IN THE SUPREME COURT OF FLORIDA

JIMMY LEE EADDY,

Appellant,

v. Case No.: 79,987

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the trial court, will be referred to in this brief as the state. Appellant, JAMES LEE EADDY, the defendant in the trial court, will be referred to in this brief as Eaddy. Any record references to the record on appeal will be noted by the symbol "R," and references to hearing transcripts will be noted by the symbol "T." All references will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

Issue I

After posing some general questions to the entire venire, the prosecutor explained the bifurcated system for cases involving the death penalty (T 237). The prosecutor then asked each prospective juror independently: "If you are convinced that the State has proved its case beyond a reasonable doubt, would you return a verdict of guilty even knowing that you would be subjecting the Defendant, Mr. Eaddy, to a possible death sentence?" (T 238). With the exception of Mrs. Martin (T 241), each prospective juror answered affirmatively (T 238-44).

The prosecutor next queried whether anyone could not recommend the death penalty "no matter what" (T 246). When Mrs. Raines answered that she could not, the prosecutor asked: "If the Judge instructs you that after hearing aggravating circumstances and mitigating circumstances and testimony, that if the mitigating circumstances are outweighed by the aggravating circumstances, that the proper recommendation for you to make is death, can you all agree to follow that particular law?" (T 246-47). The venire responded affirmatively (T 247).

After some preliminary questions addressed to the entire venire concerning the death penalty, defense counsel questioned juror Williams:

[Defense counsel]: Let me ask you, Mr. Williams, do you have any strong feelings about the death penalty?

[Williams]: Well, I believe in it.

[Defense counsel]: Okay. Have you ever advocated for it one way or the other?

[Williams]: No, I haven't.

[Defense counsel]: Do you feel -- do you know what your church's position is on it or do you attend a church?

[William]: Yes, I do.

[Defense counsel]: And do you know what their position is?

[Williams]: Our pastor, at least I haven't heard him, on the pulpit give[s] a strong opinion on it.

[Defense counsel]: And what is your educational background?

[Williams]: Graduated from high school here in Jacksonville, went to Florida State, graduated from Florida State and back to Jacksonville.

[Defense counsel]: And what was your major?

[Williams]: Management.

[Defense counsel]: Okay. Do you feel that if -- you said your personal view was that you believe in the death penalty; is that right?

[Williams]: Yes.

[Defense counsel]: And do you feel that it should always be given?

[Williams]: Well, under the circumstances, I believe if you take someone else's life and if the death penalty is given to you, I think that's sufficient.

[Defense counsel]: That's what?

[Williams]: If the death penalty is given to you, I think it's sufficient.

[Defense counsel]: Do you think it should always be given in every case?

[Williams]: If you take someone[] else's life?

[Defense counsel]: Uh-huh.

[Williams]: Yes, I believe you are due the death penalty if that's what's recommended.

[Defense counsel]: Well, if that's what's recommended by whom?

[Williams]: In regard to how law is said. I don't know how the law is. But if it's in regard to the law.

[Defense counsel]: All right. If -- well, let me rephrase the question then, do you -- any time someone is killed as a result of a homicide, do you think that the death penalty should be given regardless of any mitigation or --

[Williams]: Regardless of mitigation?

[Defense counsel]: Yes.

[Williams]: I think once they are found guilty without a reasonable doubt, I think they are due the death penalty.

[Defense counsel]: Okay. If they were found guilty beyond a reasonable doubt Is there any circumstance where you would not recommend the death penalty?

[Williams]: No, not really.

[Defense counsel]: Okay. Thank you.

(T 296-99).

Later, defense counsel continued in the same vein:

> [Defense counsel]: Mr. Lambert, how about you, what's your educational background?
>
> [Lambert]: Two years of college.
>
> [Defense counsel]: Do you have any strong feelings [about the death penalty]?
>
> [Lambert]: I am strongly in favor.
>
> [Defense counsel]: Would you have any trouble returning a recommendation of life if you found that the law and the evidence was for it?
>
> [Lambert]: The mitigating circumstance would have to be pretty strong.
>
> [Defense counsel]: They would have to be pretty strong. Could you apply the law, though, as His Honor told you what it would be?
>
> [Lambert]: I don't know what that means.
>
> [Defense counsel]: I mean, in other words, if he didn't instruct you that they would have to be pretty strong, would you have any problem applying the law that His Honor tells you if it differed from your own interpretation? That's a really complex question.
>
> [Lambert]: If it differed from mine, it would be very difficult.
>
> [Defense counsel]: Okay. And, Mr. Watson, what's your educational background?
>
> [Watson]: High school.
>
> [Defense counsel]: High school. And do you have any strong feelings about the death penalty?

[Watson]: I favor it.

[Defense counsel]: Have you ever advocated for its extension to other crimes?

[Watson]: No, I haven't.

[Defense counsel]: Do you think it's not used enough or -- or do you have any strong feeling that way?

[Watson]: I think if a person [commits] a premeditated first degree murder, it is appropriate.

[Defense counsel]: It's appropriate. If you found that mitigating factors outweighed aggravating factors, could you recommend life?

[Watson]: Not if that was the law.

[Defense counsel]: Not with hesitation.

(T 341-43).

Defense counsel challenged Williams and Lambert for cause, which the trial court denied (T 357-60, 363-64). The state then peremptorily struck Lambert (T 369-70). Thereafter, defense counsel requested one additional peremptory, because she had exhausted all peremptories and "[r]emaining on the jury [was] still a person [she] would like to excuse [who she] tried to challenge for cause" (T 371). Defense counsel identified this juror as Mr. Williams (T 372). The trial court denied this request (T 373). Although Williams served as a juror, defense counsel peremptorily struck Watson as an alternate juror (T 375, 380).

Following defense counsel's questioning, the trial court stated:

> If there are any member[s] of this jury panel -- any member of this jury panel who feels that you could not follow the law that the Court will instruct you and the definitions that the Court will instruct upon both -- in the guilt or innocence portion of this trial and in the recommendations to the Court as to the sentencing portion of this trial, if there should be such a hearing, anybody feel that you could not regardless of your personal -- I mean, in view of any personal feeling that you have that you could not follow the instructions given by the Court on the law of this state and the definition given to you by the Court in the instruction; if so raise your hand, please.
>
> Let the record show that no hands were raised in response to that question.

(T 350-51).

Issue II

During voir dire, the following dialogue took place:

> [Defense counsel]: Let me ask you, if I could just go one by one on this, Mr. Black, do you have any strongly held views about the death penalty one way or the other?
>
> [Black]: No.
>
> [Defense counsel]: You don't have any ideas about it one way or the other?

Okay. Have you ever -- you've never -- have you ever actively joined any group that advocates the use of the death penalty?

[Black]: No.

[Defense counsel]: Okay. Have you recently discussed the death penalty with friends or anything?

[Black]: No.

[Defense counsel]: Okay. Do you feel that there are any crimes which should automatically get the death penalty?

[Black]: No.

[Defense counsel]: No. Okay. In this case, will you be able to weigh the mitigating [and] aggravating circumstances?

[Black]: Explain that.

[Defense counsel]: If His Honor tells you at the end that there are certain aggravating and mitigating circumstances, if it gets to a sentencing phase, and -- and the aggravating [and] mitigating circumstances, will you be able to follow the law and weigh the aggravation and mitigation?

[Black]: Yes.

[Defense counsel]: Okay. When we talk about if you were to sit on a jury that recommends death penalties, does that mean to you that Mr. Eaddy would die or what would that mean to you?

[Mr. Black]: Yes.

[Prosecutor]: I am going to object, Your Honor, that is not a relevant question.

[Court]: The objection is sustained.

[Defense counsel]: Your Honor, if I may be heard on that? I am trying to find out what weight they would --

[Court]: Don't argue from out there, just come up to the bench if you will, please, ma'am.

(Sidebar discussion with court reporter present.)

[Court]: First this is a large room and the voices get lost in here.

Read the question back to me, please.

(The question was read back by the court reporter.)

[Court]: I think that's a highly improper question.

[Defense counsel]: Your Honor, I am trying to find out -- I think in the State's voir dire, the prosecutor indicated that their recommendation was only given great weight. And I think it's important for them to find out how they feel, what their opinions and their views are on the death penalty and how they feel what kind of weight the Court would accord their recommendation.

[Court]: Are you talking about the sentencing hearing?

[Defense counsel]: Yes, sir.

[Court]: I still sustain the objection. I don't believe that's a proper question to ask.

[Defense counsel]: What their beliefs are about the death penalty?

[Court]: No, you didn't ask about what the[ir] beliefs are about the death penalty. You asked what would happen --

[Defense counsel]: I am asking --

[Court]: What do you believe would happen to him.

[Defense counsel]: Right, which I think is important because they may think nothing would happen to him because there is so much publicity about the fact that people stay on death row a long time or warrants are not signed.

[Court]: I will sustain the objection to that question. You can rephrase your question if you wish.

(Thereupon, the following proceedings were held in open court in the presence of the jury:)

[Court]: Proceed counsel.

[Defense counsel]: Thank you, Your Honor.

What kind of weight do you feel a recommendation of death would be given by -- what kind of -- what kind of weight do you think that would be given --

[Prosecutor]: Objection, Your Honor, that's an improper question.

[Court]: The objection is sustained.

[Defense counsel]: Your Honor, the --

[Court]: What kind of weight by whom, Counselor?

[Defense counsel]: Well, I will ask him.

What kind of weight do you think the Court would give to that recommendation?

[Prosecutor]: Objection, Your Honor, again that's an improper question.

[Defense counsel]: Your Honor, what kind of weight the Court would give is not improper. That State Attorney asked do you understand this is the weight that will be given. I am just merely asking them what their understanding is.

[Court]: Do any of you have any opinion on that basis as to what weight the Court should give a recommendation by a jury?

[Mr. Black]: It's up to you.

[Venire]: No.

[Court]: Anybody have an opinion on that?

[Venire]: No.

[Court]: All right. Proceed, Counsel.

[Defense counsel]: Your Honor, one of the jurors did answer that it was up to you what weight would be given to a jury recommendation, which is not the status of the law. And I would ask for a curative instruction on that.

[Court]: I'll give the jury my instructions at the appropriate time, Counsel. At this time the objection to the question is sustained.

[Defense counsel]: How important do you feel the jury recommendation is?

[Prosecutor]: Your Honor, I'm sorry to continue to object, but these questions are improper.

[Court]: The objection is sustained.

* * * *

[Defense counsel]: Do you -- if someone were found guilty of a homicide, would you always impose the death penalty or not?

[Prosecutor]: Your Honor, I am going to object to the form of the question. Not every homicide involves the death penalty.

[Court]: The objection is sustained.

[Defense counsel]: If -- in a homicide case where the death penalty is a potential penalty, do you think it should be applied in all of those cases?

[Prosecutor]: And, Your Honor, I'm sorry, but I must object because the law in the State of Florida is very clear that there is a standard before the jury can even think about imposing the death penalty.

[Defense counsel]: Your Honor, I object, that's a misstatement of the law. I would ask to approach the bench.

[Court]: All right. Please come forward, Mrs. Reporter, come up here.

(Sidebar discussion with court reporter present.)

[Prosecutor]: Judge, may I --

[Court]: Read the question back, please.

(The question was read back by the court reporter.)

[Prosecutor]: Judge --

[Court]: Your objection?

[Prosecutor]: My objection, Judge, is that -- that the death penalty is reserved for cases where the aggravation outweighs the mitigation. Mrs. Sasser is completely ignoring that standard of the bi[]furcated system in Florida and going straight to do you think all homicides should get the death penalty.

And that completely ignores two things, one, that it's reserved for first degree murder, and, two, it's reserved for first degree murders where the State has aggravation that outweighs mitigation.

For example, last week we tried a first degree murder where we waived the death penalty.

And her question is misleading because it ignores those two facts.

[Defense counsel]: Your Honor, it considers the first fact in asking where it is a potential penalty. I can inquire as to whether or not they would apply the death penalty or feel that it should always be applied.

[Prosecutor]: She has to ask them if they can follow the law regarding aggravation and mitigation.

[Defense counsel]: I need to ask them if they can follow the law. But I can also ask them what their feelings and concerns are about the death penalty and when they would apply [it]. Voir dire is not --

[Court]: I think you are seeking to obtain a commitment from this jury on a premature basis, Counsel. I think a more proper question would be should you be selected on this jury, will you not only follow the Court's instructions on the law and the evidence in rendering a guilty verdict, will you also follow the Court's instructions and the law in the State of Florida on the question of whether or not a death penalty should be imposed as to the life imprisonment sentence.

[Defense counsel]: Your Honor, that does not ask anything about their feelings and their views about the death penalty. Some people hold the feeling that the death penalty should always be applied and they will not follow --

[Court]: Yeah, irregardless [sic] of whatever your beliefs, will you follow the law.

[Defense counsel]: Your Honor, that question regardless of your beliefs would you follow the law is a question that can be asked but that in no way corroborates the questions -- asking of the other questions.

[Court]: It does, Counsel. I will sustain the objection.

[Defense counsel]: At this time I would move for a mistrial. And I feel that the Court has limited my questioning of these people about the[ir] feelings [concerning] the death penalty and [it has] deprived my client of his constitutional rights under . . . the Florida Constitution, the United States Constitution -- under Article 4 and 14 of the United States Constitution and the due process clauses of the Florida Constitution and move for a mistrial.

[Court]: All right. You wish to be heard on that motion?

[Prosecutor]: No, Your Honor.

[Court]: Is your answer no?

[Prosecutor]: It was no, I apologize.

[Court]: Your motion for mistrial will be denied, Counsel.

(T 291-95, 299-303).

Issue III

Prior to the testimony of state witness Ismael Lopez, the state orally moved in limine to prohibit defense counsel

from inquiring about the details of the murder with which Lopez was charged "because the details of that crime [were] not relevant to his testimony" (T 838). Defense counsel argued that these details should have been admitted because "the exact same thing that [Lopez] says that my client confessed to is exactly what happened in [Lopez's] case, more or less, in that [Lopez] was a hitchhiker, got picked up and robbed someone." (T 842). The trial court noted the purpose of cross examination, i.e., to expose possible biases, prejudices, and ulterior motives of a witness as they may relate to the issues or personalities in the case at hand, and accordingly held that Lopez could be cross examined about such biases (T 848-49). However, the court ruled that defense counsel could not, under the guise of cross examination, delve into the facts surrounding the murder charge against Lopez (T 849), because such facts were not relevant in this case (T 851). Although defense counsel stated that she would like to make a proffer of the proposed testimony for the record (T 849-51), she never did so.

Issue IV

When Eaddy took the stand, he related his version of events, stating that, although the victim and a person named Rob or Robert picked him up while he was hitchhiking and took him back to the victim's apartment for a few beers, Eaddy left the apartment within the hour to continue

hitchhiking, leaving the victim and Rob or Robert there alive (T 972-74). Rob or Robert left sometime later, because he picked Eaddy up on Highway 17 and they continued to Brunswick, Georgia (R 974). There, Eaddy pumped some gas in the car; Rob or Robert gave Eaddy a credit card to pay for the gas and told Eaddy to sign because he had cut his hand (T 975). Eaddy signed his name on the receipt but realized that he should have signed the name Rob or Robert told him to sign, i.e., the victim's name (T 975).[1] They then continued to Charleston, South Carolina, and went to the house of Eaddy's mother (T 977-78). Eaddy's mother bandaged the cut on Rob or Robert's hand (T 979). Rob or Robert left the next day, and Eaddy never saw him again (T 979).

Defense counsel then asked Eaddy if he had difficulty remembering what happened on "those two days" (T 979). When Eaddy responded affirmatively, defense counsel asked: "As a result of that, did you . . . undergo any kind of hypnotic treatment?" (T 979). Eaddy responded affirmatively, and the state objected on the grounds that hypnosis evidence should not be admitted and that the state had never been made aware that any hypnosis had taken place (T 980). The trial court asked defense counsel for case law supporting

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[1] The trial court struck the statement that Rob or Robert told him to sign the victim's name as hearsay (T 975).

her position, which counsel could not provide (T 980-81), before the court excluded the evidence (T 981).

Issue V

When Eaddy testified that Rob or Robert told him to place the victim's name on the credit card receipts (T 917-27, 975, 997), the state objected on hearsay grounds (T 975). Defense counsel argued that the statement was not offered to prove the truth of the matter asserted but "merely to show why [Eaddy] did what he did" (T 975).

However, Eaddy's allegation that he signed the victim's name on the Brunswick, Georgia credit card receipt is not supported by the record. Eaddy himself testified that he had started signing his own name on the Brunswick, Georgia credit card receipt when Rob or Robert told him he should have signed the victim's name. Further, the testimony of the handwriting expert indicates that one receipt, numbered 374571, was signed with the victim's name and the other receipt, numbered 814661, was signed "J.E. Eadd" (T 921, 924). Additionally, the prosecutor observed that Eaddy had signed "J.E. Eadd" on the Brunswick, Georgia receipt (T 1104), and did the sentencing court in its written order: "One of these receipts was signed "J.E. Eadd" but that was lined through and the purported signature of Thomas E[dmonds] was then written on the receipt." (R 271).

Finally, Exhibits NN (an enlargement of the credit card receipt signatures) and UU (the actual credit card receipts) show that Eaddy signed "J.E. Eadd" to the receipt numbered 814661.

Issue VI

Defense counsel filed a motion to dismiss count two of the indictment which charged robbery, claiming that the statute of limitations had run on that offense (T 152). The prosecutor argued:

> We find it ludicrous that a person can kill someone, and then the state be limited solely because we couldn't solve the case, once we do solve it, it's past four years -- four years limitation time for lesser included, and/or the underlying felonies for the case, that the state can't proceed.
>
> It's simply ridiculous that there is not an exception for capital offenses where a person should be prosecuted not on the underlying felony, it exists, but also for lesser included of murder. And we think that statute 775.15 is ridiculous under these particular circumstances.
>
> It doesn't accomplish the whole purpose of the statute of limitations to say, well, if this defendant did something back in 1977, you can charge him for part of it but not all of what he did. And that's what this statute is saying. And, it's unconstitutional to the State of Florida in doing that.
>
> The whole purpose of the statute of limitations is to keep the state from trying to do that with someone.

* * * *

The purpose of the statute of limitation is to keep the government from harassing individuals, stringing cases out, waiting for long periods of time before we even file charges. And then, the defense has a hard time defending against it.

In this particular case, this defendant is going to have to defend against all of the facts and the elements that comprise not only armed robbery, which the state is perfectly able to put on through the felony-murder theory, but also for any lesser included offenses, so the statute really is unfair. And it doesn't speak to -- it doesn't accomplish anything in this particular circumstance.

And the -- I might point out, I know the court was not in on this case from its inception, there was no delay caused by the state in the case.

Briefly, to put the facts on the record, in 1977, Mr. Edmonds was killed, he was stabbed, he was robbed, his car was stolen, it was taken to South Carolina. Two fingerprints were found inside his home. At that time, there were no suspects to which the fingerprints could be compared.

Technology took over in the late Eighties, and we came up with this new computer call[ed] the Athis machine and because of that new technology, the Jacksonville Sheriff's Office was able to solve the crime. And I know the court is familiar with that, I don't need to put that on the record. But the new technology allowed us to solve the crime.

As soon as we knew who the suspect was and probable cause was determined, we issued an arrest warrant for his

> arrest in late 1989. He was arrested and brought back to Jacksonville in early '90, and we went to the grand jury in early 1990.
>
> And Judge, there's just no way this statute is being served or this defendant's rights are being violated by the state being able to prosecute for the underlying felony and any lesser included.

(T 153-56).

After the trial court granted the motion to dismiss count two, the prosecutor stated:

> By Ms. Sasser's motion on behalf of this defendant, she has waived their right to any lesser included offenses for the jury to be instructed, so we just want to make it -- we don't want to have to come back, reargue these motions if they come in trial next week and ask the judge to instruct on lesser included offenses.

(T 159-60). Other than briefly continuing her argument that the trial court could not strike the portion of the indictment dealing with section 775.087, defense counsel remained silent (T 160).

At the charge conference, defense counsel asked for two lesser included offense instructions to the murder charge, i.e., second degree murder and manslaughter (T 1025). Defense counsel admitted that a case from the First District held that the court did not have to give such instructions,

but nevertheless requested the instructions because Eaddy was "willing to waive his right to be convicted on lesser included offenses." (T 1025-26). The trial court felt bound to follow the First District case (T 1026), but heard argument from the prosecutor, who pointed to defense counsel's argument at the motion hearing (T 1028). The prosecutor also contended that "whenever [defense counsel] asserted her client's rights under the statute of limitations, she bound herself to this position of no lesser included on the murder. And she should stay bound to that position." (T 1028). The trial refused to give any lesser included instructions (T 1028).

Issue X

In its written sentencing order, the sentencing court related the following concerning the aggravating factor of heinous, atrocious, and cruel:

> FACT:
>
> The victim suffered 9 deep stab wounds into the upper torso with a knife, two of them being lethal; one in the middle of the chest and into the heart and one into the left midline of the body piercing the left ventricle of the heart.
>
> FACT:
>
> In addition to the stab wounds there were two slash type wounds; one to the right lower leg and one into the left shoulder muscle.

FACT:

In addition to the stabbing and cutting wounds, there was a wound caused by a blunt instrument to the midline on the back of the decedent's head.

Conclusion:

This is an aggravating circumstance. The multiple wounds inflicted show a clear "Killing Frenzy" on the part of the defendant and a determination on his part to be absolutely certain of the deceda[n]t's death before halting the infliction of wounds and departing the premisses with decedent's personal property.

(R 282-83).

Issue XV

Eaddy claimed ten mitigating factors (R 289-91), and presented the testimony of four witnesses during sentencing (T 1168-1236). Regarding statutory mitigating circumstances, the sentencing court wrote:

> This Court has carefully reviewed the extensive notes made during the trial of this cause and during the subsequent Jury Recommendation Proceeding, together with the PSI and the Florida Statutory and case law regarding Mitigating Circumstances to be considered by the trial court, and finds that there are no applicable Mitigating Circumstances in this case.

(R 283) (emphasis in original). Concerning nonstatutory mitigation, the sentencing court wrote:

A. FACT:

The defendant testified that he had only completed the Third Grade of School, but he also claimed to be a self-employed painter with an income of approximately $2,000.00 per month. However, there was also evidence that Eaddy would absent himself from home for varying periods of time, with his wife not knowing his whereabouts, thus indicating that he was far from an ideal family man. There was no evidence presented of any mental disorders or deficiencies on the part of the defendant.

CONCLUSION:

This is not a mitigating circumstance.

(R 283-84).

SUMMARY OF THE ARGUMENT

As to Issue I: The trial court did not abuse its discretion in denying Eaddy's cause challenges of prospective jurors Williams, Watson, and Lambert. Because Watson and Lambert did not serve on the jury, Eaddy cannot show that the jury was not impartial. Although Williams's answers to several poorly phrased questions by defense counsel concerning the death penalty indicated a belief that a person was "due" the death penalty upon conviction, the trial court properly posed a rehabilitative question, Williams's answer to which indicated that he could follow the law as instructed.

As to Issue II: The trial court did not abuse its discretion in limiting defense counsel's voir dire questions concerning the death penalty because they were improper. The trial court permitted defense counsel to fully explore venire persons' views on the death penalty, and limited the questioning only when defense counsel inaccurately stated Florida law.

As to Issue III: The trial court did not abuse its discretion in granting the state's motion in limine to prohibit Eaddy from asking state witness Lopez about the facts of an offense committed by Lopez. The introduction of this evidence during cross examination would have been

highly improper, as it neither tested the Lopez's perceptions or memory nor discredited him. Further, Eaddy made no attempt to introduce this evidence in his case-in-chief.

As to Issue IV: The trial court did not abuse its discretion in excluding evidence that Eaddy had been hypnotized because defense counsel failed to comply with this Court's Morgan decision before offering this evidence.

As to Issue V: The trial court did not abuse its discretion in excluding Eaddy's testimony that Rob or Robert told him to sign the victim's name on credit card receipts, because this testimony was hearsay and not relevant to any material fact in issue.

As to Issue VI: The trial court properly refused to instruct the jury on lesser included offenses of first degree murder for two reasons. First, the statement by Eaddy's counsel that Eaddy was "willing" to waive the statute of limitations for the purpose of receiving lesser included offense instructions did not constitute a valid waiver. Second, even if it did, Eaddy was not entitled to lesser included offense instructions because Eaddy took full advantage of his Spaziano choice at the pretrial hearing.

As to Issue VII: Because Eaddy did not properly challenge the sufficiency of the evidence below, he failed

to preserve this point for appellate review. In any event, the trial court properly instructed the jury on felony murder and that, in considering its recommended sentence, it could consider whether Eaddy had committed the murder during the course of a robbery, because the state presented sufficient evidence of robbery to support both instructions.

As to Issue VIII: The trial court properly instructed the jury that it could convict Eaddy of felony murder. Whether the statute of limitations had run on the underlying felony of robbery was irrelevant to a prosecution for felony murder which has no time limitation for prosecution. The mere preclusion of the state's ability to prosecute the robbery because of a time limitation has no effect on the question of whether the robbery was actually committed.

As to Issue IX: The trial court did not abuse its discretion in (1) precluding Eaddy from arguing that the state had presented no evidence of motive, and (2) permitting the state to characterize Eaddy's testimony as a "pack of lies." As to the first claim, the state was not required to prove motive. As to the second claim, because Eaddy did not request a mistrial or request a curative instruction, he failed to preserve the point for appellate review.

As to Issue X: The sentencing court properly found that the murder was committed in a heinous, atrocious, and cruel manner. The facts plainly show that the victim suffered 11 stab wounds and bled profusely. Further, a common sense inference from these facts proves the likelihood that the victim was conscious during much of the attack and suffered both physically and mentally.

As to Issue XI: Sufficient evidence existed to warrant the sentencing court in instructing the jury on the cold, calculating, and premeditated aggravating factor. The facts show that Eaddy hatched a plan to alleviate his need to hitchhike home, i.e., kill the victim and take his money, credit cards, and car.

As to Issue XII: Because Eaddy objected below only to the act of the sentencing court instructing on the cold, calculated, and premeditated aggravating factor, not to the wording of the instruction itself, he failed to preserve this point for appellate review. In any event, the trial court properly instructed the jury on this factor, because Espinosa improperly undermines the legislative intent behind section 921.141 that the court's sentence be independent and ignores precedents from this Court.

As to Issue XIII: The sentencing court's application of the cold, calculated, and premeditated aggravating factor

did not constitute an ex post facto violation. This Court has repeatedly held that application of this factor to a defendant who commits a first degree murder before the date of its enactment does not constitute an ex post facto violation, and Eaddy offers no legitimate reason for receding from this line of cases.

As to Issue XIV: Eaddy's death sentence is proportionate to other death sentences imposed under similar facts. The trial court found two well-supported aggravating factors -- felony murder and heinous, atrocious, and cruel -- and no mitigating circumstances. Eaddy's had a significant history of criminal activity and could not show that he suffered from a problem with alcohol at the time of the murder.

As to Issue XV: The sentencing court properly considered all mitigation evidence presented by Eaddy. It properly found that Eaddy was less than an ideal "family man," and that Eaddy suffered from no mental disorder. Although the court considered the mitigation, sufficient evidence existed which rebutted this evidence and warranted the court's finding of no mitigation.

ARGUMENT

Issue I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING EADDY'S CAUSE CHALLENGES OF PROSPECTIVE JURORS WILLIAMS, WATSON, AND LAMBERT.

"The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Lusk v. State, 446 So. 2d 1038, 1041 (Fla.), cert. denied, 469 U.S. 873 (1984). Deciding whether a prospective juror meets the Lusk test is within a trial court's discretion, Pentecost v. State, 545 So. 2d 861 (Fla. 1989), based upon what the court hears and observes. See Reed v. State, 560 So. 2d 203 (Fla.), cert. denied, 111 S. Ct. 230 (1990). A review of the instant record reveals that the court's refusal to excuse Williams for cause was not an abuse of discretion as it met the Lusk standard.

Prospective Jurors Watson and Lambert

Eaddy's challenge of these two prospective jurors on appeal is enigmatic. As noted in the statement of case and facts, the state peremptorily struck prospective juror Lambert (T 369-70) and defense counsel peremptorily struck prospective alternate juror Watson (T 375, 380). Therefore, they were "removed from the jury as effectively as if the

trial court had excused [them] for cause." Ross v. Oklahoma, 487 U.S. 81, 85 (1988). Because these allegedly biased prospective jurors did not serve on the jury, Eaddy cannot show that the jury was not impartial. After all, "[a]ny claim that the jury was not impartial . . . must focus . . . on the jurors who ultimately sat." Ross, 487 U.S. at 86. See also Trotter v. State, 576 So. 2d 691, 692 (Fla. 1990).

Juror Williams

During the prosecutor's questioning, Mr. Williams indicated that he could follow the law concerning aggravation and mitigation in the penalty phase. During defense counsel's questioning, other than indicating that he believed in the death penalty, Mr. Williams stated that, if one were convicted of murder and sentenced to death, "that's sufficient" and that one was "due the death penalty if that's what's recommended." (T 297-98). In response to several vaguely phrased questions, Mr. Williams stated that, if one were found guilty beyond a reasonable doubt, that person was "due the death penalty." (T 298). However, read in its entirety, Mr. Williams's testimony indicates that he would follow any applicable law regarding the death penalty.

Eaddy's reliance on Bryant v. State, 601 So. 2d 529 (Fla. 1992), is predictable, but misplaced. There, this

Court found critical the fact that no rehabilitation occurred after defense counsel elicited from 11 prospective jurors their view that the death penalty should be automatically imposed for premeditated murder. This Court noted: "The appropriate procedure, when the record preliminarily establishes that a juror's views could prevent or substantially impair his or her duties, is for either the prosecutor or the judge to make sure the prospective juror can be an impartial member of the jury." Id. at 532. Because neither the prosecutor nor the judge in Bryant engaged in such rehabilitation, this Court reversed solely for resentencing.

Admittedly, in the instant case, the prosecutor engaged in no rehabilitation (T 351). However, the trial court did pose a specific rehabilitative question to the venire concerning whether they could follow the law, despite their personal feelings (T 351). All venire persons stated that they could follow the law regardless of their individual views (T 351). Eaddy concedes the rehabilitative nature of this question, but posits that such a "blanket, nebulous inquiry" was insufficient. Appellant's Initial Brief at 23.

As this Court is well aware, it provided no formulaic procedure for accomplishing the suggested rehabilitation in Bryant, leaving this question to be answered on a case-by-case basis. The question as posed by the trial court in

this instance was clearly sufficient, as it provided the venire members with the opportunity to clarify their views. Had Mr. Williams actually believed that the death penalty should be imposed automatically in homicide cases, he could have so informed the court. The fact that Mr. Williams did not state that he could not follow the law as provided by the court indicates that Mr. Williams's statement that, once a person is found guilty, he or she is "due" the death penalty, was simply a confused response to a poorly phrased series of questions posed by defense counsel. This is not a case where Mr. Williams testified unequivocally that, regardless of circumstances, he would always recommend death if a person were convicted. Contrast O'Connell v. State, 480 So. 2d 1284 (Fla. 1986) (three prospective jurors would have automatically recommended death upon conviction of the defendant); Hill v. State, 477 So. 2d 553 (Fla. 1985) (prospective juror came to court with staunch belief that, upon conviction for premeditated murder, a person should be sentenced to death); Thomas v. State, 403 So. 2d 371 (Fla. 1981) (prospective juror admitted that he could not "recommend any mercy" in any sentencing phase under any circumstances).

In Lambrix v. State, 494 So. 2d 1143 (Fla. 1986), both the prosecutor and defense counsel "led [a prospective juror] down the path of their choosing," such that this

prospective juror offered contradictory opinions concerning the death penalty. Id. at 1146. This Court found the most pertinent portion of this venire person's testimony was her response to the questions of the trial court, "the ultimate symbol of neutrality," and concluded that the venire person's answer to the trial court that she could not vote for the death penalty under any circumstances was controlling. Id.

The instant facts are similar to those in Lambrix. Williams gave contradictory opinions on the death penalty due to the path down which defense counsel led him, first telling defense counsel that imposition of the death penalty would depend on the law as instructed by the trial court, but then stating that, upon conviction, the death penalty should be imposed. However, when the trial court posed its question to clarify the conundrum created by defense counsel's opaque questions, Williams and the entire panel indicated that they could follow the law, despite their personal views. This answer should be controlling, as it was in response to a question from "the ultimate symbol of neutrality."

Should this Court find that the trial court abused its discretion in denying Eaddy's cause challenge of Williams, Eaddy's request for a new trial on this point is clearly unwarranted. In Bryant, this Court held unequivocally that

this type of error "applies only to the penalty phase and not to the guilt phase of the trial." 601 So. 2d at 532. Accordingly, if Eaddy is entitled to relief, Eaddy should receive only a new sentencing hearing.

Issue II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN LIMITING DEFENSE COUNSEL'S VOIR DIRE QUESTIONS CONCERNING THE DEATH PENALTY.

The trial court has wide discretion in determining which questions are asked during voir dire. Stano v. State, 473 So. 2d 1282, 1285 (Fla. 1985), cert. denied, 474 U.S. 1093 (1986). After all, "[o]nly one who is present at trial can discern the nuances of the spoken word and the demeanor of those involved." Reed v. State, 560 So. 2d 203, 206, cert. denied, 111 S. Ct. 230 (Fla. 1990). Here, the trial court did not abuse its discretion in limiting defense counsel's questions about the death penalty, because the questions as phrased were improper.

Defense counsel questioned individual prospective jurors at length about their views concerning the death penalty. Eaddy nevertheless claims that the sustained objection to the question "[I]n a homicide case where the death penalty is a potential penalty, do you think it should be applied in all of those cases?" improperly limited his right to fully discern prospective juror Harrison's views on the death penalty.[2] This claim is without merit, because the question was improper. The proper question would have

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[2] Defense counsel peremptorily struck Harrison (T 365, 375).

been one which stated applicable, correct, and current Florida law, and which queried whether the juror would be able to follow that law, not one which omitted a correct statement of Florida law and posed a hypothetical.[3] After all, "[t]he purpose of voir dire examination is to obtain a fair and impartial jury to try the issues in the cause. The subject question, however, did not address the juror's impartial application of existing law, but rather it concerned her conception of what laws should exist." King v. State, 390 So. 2d 315, 319 (Fla. 1980) (citation omitted).

Eaddy relies heavily on Judge Pearson's dissent in Lavado v. State, 469 So. 2d 917 (Fla. 3d DCA 1985), which this Court adopted as its opinion in Lavado v. State, 492 So. 2d 1322 (Fla. 1986). There, defense counsel sought to learn prospective jurors' attitudes about a voluntary intoxication defense. The trial court, however, permitted no questions about the defense, and allowed questions to address only the venire's biases against drinking in general. Judge Pearson, and this Court, found this generalized inquiry inadequate to fully explore potential

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[3] Although "[a] hypothetical question making *a correct reference to the law of the case* to aid in determining the qualifications or acceptability of a prospective juror may be permitted by the trial judge in the exercise of a sound judicial discretion," the instant question contained a wholly inaccurate statement of the law. Pait v. State, 112 So. 2d 380, 383 (Fla. 1959) (emphasis supplied).

juror biases. Lavado is not persuasive precedent for Eaddy, as the trial court there wholly precluded defense counsel from discovering juror attitudes toward a defense. In the instant case, it is clear defense counsel adequately explored the venire's views about the death penalty, and that the trial court only limited those questions which posed improper hypothetical based on incorrect statements of Florida law.

Finally, the test for determining juror competence is whether a juror can lay aside a bias and decide the case solely on the evidence adduced and instructions given. Davis v. State, 461 So. 2d 67 (Fla. 1984). Venirewoman Harrison, about whom Eaddy "now complains met that test, as did all persons who eventually served on the jury. [Accordingly, Eaddy] has shown no abuse of discretion in the trial court's restriction of defense counsel's voir dire." Stano, 473 So. 2d at 1285.

Should this Court find that the trial court abused its discretion in limiting defense counsel's questions, Eaddy again seeks an inappropriate remedy in requesting a new trial. While this Court reversed and remanded for a new trial in Lavado, it did so because the restricted questioning affected Lavado's right to a fair trial. Here, the restricted questioning concerned sentencing. Accordingly, if Eaddy is entitled to any relief, that relief is a new sentencing hearing. See Bryant, 601 So. 2d at 532.

Issue III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE STATE'S MOTION IN LIMINE TO PROHIBIT EADDY FROM ASKING STATE WITNESS LOPEZ ABOUT THE FACTS OF AN OFFENSE COMMITTED BY LOPEZ.

The decision to exclude evidence is committed to the sound discretion of the trial court, State v. Savino, 567 So. 2d 892, 894 (Fla. 1990), and a decision to exclude evidence may not disturbed on appeal without a showing of abuse of discretion, Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). In the present case, the trial court did not abuse its discretion in prohibiting defense counsel from questioning state witness Lopez about an offense he had previously committed which allegedly was similar to the instant crime, because Eaddy improperly planned to adduce this information during cross examination.

Defense counsel intended to delve into the details of Lopez's prior offense during cross examination. In denying defense counsel the opportunity to do so, the trial court properly observed the following basic tenets of cross examination:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing

> interrogation, the cross-examiner is not only permitted to delve into the witness'[s] story to test the witness'[s] perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness'[s] character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness'[s] credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony."

Davis v. Alaska, 415 U.S. 308, 316 (1974) (citations omitted). See also Livingston v. State, 565 So. 2d 1288 (Fla. 1988); Alvarez v. State, 467 So. 2d 455 (Fla. 3d DCA 1985). The record clearly shows that the trial court permitted Eaddy to engage in proper cross examination, as Eaddy impeached Lopez through questions about his criminal record and history (T 865-901). Thus, Eaddy received his due under the law concerning cross examination.

In claiming that he should have been entitled to offer the details of Lopez's crime into evidence during cross

examination of Lopez, Eaddy overlooks the obvious fact that such information had nothing to do with testing Lopez's perceptions and memory or discrediting him. Thus, Eaddy's reliance on Morrell v. State, 335 So. 2d 836 (Fla. 1st DCA 1976), and Porter v. State, 386 So. 2d 1209 (Fla. 3d DCA 1980), is misplaced. In Morrell, the victim's drug addiction was a proper subject of cross examination because her addiction could have affected not only her memory of the offense committed, but her testimony on the stand. Likewise, in Porter, the police officer's numerous undercover contacts and drug purchases was a proper subject of cross examination because it affected the accuracy of the officer's identification of the defendant. See also Kelly v. State, 425 So. 2d 81 (Fla. 2d DCA 1981).

Had Eaddy wished to call Lopez as his own witness and then sought to introduce in his case-in-chief the "reverse Williams[4] rule" evidence, i.e., that a crime of a similar nature had been committed by Lopez, see Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990), case law would have supported this tactic.

> The test for admissibility of similar-fact evidence is relevancy. When the purported relevancy of past crimes is to identify the perpetrator of

[4] Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).

> the crime being tried, we have required a close similarity of facts, a unique or "fingerprint" type of information, for the evidence to be relevant. If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense. Evidence of bad character or propensity to commit a crime by another would not be admitted; such evidence should benefit a criminal defendant no more than it should benefit the state. Relevance and weighing the probative value of the evidence against the possible prejudicial effect are the determinative factors governing the admissibility of similar-fact evidence of other crimes when offered by the state. These same factors should apply when the defendant offers such evidence.

Savino, 567 So. 2d at 894 (citations omitted). As Savino and other cases make evident, this type of evidence, if relevant and more probative than prejudicial, may be admitted in a defendant's case-in-chief. See Moreno v. State, 418 So. 2d 1223 (Fla. 3d D CA 1982). However, the admission of such evidence would be subject to being tied in to the instant crime. The fact that Lopez committed a similar crime years before does not make it relevant in the instant case unless it can be shown that Lopez could have committed the instant crime. After all, the purpose of reverse Williams rule evidence is to create a reasonable doubt in the mind of the jury that someone else, not the defendant, could have committed the charged offenses. Savino, 567 So. 2d at 894.

Should this Court find that the trial court abused its discretion in precluding Eaddy from questioning Lopez about the details of his offense, any such error was clearly harmless. In light of the fact that Eaddy engaged in meaningful cross examination of Lopez, fully exploring Lopez's credibility, there is no reasonable possibility that any such error affected the jury's verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Issue IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING EVIDENCE THAT EADDY HAD BEEN HYPNOTIZED.

The decision to exclude evidence is committed to the sound discretion of the trial court, and a decision to exclude evidence may not disturbed on appeal without a showing of abuse of discretion. Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). In the present case, the trial court did not abuse its discretion in excluding Eaddy's testimony about his hypnosis because defense counsel failed to comply with this Court's decision in Morgan v. State, 537 So. 2d 973 (Fla. 1989), before offering this evidence.

In Morgan, the Florida Supreme Court examined Rock v. Arkansas, 483 U.S. 44 (1987), and concluded:

> Rock mandates that we recede from the Bundy II rule to the extent it affects a defendant's testimony or statements made to experts by a defendant in preparation of a defense.
>
> Even without the Rock decision, we would conclude that expert testimony in this instance must be allowed. The issue is not whether Morgan's hypnotic statements are reliable testimony to prove the truth of the matter asserted. Rather, the question is limited to whether mental health experts can testify about Morgan's sanity if their opinion is based in part on information received from hypnotic statements obtained through a medically approved

diagnostic technique. The evidence sought to be presented here is distinguishable from that of the Bundy cases or the Rock case. In Bundy I and Bundy II, the state sought to introduce statements from hypnotic sessions as direct evidence to prove the truth of the matter by refreshing a witness's recollection. In Rock, the defense attempted to present direct evidence to prove the truth of the matter asserted by refreshing the defendant's recollection.

We note that although Bundy prohibits the offering of hypnotically refreshed testimony as direct evidence, it does not preclude all uses of hypnosis. In Bundy II, this Court stated that "we do not undertake to foreclose the continued use of hypnosis by the police for purely investigative purposes. Any corroborating evidence obtained is admissible in a criminal trial subject to other evidentiary objections. 471 So. 2d at 19.

Courts cannot establish accepted medical practices; they can only ensure that accepted methods are properly utilized. We conclude that, even without the United States Supreme Court Rock decision, Morgan should have been permitted to introduce conclusions drawn from medically accepted techniques. Here, his mental health experts were effectively barred from using the medically accepted procedures to diagnose him. If courts seek medical opinions, they cannot bar the medical profession from using accepted medical methods to reach an opinion.

The use of hypnosis is an evolving issue and, clearly, some safeguards are appropriate to help assure reliability in the courts. We find it appropriate in the future, when hypnosis may be used to refresh a defendant's memory or by an expert witness to facilitate a medical diagnosis, that reasonable notice be

> given to the opposing party. Additionally, the hypnotic session should be recorded to ensure compliance with proper procedures and practices. At this time we recede from Bundy II only as it pertains to the defendant as a witness.

537 So. 2d at 976. See Rock, 483 U.S. at 60-61 (safeguards include using only a psychiatrist or psychologist with special training, using a neutral setting with only the hypnotist and subject present, tape- or video- recording all interrogations; in Rock, hynoptic session was taped and conducted by a licensed neuropsychologist with special hypnosis training); see also Brown v. State, 426 So. 2d 76 (Fla. 1st DCA 1983).

Although Morgan issued in 1989, and the trial in the instant matter occurred in 1992, defense counsel failed to abide by Morgan's safeguards in that counsel provided no notice to the state of its intent to use such evidence and gave no indication that the session had been recorded. And, despite the opportunity provided to defense counsel by the trial court to cite to case law supporting her position that such evidence was admissible, defense counsel failed to cite either to Morgan or Rock[5] (T 980-81). Because defense counsel failed to comply with applicable law before introducing evidence of hypnosis, the trial court properly

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[5] Rock issued in 1987.

excluded it. See **C. W. Ehrhardt, Florida Evidence,** Prior Statements of Witness § 613.2, at 437 (Supp. 1992) ("If the accused testifies, the testimony is not excluded merely because the memory has been hypnotically refreshed *when the before mentioned safeguards have been met as well as other 'proper procedures and practices' to ensure reliable testimony.*").

Eaddy concedes that his late disclosure of the hypnosis evidence constituted a Richardson[6] violation, but claims the trial court erred in its failure to conduct an adequate hearing on the discovery violation. This claim is specious. Based on the express wording of the rule, discovery rights inure to both the state and a defendant. See **Fla. R. Crim. P.** 3.220(b) & (d). Eaddy had an obligation to provide the state with information about his hypnotic session(s), which he failed to do. Accordingly, the state had a right to claim a Richardson violation at trial, which it did (T 980). However, Eaddy may not assert the state's discovery right on appeal. To violate the state's right to discovery at trial, and then turn around on appeal and assert that he had a right to a Richardson hearing on his discovery violation is absurd and unsupported in law.

In any event, the trial court conducted an adequate hearing on the violation. Richardson and its progeny do not

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[6] Richardson v. State, 246 So. 2d 771 (Fla. 1971).

require that a hearing on a discovery violation be labelled as such or have any particular structure. Instead, "the requirement [is] that a trial court merely listen and evaluate any claim of prejudice . . . ." Smith v. State, 500 So. 2d 125, 126 (Fla. 1986) (emphasis in original). Here, the trial court listened, but defense counsel offered no legitimate reason why the evidence should be admitted (T 980-81).

Should this Court find the trial court's ruling erroneous, any such error was clearly harmless. Although defense counsel was not permitted to comment on hypnosis, the record shows that she presented a complete and fair defense that appellant did not commit the murder. Appellant fully recounted his version of events, evidencing that he recalled the days in question. As shown by the timing and phrasing of defense counsel's question, reference to hypnosis was unnecessary based on appellant's prior testimony. Thus, there is no reasonable possibility that any error on this point affected the jury's verdict. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986).

Issue V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING EADDY'S TESTIMONY THAT ROB OR ROBERT TOLD HIM TO SIGN THE VICTIM'S NAME ON CREDIT CARD RECEIPTS.

The decision to exclude evidence is committed to the sound discretion of the trial court, and a decision to exclude evidence may not disturbed on appeal without a showing of abuse of discretion. Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). Here, the trial court did not abuse its discretion in excluding Eaddy's testimony that Rob or Robert told him to sign the victim's name on receipts from the use of the victim's credit card, because this testimony was hearsay and not relevant to any material fact in issue. Hitchcock v. State, 413 So. 2d 741, 744 (Fla. 1982).

The record clearly shows that defense counsel offered Rob or Robert's statement to show why Eaddy signed the victim's name on the credit card receipts. Thus, the statement was offered to prove the truth of the matter asserted, i.e., that appellant signed the credit card receipts because Rob or Robert told him to do so. Under the explicit terms of **Fla. Stat. §** 90.801(1)(c) (1977),[7] the statement is classic hearsay.

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[7] Eaddy committed the instant murder in January 1977 (R 16).

Even if the statement could have passed the section 90.801(1)(c) hurdle, it could not have passed the **Fla. Stat. §§** 90.401 & 90.402 (1977) hurdles. The fact that Rob or Robert may have told Eaddy to sign the victim's name on the credit card receipts is not relevant to any material fact at issue. See Wright v. State, 586 So. 2d 1024, 1030 (Fla. 1991); Wise v. State, 546 So. 2d 1068, 1070 (Fla. 2d DCA 1989). The central issue in this case was whether Eaddy killed the victim. Eaddy's motive for signing receipts with the victim's name when using the victim's credit card was not relevant to this issue. See Barnes v. State, 462 So. 2d 550, 551 (Fla. 1st DCA 1985). This is not a case where the proffered evidence helped to prove Eaddy's defense that someone else killed the victim. Contrast Koon v. State, 513 So. 2d 1253, 1255 (Fla. 1987) (where state sought to prove Koon's motive to kill one of two prosecution witnesses in a federal counterfeiting case, secret service agent's testimony that a U.S. magistrate had stated in Koon's presence that she would have dismissed the federal charges against him had there been only one prosecution witness was not hearsay since it was offered to prove motive, not for the truth of the matter asserted); Barber v. State, 576 So. 2d 825, 831 (Fla. 1st DCA 1991) (where Barber's defense was voluntary intoxication, tape recording was not offered to prove truth of matters asserted therein, but offered to show the manner in which it was spoken, from which a jury could

have inferred that Barber was intoxicated); E.B. v. State, 531 So. 2d 1053, 1055 (Fla. 3d DCA 1988) (where E.B. claimed self defense, statement that school officials told E.B. to leave early on the day in question because his life was in danger should have been admitted as it was not offered to prove the truth of the statement, but to show that E.B. had reason to fear the victim).

Should this Court find that the trial court abused its discretion in excluding Eaddy's testimony that Rob or Robert told him to sign the credit card receipts with the victim's name, any such error was harmless. Although the court excluded this particular piece of "Rob or Robert" evidence, it permitted Eaddy to testify that Rob or Robert was in the car when the victim picked him up, was at the victim's apartment, picked him up later, and travelled with him to South Carolina (T 971-79). Further, the state produced substantial evidence which pointed to Eaddy as the sole perpetrator -- the fingerprints, the confession to Lopez, the victim's car found burned near the home of Eaddy's mother, and the credit card receipts. Thus, there is no reasonable possibility that any error on this point affected the jury's verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Issue VI

WHETHER THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES OF FIRST DEGREE MURDER.

Eaddy claims that the trial court erred in refusing to accept Eaddy's waiver of the statute of limitations for the purpose of receiving lesser included offense instructions.[8] However, defense counsel's statement that Eaddy was "willing" to waive the statute of limitations for the purpose of receiving lesser included offense instructions did not constitute a valid waiver of this defense. This Court requires much more:

> Before allowing a defendant to divest himself of this protection, the court must be satisfied that the defendant himself, personally and not merely through his attorney, appreciates the nature of the right he is renouncing and is aware of the potential consequences of his decision. We agree with the state's position that an effective waiver may only be made after a determination on the record that the waiver was knowingly, intelligently, and voluntarily made; the waiver was made for the defendant's benefit and after consultation with counsel; and the

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[8] Eaddy devotes many pages of his brief to the claim that the trial court erred in relying solely on Rembert v. State, 476 So. 2d 721 (Fla. 1st DCA 1985). Right or wrong in relying on Rembert, the trial court was correct in its refusal for the reasons enunciated in text. This Court is well aware that "[a] conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it." Caso v. State, 524 So. 2d 422, 424 (Fla. 1988).

> waiver does not handicap the defendant or contravene any of the public policy reasons motivating the enactment of the statute.

Tucker v. State, 459 So. 2d 306, 309 (Fla. 1984). Eaddy made no representations to the court about waiving the defense, and defense counsel offered nothing from Eaddy showing that he personally wished to waive the defense. Contrast Rembert v. State, 476 So. 2d 721, 722 (Fla. 1st DCA 1985) (the First District found the waiver invalid, even though defense counsel submitted a written waiver from Rembert), aff'd on other grounds, Rembert v. Dugger, 842 F.2d 301 (11th Cir. 1988).

If this Court finds a valid waiver, Eaddy nevertheless was not entitled to lesser included offense instructions. In Spaziano v. Florida, 468 U.S. 447, 456 (1984), the Supreme Court reaffirmed its

> commitment to the demands of reliability in decisions involving death and to the defendant's right to the benefit of a lesser included offense instruction that may reduce the risk of unwarranted capital convictions. But [it was] unwilling to close [its] eyes to the social cost[9] of petitioner's proposed rule. Beck does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice. Such a rule not

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9 Beck v. Alabama, 447 U.S. 625 (1980).

> only would undermine the public's confidence in the criminal justice system, but it would also do a serious disservice to the goal of rationality on which the Beck rule is based.
>
> If the jury is not to be tricked into thinking that there is a range of offenses for which the defendant may be held accountable, then the question is whether Beck requires that a lesser included offense instruction be given, with the defendant being forced to waive the expired statute of limitations on those offenses, or whether the defendant should be given a choice between having the benefit of the lesser included offense instruction or asserting the statute of limitations on the lesser included offenses. . . . [T]he better option is that the defendant be given the choice.

Eaddy had a Spaziano choice at the pretrial hearing and chose to invoke the statute of limitations defense on the robbery charge. This choice proved successful for Eaddy, as the trial court dismissed the robbery charge.[10] The prosecutor argued that, because of this choice, Eaddy should not be permitted later to waive the statute of limitations for the purpose of receiving lesser included offense instructions. Further, the prosecutor clearly indicated that, as a result of the dismissal of the robbery count, it would proceed under an "all or nothing" theory at trial,

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[10] According to Sochor v. State, 580 So. 2d 595 (Fla. 1991), **Fla. Stat. §** 775.15 (1977) did not require dismissal of the robbery charge. Because of Eaddy's "undisputed, continuous absence from the state," the running of the statute was tolled. Id. at 602.

i.e., the state would seek to prove Eaddy guilty of first degree murder only (T 157). Thus, defense counsel could not have claimed after the state rested that she was surprised by the state's theory, and could not contended that a determination of whether the evidence supported the giving of instructions on other offenses was required. Because defense counsel was aware of the state's theory long before the charge conference, certainly she could have expanded Eaddy's choice at the motion hearing to encompass a decision regarding jury instructions. Because defense counsel failed to state a position at the pretrial hearing, she was estopped from asserting the point at the charge conference.

Further, to permit Eaddy to claim the defense at one juncture and then waive it at another would permit Eaddy to build error into the record. For example:

> I. Eaddy could invoke the defense pretrial and have the robbery charge dismissed. Eaddy then would be tried solely on premeditated first degree murder.
>
> II. At trial, defense counsel could attempt a waiver of the defense for jury instruction purposes, but Eaddy would remain silent. The trial court would accept the waiver and instruct on the lesser offenses. The jury convicts Eaddy of a lesser offense like second degree murder.
>
> III. On appeal, Eaddy argues that his waiver was invalid, and this Court orders a new trial. On remand, the highest offense Eaddy could be tried on is second degree murder.

IV. At trial, new defense counsel invokes the statute of limitations.

V. Eaddy walks free.

Such results are untenable. The purpose of the statute of limitations is to eradicate the possibility that time limitations will be manipulated to achieve a favorable position for a party. State v. Hickman, 189 So. 2d 254 (Fla. 2d DCA 1966). To permit the above scenario to come to fruition is to permit the ultimate manipulation of the outcomes of trials and appeals.

Issue VII

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON FELONY MURDER AND THAT, IN CONSIDERING ITS RECOMMENDED SENTENCE, IT COULD CONSIDER WHETHER EADDY HAD COMMITTED THE MURDER DURING THE COURSE OF A ROBBERY.

Eaddy claims error on two points under this issue. First, the trial court should not have instructed that jury on the felony murder theory because the state presented insufficient evidence of felony murder. And second, the trial court should not have instructed the jury that it could consider whether Eaddy had committed the murder during the course of the robbery in recommending a sentence to the court. Eaddy is wrong in both contentions. Because the state presented sufficient evidence of robbery, thereby presenting competent evidence of felony murder, the trial court properly instructed the jury.

Initially, this Court should be aware that Eaddy never challenged the sufficiency of the evidence presented on the felony murder theory below.[11] Although defense counsel moved for a judgment of acquittal at the close of the

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[11] Although defense counsel objected to the giving of a felony murder instruction at the charge conference, she objected solely on the grounds that the statute of limitations had run (T 1035).

state's case, the motion exhibited a classic "shotgun" approach:[12]

> I want[] to make a motion for judgment of acquittal based on the insufficiency of the State's case to prove that my client committed first degree murder. There's been no evidence of that he was there on that date, there's been no evidence of premeditation and there's been no evidence of murder. And I would ask the Court to dismiss the charges.

(T 944). Accordingly, Eaddy did not preserve this argument for appellate review, and it should not be considered by this Court. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

In any event, Eaddy claims that, because the state had to rely exclusively on circumstantial evidence to prove its case, the state had to exclude every reasonable hypothesis of innocence, which it failed to do. Appellant's Initial Brief at 55. This circumstantial evidence contention is inapplicable here, and is otherwise unsound.

In Lynch v. State, 293 So.2d 44, 45 (Fla. 1974), this Court succinctly stated the law regarding motions for judgments of acquittal:

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12 A "shotgun" motion for judgment of acquittal is one which fails to specify for the trial court to what extent the evidence was insufficient. Cornwell v. State, 425 So. 2d 1189, 1190 (Fla. 1st DCA 1983).

> A defendant, in moving for a judgment of acquittal admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the Court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge. The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal.

In contravention of this legal standard, there still exists an archaic holdover from the common law known as the circumstantial evidence rule. Although the test (whether the state presented substantial competent evidence which proved each element of the charged crime) remains the same whether the state uses direct or circumstantial evidence, when the state relies solely on circumstantial evidence to prove its case, the special standard related in State v. Law, 559 So.2d 187 (Fla. 1989), applies, i.e., where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot

be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.

This rule has never been codified by statute in Florida and is being replaced nationwide[13] with the view that, because direct and circumstantial evidence possess the same probative value, they are subject to the same standard of proof. For example, in State v. Jenks, 61 Ohio St. 3d 259, 574 N.E.2d 492 (1991), the court cited to Holland v. United States, 348 U.S. 121 (1954), and held:

> Circumstantial evidence and direct evidence inherently possess the same probative value. In some instances certain facts can only be established by circumstantial evidence. Hence, we can

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[13] See Hebron v. State, 608 A.2d 1291, 1294 (Md. Ct. App. 1992) ("[B]y 1977, at least 11 States had adopted the new Federal approach. In fact, more than 11 States have abandoned their former practice, based largely on Holland. See . . . State v. Wilkins, . . . [215 Kan. 145,] 523 P.2d 728 [1974)]; State v. Harvill, 106 Ariz. 386, 476 P.2d 841 (1970); Henry v. State, 298 A.2d 327 (Del. Supr. 1972); State v. Roddy, 401 A.2d 23 (R.I. 1979); State v. Jackson, 331 A.2d 361 (Me. 1975); Hankins v. State, 646 S.W.2d 191 (Tex. Cr. App. 1981); State v. Derouchie, 140 Vt. 437, 440 A.2d 146 (1981); State v. Gosby, 85 Wash. 2d 758, 539 P.2d 680 (1975); Blakely v. State, 542 P.2d 857 (Wyo. 1975); State v. Jenks, 61 Ohio St. 3d 259, 574 N.E.2d 492 (1991)."); People v. Wolfe, 489 N.W.2d 748 (Mich. 1992) ("The theory that there is a special rule applicable to cases based on circumstantial evidence that requires the exclusion of every hypothesis except that of guilt . . . has been rejected by the United States Supreme Court, Holland v. Untied States, 348 U.S. 121 . . . (1954), by this Court, People v. Bercheny, 387 Mich. 431, 196 N.W.2d 767 (1972), and by virtually every federal circuit court. 'It is now understood that a single test applies, regardless of the kind of evidence . . . .'") (citation omitted).

discern no reason to continue the requirement that circumstantial evidence must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt. We agree with those courts that have held that an additional instruction on the sufficiency of circumstantial evidence invites confusion and is unwarranted. Since circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that it weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt. Nothing more should be required of a fact-finding.

In every criminal case, the jury is asked to weigh all of the admissible evidence, both circumstantial and direct, to determine if the defendant is guilty beyond a reasonable doubt. Hence, there is but one standard of proof in a criminal case, and that is proof of guilt beyond a reasonable doubt. This tenet of the criminal law remains true, whether the evidence against a defendant is circumstantial or direct. We therefore hold that where the state relies on circumstantial evidence to prove an element of the offense, and where the jury is properly instructed on the standards for reasonable doubt, an additional instruction on circumstantial evidence is not required. Once the jury is properly instructed as to the heavy burden the state bears under the "guilt beyond a reasonable doubt" standard, the jury is then free to choose between competing constructions of the evidence. We hold that when the state relies on circumstantial evidence to prove an element of the offense charged, there is no requirement that the evidence must be irreconcilable with any reasonable theory of innocence in order to support a conviction.

574 N.E.2d at 502-03 (citations omitted).

Although this Court currently approves the dichotomous treatment of circumstantial and direct evidence, it should consider the well-reasoned, burgeoning nationwide trend to discard the dichotomy. The continued reliance on this distinction in theory points to absurd results in practice. For example, in Jones v. State, 466 So.2d 301 (3d DCA 1985), aff'd, 485 So.2d 1283 (Fla. 1986), the Third District attempted to distinguish direct and circumstantial evidence:

> As is true of any crime, the . . . elements of [any charged offenses] may be established through direct or circumstantial evidence. "Direct evidence is that to which the witness testifies of his own knowledge as to the facts in issue. Circumstantial evidence is proof of certain facts or circumstances from which the trier of fact may infer that the ultimate facts in dispute existed or did not exist." Where, however, the state relies entirely on circumstantial evidence to establish a charged crime . . . Florida law for good reason has long imposed a special and strict standard of proof which the state's evidence must satisfy in order to survive a defense motion for judgment of acquittal at trial.

Id. at 318 (citations omitted; emphasis added). Based on this definition, a confession, as is present in this case, is considered "direct" evidence. Nevertheless, it is evidence from which the jury may make inferences about Eaddy's guilt and will weigh against still other inferences.

Thus, the confession also meets the definition of circumstantial evidence. To continue this distinction when, in practice, none is warranted, is absurd.

In Holland, the United States Supreme Court observed:

> [T]he better rule is that where the jury is properly instructed on the standard for reasonable doubt, . . . an additional instruction on circumstantial evidence is confusing and incorrect . . . .
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> Circumstantial evidence in this respect is no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

348 U.S. at 140.

In any event, Eaddy's reliance on Law is inexplicable since he is not entitled to the special Law standard. As the record clearly shows, the state's case against Eaddy did not consist only of circumstantial evidence. The state presented substantial direct evidence which placed Eaddy at the scene. As recounted by the prosecutor during closing argument, the state adduced evidence of Eaddy's fingerprints

at the scene, Eaddy's unauthorized use of the victim's credit card, and Eaddy's confession (T 1097-99, 1105-06) -- all of which constitute direct evidence under Jones.

The jury reasonably and legitimately could have inferred from the evidence that, due to his having been a passenger in the victim's car, Eaddy formed a plan to obtain the car for his own so that he could travel to South Carolina without the necessity of hitchhiking. Upon arriving at the victim's apartment, Eaddy waited for an opportunity to kill the victim and steal his car. When the victim asked Eaddy for sex and walked toward the bedroom (T 859), Eaddy's opportunity presented itself. After killing the victim, searching the victim's pants pockets, and taking the car keys, Eaddy rifled through the victim's apartment for items he would need on his trip, i.e., money, credit cards, etc. (T 645). This is sufficient proof of robbery to support the felony murder instruction. See Enriquez v. State, 449 So. 2d 845, 848 (Fla. 3d DCA 1984). Further, because there was sufficient evidence of robbery, the trial court also correctly instructed the jury that it could consider whether the murder was committed during a robbery in recommending a sentence. Sochor v. State, 580 So. 2d 595, 603 (Fla. 1991), vacated, 119 L. Ed. 2d 326 (1992), on remand, 18 Fla. L. Weekly S273, S275 (Fla. 1993).

Issue VIII

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT IT COULD CONVICT EADDY OF FELONY MURDER.

Eaddy argues that the state should not have been allowed to argue Eaddy committed a robbery because he was not charged with that offense, and thus the trial court erred in instructing the jury on felony murder since the statute of limitations had run on the underlying felony of robbery. Eaddy's argument is disingenuous as it overlooks Florida law. Eaddy was prosecuted for first degree murder, which the state has a right to prove through a premeditation theory or a felony murder theory. Young v. State, 579 So. 2d 721 (Fla. 1991), cert. denied, 117 L.Ed. 2d 438 (1992). Additionally, felony murder is a separate charge from the underlying felony, and a defendant may be charged with and convicted of both. Mills v. State, 476 So. 2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986); State v. Enmund, 476 So. 2d 165 (Fla. 1985). Finally, the trial court's instruction on the underlying felony does not have to meet the same specificity requirements as if a defendant were charged separately with the underlying felony. Brumbley v. State, 453 So. 2d 38 (Fla. 1984); McRae v. Wainwright, 422 So. 2d 824 (Fla. 1982).

A logical extension of these tenets is that, where a defendant is charged with first degree murder but not the

underlying felony, the state may adduce evidence of the underlying felony to prove felony murder, and the trial court may instruct the jury on felony murder and that, in recommending a sentence, it may consider whether the murder was committed during the course of a robbery, regardless of whether the statute of limitations has run on the underlying felony. Application of the statute of limitations to the underlying felony should not defeat the state's ability to prove felony murder which has no time limitation for prosecution. See Jackson v. State, 513 So. 2d 1093, 1095 (Fla. 1st DCA 1987) ("[T]he running of the statute of limitations on the underlying felony is irrelevant to a prosecution for felony murder, a crime for which there is no statute of limitations. The mere preclusion of the state's capacity to prosecute the subordinate crime because of a time limitation has no effect upon the question of whether such crime was committed.") (citations omitted).

In arguing at great length that this Court should reject the reasoning of Jackson v. State, 513 So. 2d 1093 (Fla. 1st DCA 1987), Eaddy apparently overlooked a recent case from this Court -- Sochor v. State, 580 So. 2d 595 (Fla. 1991) -- which implicitly incorporates Jackson's rationale and is dispositive of the issue. Sochor committed the offenses of kidnapping and first degree murder in 1981. Police were unable locate Sochor until 1986, when he was

arrested in Georgia on an unrelated offense and extradited to Florida where a grand jury indicated him on the murder and kidnapping charges. In this Court, Sochor argued

> that the trial court fundamentally erred by failing to instruct the jury on the statute of limitation as an absolute defense to felony murder and kidnapping. This . . . is a defensive matter that must be raised at trial. Had it been raised, the state could have shown that, even though Sochor was indicted for kidnapping beyond the applicable four-year limitation period, his undisputed, continuous absence from the state tolled the running of the statute. See § 775.15(6), Fla. Stat. (1989). Thus, the trial court did not commit fundamental error by failing to instruct the jury in this regard. In addition, capital crimes are not subject to a statute of limitation. § 775.15(1), Fla. Stat. (1989). Hence, Sochor's argument that his murder conviction must be overturned and remanded for a new trial because the limitation period had expired on several of the underlying felonies supporting a possible felony-murder theory is untenable.

Id. at 602.

Here, it is undisputed that Eaddy was continuously out of Florida from 1977 until his 1990 arrest. This fact alone tolled the running of the seven year time limit, pursuant to **Fla. Stat. §** 775.12(6) (1977). Even though the trial court dismissed the robbery charge on the theory that the time limitation had expired, Florida law holds otherwise.[14] Accordingly, the trial court properly instructed the jury.

In any event,

> a statute limiting the time within which judicial action my be effectively invoked affects only the right to relief or . . . the imposition of a penalty. Consistent with that principle, section 775.15(2)(b) does not obliterate [Eaddy]'s crime of . . . robbery but simply forecloses penalizing its commission. In spite of the fact that th[is] doctrine . . . stems from civil actions, [there is] no reason to reject its application in a criminal prosecution. In short, the sophistry urged . . . by [Eaddy] falls short of overcoming the narrow effect of section 775.15(2)(b). The duration of [Eaddy]'s success in evading capture shields him only from punishment for the . . . robbery and not from the exposition of those facts essential to conviction[] for the felony murder[].

Id. at 1095.

Eaddy's claim that Jackson is flawed because it relies on principles enunciated in a civil case, and civil concepts should not be applied in a criminal context, is spurious. Criminal cases often refer to civil concepts. See, e.g., State v. Kelley, 588 So. 2d 595 (Fla. 1st DCA 1991) (Premedial statutes "'do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing . . . .'"). Even more significant is Eaddy's failure to offer a legitimate

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[14] Apparently, so does New York law. People v. Harvin, 46 Misc. 2d 417, 259 N.Y.S.2d 883 (Sup. Ct. 1965).

reason to reject application of the civil principles referred to in Jackson. The principles are completely consonant with the purpose of section 775.15, in that they provide Eaddy with a complete remedy, i.e., nolle prossing of charges on which the time period has expired. Buying into Eaddy's theory, however, would not only afford him a remedy, but would penalize the state from using the facts of the robbery to establish felony murder, when the state did absolutely nothing wrong or manipulative in prosecuting Eaddy 11 years after the murder. Such a contention is untenable.

Eaddy also argues that the purpose of the statute of limitations would be defeated by permitted the state to prove the underlying felony of robbery where the trial court dismissed the separate charge of robbery on limitations grounds. The purpose of the limitation statute is clear: To protect people from being interminably under the threat of possible criminal prosecution, which might otherwise be delayed indefinitely until defense witnesses die, disappear, or otherwise become unavailable, judges would change office, or innumerable other time hazards might develop which could conceivably defeat, or at least hamper, an otherwise good defense. State v. Hickman, 189 So. 2d 254 (Fla. 2d DCA 1966). Inherent in this policy is the preclusion of the state engaging in the manipulation of time frames to achieve a favorable prosecution.

Here, there can be no legitimate claim that the state vindictively stalled until Eaddy's possible defense witnesses became unavailable.[15] The state simply did not have the scientific technology to focus its investigation on one suspect until the late 1980's (T 155). As soon as this technology became available, the state used it and focused its investigation on Eaddy (T 156). After all,

> [a]t common law there was no limitation of time within which a criminal prosecution was permitted; a statute of limitation as to criminal prosecution is strictly a creature of Statute. As such, it is an extension of the sovereign power in behalf of the individual. And while it has been generally held that such a Statute should be liberally construed in behalf of the individual, by the same token, in simple justice to the State as the sovereign authority bestowing the privilege, it is entitled to something more than a hypertechnical, distorted, strained construction of the factors constituting the exercise of such privilege.
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> In the instant case it is abundantly clear that the State of Florida intended in good faith to commence the prosecution of defendant a[s soon as possible] after the alleged offense was committed and took positive steps to set the machinery in motion to effectuate and to evidence that intent. Such substantially should satisfy the Statute. The fact that defendant evades

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[15] In other words, "the State has done nothing wrong. It has acted properly and ethically . . . ." State v. Agee, 18 Fla. L. Weekly S391, S392 (Fla. July 1, 1993) (Overton, J., dissenting).

> service of legal process . . . years thereafter and neither submits to such process or challenges in any way the sufficiency thereof, should not be permitted to defeat the very purpose of procuring its assurance in the first place, which was ostensibly to stop the running of the Statute. Technical niceties and strained construction should not be allowed to defeat elemental justice and fair reasoning.

Id. at 261-62.

Issue IX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN (1) PRECLUDING EADDY FROM ARGUING THAT THE STATE HAD PRESENTED NO EVIDENCE OF MOTIVE, AND (2) PERMITTING THE STATE TO CHARACTERIZE EADDY'S TESTIMONY AS A "PACK OF LIES"

In the exercise of its discretion, the trial court controls the comments made in closing arguments, and this Court has repeatedly held that the trial court's ruling on these matters will not be overturned unless a clear abuse of discretion is shown. Hooper v. State, 476 So. 2d 1253, 1257 (Fla. 1985), cert. denied, 475 U.S. 1098 (1986); Davis v. State, 461 So. 2d 67, 70 (Fla. 1984). In the instant case, the trial court did not abuse its discretion in precluding Eaddy from arguing the state had failed to prove motive and in permitting the state to characterize Eaddy's testimony as a "pack of lies," because, as to the first claim, the state was not required to prove motive, and as to the second claim, Eaddy failed to preserve it for appellate review. In any event, although the lying comments were improper, any error was harmless.

Motive

Although evidence of motive is admissible, the law is clear that the state has no burden to prove motive. Dino v. State, 405 So. 2d 213 (Fla. 1981); Matthews v. State, 130 Fla. 53, 177 So. 321 (1938). Accordingly, defense counsel's

statement in closing argument that the state had proven no motive was improper, and left unsustained, would have prejudiced the state by giving jurors the impression that the state had failed to prove a required element. In any event, although the trial court sustained the state's objection, defense counsel nevertheless argued the equivalent to the jury: "I would suggest to you that there is no premeditation and no reason for premeditation, nothing presented to you all to show that these people ever knew each other before." (T 1095) (emphasis supplied). Thus, defense counsel plainly argued lack of motive.

Lying

Although Eaddy objected to the state's opening sentence in closing argument, he failed to request a mistrial or curative instruction. Accordingly, Eaddy failed to preserve this point for appellate review, and this Court should decline to address it. Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Oliva v. State, 346 So. 2d 1066 (Fla. 3d DCA 1977), cert. denied, 434 U.S. 1010 (1978).

In any event, the test for evaluating prosecutorial comments is whether the remark was improper and prejudicially affect the substantive rights of Eaddy. United States v. Langford, 946 F.2d 798 (11th Cir. 1991), cert. denied, 112 S. Ct. 1562 (1992); United States v.

Garate-Vergara, 942 F.2d 1543 (11th Cir. 1991), cert. denied, 112 S. Ct. 1212 (1992); United States v. Lacayo, 758 F.2d 1559 (11th Cir. 1985), cert. denied, 474 U.S. 1019 (1986). See also State v. Murray, 443 So. 2d 955 (Fla. 1984) (error must be so prejudicial "'as to vitiate the entire trial.'") (citation omitted). Although Eaddy claims the comments about his lying were improper, he makes no showing of how his substantive rights were prejudiced. The trial court sustained the objection, and the prosecutor heeded the court's admonishment (T 1056).

Although the lying comment may not have been proper, it clearly was harmless due to its extremely limited reference. Thus, there is no reasonable possibility that it affected the jury's verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Issue X

WHETHER THE SENTENCING COURT PROPERLY FOUND THAT THE MURDER WAS COMMITTED IN A HEINOUS, ATROCIOUS AND CRUEL MANNER.

Eaddy claims that the trial court erred in finding as an aggravating circumstance that the murder was committed in an especially heinous, atrocious, and cruel manner, because "there is no indication the victim was awake or conscious when stabbed." Appellant's Initial Brief at 69. Thus, Eaddy contends the state failed in its burden to prove the physical and mental suffering of the victim before his death. Eaddy is wrong.

In Gilliam v. State, 582 So. 2d 610 (Fla. 1991), this Court observed that, in arriving at a determination of whether an aggravating circumstance has been proven, a sentencing court may use a "'common-sense inference from the circumstances.'" Id. at 612 (quoting Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988, cert. denied, 489 U.S. 1100 (1989)). This Court found that the heinous, atrocious, and cruel aggravating factor had been proven through evidence of the number of wounds and the fact that screams had been heard.

Here, the medical examiner testified that the victim sustained 11 stab wounds (T 613). The first[16] wound was in

[16] Numbered as referred to by the medical examiner.

the shoulder (T 615), the second in the heart (T 616), the third in the lungs (T 618), the fourth in the liver (T 618), the fifth in the intestines (T 618), the sixth in the heart (T 619), the seventh in the stomach (T 619), the eighth in the intestines (T 619), the ninth was a slash wound (T 619), the tenth was a slash wound to the leg (T 620), and the eleventh was a slash wound to the hip (T 620-21). He stated that these wounds were consistent with the use of a 10 inch butcher knife (T 622).

The medical examiner also stated that there was a laceration to the back of the victim's head, caused by impact with a blunt type instrument, consistent with the use of a quart sized glass soda bottle (T 623-24). He concluded that the victim died of stab wounds to the chest and abdomen with massive internal bleeding (T 633).

Thus, the medical examiner never testified that the victim was rendered unconscious by the blow to the back of his head, and could not testify with any degree of certainty as to the order of the injuries (T 637), other than an estimate that all were inflicted within a half hour of each other (T 641). In fact, the medical examiner testified that any number of scenarios were possible: The victim could have sustained the head injury and then been able to walk around, could have been dazed briefly and then regained his faculties, or could have passed out for a few seconds or minutes (T 640).

Additionally, the victim's next door neighbor testified that, around 9:30 to 10:00 p.m. on the night in question, she heard some loud, rhythmic, heavy thumping noises emanating from the victim's apartment (T 478); she thought it might be a headboard knocking on the wall (T 493). She also recounted hearing two male voices in the victim's apartment (T 482). Finally, she recalled hearing some hysterical, loud pitched laughter (T 483).

These facts clearly show that Eaddy torturously killed the victim, inflicting 11 knife wounds on the victim, at least two of which were fatal (T 638). The victim bled profusely both internally and externally while on his back, and when repositioned face down on the bed (T 629). Although the order of the injuries could not be ascertained, the victim could have been conscious for at least 30 to 40 seconds after the fatal wounds to the heart (T 638).

Further, a common sense inference from these facts is that, with the blow to the head, Eaddy hoped to render the victim unconscious. Eaddy was unsuccessful, and either resorted to, or continued, stabbing the victim. Because the victim could have been conscious during the entire stabbing episode if the fatal wounds were inflicted last, the victim would have suffered great pain. The hysterical laughter heard by the next door neighbor could have been the victim screaming, muffled by the walls between the apartments. The

two shallow slashes to the victim's right leg could have been inflicted while the victim raised his leg defensively.

This Court has consistently upheld the finding of this aggravating factor under similar circumstances. See Kight v. Dugger, 574 So. 2d 1066, 1071 (Fla. 1990) ("The number of stab wounds [is] evidence from which the desire to inflict torture should be inferred."); see also Campbell v. State, 571 So. 2d 415 (Fla. 1990); Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987); Nibert v. State, 508 So. 2d 1 (Fla. 1987); Lusk v. State, 446 So. 2d 1038 (Fla. 1984).

Should this Court disagree, the erroneous finding of this aggravating circumstance was harmless beyond a reasonable doubt for two reasons. One, because the sentencing court did not instruct the jury on this factor, the jury did not consider it in recommending 11 to 1 that Eaddy be sentenced to death. Eaddy claims he was "sandbagged" by the sentencing court, but as the court pointed out, it is a statutory aggravating circumstance and thus Eaddy was on notice that this factor might be found. This Court has commented on the enigma of "how the jury's not being instructed on this aggravating circumstance has worked to [Eaddy]'s disadvantage . . . ." Hoffman v. State, 474 So. 2d 1178, 1182 (Fla. 1985).

Two, given the strength of the evidence supporting the remaining aggravating circumstance -- murder committed during the commission of a felony -- and the lack of mitigating circumstances, elimination of the heinous, atrocious, and cruel aggravating factor there is no reasonable possibility that the sentencing court would have given a lesser sentence. See Sochor v. State, 18 Fla. L. Weekly S273, S276 (Fla. May 6, 1993); Maqueira v. State, 588 So. 2d 221, 224 (Fla. 1991); cert. denied, 112 S. Ct. 1961 (1992); Capehart v. State, 583 So. 2d 1009, 1015 (Fla. 1991), cert. denied 112 S. Ct. 955 (1992); Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988).

Issue XI

WHETHER THERE WAS SUFFICIENT EVIDENCE TO WARRANT THE SENTENCING COURT IN INSTRUCTING THE JURY ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR.

As this Court is well aware, section 921.141(5)(i) requires proof beyond a reasonable doubt of "heightened premeditation." Thompson v. State, 565 So. 2d 1311, 1317 (Fla. 1990). "Heightened premeditation can be demonstrated by the manner of the killing, but the evidence must prove beyond a reasonable doubt that the defendant planned or prearranged to commit murder before the crime began." Id. at 1318. Because the state presented evidence of heightened premeditation to the jury, the trial court properly gave an instruction on this aggravating factor.

In Bowden v. State, 588 So. 2d 225 (Fla. 1991), cert. denied, 112 S. Ct. 1596 (1992), the sentencing court instructed the jury on the aggravating circumstance that the murder was committed during a robbery, but did not find this factor in imposing a death sentence. On appeal, Bowden argued that the evidence obviously did not support a finding that the murder was committed during a robbery. This Court rejected Bowden's argument:

> The fact that the state did not prove this aggravating factor to the trial court's satisfaction does not require a conclusion that there was insufficient

> evidence of a robbery to allow the jury to consider the factor. Where, as here, evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required. Stewart v. State, 558 So. 2d 416, 420 (Fla. 1990). As we have previously noted,
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> > [i]f the advisory function [of the jury] were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.
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> 558 So. 2d at 421 (emphasis deleted) (quoting Floyd v. State, 497 So. 2d 1211, 1215 (Fla. 1986)).

Id. at 231.

In this case, the state presented sufficient evidence that Eaddy killed the victim in a cold, calculated, and premeditated manner. Eaddy told Lopez that "a fag" picked him up while Eaddy was hitchhiking, and wanted Eaddy to go with him to his apartment to "have a good time" (T 857). Eaddy went voluntarily, and the victim said that he wanted to give Eaddy a "blow job" (T 858). Eaddy permitted this, after which the victim wanted to engage in sexual intercourse (T 858-59). Eaddy initially indicated he would, but changed his mind and "went up [on] him with a steel

dick," i.e., stabbed him with a knife (T 859-60). Eaddy took the victim's car and departed (T 861). This evidence, combined with the medical testimony, shows that, upon meeting the victim, Eaddy hatched a plan that obviated the need to hitchhike home. Compare Remeta v. State, 522 So. 2d 825, 829 (Fla. 1988) (Remeta planned the robbery in advance and planned to leave no witnesses). Eaddy decided that the victim was easy prey, played along with the victim to a certain point, and then killed the victim so that he could acquire only the items he needed -- money, credit cards, and a car. Despite Eaddy's going through the victim's pants pockets and furniture, he did not take gold jewelry or other items. Compare Durocher v. State, 596 So. 2d 997 (Fla. 1992). Under Bowden, the given instruction was both warranted and required, regardless of whether the trial court found the factor.

Issue XII

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR.

Eaddy claims that the instruction given on this aggravating factor "merely tracked the statutory language, and was in any event woefully short of adequately informing [the jury] of the limits this court has placed on it." Appellant's Initial Brief at 76. Predictably, Eaddy relies on Espinosa v. Florida, 120 L. Ed. 2d 854 (1992), and its conclusion that the jury is the first sentencer in a capital case, with the trial court having a veto power only in rare circumstances, to contend that the jury must receive adequate instructions so that the second sentencer, i.e., the court, can give the required "great weight" to the jury recommendation.

Although Eaddy filed a pretrial motion to preclude instruction on this factor, and argued this point at the sentencing charge conference, he objected strictly to the act of the sentencing court instructing on this factor, but did not object to the wording of the instruction itself (T 1262-67). On the basis of Hodges v. State, 18 Fla. L. Weekly S255 (Fla. Apr. 15, 1993), Kennedy v. Singletary, 602 So. 2d 1285 (Fla. 1992), and Sochor v. State, 580 So. 2d 595, 602-03 (Fla. 1991), this claim is procedurally

barred.[17] Further, in Sochor v. Florida, 119 L. Ed. 2d 326, 338 (1992), the United States Supreme Court expressly honored this procedural bar, thereby conclusively putting to rest any notion that this claim was fundamental in nature.

Should this Court disregard the bar, it should correct and clarify the characterization of Florida's capital sentencing structure enunciated in Espinosa, since this Court's construction of Florida law is binding on all other courts. See Wainwright v. Goode, 464 U.S. 78 (1983). Although this Court has commented on the importance of the jury recommendation, see Grossman v. State, 525 So. 2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989); Tedder v. State, 322 So. 2d 908 (Fla. 1975), it has never held that the jury must be considered the first sentencer, or that the sentencing court must weigh the jury's recommendation as if it were a non-statutory aggravating factor. The construction of section 921.141 as reached by the Espinosa Court completely undermines the explicit legislative intent that the sentencing court's sentence be "independent." **Fla. Stat. §** 921.141 (1977). This construction also ignores many precedents of this Court, notably Combs v. State, 525 So. 2d 853 (Fla. 1988), in which this court stated:

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[17] In Kennedy, this Court alternatively found harmless error, which is equally applicable in this case.

> 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 he 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.'

Id. at 857 (citation omitted).

Finally, any alleged error in the jury instruction was harmless beyond a reasonable doubt under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), and Chapman v. California, 386 U.S. 18 (1967). Because the United States Supreme Court has never stated the exact ingredients for an adequate instruction on this aggravating circumstance, it is difficult to determine how the instant instruction is deficient. This is particularly so, where Eaddy presented evidence of ten alleged mitigating circumstances and his defense counsel strenuously argued them. See Graham v. Collins, 6 Fla. L. Weekly Fed. S864, S868 (Jan. 25, 1993) ("the jury plainly could have [rejected CCP] consistent with its instructions.").

Issue XIII

WHETHER THE SENTENCING COURT'S APPLICATION OF THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE CONSTITUTED AN EX POST FACTO VIOLATION.

Eaddy argues that, because he committed the instant crime in 1977 and the cold, calculated, and premeditated aggravating factor did not come into existence until 1979, application of it to him constitutes an ex post facto violation. Eaddy's argument on this point mirrors Justice Kogan's concurrence in Ellis v. State, Case No. 75,813 (Fla. July 1, 1993). There, although Justice Kogan recognized that this Court had previously rejected ex post facto challenges in this same context, e.g., Justus v. State, 438 So. 2d 358 (Fla. 1983), cert. denied, 465 U.S. 1052 (1984), he opined that the analysis had been rendered questionable by the intervention of Miller v. Florida, 482 U.S. 423 (1987), and was irreconcilable with Raske v. Martinez, 876 F.2d 1496 (11th Cir.), cert. denied, 493 U.S. 993 (1989), Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990), Dugger v. Williams, 593 So. 2d 180 (Fla. 1991), and **Fla. Const.** art. X, § 9. The majority in Ellis apparently found to the contrary.

Additionally, in a case more recent than any of those cited by Justice Kogan, this Court found reconsideration of the Justus rationale unnecessary. In Dougan v. State, 595

So. 2d 1 (Fla. 1992), cert. denied, 113 S. Ct. 383 (1993), this Court explicitly stated: "Several issues have been decided adversely to Dougan's contentions . . . ex post facto application of the cold, calculated, and premeditated aggravating factor, Combs v. State, 403 So . 2d 418 (Fla. 1981), cert. denied 456 U.S. 984 . . . (1982) . . . ." Id. at 3 n.3. Eaddy has shown no valid reason from receding from Combs or Justus.

Issue XIV

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

Eaddy claims that his death sentence is disproportionate because, although he stabbed the victim 11 times, he previously had not been engaged in "violent" criminal activity. In this regard, Eaddy acknowledges that other defendants have had their death sentences affirmed under similar facts, but contends that "[p]lacing this single 'explosion of total criminality' in the context of his otherwise nonviolent life reveals that death is an unwarranted punishment." Appellant's Initial Brief at 87. Eaddy's argument overlooks the explicit language of section 921.141(6).

Section 921.141(6)(a), Florida Statutes, provides that "no significant history of prior criminal activity" shall be a mitigating circumstance, without one mention of the word "violent." See Johnson v. State, 442 So. 2d 185, 189 (Fla. 1983), cert. denied, 465 U.S. 1061 (1984); Fitzpatrick v. State, 437 So. 2d 1072, 1078 (Fla. 1983), cert. denied, 466 U.S. 963 (1984). Although Eaddy's criminal history reveals no prior "violent" crimes against persons, the fact remains that Eaddy has a significant history of prior criminal activity. Prior to killing the victim, Eaddy's persistent involvement with the criminal justice system included 17

counts of forgery, vagrancies, burglary, breaking and entering, three counts of grand larceny, and shoplifting. After the victim's death, Eaddy's history includes generally alcohol-related crimes -- driving under the influence, public drunkenness, resisting arrest, driving with a suspended license, using another's license, etc., with the exception of possession of a loaded weapon in 1984.

Eaddy's effort to have his alcoholism problem militate against a death sentence is futile. He cites to other cases which involved the use of alcohol at the time the murders were committed. See Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985) ("the appellant is an alcoholic and was intoxicated at the time of the homicide."). Eaddy cannot avail himself of this route, as the only evidence of alcoholism presented was at times other than 1977, when Eaddy killed the victim: (1) in 1980 due to his divorce (T 957, 1180, 1233); (2) in 1975, after the death of his son (T 1180); and (3) during the 1980's, as evidenced by the presentence investigation. Compare Wickham v. State, 593 So. 2d 191, 194 (Fla. 1992) (the forcefulness of the mitigating factors was diminished by the state's evidence that Wickham "was not drinking at the time the murder was committed."), cert. denied, 112 S. Ct. 3004 (1993).

Eaddy's reliance on Rembert v. State, 445 So. 2d 337 (Fla. 1984), and Nibert v. State, 508 So. 2d 1 (Fla. 1987),

is flawed for this very reason. In Rembert, this Court struck three of the four aggravating circumstances, leaving felony murder and no mitigating circumstance. In reversing the sentence, this Court found significant that, although Rembert had introduced "a considerable amount of nonstatutory mitigating evidence," the trial court had found none. 445 So. 2d at 340. Although this Court did not elaborate on the mitigation, there was evidence that Rembert had been drinking on the day of the murder. Likewise, in Nibert, this Court invalidated one aggravating factor, leaving one aggravating circumstance and no mitigating circumstances. This Court remanded for resentencing, apparently based on the evidence presented in mitigation that Nibert had a problem with alcohol and was drinking on the night in question.

Finally, although Eaddy claimed ten mitigating factors (R 289-91), the sentencing court found no mitigating circumstances (R 283-84). Eaddy's death sentence is proportionate to the death sentences affirmed by this Court in cases involving similar facts and a similar balance of aggravating and mitigating circumstances. See Durocher v. State, 596 So. 2d 997, 1001 (Fla. 1992) (Durocher killed the victim in furtherance of stealing his money and car; four aggravators, one weak mitigator); Kight v. State, 512 So. 2d 922 (Fla. 1987) (51 stab wounds; two aggravators; two

nonstatutory mitigators), cert. denied, 485 U.S. 929 (1988); Lusk v. State, 446 So. 2d 1038 (Fla. 1984) (three stab wounds; four aggravators; no mitigators).

Issue XV

WHETHER THE SENTENCING COURT PROPERLY CONSIDERED THE MITIGATING FACTORS PRESENTED BY EADDY.

Eaddy claims that the sentencing court was incorrect about the nonstatutory mitigation it did consider, and that the sentencing court compounded this error by failing to mention or expressly consider the other mitigation presented by Eaddy, in violation of Campbell v. State, 571 So. 2d 415 (Fla. 1990). Eaddy is incorrect in both contentions.

First, the sentencing court's finding regarding Eaddy's absence from the home was amply supported by the record. Eaddy's wife testified that, while she was pregnant in 1976-77, she moved in with her mother, due to pregnancy complications. Although she recalled seeing Eaddy "some time" in 1977, she did not remember dates (T 958). However, she did recount that in January 1977, the month Eaddy killed the victim (R 16), she did not know where Eaddy was or what he had been doing (T 965). Thus, the sentencing court was clearly justified in concluding that Eaddy was less than an ideal "family man," and its conclusion on this point in no way impugned Eaddy's reputation for being a good father. Appellant's Initial Brief at 89.

Further, the record supports the trial court's determination that Eaddy suffered no mental disorder or

deficiency. Dr. Leggum testified that Eaddy had a low average intellectual capacity (T 1177), poor self concept (T 1179), no organic problems (T 1179), a problem with alcohol (as related to him by Eaddy) (T 1180), high depression and anger (at the time of the interview) (T 1181), and passive aggressive tendencies (T 1181).[18] On cross examination, Dr. Leggum clearly stated: "He is not psychotic. He does not have an organic disorder. He is not mentally retarded." (T 1193). Dr. Leggum also related that Eaddy was not insane (T 1193).

Second, this Court has

> previously held that a trial court need not expressly address each nonstatutory mitigating factor in rejecting them, Mason v. State, 438 So. 2d 374 (Fla.

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[18] A passive aggressive individual is one

> has had difficulties in terms of maximizing his particular abilities and capacities, an individual who has always been an underachiever, and individual who has always been somewhat hesitant in terms of directly asserting himself.
>
> Passive aggressive personalities are often found among people with low self esteem and people who are chronically depressed. They are individuals show also are not likely to be in touch with angry feelings that they actually have. They have trouble in kind of owning that that's the way that they're feeling at the time.

(T 1181).

> 1983), cert. denied, 465 U.S. 1051 . . . (1984), and "[t]hat the court's findings of fact did not specifically address appellant's evidence and arguments does not mean they were not considered." Brown v. State, 473 So. 2d 1260, 1268 (Fla.), cert. denied, 474 U.S. 1038 . . . (1985). More recently, however, to assist trial courts in setting out their findings, [this Court has] formulated guidelines for findings in regard to mitigating evidence in Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 . . . (1988), and Campbell v. State, no. 72,622 (Fla. June 14, 1990). We have even noted broad categories of nonstatutory mitigating evidence which may be valid. Campbell, slip op. at 9 n.6. However, "[m]itigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt." Eutzy v. State, 458 So. 2d 755, 759 (Fla. 1984), cert. denied, 471 U.S. 1045 . . . (1985). [This Court], as a reviewing court, not a fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in any particular case. Hudson v. State, 538 So. 2d 829 (Fla.), cert. denied . . . 107 L. Ed. 2d 165 (1989); Brown v. Wainwright, 392 So. 2d 1327 (Fla.), cert. denied, 454 U.S. 1000 . . . (1981). Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion. King v. Dugger, 555 So. 2d 355 (Fla. 1990); Scull v. State, 533 So. 2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037 . . . . (1989); Stano v. State, 473 So. 2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093 . . . (1986).

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

It is perfectly evident in this case that the sentencing court considered the mitigation. Defense counsel

filed a written sentencing memorandum, called witnesses at the sentencing hearing who testified regarding the proposed mitigating factors, and vigorously argued mitigation in her closing argument (T 1304-08). Further, in sentencing Eaddy, the court acknowledged several of the mitigators and pointed to evidence which rebutted them (R 283-84; T 1374).

Eaddy cannot legitimately claim that the sentencing court abused its discretion in this case. The alleged mitigation presented by Eaddy was at best weak, particularly in light of the strong evidence which supported the two aggravating circumstances. Nevertheless, the court reviewed the evidence before determining that none of it established any of the statutory mitigating circumstances listed in section 921.141(6), and before finding the evidence insufficient to prove nonstatutory mitigation (R 283-84). Compare White v. State, 446 So. 2d 1031 (Fla. 1984).

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm Eaddy's conviction for first degree murder and sentence of death.

Respectfully submitted,

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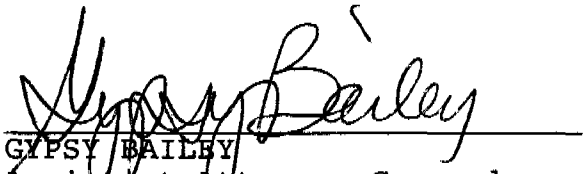
ATTORNEY GENERAL



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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 DAVID A. DAVIS, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 26th day of July, 1993.

Gypsy Bailey

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