aggravating factors 5(a) and 5(b), appellant does not dispute the correctness of the trial court's findings.

> "1. The Defendant, Richard W. Rhodes, committed this capital felony while under a sentence of imprisonment. This aggravating

circumstance was established by the evidence beyond a reasonable doubt.

Documentary evidence was introduced during the penalty phase trial proving that the Defendant, on January 25th, 1979, had been sentenced to a prison term of eight years for Battery with a Deadly Weapon and four years consecutively for Attempted Robbery in Nevada. The defendant was released on parole on June 15th, 1983. His parole was scheduled to terminate on April 16th, 1985. The murder of Karen Jeter Nieradka occurred on February 29th, 1984. Since the Defendant was still on parole at the time he committed the murder, the Court finds that this aggravating circumstance has been established. White v. State, 403 So. 2d 331 (Fla. 1981).

2. The Defendant, Richard W. Rhodes, was previously convicted of a felony involving the use or threat of violence to another person. This aggravating circumstance was established by the evidence beyond a reasonable doubt.

Documentary evidence was introduced during the penalty phase trial establishing that the Defendant was convicted of Robbery in the First Degree in Coos County, Oregon on January 21st, 1974. On February 4th, 1976, while in prison, he was convicted of Assault in the Third Degree. Finally, on January 25th, 1979, the Defendant was convicted of Attempted Robbery and Battery with a Deadly Weapon in Mineral County, Nevada. The crimes for which the Defendant was convicted in Nevada were committed within one month of his release from Oregon. The Murder of Karen Jeter Nieradka was committed less than nine months following his release on parole from Nevada."

(R 488 - 489)

And rather than regard appellant's prior failures to cope in a nonviolent fashion with his fellow citizens as an irrelevance, which appellant implies, the state would suggest that such

history is the most appropriate factor to weigh in deciding whether the ultimate sanction of death or life imprisonment should be imposed. Appellant's parole status at the time of his murder of Karen Jeter Nieradka was properly deemed a serious aggravating factor. White v. State, 403 So. 2d 331 (Fla. 1981). Similarly, appellant's criminal record of a robbery in 1974, an assault while in prison in 1976, and attempted battery with a deadly weapon in 1979, all fortify the view that Mr. Rhodes is a violent man for whom the ultimate sanction is called for. Appellant's reliance on Rembert v. State, 445 So. 2d 337 (Fla. 1984), is unavailing; there, this Court found only one valid aggravating factor instead of three present here. In Songer, supra, the trial court found only one aggravating factor. The Court characterized Songer as a case that "may represent the least aggravated and most mitigated case to undergo proportionality analysis." 544 So. 2d at 1011. Rhodes' violent criminal history takes him out of this group.

To support his argument, appellant alludes to the mitigating evidence he presented below and commented upon by the trial court in his sentencing order:

> "1. The age of the Defendant at the time of the crime -- 30. This mitigating Circumstance was established and considered by this Court.
>
> 2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. This mitigating circumstance was established and considered by this court.

The Defendant's background is a laundry list of experiences that almost predicted a life of crime and violence. He was abandoned at a young age by both his parents, although he later spent some time with his natural father. He was certainly neglected, and there was come evidence that he had been sexually abused. As a child he was hyperactive and diagnosed as having a character disorder. He grew up in various foster homes. There was little or no stability to his existence since he would cause such problems within the household that he would have to be removed. During his youth there was a history, reflected in the records introduced at the Penalty Phase, of killing animals, sexual play with other children, and compulsive lying. Unable to coexist in the home of his father and stepmother, or foster homes, the Defendant was eventually placed in Napa State Hospital in California. There he remained from the time he was twelve until he turned eighteen.

Upon his release from the Napa State Hospital, he lived for a time with a Don Betterley, an Activity Specialist at the Hospital who had apparently taken an interest in him. At the time the Defendant's imprisonment in Oregon, Mr. Betterley submitted a confidential questionnaire to the Oregon State Correctional Institution that provided a great deal of insight into the Defendant. His opinion of the Defendant mirrors that of the various psychiatrists and other mental health professionals who have examined him over the years. These include Dr. Donald Taylor and Sidney Merin, PhD., both of whom testified at the second Penalty Phase.

Dr. Taylor, a psychiatrist, was of the opinion that the Defendant was severely emotionally disturbed. Significantly, he did not find that the Defendant was schizophrenic, as he had been diagnosed in California as a youth. His opinion was more consistent with the diagnosis of a personality disorder, which was reflected on the Defendant's discharge summary from Napa State Hospital in 1970.

Dr. Merin also confirmed the diagnosis of a personality disorder.

Finally, the anecdotal evidence provided by the testimony of the Defendant's brother, James Rhodes, is consistent with the opinions of the professionals who have examined him.

3. Any other aspects of the Defendant's character or record and any other circumstance of the offense. The Court has considered the following non statutory mitigating circumstances.

a. As a child, the defendant was abandoned by his parents. This fact was established and considered by the court.

b. The social welfare system of California was never able to adequately place the Defendant in a social environment that could address his needs as a child. The Defendant has spent the majority of his life in institutions, from the time he was at least twelve. From the Napa State Hospital, to the prison systems of Oregon and Nevada, the Defendant was never de-institutionalized for more than a few months at a time. As a result, the Defendant never experienced a family life that could be considered normal. These facts were established and considered by the court.

c. It was suggested by the Defendant, as another mitigating circumstance, that he was under the influence of extreme mental or emotional disturbance at the time of the crime. The Court has considered the evidence offered and finds that it is insufficient to establish this mitigator. The evidence offered was essentially identical to that supporting mitigating circumstance two (2) above. In considering this alleged mitigator, the Court finds that said evidence is consistent with this alleged mitigator, the Court finds that said evidence is consistent with the impairment of the Defendant's ability to conform his conduct to the requirements of the law, but does not rise to the level of extreme mental or

> emotional disturbance. Accordingly, the Court has given no weight to this alleged factor.
>
> d. It was also suggested by the Defendant that he was under extreme duress at the time of the crime, as a result of alcohol consumption and his family history. Any evidence of alcohol consumption was almost entirely speculative. In fact, the testimony of Dr. Merin tended to negate this factor. Likewise, the confidential questionnaire of Don Betterley indicates no particular problem with alcohol. The only real evidence of this mitigator was contained in the testimony of Dr. Taylor, and it was more conjecture than evidence. Likewise, the family history of the Defendant was considered by the Court in mitigating circumstances Two (2) above. It was not established that that history placed the Defendant under extreme duress at the time of the crime. Given the lack of evidence of the existence of this mitigator, the Court has given it no weight."

(R 489 - 491)

To the extent that appellant may be urging that the mere presence of the mitigating factor of extreme mental or emotional disturbance -- if it were found to be present by a trial judge -- would compel a disproportionality conclusion he is mistaken. See Cruse v. State, 588 So. 2d 983 (Fla. 1991). In the instant case of course the trial court found an impairment of the ability to conform to the requirements of law but it did not rise to the level of extreme mental or emotional disturbance.

Appellant appears to argue that the trial court should have given more deference to the testimony of defense witness Dr. Taylor. State rebuttal witness Dr. Merin opined that Rhodes did not suffer from any kind of mental disturbance and thought Rhodes had an antisocial personality (R 1088).

This Court has consistently declined to engage in second-guessing of trial judges when they consider the matters presented to them and disagree with the weight the defense would attribute to them. See Nixon v. State, 572 So. 2d 1336 (Fla. 1990) (clear that trial court considered and rejected all mitigating evidence offered); Robinson v. State, 574 So. 2d 108 (Fla. 1991) (no error in failing to find additional mitigating factors; trial court's comprehensive order discussed all mitigating presented and reflected it considered and weighed it); Gunsby v. State, 574 So. 2d 1085 (Fla. 1991) (trial judge considered conflicting testimony of mental health professionals and as an appellate court we have no authority to reweigh that evidence); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991) (mental health experts often reach different conclusions); Sanchez-Velasco v. State, 570 So. 2d 908 (Fla. 1990) (failure to find extreme mental or emotional distress and inability to appreciate the criminality of conduct not error; judge could appropriately reject it since the evidence was not without equivocation and reservation; Zeigler v. State, 580 So. 2d 127 (Fla. 1991) (judge explained why he was giving little or no weight to the mitigating evidence); Sochor v. State, 580 So. 2d 595 (Fla. 1991) (OK for trial judge to reject mitigating factors; although several doctors testified as to defendant's mental instability, one testified he had not been truthful and another that he had selective amnesia and deciding about the family history as mitigation is within the trial court's discretion); Jones v. State, 580 So. 2d 143 (Fla. 1991) (while a

poor home environment in some cases may be mitigating, sentencing is an individualized process and the trial court may find it insufficient); Ponticelli v. State, 593 So. 2d 483 (Fla. 1991) (rejecting defense argument that court failed to consider unrebutted mitigating evidence; trial court found doctor's testimony "speculation" and there was competent, substantial evidence to support rejection of the mitigating evidence); Hall v. State, ___ So. 2d ___, 18 Fla. Law Weekly S 63 (Fla. Case No. 77,563, January 14, 1993).

Appellant notes that this Court has recognized that a troubled background and family life can be mitigating and indeed it has and the trial court's order reflects a consideration of his background ("Defendant's background is a laundry list of experiences that almost predicted a life of crime and violence . . . little or no stability to his existence since he would cause such problems within the household that he would have to be removed." - R 489). The issue is not whether the trial court considered such matters, but rather they were of such sufficiency to outweigh the aggravating.[8]

Rhodes relies on Livingston v. State, 565 So. 2d 1288 (1990) and Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988). Livingston was a seventeen year old with one prior felony conviction; appellant is thirty years old with two prior convictions (the

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[8] And despite a similar background appellant's brother James did not turn to murder.

Nevada offense committed within one month of his release from Oregon an the instant murder committed less than nine months following release on parole from Nevada - R 489). Fitzpatrick involved the actions of an "emotionally-disturbed man-child not those of a cold-blooded, heartless killer." 527 So. 2d at 812; the instant case involves a manipulative, violent adult once again pursuing a course of violence.

The imposition of a sentence of death herein is not disproportionate.

## ISSUE VIII

WHETHER ONE OF THE TWO WRITTEN JUDGMENTS FILED HEREIN IS EXTRANEOUS.

Appellee agrees that only one judgment should be imposed in the instant case and that this Court previously affirmed the judgment of guilt. Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989). Any subsequent declaration adjudicating appellant guilty is extraneous and unnecessary and may be set aside leaving intact the prior adjudication affirmed by this Court.

## CONCLUSION

Based on the foregoing facts, arguments and citations of authority, this Honorable Court should affirm the sentence of the trial court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 30th day of July, 1993.

OF COUNSEL FOR APPELLEE.