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IN THE SUPREME COURT OF FLORIDA

GARY WHITTON,

Appellant,

v. CASE NO. 80,536

STATE OF FLORIDA,

Appellee.

______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR WALTON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

(A) Procedural History

The Appellant's outline of the chronology of the case is accepted.

(B) Facts

The State will rely upon its own summary of the facts. In doing so, the State will offer an overview of the crime itself followed by specific facts relevant to each point on appeal. The Appellant's statement, while generally correct, is somewhat incomplete and, in addition, tends to set out the facts in a manner favoring the Appellant, contrary to established law. On appeal, all facts and all inferences from the facts must be taken in favor of the judgment and sentence. Gilvin v. State, 418 So.2d 996 (Fla. 1982); Shapiro v. State, 390 So.2d 344 (Fla. 1980). Therefore, the operative facts of this case are as follows:

The Appellant, Gary Whitton, met the victim, James Mauldin, at a treatment center for alcoholics called the Barcelona House (R 1815). Over a period of eighteen months, Whitton befriended Mauldin (R 1815).

On October 6, 1990, Mauldin returned to Pensacola from his offshore job (R 1816). Mauldin visited Whitton (R 1816) and had Whitton check him into a local motel (R 1816). On October 7, 1990, Mauldin again visited Whitton (R 1817) and spent the night at Whitton's home (R 1818).

On Monday, October 8, 1990, Mr. Whitton drove Mauldin to Mauldin's bank, but the bank was closed (R 1819). Whitton did

not go to work on October 8, but on the evening of the 8th, Whitton telephoned his employer, Mr. Traweek, and told him that he had to go to Ocala on family business (R 1532). The story was false (R 1840-1841), as Whitton later conceded.

On Tuesday, October 9, 1990, Whitton took Mauldin to the bank a second time (R 1822). According to the teller (Ms. McCormick), Mauldin came to the counter, by himself, and attempted to withdraw money from his account (R 1412-1416). Since Mauldin did not have his passbook, he could not make a withdrawal. Mauldin seemed to be intoxicated and was rude to the teller (R 1418).

Mauldin decided to close his account and withdraw all his money. Mr. Whitton helped Mauldin fill out the required forms (R 1418-1419).

According to Whitton, Mauldin's next desire was to check into another motel and sober up before meeting his father (R 1823). Whitton took Mauldin to a different motel, the Sun and Sand Motel in Destin (R 1824).

The desk clerk, John Maleszewski, testified that Whitton and Mauldin requested a room for one person (R 1423). Mauldin could not fill out the registration form, so Whitton did (R 1424).

Since October is a very slow month, only two of the motel's thirty-one rooms were rented (R 1431). Mauldin was renting one of those rooms, Room Five (R 1428-1431). As Whitton drove Mauldin to the room, Eric Fleming, an employee, noticed that Whitton's car had Alabama tags, not Florida tags, as represented

on the registration (R 1426). The tag number was also incorrect (R 1426).

Sometime later, Maleszewski saw Mauldin and a companion crossing the road (R 1431).

Mr. Whitton testified that he had indeed falsified the registration form (R 1825). According to Whitton, he gave false information in order to avoid being billed (i.e., located) (R 1825). Interestingly, however, Whitton had not taken the same precaution when he signed Mauldin into the Traveler's Inn two days earlier (R 1853).

Mr. Whitton left Mr. Mauldin at the motel and went to visit Maureen Fitzgerald, Mauldin's girlfriend (R 1482). The visit was very unusual, since Whitton had never before visited Ms. Fitzgerald without Mr. Mauldin (R 1496). Whitton told Ms. Fitzgerald he left Mauldin at a motel, but could not recall the name (R 1863).

Mr. Whitton claimed that he kept trying to call Mr. Mauldin's mother (Mrs. McCoy) all day (R 1917). Mrs. McCoy, however, testified that she was constantly at home from 2:30 p.m. onward, but nobody called (R 1917).

Meanwhile, back at the motel, Mr. Maleszewski completed his shift and retired to his apartment (room number eight). Around 10:30 p.m., he heard a car door close (R 1431). Anticipating a customer, Maleszewski looked outside and saw Whitton's car in front of apartment nine (R 1432). At approximately 12:32 a.m., he heard another noise, looked outside, and saw someone get something from the trunk of Whitton's car and then drive away in Whitton's car (R 1433)

Whitton testified that he returned to the motel to check on Mauldin (R 1834, 1865-1867). Whitton testified that upon entering the room he saw blood everywhere (R 1836). Indeed, the blood was so deep that it actually soaked through his boots onto his socks (R 1870-1871). Whitton claimed that he stayed only about thirty seconds and then fled (R 1872). According to Whitton, he did not report his friend's murder because he "did not want to get involved." (R 1872-1877).

Mr. Whitton's alleged "flight", however, included a trip to a Conoco station where he took time to purchase gas and a "double car wash" for his car (R 1518-1519). Later that morning, Mr. Whitton suddenly had enough cash to go around paying various delinquent bills and renew his license tags (R 1512-1525). Whitton claimed that this influx of cash came from three sources; his paycheck, money for utilities paid to him by Renee Sims, and the proceeds from the sale of some furniture (R 1844-1845). None of Whitton's sources other than his paycheck (for $148.43), could be verified.

While the newly solvent Mr. Whitton was going around paying his bills, the motel staff found Mauldin's body and called the police (R 1434-1435).

Mr. Whitton was picked up for questioning and gave a series of three inconsistent and ever more incriminating stories (R 1763). In the first version Whitton claimed to have simply left Mauldin at the motel (R 1763-1764). In the second, Whitton added some details regarding his activities but denied that he ever returned to the motel (R 1763-1768). In the third version,

Whitton admitted returning to the motel, allegedly to advise Mauldin that his mother wanted to see him (R 1770). In this version, Whitton claimed he found Mauldin's body and got blood on his boots and socks (R 1770).

While Whitton was in jail, he spoke to a "jailhouse lawyer" named Ken McCullough (R 1642-1643). Whitton confessed to the murder (id.). Sometime later (in April 1992), the two prisoners spoke again and were overheard by another prisoner, Jake Ozio (R 1613).

McCullough never reported the confessions but Jake Ozio did, and gave McCullough's name to the State (R 1645-1646). Although McCullough was a friend of Inez Adkinson (the prosecutor's mother), the prosecutor himself (Mr. Adkinson), was the attorney who convicted McCullough, tried to have him declared an "habitual offender" and won a sentence in excess of the sentencing guidelines (R 1654-1657). Thus, McCullough had no reason to assist the prosecutor.[1]

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[1] The defense tried to impeach Jake Ozio by claiming he received a lenient sentence (R 1616-1618). In actuality, Jake Ozio and his partner were in jail on three counts of residential burglary, three counts of grand theft and possession of a short-barrel gun (R 1618). Although the defense represented that these crimes carried a potential statutory sentence of fifteen years (with a minimum mandatory), Ozio knew that under the "guidelines" he would not actually receive the legislated punishment (R 1618).

Ozio was eighteen years old and had no prior convictions (R 1626). Ozio cooperated with the police by taking them to various pawn shops to recover stolen property (R 1623). Ozio's partner did not help the police and did not testify in this case, yet both Ozio and his partner received the "guidelines" sentence of community control (R 1631). The only break received by Ozio involved the minimum mandatory on the gun charge, but that deal was not made in connection with this case (R 1636). Thus, Ozio was not impeached.

At trial, the State called a host of crime scene technicians, experts and assorted witnesses including Ozio and McCullough.

Officer Fred Mann testified that the victim's wallet was empty and his pants pockets were pulled out (R 1609). Dr. Kielman provided graphic testimony on the cause of death (R 1660, et seq.). Blood spatter expert Janice Johnson interpreted the bloodstain patterns in an effort to reconstruct the crime (R 1704, et seq.). Mr. Johnson also testified regarding certain stains found inside Whitton's boots that indicated that the boots were not worn during the attack itself but, rather, were put on later (R 1722-1724).

Forensic serologist Laura Ginsburg testified that Mauldin had type "A" blood while Whitton was type "O" and a "secretor". (R 1733). The victim's blood type was, obviously, detected in the motel room (bloodstains). It was also found in bloodstains on Whitton's car seats and on his boots (R 1742-1743). Meanwhile, type "O" secretions were found on cigarette butts in the motel room (R 1738).

Despite the fact that Whitton "admitted" that he found the victim's body and got Mauldin's blood on his boots, the defense tried to impeach Ms. Ginsburg by calling its own expert, Shirley Zeigler (R 1907). Despite the fact that Whitton had already testified to getting Mauldin's blood on his boots (R 1870), Zeigler testified that she could not match the DNA found in one, isolated "swab" from Whitton's boot with the victim's blood (R 1907). She did not test other stains (R 1907-1915).

The defense raised other issues, including the presence of unidentified fingerprints on certain items purchased from the convenience store (by Mauldin) (R 1801-1813). The defense did not show that these stray prints, even if unidentified, came from the same person nor did the defense refute the idea that the prints could have been left by the store clerk or other customers (R 1801-1813).

Whitton was found guilty as charged (R 619-622, 2034-2035). The court granted a continuance before the penalty phase.

The State recalled Mr. McCullough who testified that Whitton confessed to killing Mauldin to avoid being reincarcerated in Alabama for violating parole (R 2121). Steven Green, a parole official from Alabama, verified Mauldin's prior conviction for armed robbery (R 2127). The final state witness was Dr. Kielman, who testified to the issue of "heinous, atrocious or cruel" murder (R 2135-2139).

The defense called a psychologist, James Larson (R 2153), who testified to Whitton's alcohol abuse and low-normal IQ (R 2153). Larson stated that Whitton did not suffer from any major mental illness and also conceded Whitton's "good insight" and motivation to help himself (R 2163-2165). Indeed, on cross examination Dr. Larson conceded that Whitton was sane, competent, appreciated his situation and knew both what he was doing and the consequences (R 2170-2172). The doctor specifically checked Mr. Whitton for possible statutory and non-statutory mitigating factors <u>in addition</u> to the court-ordered tests (R 2176), and found <u>no</u> statutory mitigating factors and only possible

"educational deprivation", possible "fetal alcohol syndrome", a "lack of positive role models", a tough childhood and a "lack of a violent history" (that, we note, apparently excluded Whitton's prior armed robbery) (R 2177).

The defense called Royal Whitton, the Appellant's brother, who also endured a tough youth but was not a criminal (R 2185-2188), and Renee Sims, a close friend of Mr. Whitton (R 2189). Other character witnesses (Mrs. George and Mrs. McGuire) were called along with an aunt who saw Whitton when he was very young (R 2192-2208).

The advisory jury recommended death (12-0) (R 2255), and Whitton was sentenced to death.

The court found the following aggravating factors: (1) Mr. Whitton was under sentence for armed robbery at the time of the killing; (2) Mr. Whitton had a prior conviction for a violent felony; (3) Mr. Whitton killed Mauldin to avoid arrest; (4) Mr. Whitton killed Mauldin for pecuniary gain, and (5) the murder was especially heinous, atrocious or cruel (R 2274-2278).

The court listed all of the mitigating factors suggested by the defense (R 2279), giving weight to Whitton's low-normal IQ, alcoholism, "charitable deeds" and status as a "child of God", but less weight to Whitton's work history and potential for rehabilitation (R 2279-2281).

Whitton was sentenced to death in keeping with the jury's recommendation (R 2281).

For the Court's convenience, the Appellee will provide the facts relevant to each argument in the appropriate portion of the brief.

SUMMARY OF ARGUMENT

The seven issues raised by the Appellant's brief do not provide any basis for reversal of Whitton's conviction or sentence.

The first issue ("prosecutorial misconduct") is based upon an incomplete recitation of facts combined with unpreserved (and thus waived) issues of law.

The second issue was never raised in the trial court and is barred on appeal.

The third issue is a baseless challenge to a jury instruction on the heinous-atrocious-cruel factor that misapprehends both the facts and the law.

The fourth issue is a baseless challenge to the application of the heinousness factor to this murder.

Points five and six mirror the arguments in points three and four, applying those arguments to the "avoid arrest" factor. Again, the claims are legally and factually baseless.

Finally, Whitton questions the proportionality of his death sentence on the basis of mitigating factors having no nexus to the crime.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL

The first issue on appeal involves the trial court's denial of a defense motion for mistrial. According to the Appellant, the prosecutor solicited and made repeated comments regarding Mr. Whitton's invocation of his Miranda[2] rights, thus compelling a mistrial.

The Appellant is not entitled to relief. His brief fails to account for all of the record facts, it fails to confront the issue of waiver, it fails to discuss the relevant standard of review and it fails to analyze the facts, in context, to see if any error was either invited or at least harmless. Instead, the brief makes a perfunctory statement regarding a legal principle and then assumes the existence of per se reversible error.

(a) Waiver

At the outset it is necessary to point out the alleged "errors" that are properly preserved for review by the Court.

Mr. Whitton's brief cites to three alleged instances in which the State made or solicited comments regarding his invocation of his Miranda rights. The first incident occurred during the testimony of Investigator Allen Cotton. In response to a general request for a narrative account of the questioning of Mr. Whitton (see below), Investigator Cotton said "he

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

[Whitton] decided he did not want to talk to us any more". (R 1771).

The defense never objected to this comment and never moved for a mistrial.

The second incident came about during the cross examination of Whitton himself, when the prosecutor asked Whitton, "And when you told him that, then you didn't say nothing else." (R 1886). Once again, the defense never objected, never sought a curative instruction and never moved for a mistrial.

It is axiomatic that this Court will not review errors for which no objection was raised at trial. Clark v. State, 363 So.2d 331 (Fla. 1980); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Gunsby v. State, 574 So.2d 1085 (Fla. 1991). In State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), the waiver was extended to cover the kind of error raised herein. See Stewart v. State, 620 So.2d 177 (Fla. 1993). Thus, the only issue properly before this Court is the trial court's response to the State's closing argument and the objection raised at that time (see below), since that issue was the only issue preserved in the trial court.

It should also be noted that Mr. Whitton declined the offer of a curative instruction during the State's closing argument. This, again, was contrary to procedure and constitutes a waiver of any claim. See Buenoano v. State, 527 So.2d 194 (Fla. 1988); Duest v. State, 462 So.2d 446 (Fla. 1985); Ferguson v. State, 417 So.2d 639 (Fla. 1982).

Without abandoning this procedural defense, the State will discuss the merits of Mr. Whitton's claims.

(b) Standard of Review

The Appellant's brief does not discuss the legal standards that must be applied on review of the trial court's decision to deny the motion for mistrial. Two distinct standards apply.

First, given the fact that we are dealing with a motion for mistrial, it is necessary to remember that a trial court's decision to grant or deny a motion for mistrial is discretionary and, as a result, only subject to reversal upon a showing of an abuse of discretion. Sireci v. State, 587 So.2d 450 (Fla. 1991); Dufour v. State, 495 So.2d 154 (Fla. 1986); Marek v. State, 492 So.2d 1055 (Fla. 1986).

Where, as here, the trial court's decision enjoys record support, the lower court must be upheld even if the appellate court would (were it the trial court) have ruled differently. Sireci, supra; Marek, supra.

The second applicable standard relates to the "error" itself.

While it is true that the State, under ordinary circumstances, should not comment upon the defendant's post-arrest silence, it is also true that a violation of this principle does not constitute per se reversible error. State v. Lowry, 498 So.2d 427 (Fla. 1986); State v. DiGuilio, supra.

In reviewing the denial of a timely defense motion for mistrial, the reviewing court may also determine whether the objectionable comment was invited by the defense or was otherwise "harmless". Jackson v. State, 359 So.2d 1190 (Fla. 1978); Jennings v. State, 457 So.2d 587 (Fla. 3rd DCA 1984); DiGuilio,

supra. DiGuilio recognized that allegedly improper arguments by a prosecutor must be reviewed in context, stating:

> We are no longer only dealing with clear-cut violations where the prosecutor directly comments on the accused's silence and hammers the point home as in Rowe v. State, 87 Fla. 17, 98 So. 613 (1924). Comments on silence are lumped together in an amorphoous mass where no distinction is drawn between the direct or indirect, the advertent from the inadvertent, the emphasized from the causal, the clear from the ambiguous, and, most importantly, the harmful from the harmless. In short, no bright line can be drawn around or within the almost unlimited variety of comments that will place all of the harmful errors on one side and the harmless errors on the other, unless the circumstances of the trial are considered. We must apply harmless error analysis to the 'fairly susceptible' comment in order to obtain the requisite discriminatory capacity.

DiGuilio, at 1136.

Federally, an analogous standard of harmlessness (again, based upon the context in which the arguments were made) is applied. Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989); Kennedy v. Singletary, 933 F.2d 905 (11th Cir. 1991); United States v. Herring, 955 F.2d 703 (11th Cir. 1992); United States v. Chandler, ___ F.2d ___ (11th Cir. 1993), 7 Fla.L.Weekly.Fed. C609.

The record clearly provides support for the trial court's decision sufficient to overcome any issue of "abuse of discretion", while the prosecutor's argument, when viewed in context with the theory of the defense, Whitton's testimony, and the issue of Whitton's cooperation with the police, was clearly invited, as well as "harmless".

(c) Analysis

Gary Whitton's defense to the charges of murder and robbery was "alibi". Basically, Whitton contended that he took the victim, Mr. Mauldin, to the motel, left Mauldin alone, returned late that night to see Mauldin, found Mauldin dead and left the motel (without calling the police) because he did not want to get involved (R 1814-1882).

As noted above, the State's case consisted of (1) eyewitness testimony from people who saw Whitton with Mauldin at Mauldin's bank (R 1411, et seq.), (2) the motel (R 1421, et seq.), (3) testimony from creditors that Whitton paid off on the morning after the crime (R 1478, 1511, 1524), (4) a witness who saw Whitton's car at the motel around the time of the murder (R 1431, <u>et</u> <u>seq</u>.), (5) testimony that Whitton had his car washed after leaving the motel (R 1517, et seq.), (6) testimony that Whitton lied to his employer (claiming to be in another city at the time of the killing) (R 1529, et seq.), (7) testimony that Whitton lied to the police (R 1753, et seq.), and (8) expert testimony regarding blood spatters, bloodstains and the cause of death (R 1660-1752).

All of the State's evidence was corroborated by Whitton's confession to two other inmates (R 1610-1658), and, to a surprising degree, by Whitton's <u>own</u> testimony.

The police officer who questioned Mr. Whitton was Investigator Allen Cotton. During the direct examination of Mr. Cotton, the prosecutor asked a general, narrative question; to-wit:

> Now, if you would, I'd like for you to tell us basically what he said at the various times you talked to him and perhaps point out to the jury the inconsistencies as we go along, if you can.

(R 1763).

This question did not request any comment upon the defendant's silence and did not draw an objection from the defense. Mr. Cotton was the State's last witness, meaning that the jury had already seen and heard the vast bulk of the case, including Whitton's confessions.

In the course of his lengthy narrative response (R 1763-1771), Officer Cotton made the following unsolicited remark:

> And at 05:15 AM he decided, once we were getting much closer to what we felt was the truth and we were tightening down on him being at the murder scene, he decided he did not want to talk to us any more.

(R 1771).

As noted before, this comment was so inconsequential in context that the defense did not object, move for a curative instruction or move for a mistrial. Clark, supra; Stewart, supra. The absence of an objection is an indicator of harmlessness, Duest v. State, 462 So.2d 446 (Fla. 1985), or lack of prejudice. See Irizarry v. State, 496 So.2d 822 (Fla. 1986). Had the comment been noteworthy, Whitton would in all probability have objected, just as he did during closing argument.

The second "incident", although similarly not preserved, is important in placing the prosecutor's closing argument in the proper context, for it involves a comment that was virtually invited by the defense.

On direct examination, the following exchange took place between Whitton and his own attorney:

> Q. All right. Did you tell Investigator Cotton that you were there a few minutes?
>
> A. I don't remember exactly how long I told him I was there. I could have said a few minutes. That's very possible.
>
> Q. But today you've been asked specifically . . .
>
> A. Yes, sir.
>
> Q. . . . how long you were there, approximately. Is what you've told this jury true about how long you were there?
>
> A. It's the best estimate I can give, yes. I didn't keep a time schedule of how long I stayed there. I can say that I didn't stay there no longer than thirty minutes that morning when I went and took him there.
>
> Q. When you were arrested how much money did you have on you?
>
> A. I don't remember the exact amount. I think it was somewhere around fifty dollars.
>
> Q. And do you realize you could have told somebody?
>
> A. Yes, sir.

(R 1881-1882) (emphasis added).

These questions by Whitton's own attorney conveyed the message that Whitton wanted to cooperate with the police, would have answered questions (if only they had been asked), and was being forthright. On recross, the State quite properly and (significantly), without objection, probed the issue of Whitton's candor and desire to cooperate "if asked"; to-wit:

> Q. But you do agree that your memory was better in 1990, October 1990, when you talked to Mr. Cotton and that would be closer to the time, wouldn't it?

> A. Mr. Cotton asked me back then how long I had been there and I said a few minutes. He didn't take the question any further than that. He didn't ask me for specifics. He didn't ask me right down to the last second.
>
> Q. He was asking you for specifics wasn't he Mr. Whitton?
>
> A. He was trying to find out what happened that day, yes.
>
> Q. And you were lying to him constantly, weren't you?
>
> A. I lied to him up to -- the only point I lied to him was the fact I told him at first I did not go back there.
>
> Q. And what did you do when you told him, and what did you do after that when you told him you didn't go back there?
>
> A. I told him.
>
> Q. You didn't say any more, did you?
>
> A. Excuse me?
>
> Q. You didn't say any more then, did you?
>
> A. No, I did tell him after awhile I did go back there.
>
> Q. And when you told him that you didn't say nothing else?
>
> A. No, sir.

(R 1885-1886) (emphasis added).

The defense, once again, did not object to this fair line of cross examination that was clearly invited by Whitton's direct testimony. Jackson, supra; Jennings, supra.

By the time the attorneys began their closing arguments, the jury was already aware of Mr. Whitton's propensity to give false information (to his employer, to the motel staff, to Mauldin's

girlfriend, to the police and to the jury itself), and of his decision not to answer Investigator Cotton's questions, all without objection. Thus, when the prosecutor made the following argument, it revealed nothing new, nothing prejudicial and nothing that was unsupported by the record:

> He tells Allen Cotton that he doesn't go back over there. He kept on and on. And sure they question him for three hours and they'll question the next person for that length of time. But in the last part of that interview, before the defendant says 'I'm not talking to you any more', he tells him 'I went back over there, I walked in and I saw my friend dead and I left.' Then he doesn't say anything else. He realizes at that point 'uh-oh'.

(R 1956).

While the defense objected to this argument, it declined the court's offer of a curative instruction (again raising a question as to the seriousness of any claim of prejudice as well as waiver, per Buenoano, supra; Duest, supra).

Mr. Whitton did not have the right to portray himself as a cooperative defendant who could have cleared up all of the confusion "if only" he had been asked the correct questions by the police. By attempting to create the impression that he was cooperative, Whitton directly placed his silence at issue along with his lies to the police. Doyle v. Ohio, 426 U.S. 610 (1976).

Indeed, Doyle v. Ohio, id, recognizes two exceptions to the general prohibition against using post-Miranda silence as impeachment:

> (1) A defendant's silence is admissible to impeach a claim that the defendant cooperated with law enforcement.

> (2) A defendant's silence may be used when said defendant waives Miranda, answers some questions, and then invokes his rights.

The first exception is plainly set forth in Doyle:

> It goes without saying that the fact of post-arrest silence could be used by the prosecutor to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.

(426 U.S. at 618, n.11).

When Whitton tried to create the impression that he would have answered more detailed questions "if only" he had been asked the right questions, he clearly set himself up for the prosecutor's cross examination and his argument. United States v. Hoac, 990 F.2d 1099 (9th Cir. 1993); Anderson v. Charles, 447 U.S. 404 (1980).

This brings us to the second exception, which was set forth in Anderson v. Charles, as follows:

> Doyle bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But Doyle does not apply to cross examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who speaks after receiving Miranda warnings has not been induced to remain silent at all.

Id. at 408.

This extension of the Doyle decision has been interpreted as allowing cross examination on the issue of matters not revealed by a defendant in a post-Miranda statement, including the issue of "how" the post-Miranda interview came to be terminated.

United States v. Harris, 956 F.2d 177, 181 (8th Cir.), cert. denied, ___ U.S. ___, 121 L.Ed.2d 48 (1992); United States v. Robinson, 956 F.2d 1388 (7th Cir. 1992); United States v. Shue, 766 F.2d 1122 (7th Cir. 1985); Rowan v. Owens, 752 F.2d 1186 (7th Cir.), cert. denied, 476 U.S. 1140 (1984); United States v. Hoac, supra; but see United States v. Canterbury, 985 F.2d 483 (10th Cir. 1993).

The opinion is United States v. Harris sets out the exception well:

> Reference to the silence of an accused usually is impermissible because it is fundamentally unfair for the government to induce silence through Miranda warnings and then later use this silence against the accused. See Doyle v. Ohio (cite omitted). Where the accused initially waives his right to remain silent and agrees to questioning, however, no such inducement has occurred. If the accused subsequently refuses to answer further questions, the prosecution may note the refusal because it now constitutes part of an otherwise admissible conversation between the police and the accused. See United States v. Collins, 652 F.2d 735, 740 (8th Cir.), cert. denied, 455 U.S. 906 (1981). . . . The prosecutor's commentary, therefore, was permissible.

While the cited authorities address cross examination rather than closing argument it is obvious that counsel may argue matters that were properly admitted into evidence. Here, the prosecutor did nothing more than argue matters which were already of record and which were properly admitted without objection.

From this record, it is patently obvious that the trial court did not abuse its discretion in denying the motion for mistrial.

(d) Harmless Error

The harmless error defense applies to cases such as the one at bar. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Brecht v. Abrahamson, 507 U.S. ___, 123 L.Ed.2d 353 (1993). If we assume, arguendo, that no Doyle exceptions applied and that the prosecutor erred in commenting upon record evidence that was received without objection, the totality of the record clearly renders any "error" harmless. Irving v. State, ___ So.2d ___ (Fla. 3rd DCA 1993), 18 Fla.L.Weekly D2481; Phillips v. State, 621 So.2d 734 (Fla. 3rd DCA 1993); Stewart v. State, 620 So.2d 177 (Fla. 1993). The evidence against Whitton included:

> (1) The fact that he was with the victim on the day of the crime, helping Mauldin withdraw money from his bank and checking into a motel (R 1411-1416, 1421).
>
> (2) The fact that only Whitton knew (both) where Mauldin was and the fact he had cash on him.
>
> (3) The fact that Whitton gave false information to the motel staff to conceal his identity (or at least his whereabouts) (R 1426).
>
> (4) The fact that Whitton lied to his boss, claiming to be in Gainesville (or Ocala) to confuse the issue of just where he was at any given time.
>
> (5) The fact that Whitton returned to the motel on the night Mauldin was killed (R 1432, 1834).
>
> (6) The fact that blood matching the victim's type - blood Whitton agreed was the victim's - was found on Whitton's boots and in his car (R 1741-1743, 1770-1771, 1870).
>
> (7) the fact that Whitton suddenly had money to pay bills on the day after the murder (R 1511-1526).

(8) The fact that Whitton repeatedly lied to the police about his activities on October 9th (R 1753-1771).

(9) The fact (never denied by Whitton) that Whitton confessed to the murder to inmates Ozio and McCullough (R 1610-1660).

Against this evidence Whitton offered the improbable story that he cared a great deal for Mr. Mauldin until he "found Mauldin dead", at which point he "did not want to get involved" and a minimal suggestion that some mysterious third person could have killed Mauldin.[3] Whitton was simply not a credible witness and his theory of defense (a phantom killer and his sudden desire not to get involved after the death of his good friend), simply did not add up. Indeed, after Whitton confessed that he lied to the police, the mere fact that he stopped answering questions became irrelevant.

Mr. Whitton cannot show that the prosecutor's argument was the focal point of the jury's deliberations or that it had some fundamental impact upon the fairness of his trial. Indeed, the argument was so inconsequential that Mr. Whitton did not follow up his merely pro forma objection with any request for a curative instruction. Buenoano, supra; Duest, supra. His rejection of the court's offer of a curative instruction may fairly be interpreted as a desire not to highlight an otherwise objectionable comment (thus showing that the comment by the prosecutor was not of some overwhelming impact).

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[3] Whitton showed that unidentified fingerprints were found on a just-purchased wine bottle and sandwich wrapper. Among other deficiencies, Whitton never showed that the prints on the two objects were the same.

Clearly, any "error", if not waived or invited, when reviewed in context, was harmless beyond any reasonable doubt.

POINT II

THE FOURTH AMENDMENT ISSUE IS NOT PROPERLY BEFORE THE COURT INASMUCH AS IT WAS NEITHER RAISED NOR RULED UPON IN THE TRIAL COURT

The Appellant contends that his constitutional rights under the Fourth Amendment were violated, thus compelling the suppression of his statements to the police without regard for the issue of whether his Fifth Amendment rights were violated (avoiding Oregon v. Elstad, 470 U.S. 298 (1985)). Obviously, the "Fourth Amendment violation" is based upon Whitton's claim that he was illegally arrested, in his home, without a warrant.

What the Appellant has failed to tell the Court is that no Fourth Amendment claim was raised in his motion to suppress (SR 1, 2), nor was the issue argued orally (R 764, et seq.). The only issue argued below was one based upon the Fifth Amendment.[4] Thus, the issue raised on appeal was not raised, not preserved, and not ruled upon in the lower and cannot be argued on appeal. Gunsby v. State, 574 So.2d 1085 (Fla. 1991); Mitchell v. State, 527 So.2d 179 (Fla. 1988); Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1984); Holton v. State, 573 So.2d 284 (Fla. 1990); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

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[4] Claims of error arising under the Fourth, Fifth and Sixth Amendments are not fungible. McNeil v. Wisconsin, 501 U.S. ___, 115 L.Ed.2d 158 (1991); Withrow v. Williams, ___ U.S. ___, 123 L.Ed.2d 407 (1993).

The trial court ruled that Mr. Whitton was "in custody" for Fifth Amendment purposes but never ruled, nor was it asked to rule, on any Fourth Amendment issue. Without waiving the procedural bar, the State notes that no illegal seizure appears in the record and, indeed, Mr. Whitton's own testimony at the suppression hearing defeats his claim. The record reveals the following facts:

After the discovery of James Mauldin's body at the Sun and Sand Motel, the police had no witnesses except the owner of the Buick automobile referred to on Mauldin's card (R 775). Mr. Whitton owned the Buick, and the police watched his home to see when he would appear (R 775). Whitton was merely a potential witness, not a "defendant", and unlike the cited cases of Brown v. Illinois, 422 U.S. 490 (1975), and Dunaway v. New York, 442 U.S. 200 (1979), no one was ordered to arrest him.

Whitton's car was spotted at his home late at night on October 10-11, 1990 (R 775-775). Investigator Cotton, with officers Peaden and Campbell, went to Whitton's door and asked to come in (R 768). Although it is true the officers, like most policemen, had guns, there was no testimony that these guns were ever drawn or used against Whitton in any way. This, again, distinguishes this case from Brown and Dunaway.

Mr. Whitton invited the officers inside. Again, unlike Whitton's cited cases, the police repeatedly assured Whitton he was not under arrest (R 768, 769, 796), and in fact told him he did not have to speak with them (R 783), even though Miranda warnings were not given.

Mr. Whitton's own sworn testimony dispels any myth that he was "seized", "arrested" or "forced to go against his will"; to-wit:

> Q. As long as you were not under arrest, what did you have the right to do?
>
> A. Stay at my house, as far as I was concerned.
>
> Q. And you knew that?
>
> A. No, I didn't actually know that, I mean, it never was --
>
> Q. You knew that, didn't you?
>
> A. I was never forced to go, if that's what you mean, no.

(R 801-802).

Once at the station, Whitton was again told he was <u>not</u> under arrest (R 771-772). Whitton told the police that he had left Mauldin in Destin on the 9th of October (R 771-772).

Given his use of the victim's name, Whitton was given <u>Miranda</u> warnings by Officer Cotton (R 771-772). The record, however, still does not reflect an arrest and no one testified to any arrest.

Whitton continued giving false and exculpatory stories to the police in an obvious attempt to talk his way out of trouble. Contradictions in his stories, however, caused the police to begin "getting close". When Whitton sensed this danger, he freely invoked his rights and all questioning ceased (R 789, 799).

In its order granting - and - denying suppression, the trial court said:

> The Defendant testified at this hearing that he understood he did not have to answer their questions; in part because of his prior contacts with law enforcement, but that 'When the law shows up and tells you to come to the Sheriff's Office, you don't have no choice.' The Defendant was then transported to the Sheriff's Office in an unmarked car. The Court also finds for purposes of Miranda the Defendant was in custody while at the Sheriff's Office inasmuch as Defendant believed and a reasonable person would have believed that his freedom was restrained to a degree associated with actual arrest. Upon arriving at the Sheriff's Office, the Defendant was asked background questions for approximately five to seven minutes before being advised of his Miranda rights. The Court finds that these initial statements, while obtained in technical violation of Miranda, were nevertheless voluntary.

(R 616) (emphasis added).

Turning to Oregon v. Elstad, the Court held:

> Therefore, while the unwarned statements obviously must be suppressed, the issue as set forth in Oregon v. Elstad (citation omitted), is whether the subsequent warned statements should be suppressed because they were involuntary. The court finds no deliberate coercive or improper tactics associated with the acknowledgment and waiver by the Defendant of his Miranda rights. The preponderance of the evidence demonstrates that the Defendant signed the waiver within five to seven minutes of arriving at the station and then engaged in a three hour discussion with law enforcement. It is also significant that the Defendant later exercised one of the rights set forth in that waiver, a further indication that he understood said rights.

(R 616-617) (emphasis added).

The trial court's decision to resolve the suppression issue along the lines of Oregon v. Elstad, supra, and not the Fourth Amendment, shows that it did not find the alleged "seizure" of Mr. Whitton "illegal" whether Whitton was ever in custody or not.

As Whitton himself confesses on appeal, this finding is presumptively correct. Caso v. State, 529 So.2d 422 (Fla. 1988).

In Florida v. Bostick, 501 U.S. ___, 115 L.Ed.2d 389 (1991), the Court held:

> Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free 'to disregard the police and go about his business', California v. Hodari D., 499 U.S. ___, ... the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. The Court made precisely this point in Terry v. Ohio, 392 U.S. 1 . . . 'obviously not all personal intercourse between policemen and citizens involves 'seizures' of persons.' Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may be conclude a 'seizure' has occurred.

Id. at 398.

In an interesting parallel to this case, Bostick notes that the mere fact that the police officers carried guns (in a holster or bag) did not factor into the equation where the guns were never drawn nor pointed at the accused.

In our case, again, Whitton invited the police in, he knew his rights, he was repeatedly told he was not under arrest and he was never threatened or forced to go to the station. Under Bostick, his gratuitous comment about "armed officers" carries no weight at all.

Bostick makes one other significant point. Bostick notes that the defendant in that case was "restrained" by virtue of being on a bus, but noted that this "restraint" existed independent of any action by the police.

In Harris v. New York, 495 U.S. 14 (1990), the police, having probable cause but no warrant, arrested the defendant at his home after displaying "guns and badges". Harris was read his Miranda rights in his home, and again at the police station (two times). The Supreme Court addressed the suppression issue from the perspective of an illegal arrest, per Payton v. New York, 445 U.S. 573 (1980), by first noting:

> But, as we have emphasized in earlier cases, 'we have declined to adopt a 'per se' or 'but for' rule that would make inadmissible any evidence, whether tangible or live witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest.' United States v. Ceccolini, 435 U.S. 268 . . .

The Court went on to note that Harris, if unlawfully arrested "the first time", was not immune from prosecution and could be lawfully rearrested. See United States v. Crews, 445 U.S. 463 (1980). Thus, distinguishing between the mechanics and the legitimacy of his arrest, the Court ruled that Harris' confession "was not the product of unlawful custody", nor was it "the fruit of having been arrested in the home rather than someplace else." (Id. at 19).

Finally, it is submitted that any "error" was harmless. DiGuilio, supra.[5]

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[5] It should be noted that in Drake v. State, 441 So.2d 1079 (Fla. 1984), this Court agreed that mere station house interrogations are not per se "coercive" or even "custodial". In Caso v. State, 524 So.2d 422 (Fla. 1988), the defendant was never told he was not under arrest, while in State v. Stevens, 574 So.2d 197 (Fla. 1st DCA 1991), the court recognized that the illegality of Stevens' arrest did not compel the suppression of his later statements. Thus, Mr. Whitton's request for some per se rule is not supported by his own cases.

Whitton testified on his own behalf at trial, thus opening the door to impeachment with any improperly obtained statements (see Point I). Here, however, the problem facing Whitton was (and is) compounded by the fact that Whitton himself relied upon his own exculpatory statements to the police as a part of his defense of alibi. Thus, it cannot be said that Mr. Whitton's exculpatory statements to the police were strictly a tool for the prosecution or that "but for" the suppression order the jury would not have learned of these statements, nor can it be said that the State failed to fully comply with the court's suppression order.

Mr. Whitton is not entitled to relief on this procedurally barred and meritless issue. Again, the claim was not presented to the trial court, was not ruled upon by the trial court and was not preserved for appellate review.

POINT III

THE TRIAL COURT DID NOT ERR IN GIVING THE APPROVED JURY INSTRUCTION ON THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING FACTOR

The third point on appeal is an admittedly meritless attempt to challenge the new, standard jury instruction on the "heinous, atrocious or cruel" aggravating factor along the lines urged in Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). In doing so, however, Mr. Whitton argues that a second jury instruction, proposed by the defense sub judice, should have been given instead of the standard instruction.

Thus, the issue before this Court is a comparative assessment of two rival instructions rather than a pure Espinosa issue.[6]

The Appellant's brief correctly recites his proposed jury instruction on the "heinous, atrocious or cruel" (HAC) statutory aggravating factor as well as the approved HAC instruction given by the trial court. For the Court's convenience, both instructions will be requoted herein.

The trial court gave the following jury instruction:

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

(R 648, 2247).

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[6] The State notes that Espinosa's redefinition of the advisory jury's role is a federal interpretation of state law that is both contrary to other Supreme Court decisions, see Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Hildwin v. Florida, 490 U.S. 638 (1989), and is not binding on this Court because it is a mere federal reinterpretation, in dicta, of a state statute that addresses a non-constitutional issue (i.e., the identity of the sentencer, Spaziano, supra). State Supreme Courts have final authority in interpreting state law and enjoy supremacy in that sphere even over the United States Supreme Court. Gryger v. Burke, 334 U.S. 728 (1948); Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983); Moore v. Sims, 442 So.2d 415 (1979); Pennzoil v. Texaco, 481 U.S. 1 (1987). This Court is legally obliged to uphold its supremacy in the field of state law. By statute, Florida juries are not "co-sentencers". Combs v. State, 525 So.2d 853 (Fla. 1988).

As conceded by Mr. Whitton, this instruction has been specifically upheld by this Court. Hall v. State, 614 So.2d 473 (Fla. 1993); Taylor v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S643 (Fla. 1993), thus effectively mooting this claim.

Mr. Whitton proposed a shorter, less instructive and legally incorrect instruction which read as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. To be heinous, atrocious or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental or physical pain to the victim, and the victim must have actually consciously suffered such pain for a substantial period of time before death.

(R 623-625).

This proposed instruction substantially misrepresented the law and, as such, was properly rejected by the trial judge. Garmise v. State, 311 So.2d 747 (Fla. 1975). The instruction limits the HAC factor to specific instances of intentional torture, failing, in the process, to include murders that were unnecessarily torturous to the victim notwithstanding the defendant's intent.

Thus, the instruction that Mr. Whitton claims "should" have been given cannot serve as a basis for relief.

POINT IV

THE TRIAL COURT DID NOT ERR IN FINDING THAT THIS MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

The trial judge, as actual sentencer, found that the "HAC" statutory aggravating factor applied, stating:

> 5. The capital felony was especially heinous, atrocious, or cruel.
>
> The victim is considerably larger than the Defendant. The two had gotten into a fight earlier in the day and the victim had gotten the best of the Defendant. The Defendant left the motel, went to his home in Pensacola, and then late in the evening returned to the motel room for the purpose of robbing the victim. The victim was beaten to death with a multitude of blows. The first injury occurred on the south bed in the motel room; the evidence shows that the victim was not rendered unconscious by that blow because he moved from his prone position on the south bed, to a chair at the foot of that bed, around the foot of the north bed, and that he finally died as he lay between the north bed and the north wall. The Medical Examiner testified that although he could not precisely measure the duration of the beating, he would estimate it at thirty minutes. The blood throughout the room was evidence of a violent combat. There was blood on the floor, furniture, walls, and even the ceiling. There were overlays of blood splatters in several locations. The massive wounds on the neck and side of the victim's face would cause significant bleeding. There were defensive wounds on the victim's hand and arm. The victim had a blood alcohol level of .34; however, it is clear from the physical evidence that he was sufficiently aware of his impending death to put up a tremendous resistance. Even though the victim's system was depressed by alcohol, the victim felt pain and was aware of his impending death as is evidenced by the manner in which his adrenaline obviously overrode his drunkenness and allowed him to resist the Defendant even after sustaining massive blows that would have brought down a drunk elephant. The crime scene photographs are a

> gruesome testimony to the amount of blood in the human body and the victim's tenacity for life. This murder was extremely wicked and vile and inflicted a high degree of pain and suffering on the victim. This murder was accompanied by such additional acts which sets this crime apart from the normal capital felonies. It was indeed a conscienceless, pitiless crime which was unnecessarily torturous to the victim. The aggravating factor that the capital felony was especially heinous, atrocious or cruel has been proved beyond a reasonable doubt.

(R 693-694).

The trial court's findings were supported by the record.

Whitton beat up Mr. Mauldin and inflicted more than twenty stab wounds on his "friend" (R 1677). The physical evidence proved beyond any reasonable doubt that Mr. Mauldin received a host of non-fatal wounds while moving about the motel room and attempting to ward off this vicious assault. This evidence included blood spatters that showed Mauldin's blood being virtually "slung" about the room (R 1713), and other spatters reflecting movement and the fact that Mauldin was on his feet for part of the attack (R 1689, 1709-1712).

Dr. Kielman testified that Mauldin was conscious during the attack (R 2136-2137). This was verified not only by the blood spatters, but by the defensive wounds to Mr. Mauldin's hands (R 1690-1693, 2137). During the course of the beating and stabbing, Mauldin suffered non-fatal stab wounds to his shoulder (R 1685), his cheek (R 1686), his neck (R 1686), his face just below his eye (R 1689), his scalp (R 1686), his back (R 1688), and his arm (R 1691-1692).

Mauldin's skull was fractured and he received three fatal stabs in his heart. These wounds, however, had to come late in the attack because they were sufficient to "knock out" or immobilize Mr. Mauldin (R 1682-1685), and due to the accumulation of blood in Mauldin's chest (R 1696).

This evidence was unrebutted. On cross, defense counsel tried to get Dr. Kielman to opine that Mauldin was "anesthetized" by alcohol and thus found the attack painless. Dr. Kielman did not accept this defense theory, noting that Mr. Mauldin's alcohol tolerance and his adrenaline reaction to the attack would diminish (if not negate) the "anesthetic" action of the alcohol (R 2143-2149). Dr. Kielman stated, without rebuttal, that Mauldin felt pain, anguish and a sense of his impending death and was not in any "stupor" (R 2148-2149).

While the Appellant does not find the process of hacking and beating someone to death particularly offensive or unusual, his position is not generally shared by society.

This brutal assault reflected clear indifference to the suffering of Mr. Mauldin. Cheshire v. State, 568 So.2d 908 (Fla. 1990). The physical evidence and the unrebutted testimony of Dr. Kielman was more than sufficient to prove beyond any reasonable doubt that Mauldin had time to suffer and to anticipate his death. Tompkins v. State, 502 So.2d 415 (Fla. 1986) (victim struggled, fought for life).

Indeed, the murder at bar compares with a number of cases in which the HAC factor was upheld. In Taylor v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S643, the victim was beaten and

stabbed more than twenty times, clearly suffering pain and anguish. In <u>Medina v. State</u>, 466 So.2d 1046 (Fla. 1986), the victim was stabbed ten times over the course of a ten-to-thirty minute attack. In <u>Perry v. State</u>, 522 So.2d 817 (Fla. 1988), the victim suffered multiple stab wounds and a physical beating, incurring <u>defensive wounds</u> in the process which were found to be important proof of the existence of the HAC factor. The knife attack at bar similarly compares with <u>Johnston v. State</u>, 497 So.2d 863 (Fla. 1986); <u>Wright v. State</u>, 473 So.2d 1277 (Fla. 1985); <u>Quince v. State</u>, 414 So.2d 185 (Fla. 1982); <u>Dudley v. State</u>, 545 So.2d 857 (Fla. 1989); <u>Gilliam v. State</u>, 582 So.2d 610 (Fla. 1991), and <u>Atwater v. State</u>, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S496.

In <u>Perry v. State</u>, <u>supra</u>, this Court also noted the impact of the location of the murder (the victim's home), as adding to any sense of anguish. Here, Mauldin was not in the safety of his "home" <u>per se</u>, but he was in the safety of his latest motel room in the company of a trusted friend. Thus, the same consideration applies.

The Appellant counters the obvious with a fanciful and egregious theory that the victim was in a stupor, was both drunk and asleep, and only "moved" to the extent he rolled from the bed to the floor. This theory, of course, is belied by the physical evidence that Mauldin struggled, incurred defensive wounds, was <u>standing</u> during some of the fighting and that the fatal wounds were inflicted <u>last</u>, not <u>first</u>, as suggested in Mauldin's brief.

POINT V

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE "AVOID ARREST" AGGRAVATING FACTOR

In his fifth point on appeal Mr. Whitton challenges the wording of the "avoid arrest" (statutory aggravating factor) jury instruction in an effort to extend the holding in Espinosa v. Florida, supra, beyond its recognized limits.

In support of this argument, Whitton cites to Hodges v. Florida, ___ U.S. ___, 121 L.Ed.2d 6 (1992), a summary disposition of a petition for writ of certiorari which does not contain any determination of the merits of any claim. Had Mr. Whitton fully researched the issue, he would have discovered:

> (1) Hodges obtained summary relief on a petition that did not raise the "avoid arrest" instruction, and
>
> (2) On remand, all relief was denied because Hodges failed to object at trial and thus procedurally defaulted the claim. Hodges v. State, 619 So.2d 272 (Fla. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 560 (1993).

The Hodges decision is only important for the eventual application of a procedural bar.

In our case, the defense questioned the State's ability to put on evidence supporting the "avoid arrest" factor (R 2053-2055), but after the State proffered Whitton's statement (that he killed Mauldin to avoid being sent back to prison in Alabama for violating parole, R 2106-2111), the defense agreed to the giving of the "avoid arrest" instruction and never objected. Therefore, the issue is procedurally barred. Hodges, supra; Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992);

Kennedy v. Singletary, 602 So.2d 1285 (Fla. 1992); Ferguson v. Singletary, ___ So.2d ___ (Fla. 1994), 19 Fla.L.Weekly S101; Sims v. Singletary, 622 So.2d 980 (Fla. 1993); Rose v. State, 617 So.2d 291 (Fla. 1993).

Without waiving this defense two points must be made.

First, Espinosa condemned the former standard jury instruction on the HAC factor due to the vagueness of the adjectives "heinous, atrocious or cruel". [The instruction at bar does not involve adjectives, it involves the infinitive "to avoid" and the noun "arrest". Mr. Whitton has not told us what part of "avoid" or "arrest" he - or anyone else - did not understand.] It is submitted that Mr. Whitton's effort to stretch Espinosa beyond its obvious limits is as nonsensical as it is procedurally barred.[7]

Second, it is clear, once again, that any "error" was harmless given the fact that Mr. Whitton confessed to this dominant motive, thereby making the application of this aggravating factor patently correct, if not inevitable (see argument, Point VI, below). The harmless error factor would apply in this case if, as Whitton alleges, Espinosa applies,

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[7] It should be noted that one primary fallacy attending Espinosa involves the apparent need to provide even lengthier jury instructions surveying every case decision casting any subtle nuance upon every aggravating factor; a task currently encompassing twenty years of caselaw. Since the jury is neither a sentencer nor a cosentencer under Florida law regardless of any nonbinding federal "reinterpretation" of state law, see Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Hildwin v. Florida, 490 U.S. 538 (1989); Pennzoil v. Texaco, 481 U.S. 1 (1987) (federal reinterpretations of state law, even from the Supreme Court, are not binding on the states), the entire suggested process is, at best, superfluous.

given the fact that Espinosa error can be harmless. DiGuilio, supra; Davis, supra; Marek, supra; Gorby, supra.

This brings us to Point VI.

POINT VI

THE TRIAL COURT DID NOT ERR IN APPLYING THE "AVOID ARREST" FACTOR IN LIGHT OF MR. WHITTON'S UNREBUTTED CONFESSION ON POINT

The trial court found the "avoid arrest" factor present, stating:

> Following the Defendant's incarceration on these charges, the Defendant told a cellmate that he killed Mr. Mauldin so that he would not get caught and his parole violated, that because he was on parole he could not just rob Mr. Mauldin and then leave him, and that after they got into a fight he had to kill Mr. Mauldin to ensure that the victim would not be a witness against him. This aggravating circumstance was proved beyond a reasonable doubt.

(R 692).

The unrebutted testimony of Mr. Whitton's cellmate, Ken McCullough, was:

> He said after him and the gentleman had got in a confrontation and he had come back over, he had to kill the witness, because if he didn't he would be a witness to testify against him and that they would have got in the previous confrontation and what-have-you and by doing away with the witness, that way he didn't feel like he would be caught and his parole violated.

(R 2122).

While it is true that this murder was committed in the course of a robbery, the mere presence of that other felony would not preclude application of the "avoid arrest" factor. Similarly, it is not necessary that the victim be a law

enforcement officer. The key to the application of this factor is the motive of the defendant. Stein v. State, ___ So.2d ___ (Fla. 1994), 19 Fla.L.Weekly S32.

In cases in which the defendant expressly states that he murdered the victim to eliminate a witness the proof of the "avoid arrest" factor is strong. Kokal v. State, 492 So.2d 1317 (Fla. 1986) (defendant killed victim because "dead men don't tell lies"); Lopez v. State, 536 So.2d 226 (Fla. 1988) (defendant tells accomplices not to leave witnesses); Johnson v. State, 442 So.2d 185 (Fla. 1983) ("dead witnesses don't talk").

While Mr. Whitton may wish to argue the "credibility issue" as to witness Mr. McCullough, that issue was one to be resolved by the trial judge, who heard and saw the witness, and not an appellate court. Johnson v. State, supra. In Johnson, at 188, this Court held:

> Appellant argues that Ms. Burks' testimony was not credible because she was only seventeen and a participant in the crime. The credibility of a witness is for the finder of fact, not an appellate court, to determine. The testimony to appellant's admission is sufficient proof that he committed the murder to eliminate a witness to the robbery. The evidence supports the trial judge's finding that the murder was committed for the purpose of avoiding arrest or hindering law enforcement.

Although Whitton's confession proves the existence of this factor, there is other record evidence as well.

Whitton befriended Mr. Mauldin and moved him to a secret location where he robbed and killed him. Whitton's alibi defense was served by the removal of Mauldin to a motel in another city as well as Whitton's giving a phony address and vehicle tag

number to the motel staff prior to the killing. Clearly Whitton never intended to be linked to the motel room. This tactic is comparable to the murder in Bryan v. State, 533 So.2d 744 (Fla. 1988), where the victim was taken to an isolated area to be killed, or even to Washington v. State, 362 So.2d 658 (Fla. 1978), wherein the victim knew the defendant and was taken to an isolated area to be killed.

Another point to be considered relates back to Whitton's contention that, at the time of the murder, Mauldin was in a drunken stupor, if not asleep. If that was true, Whitton could easily have stolen Mauldin's money and fled without killing him. Thus, the only reason Whitton had for killing Mauldin was to prevent Mauldin from having him arrested whenever Mauldin woke up, just as Whitton confessed to McCullough. The fact that it was not necessary to kill Mauldin in order to rob him is further proof of the avoid arrest factor, as recognized by this Court in Henry v. State, 613 So.2d 429 (Fla. 1993). Indeed, no other motive for the killing is plausible. See Remeta v. State, 522 So.2d 825 (Fla. 1988); Lightbourne v. State, 438 So.2d 380 (Fla. 1983); Kokal v. State, 492 So.2d 1317 (Fla. 1986).

Even if this factor could be challenged, any "error" was harmless given the strength of the remaining aggravating factors (including the "HAC" factor, Whitton's prior felony conviction, his parole status, and the "pecuniary gain" factor), which clearly outweigh his proffered mitigation, Rogers v. State, 511 So.2d 526 (Fla. 1987), which will be discussed below.

POINT VII

THE DEATH PENALTY WAS PROPORTIONAL AND APPROPRIATE

The Appellant's final point on appeal is titled as a request for proportionality review but, in fact, it is a request for this court to look at the aggravating and mitigating factors and simply substitute its own sentence for the one imposed - according to statute - by the trial judge. This request is contrary to the law. Mikenas v. State, 367 So.2d 606 (Fla. 1978). "Proportionality review" involves the comparison of cases, not the reweighing of factors within a single case. See Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984).

As noted above, there were five valid aggravating factors in this case: (1) Whitton was under sentence at the time of the murder; (2) Whitton had a prior conviction for a violent felony; (3) Whitton murdered the victim to avoid arrest; (4) Whitton committed the murder for pecuniary gain, and (5) the murder was heinous, atrocious or cruel.

The trial judge, apparently operating under the impression that she was required to find any proffered "mitigating" factor per Campbell v. State, 571 So.2d 415 (Fla. 1990), found and assigned weight to nine separate mitigating factors but, in doing so, clearly noted the lack of any causal connection or ameliorative impact to, or on, the crime itself; to-wit:

> (1) The judge noted that Whitton's parents were alcoholics who abused their children, but also noted: "The evidence also demonstrates that other siblings from this same environment are productive, law abiding, citizens." (R 2278-2279). The mere existence of a "tough childhood" is not

necessarily mitigating. Valle v. State, 581 So.2d 40 (Fla. 1991); Sochor v. State, 580 So.2d 595 (Fla. 1990).

(2) The court found, but gave "little weight", to Whitton's good employment record between felonies (R 2279). Indeed, Whitton's ability to work "if he wanted" would seem to offset any motive such as poverty or deprivation as an excuse for robbery.

(3) The court, incredibly, credited Whitton with some "potential for rehabilitation" (R 2279), despite his parole status (see, e.g., Duncan v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S268, finding error in crediting mitigating factors where no evidence exists).

(4) The court credited Whitton's "charitable assistance" to others, despite his exploitation and murder of Mr. Mauldin, whom he befriended at a treatment center (R 2279-2280).

(5) The court credited Whitton with "sensitivity" to others and "patience" with children (R 2280).

(6) The court credited Whitton's alcoholism, but noted that the absence of any proof of alcohol use or impairment at the time of the murder diminished this factor below the level of "statutory" mitigation (R 2280).

(7) The court also credited Whitton's unstable personality and minor mental problems while noting his sanity and competence (R 2280-2281).

(8) Finally, Whitton received mitigating credit for being "a child of God" (R 2281).

It is submitted that the factors assigned mitigating weight by the trial judge shared one common deficiency. Not one of these factors explained, caused, excused, lessened or ameliorated Whitton's crime. In fact, no nexus between these factors and the crime at bar was attested to even by Whitton's own paid expert, Dr. Larson. On the contrary, Larson said that this crime could not be blamed upon Whitton's childhood (R 2168).

Whitton was not mentally ill (R 2156, 2165), he was not retarded (id.), there was no causal connection between his childhood and this crime or his latent alcoholism and this crime (R 2168, 2172).[8] At most, Whitton was a "nice person" between robberies and murders. The trial judge clearly extended every possible benefit to Whitton, yet it cannot be said that Whitton's mitigating evidence outweighed either the three uncontested statutory aggravating factors or the five valid statutory factors listed above.

The death sentence at bar was clearly proportional to the brutal stabbings in Taylor v. State, supra; Medina v. State, supra; Johnston v. State, supra; Wright v. State, supra; Perry v. State, supra, and others, none of which are confronted by Whitton's brief.

Given the strength of the aggravators at bar and the absence of any nexus between the mitigators and the crime itself - see Rogers v. State, 511 So.2d 526 (Fla. 1987); Sireci v. State, 587 So.2d 450 (Fla. 1991), the death sentence at bar was both proportional and proper.

Finally, given the nature of the proffered mitigation, the State submits that the death penalty is appropriate in this case even if the two challenged aggravators are not considered. Rogers, supra; DiGuilio, supra. In such a situation, the State would still have three uncontested aggravating factors that would

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8 See Rogers v. State, 511 So.2d 526 (Fla. 1987) (trial judge must consider the proffered mitigating evidence both as to its existence and as to whether it has any nexus to the crime). See also Sireci v. State, 399 So.2d 964 (Fla. 1981).

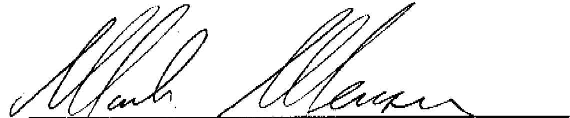
not be offset by "mitigating factors" having no causal connection to the crime.

CONCLUSION

The Appellant is not entitled to relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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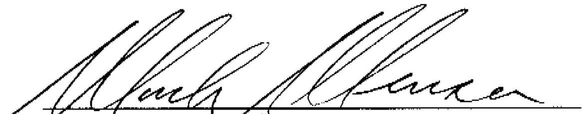
Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Ms. Paula Saunders, Esq., Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 18th day of April, 1994.



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