IN THE SUPREME COURT OF FLORIDA

ANTHONY WASHINGTON,

Appellant,

v.

Case No. 80,537

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

At the motion to suppress hearing on November 1, 1991, police office Michael Darroch testified that he investigated the homicide of 92 year old Alice Berdat; evidence was collected at the scene including sperm and hair. The homicide occurred August 17, 1989 (R 1818). He also investigated a rape that occurred August 25 at the Residence Inn and made a composite with the victim (R 1818). One suspect was narrowed after the composite was shown to corrections officers at the Largo Correctional Center -- appellant Washington (R 1819). Washington became a suspect in the rape and homicide cases. Appellant was an inmate at the Largo Center at the time (R 1820 - 21). Appellant was interviewed September 5, 1989 (R 1822) and given Miranda rights; he denied involvement in the August 25 rape (R 1823). He consented to providing blood and hair samples (R 1824). The witness again interviewed Washington on September 19 (R 1825) wherein he admitted having sex with the woman at Residence Inn on August 25. He subsequently pled guilty to that rape (R 1825). He did not mention the homicide case in his interviews with appellant on September 5 or 19 (R 1826). Darroch told appellant that the hair taken on September 5 had been compared in the homicide case and that Darroch anticipated that blood results would be positive showing his DNA at the scene of the crime and appellant responded that it wasn't him (R 1827 - 28). A watch was taken from the victim's residence August 17, 1989, and the police learned appellant sold a watch at one of the job sites (R

1829). David Mizell indicated he was present when appellant sold a watch for five dollars to Robert Leacock (R 1830). The watch was recovered from Leacock who identified appellant as the seller (R 1831). The son of the victim Henry Berdat described the watch in detail and he identified it as being in the victim's possession (R 1831 - 32). Appellant left the work release center at 6:00 a.m. and returned at 9:17 a.m. -- he did not work for Cocoa Masonry on that day and he could not recall his whereabouts between 7:00 am. and 9:17 a.m. (R 1832 - 33). Marianne Haldreth told the witness a Negroid hair was found at the scene (R 1834). A disciplinary hearing was held after the rape case on August 25 and appellant asked Mr. Duncan if he were being charged with murder. No mention of a homicide had been made to Washington (R 1834 - 35) The prosecutor argued the defendant gave valid consent and the inevitable discovery doctrine (R 1858 - 59).

The trial court denied the motion finding that Washington validly consented to the hair and blood samples to Darroch, that the officer's approach did not invalidate the consent. The court declined to rule on inevitable discovery (R 1878).

AT trial Henry Berdat, son of the deceased, described his mother's residence and the routine she followed (R 2257 - 58). He described the watch she owned, received as a Christmas gift from the witness' father in 1946 or 1947 (R 2260). On the afternoon of August 17, 1989, he and his wife received a phone call from a neighbor Mrs. Maravo who reported something wrong with his mother (R 2262). The door was open and when they walked

in a jewelry box on the dresser was in disarray. A hearing aid and false teeth were on the floor (R 2263). She was partially naked. He pulled a bedsheet over her and called 911 (R 2267).

Business records from Cocoa Masonry and transportation log records from Largo Community Correctional Center were stipulated into evidence (R 2274).

Daniel Jimpie, a foreman at Cocoa Masonry in August of 1989, kept track of the working hours of those from the work release center (R 2277) and appellant did not work on the 17th of August (R 2279). David Mizell testified that appellant approached him about a watch on August 18, but he did not purchase the "old lady's watch", Robert Leacock did (R 2298 - 2301).

Robert Leacock testified that he bought a watch from Anthony Washington (R 2294). Exhibit 2 was that watch (R 2295).

Police officer Michael Darroch responded to the scene of the crime on August 17 (R 2309). He described the floor plan of the residence (R 2312). Only the master bedroom was in disarray (R 2313). Pubic hairs found near the victim's body were taken into evidence by technician Levy (R 2321). Darroch attended the autopsy conducted by Dr. Joan Wood which revealed the presence of sperm in the victim and they began looking for Negro males (R 2322). The Largo work release center was a 39 minute walk to the victim's house (R 2323). Records revealed that appellant left the correctional center at 6:00 a.m. and returned at 9:17 am. and did not work that day at Cocoa Masonry (R 2324). The gold-colored watch was recovered from Mr. Leacock on August 31 (R

2324). Mr. Berdat identified the watch as being his mother's (R 2327). Darroch showed appellant's photo to Leacock and the latter said that was the person who sold him the watch (R 2329). Blood and hair samples of appellant were obtained September 5 (R 2330).

Donald DeWitt, a lieutenant at the Largo Correctional Center, described the sign out procedures at the work release center. Following a disciplinary hearing on the 29th for Washington's failure to remain in the area, appellant said, "You are treating me like I killed somebody." There had been no mention of a homicide (R 2351 - 52).

Corrections Officer Edward Duncan identified the work release log and testified Washington left at 6:00 a.m. and returned at 9:17 a.m. on August 27 (R 2360). At the disciplinary hearing on the 29th Washington asked if he was being charged with the murder (R 2362).

Donald Lamar also testified that appellant asked Duncan on the 29th if he was being charged with the murder. There had been no discussion about a homicide (R 2367).

Crime scene technician Daniel Levy testified there were no prints of value at the victim's residence (R 2374). Human hair was found on the victim (R 2375).

Marianne Hildreth, F.D.L.E. microanalyst, was found by the court to be an expert in hair examination (R 2403). She received known hair samples from Berdat (the victim) and from appellant Washington, head and public hair samples (R 2409). She made a comparison of the hair represented as having come from a sheet

under the vaginal area of the victim and found it was Negroid public, the same characteristics as the pubic hair collected from appellant. A second hair collected from the vaginal hair of the victim was also found to be Negroid pubic with the same microscopic characteristics as appellant's known pubic sample. The third hair purportedly from the victim's backside was a Negroid pubic hair exhibiting the same characteristics as appellant's pubic hair. A fourth hair from the victim's housecoat was a Negroid pubic with the same characteristics as appellant's. Additional debris included a fifth hair like Washington's; also there was a Negroid head hair present. The pubic hair combings of the victim contained a Negroid body hair and a Caucasian pubic hair with the same characteristics as the victim's (R 2414 - 18)

Mark Babyak, special agent with the F.B.I. assigned to the serology unit at the time of examining this evidence (R 2432), was able to determine the blood from the victim was group B and she was a secretor; appellant was type O and Babyak was unable to determine the secretor status (R 2443). Semen was found in the vaginal swabs (R 2444). He retained the tips of swabs to be given to special agent Adams for DNA analysis (R 2444).

Marianne Hildreth opined that from the pubic hairs recovered it was more likely the pubic area was exposed and that this was a primary rather than secondary transfer (R 2452 - 53). She opined all the pubic hairs come from the same source (R 2454).

Dwight Adams, special agent with the F.B.I. assigned to the DNA Analysis Unit of the F.B.I. lab, was accepted as an expert (R 2459) The witness explained what DNA is (R 2459). Adams received two vaginal swabs and the two known blood samples, one from the victim and one from the defendant, from Agent Babyak (R 2468).

Mr. Adams testified there was a match between the DNA from the semen found on the questioned (Q1, Q2) vaginal swabs to the DNA known blood sample of Anthony Washington (R 2500). State's Exhibit 7, copies of the autoradiographs or autorands, was introduced into evidence (R 2506 - 07). The witness also discussed the statistical probability he reached (R 2507). Using the three probes he was able to make an interpretation on the comparing that to his black population database, the likelihood of finding another unrelated individual chosen at random from that population would be approximately 1 in 195,000 individuals (R 2509). Under the current black population data, the likelihood now of selecting a black individual at random having a DNA profile like that of Mr. Washington would be approximately 1 in 400,000 (R 2522).

Technician David Levy was recalled and testified that he received evidence from Dr. Joan Wood at the autopsy, submitted swabs to the F.B.I. lab, sent hair samples to the F.D.L.E. (R 2547). He identified Exhibit B which was introduced into evidence (R 2548 - 49) and Exhibit 9 (R 2550 - 53) and Exhibit 10 (R 2554) as well as Exhibit 12 (R 2556)

Dr. Joan Wood performed an autopsy on Alice Berdot (R 1634). She examined the body at the scene of the crime on August 7, 1989 (R 1639); it was obvious she was a homicide victim. The bedroom was in disarray, blood on the bed, she was lying on the floor with her robe open, there were injuries to the face including bruises and petechial hemorrhages about and within the eyes. Petechial hemorrhages are seen when there has been some form of asphyxiation (R 1640) In this case the form of asphyxiation was created by manual strangulation (R 1642). There were fingernail marks on her left leg below the left knee and bruising on the right leg; blood coming from the vagina (R 1642). The victim was 64 and 1/2 inches tall and weighed 102 pounds. External examination revealed bruises on her face, her dentures were on the floor in the bedroom, a fingernail mark was on the roof of her mouth (R 1643). She had a fingernail mark on the neck (R 1644) and a bruise on the right side of her neck above the collarbone. There was a bruise on the left chest and Dr. Wood could feel her ribs were fractured (R 1645).

There were a total of 23 bruises on her right arm and hand; the bruising of the arms of Ms. Berdot are typical holding marks (R 1647). There was bruising of the leg and groin area (R 1647). The bruises were consistent with hands putting pressure against the inside of each leg. The witness opined that the victim was alive when the injuries were created (R 1650). The injuries were non-consensual (R 1651). External examination of the genitalia revealed at least eleven separate areas of injury visible to the

tissues about the vagina and the urethra. Two of the bruises were associated with actual superficial splitting open of the skin (R 1651). Sperm cells were present (R 1652). Dr. Wood opined there had been penetration by a penis (R 1653). Internal examination revealed seventeen rib fractures, three ribs were fractured in two separate places (R 1655). The victim was 93 years old; the rib injuries created a flail chest which is a life-threatening medical emergency (R 1656). She opined that the injuries were consistent with an adult kneeling on her chest (R 1657). Four separate bruises were found on the scalp (R 1658).

The hyoid bone which sits above the level of the voice box had fractures on the left and right side; additionally, there were multiple fractures of the cartilage forming the voice box (R 1659). The witness opined that he injuries were consistent with the application of force by hands compressing the neck, larynx and hyoid bone (R 1659). The cause of death was homicidal violence including manual choking and blunt trauma to the chest with multiple rib fractures (R 1660). By examining the body and the circumstances of the scene and use of a vitreous-potassium test Dr. Wood opined that death occurred as early as 6:00 am. and as late as 10:00 a.m. (R 1662). The amount of time for strangulation is a minimum of 30 to 45 seconds extending outward to two or three minutes (R 1662) The injuries to the vaginal area occurred while she was alive (R 1663).

At penalty phase the state called to the stand rape victim Mary Beth Weigers who stated that appellant raped and strangled

her on August 25, 1989 (R 1682 - 1689), the state introduced judgments and sentences of appellant's prior felony violent convictions (R 1691 - 1692). The defense called Dr. Sidney Merin (R 1695 - 1722), appellant's mother Willie Mae Washington (R 1723 - 30) and Dr. Joan Wood (R 1736 - 1742). The jury returned a recommendation of life imprisonment (R 2750). The trial court rejected that recommendation and imposed a sentence of death on the murder count (R 1572 - 1594).

This appeal follows.

SUMMARY OF THE ARGUMENT

I. The trial court correctly permitted the state's peremptory excusal of juror Welch since a racially neutral reason was provided, to wit: strong opposition to the death penalty in all cases.

II. The lower court did not err in denying appellant's motion to suppress evidence seized from him as valid consent was given and the evidence would have been recovered in any event under the inevitable discovery doctrine.

III. The trial court did not err in denying the motion to suppress the identification made by witness Leacock as there is no substantial likelihood of irreparable misidentification.

IV. The lower court did not err in permitting the state to present expert DNA evidence. Expert Dwight Adams carefully explained the procedures and how he could be assured of accurate results. The technician who worked under his supervision, Baumstark, provided an affidavit declaring she followed the protocol but had no independent recollection of this case.

V. The evidence was sufficient to establish appellant as the perpetrator of the Berdat homicide. He was physically located in proximity to her residence at the time of the homicide, sold her stolen watch the following day, made inquiry about arrest for homicide when no one mentioned a homicide and DNA evidence and testimony regarding pubic hairs found at the scene demonstrate appellant's guilt beyond a reasonable doubt.

VI. The "HAC" aggravating factor is not unconstitutionally vague. Any complaint about the jury instruction should be deemed procedurally barred since the defense declined the trial court's invitation to submit an appropriate instruction and, alternatively, the claim is meritless since an appropriate instruction was given. There can be no "Espinosa" error since the jury recommended life imprisonment and strangulation is heinous. Sochor v. Florida, 504 U.S. ___, 119 L.Ed.2d 326 (1992).

VII. The trial court gave a thorough and proper analysis rejecting the jury's life recommendation. Judge Schaeffer's imposition of a sentence of death satisfies the requirements of Tedder v. State, 322 So. 2d 908 (Fla. 1975).

VIII. Defense counsel conceded below that appellant could be sentenced as an habitual violent felony offender and given consecutive sentences. He should be precluded from challenging it now. Any error is harmless.

IX. Only one written judgment for the murder, burglary and sexual battery counts is necessary.

ARGUMENT

ISSUE I

WHETHER REVERSIBLE ERROR IS PRESENT BY THE STATE'S PEREMPTORY EXCUSAL WITH A RACIALLY-NEUTRAL REASON OF JUROR JOHNNY WELCH.

The record reflects the following exchanges between prospective juror Johnny Welch and the trial court and the prosecutor.

> "THE COURT: Johnny Welch, how are you, sir?
>
> PERSPECTIVE JUROR WELCH: Just fine.
>
> THE COURT: How do you feel about the death penalty?
>
> PERSPECTIVE JUROR WELCH: I strongly oppose the death penalty.

(R 2097)

> MR. FEDERICO: And you indicate you are strongly opposed to the death penalty; is that correct?
>
> PERSPECTIVE JUROR WELCH: That's correct.
>
> MR. FEDERICO: Is that in all cases?
>
> PERSPECTIVE JUROR WELCH: Yes, in all cases. I haven't seen where it helped our society in deterring crime and it hasn't been used fairly in some cases."

(R 2150)

Then respective counsel and the trial court engaged in dialogue (R 2215 - 17):

> THE COURT: Okay. Let me hear the State as to eighteen, nineteen, twenty, twenty-one, twenty-two.
>
> MR. FEDERICO: Twenty-one and twenty-two, Judge.

MR. MCCOUN: We'd object to the peremptory on twenty-two, unless there is a basis. We only have two blacks on the jury panel. Unless there is some issues --

THE COURT: Will the State respond, please.

MR. FEDERICO: First, as to number eleven, the juror Eva Mae West, she is a black juror and she has not been challenged by the State. I am challenging Mr. West (sic) who is the other black juror on the panel. I'm just making my record.

MR. MCCOUN: His name is Welch.

MR. FEDERICO: Mr. Welch clearly indicated he was strongly opposed to the death penalty in all cases and that would be a reason, especially in light of the fact that the other person that indicated in opposition so far, Ms. Muller, she indicated she was opposed to the death penalty and the State has exercised a peremptory as well.

THE COURT: And on Betty Lake.

MR. FEDERICO: Who also indicated she had problems with the death penalty. They are not African-Americans and the State exercised peremptory challenges based on their feelings of the death penalty. And the same is true with Mr. Welch. That is res judicata and is consistent with our other challenges along those lines.

THE COURT: The Court is going to find this is a race neutral reason. I wrote as I was listening to the selection that Mr. Welch said -- and the record will speak for itself -- but what I wrote is he is strongly opposed the death penalty, that he opposed it in all cases, although, he did say that he would be fair in following the law which I, therefore, did not allow the State to exercise its cause challenge.

I think that Mr. Welch and Mr. Hallgren were the only two people that indicated that they strongly opposed the death penalty to the

> point where they opposed it in all cases, even though they made statements after that and I would not allow them to be excused for cause. I think that is a race neutral reason and I will allow the challenge.

Appellant cites State v. Johans, 613 So. 2d 1319 (Fla. 1993) and acknowledges that that decision postdated the instant trial so that the prospective rule that a Neil inquiry is required when an objection is made that peremptory challenges are being exercised in a racially discriminatory manner is inapplicable. It matters not because the trial judge conducted a satisfactory inquiry.

Appellant cites Valentine v. State, 616 So. 2d 971 (Fla. 1993) wherein this Court determined that he trial court had failed to conduct a Neil inquiry upon a proper complaint by the defense; it should be noted that the defense had pointed out in that case the challenged juror "was not opposed to the death penalty". Id. at 973. Valentine is thus distinguishable.

Appellant argues that juror Lake also had given answers indicating her inability to follow the law. Indeed, she did (R 2087 - 89). And Lake was not black and she was excused peremptorily by the prosecutor (R 2214). This confirms the valid racially-neutral reasons for excusal.

Since appellant seems to be confused in the last two paragraphs of his brief on pages 28 and 29, perhaps some clarification is needed. Washington correctly points out that the jury recommended life imprisonment so there can be no reversible error under the former Witherspoon v. Illinois, 391

U.S. 510, 20 L.Ed.2d 776 (1968). Secondly, all of the cases cited at Brief, p. 29 involve juror excusals for cause, not peremptory challenges; they were concerned with whether jurors should be eliminated for cause depending on their death penalty views or their ability to follow the law. None of them remotely suggest that a juror opposed to the death penalty may not be the subject of a peremptory strike. And that is a legitimate basis -- unlike a racially-motivated reason -- for a peremptory challenge.

The claim is meritless.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE THAT WAS SEIZED FROM HIM.

A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness. See, McNamara v. State, 357 So. 2d 410 (Fla. 1978); Savage v. State, 588 So. 2d 975 (Fla. 1991); Owen v. State, 560 So. 2d 207 (Fla. 1990); Henry v. State, 586 So. 2d 1033 (Fla. 1991); Medina v. State, 466 So. 2d 1046 (Fla. 1985); R. Jones v. State, 612 So. 2d 1370 (Fla. 1992).

In the instant case, following an evidentiary hearing at which appellant did not testify (R 1817 - 79), the trial court denied the motion, opining:

> THE COURT: I'm going to deny the motion. I think that the consent that Mr. Washington gave at the time of the interrogation by Detective Darroch was such that the hair and blood could have been used in the Residence Inn investigation, and but for the fact that prior to the time that it was used for that purpose, Mr. Washington pled guilty or indicated that he had committed that offense vitiated the officers' responsibility to use it for that. I think once we come to the conclusion that the consent was valid, the theory and wording from Colorado v. Spring as to the fact that it's not necessarily a trick not to tell them what you are going to use it for comes into play. I think the mere fact that the officer approached it the way he did does in no way invalidate the consent. And having ruled that it's a valid consent, I'm not going to address the inevitable discovery theory.
>
> (R 1878)

Appellee respectfully submits that the trial court's order can be sustained on either of two theories (1) consent and (2) inevitable discovery. While it is true that the lower court declined to address the inevitable discovery theory, the record is sufficient for the appellate court to find the doctrine applicable. Hayes v. State, 488 So.2d 77 (Fla. 1986), cert. denied, 479 U.S. 831, 93 L.Ed.2d 65 (1986).

(1) Consent -- Officer Darroch testified that he investigated the homicide of Alice Berdat on August 17, 1989; hair sperm evidence was collected at the scene. He also investigated a rape that had occurred at the Residence Inn on August 25 and made a composite of the assailant with that victim (R 1818- 19). Anthony Washington was a possible suspect (R 1819) in both cases (R 1820). Darroch interviewed appellant at the Zephyrhills Correctional Center on September 5, 1989 (R 1822).[1] Darroch read Miranda warnings to him; appellant indicated he understood his rights and wished to speak to the officer (R 1823). Washington denied involvement and even his presence at the Residence Inn on August 25 (R 1823). Darroch asked for blood and hair samples and Washington consented to providing them. Darroch told him the samples would be helpful in proving or disproving he committed the sexual battery. One of the reasons

[1] Appellant was on work release at the time of the two crimes. Appellant was not in custody on the instant murder charge or the August 25 motel rape (R 1838).

for the request was to collect physical evidence for subsequent comparison (there was evidence of vaginal discharge in the motel room) (R 1824 - 25). Subsequently, in an interview on September 19, 1989, appellant admitted having sex with the woman at the Residence Inn on August 25, and for that reason Darroch did not submit the samples for analysis in the rape case (R 1825). Darroch did not mention the homicide in his interviews of September 5 and 19 (R 1826). On September 25 Darroch told Washington the hair taken matched that at the homicide crime scene; he did not object, but only insisted he had not been there (R 1827 - 28).[2]

The trial court correctly ruled that appellant consented to the blood sample search. There was no coercion and Officer Darroch did not misstate anything to the accused; even if he had, that would not be impermissible State v. Manning, 506 So. 2d 1094, 1097 - 1098 (Fla. 3d DCA 1987); Colorado v. Spring, 479 U.S. 564, 93 L.Ed.2d 954 (1987) (mere silence by law enforcement officials as to the subject matter of an interrogation is not trickery sufficient to invalidate a suspect's waiver of Miranda rights).[3]

---

[2] The witness further explained that he would have used the blood samples for the rape case had it subsequently gone to trial (R 1844, 1846).

[3] Appellant seems to be suggesting that Schneckloth v. Bustamonte 412 U.S. 218, 36 L.Ed.2d 854 (1973) requires the accused be told that he has a right to refuse to consent to a search; if he is so arguing Schneckloth specifically holds to the contrary. 412 U.S. at 232 - 233, 36 L.Ed.2d at 865 - 66.

B. Inevitable Discovery --

Quite apart form the consent ruling below, affirmance is required because the police would have been able subsequently to obtain a blood sample from appellant based on the evidence gained regarding appellant's sale of the watch and his involvement in the Weigers' rape. Hayes v. State, supra. Craig v. State, 510 So. 2d 857 (Fla. 1987); State v. Ruiz, 502 So. 2d 87 (Fla. 4th DCA 1987).

Appellant's claim is meritless.

ISSUE III

WHETHER THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS IDENTIFICATION MADE BY WITNESS LEACOCK.

At trial witness Robert Leacock gave the following identification testimony:

> Q. Do you know an Anthony Washington?
>
> A. Anthony, yeah. I bought a watch from him.
>
> Q. Let me back up a second, though. Do you think you could identify him if you saw him again; could you recognize him if you saw him again?
>
> A. I believe so.
>
> Q. Look around this courtroom and take a good look and if you think you see him. Point to him and identify him.
>
> A. I believe it's the gentleman sitting over there.
>
> Q. What is he wearing, sir?
>
> A. Wearing a blue shirt.
>
> Q. What race is he, sir?
>
> A. He is colored.
>
> Q. That is the person you believe you bought the watch from?
>
> A. It looks like him.
>
> MR. BROWN: May the record reflect simply that he stated he believes it looks like him.
>
> THE COURT: Yes.

(R 2294 - 95)

Earlier the court had heard testimony from Officer Michael Darroch on the Leacock identification (R 1988 - 2004). Darroch testified that on August 31, 1989, he went to a job site and spoke to a number of people that worked on a crew with appellant. David Mizell told him that Washington had been attempting to sell jewelry to people on the work crew. Specifically, Mizell told him Leacock bought a watch for five dollars from Washington (R 1990). Darroch further testified that Leacock said he bought a watch for five dollars from Washington and identified him from a photograph (R 1991). Darroch talked to five or six others on the work crew all of whom identified Washington by name as the person who sold the watch to Leacock (R 1992). Leacock was shown a single photograph (R 1992).

Darroch also testified at trial that Leacock had identified appellant's photo as depicting the one who sold him the watch (R 2329).

In Gorby v. State, ___ So. 2d ___, 18 Fla. Law Weekly S 623 (Fla. December 9, 1993), this Court opined:

> Callaway first identified Gorby from a photographic lineup and also identified him at trial. Gorby now argues that Calaway's identification should have been suppressed. Again, we disagree.
>
> Citing Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), this Court has stated that the test for evaluating claims of unreliable identification is "whether the police employed a procedure so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification," with the reliability of the identification to be determined on the

> totality of the circumstances. Holsworth v. State, 522 So. 2d 348, 352 (Fla. 1988). Three of the photographs, including Gorby's used in the lineup had writing or printing on them. After the suppression hearing, the trial court found that the lineup had been suggestive, but that the writing on the photos did not figure into Callaway's identifying Gorby and did "not give rise to a substantial likelihood of irreparable misidentification." Callaway testified that he spent about thirty minutes with Gorby and that he paid no attention to the writing on Gorby's photograph. We find no abuse of discretion in the trial court's denial of Gorby's motion to suppress Callaway's identification. See Power v. State, 605 So. 2d 856 (Fla. 1992), cert. denied, 113 S.Ct. 1863, 123 L.Ed.2d 483 (1993).

As in Gorby,. and in Blanco v. State, 452 So. 2d 520 (Fla. 1984), where there was no unnecessarily suggestive procedure employed the trial court sub judice did not abuse its discretion in denying Washington's motion to suppress Leacock's testimony. The prosecutor noted below that Leacock knew the appellant previously on the job, other witnesses had identified Washington as the person selling jewelry to Leacock and that in light of the officer knowing Washington identified by name at the time he interviewed Leacock there is not substantial likelihood of misidentification (R 2001 - 2002). As the court below articulated:

> THE COURT: I think that the line of cases that the defense relies on, there is a distinction. Most of these cases that deal with identification are dealing with a victim, number one. One of the problems with that is that the victim is generally someone who does not know the Defendant at all. They are there for the first time having one picture put under your nose and asking is

this the person who robbed you or is this the person that raped you, for example.

One of the reasons of possible misidentification are numerous. Number one, the victim obviously wants to see the person who committed the crime put behind bars or arrested or what have you. Therefore, they are very anxious to make an identification to solve the crime, assist the police and all those things.

Number two, often times they have no idea who the person is and, therefore, there is a substantial likelihood of misidentification, which is the real gravamen of single photo IDs.

In this particular case it is not a victim, but a witness. It was a witness to an act that presumably was not confrontive or combative or the type of act that might cause a witness to be overly upset and, therefore, likely to misidentify. This is a guy buying a watch or allegedly buying a watch. There is no reason for him to be fearful, such as if he was looking at a gun or a defendant's face.

Because he is a witness to an act that is not a crime, because he has no reason, really, to want to assist the police or anything of the sort, he doesn't much care one way or the other. Most importantly, because the prong of misidentification cases does deal with is there a substantial likelihood of misidentification and the fact that the officer said he talked to numerous people who said that it was indeed Mr. Washington who was attempting to sell the jewelry, the aspect of substantial likelihood of misidentification simply isn't present in this case.

(R 2002 - 2004)

Appellant has failed in his burden to establish an abuse of discretion. Power v. State, 605 So. 2d 856 (Fla. 1992).

ISSUE IV

WHETHER THE LOWER COURT ERRED IN PERMITTING THE STATE TO PRESENT EXPERT DNA EVIDENCE.

At a hearing on February 25, 1992, on defendant's motion to compel and motion to continue trial before Judge Downey after hearing defense counsel urge that he was attempting to challenge the sufficiency of the database, the court granted the motion to compel and to continue the trial:

> THE COURT: Okay. I'm going to at this time grant the motion to compel as it relates to the following limited matters. Prior to discovery or deposition of the expert from the FBI the State will provide who performed the test. How it was performed. Qualifications of the person that performed the test. The database figures that the FBI had available. Any problems that they encountered. The results that they reached and the computations that were used to obtain those results.
>
> I will not require the FBI or the State through the FBI through the State to provide all the working papers that were used to come up with this as is requested in the motion. I think that that is not required in the rules of evidence as it relates to discovery and (b), would be so encumbering upon the FBI and the State to produce that it would just become an overwhelming paper work nightmare.
>
> Based on having granted that and in order to give defense time to get this stuff -- and I'll give the State five days to comply with the motion to compel. And to give the defense time to spend part of the money that they just got to get an expert and have him review that and then consult with the defense and then take the deposition of the expert and then prepare a motion to suppress should they chose to do so as a result of all of that, I will grant the motion to continue the trial.

(R 2795 - 96)

On March 17, 1992, another hearing was held on the motion to compel and the defense requested that its expert be allowed to go through the database at the FBI facility in Washington (R 2804 - 05). The motion was reset (R 2809).

On May 20, 1992, the defense claimed that it had deposed FBI supervisor Dwight Adams who indicated a technician Ann Baumstark performed the test. She was not listed as a witness, performed only ministerial acts and the defense conceded he didn't have the right to take her deposition. The defense also sought "bench notes" on the DNA testing. The defense withdrew the matter dealing with Baumstark and would determine whether it was appropriate to come back (R 2813 - 15).

On June 9, 1992, the defense requested an order that Baumstark appear for deposition. Agent Adams said defense counsel would not be able to depose her and would have to go through legal counsel (R 2821). The defense added the FBI responded that they did not believe there was a right to depose Baumstark under the Florida Rules (R 2822).

The prosecutor responded that she performed ministerial functions, the FBI protocol, and that the state had no intention of calling her as a witness (R 2828). Additionally, the prosecutor provided an affidavit from Baumstark indicating she had reviewed her notes, that she's done over 1200 of these analyses and has no specific recollection of it and would have to rely on the lab notes or bench notes she performed. The

prosecutor related he didn't know what additional information to get. The prosecutor indicated all had been given to the defense (R 2828 - 30) and that discovery had been complied with.

The trial court ruled that Baumstark's functions were not ministerial, but based on Rule 3.220 and her affidavit indicating no recollection, no useful purpose would be served by arranging even a telephone deposition and the supervisor would be subject to cross-examination on the bench notes. The motion was denied. (R 2832 - 33).

Expert testimony regarding DNA evidence is admissible in Florida. See Andrews v. State, 533 So. 2d 841 (Fla. 5th DCA 1988), rev. denied, 542 So. 2d 1332 (Fla. 1989); Robinson v. State, 610 So. 2d 1288 (Fla. 1992); Martinez v. State, 549 So. 2d 694 (Fla. 5th DCA 1989).

The trial court did not abuse its discretion. AS the trial court noted Baumstark provided an affidavit indicating she had reviewed her notes, had done over 1200 of these analyses and had no specific recollection of this one and she would have to rely on the lab notes or bench notes she performed. Furthermore, she had reviewed the lab notes and this did not refresh her recollections regarding the steps in this case (R 2829, 2832 - 33; R 1187 89). Even had the trial court entered an order that she be deposed by telephone -- as the defense requested -- there is no basis to believe that she could add anything other than the affidavit information.

Moreover, the trial court correctly ruled that the testimony of FBI special agent Dwight Adams was admissible:

> THE COURT: And based upon the testimony I heard here, the clear answer is yes, he worked for a team. He supervised her. Had she made a mistake, he would have known about it from her notes and her pictures. You can't or haven't contradicted that.
>
> (R 2489 - 90)
>
> * * *
>
> Based on the proffer and on your voir dire of the witness, I am quite confident that he should be allowed to testify, subject to cross-examination and argument regarding whether the State should have additionally produced this woman.
>
> Based on his testimony, he can testify. He says he did it together. They did it as a team. If she made a mistake, he would know about it. There were no mistakes. That's his testimony and he gets to testify.
>
> (R 2490 - 91)

Appellant cites Robinson, supra, for the proposition that a proper predicate for the expert testimony was lacking. He is mistaken. Expert Adams testified as to his supervision of Baumstark's work and explained the safeguards that would have been triggered and brought to his attention even if Baumstark had made an error (R 2473 - 2484).[4]

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[4] There are many safeguards throughout this entire process that allowed me to know whether a sample was correctly labeled and whether it was correctly carried through this process" (R 2479); only one case is worked at a particular time (R 2479). No errors are made in the proficiency test (R 2481). If technician misses a step or does it incorrectly it would show up in the photographs he reviews throughout the case and that did not happen (R 2482). The autoradiographs are the end result that tells him each of those steps were done adequately (R 2484).

Appellant cites State v. Clark, 614 So. 2d 453 (Fla. 1992). In Clark but not in this case a discovery deposition was used as substantive evidence in a criminal trial. Sub judice expert Dwight Adams testified regarding the DNA procedures and results and was fully subject to cross examination.

Appellant cites Hill v. State, 535 So. 2d 354 (Fla. 5th DCA 1988), wherein the appellate court determined that the defendant was deprived of a fair trial when on the Sunday evening preceding the Monday trial he was for the first time permitted the right to interview and depose the DNA expert witness regarding the DNA match. The trial court erroneously denied a request for continuance on the morning of trial and thus was unable to form a defense to the expert testimony. Here, in contrast, defense counsel knew months ahead of time about the expected witness Adams was deposed on April 24, 1992 (R 1135 - 1187) some three months prior to trial.

Appellant's claim is meritless.

ISSUE V

WHETHER THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT APPELLANT PERPETRATED THE OFFENSES AGAINST VICTIM ALICE BERDAT.

In Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989), this Court opined:

> "Appellant correctly points out that in order to prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. *McArthur v. State*, 351 So. 2d 972, 976 n. 12 (Fla. 1977). Where the element of premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the state must be inconsistent with every other reasonable inference. *Wilson v. State*, 493 So. 2d 1019 (Fla. 1986); *Hall v. State*, 403 So. 2d 1321 (Fla. 1981).
>
> But the question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, the verdict will not be reversed on appeal. *Heiney v. State*, 447 So. 2d 210, 212 (Fla.), *cert. denied*, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); *Williams v. State*, 437 So. 2d 133 (Fla. 1983), *cert. denied*,, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984); *Rose v. State*, 425 So.2d 521 (Fla. 1982), *cert. denied, 461* U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983). The circumstantial evidence standard does not require the jury to believe the defense version of facts on which the state has produced conflicting evidence and the state, as appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. *Buenoano v. State*, 478 So. 2d 387 (Fla. 1st DCA 1985), *review dismissed*, 504 So. 2d 762 (Fla. 1987)."

Appellant's contention that the state failed to prove that Washington was the perpetrator is meritless. As noted by the prosecutor in his closing argument, the crime occurred in the

morning of August 17, appellant was back in the work release facility at 9:17 a.m.; the following morning (the 18th) appellant attempted to sell the victim's watch to Mr. Mizell and in fact sold it to Mr. Leacock (R 2622 - 24). According to Dr. Joan Wood, the time of death was eight o'clock give or take two hours and Washington was out of the work release center from 6:00 to 9:17. Cocoa Masonry where appellant worked was five minutes from the work release center and the victim's home was within thirty-nine minutes walking distance (R 2625 - 26). When Washington returned to the work center he was told to pack his clothes and was handcuffed and Washington asks "Are you guys charging me with murder?" He subsequently made a second statement "You guys are treating me like I killed somebody." (R 2626 - 28) The F.D.L.E. hair expert testified regarding five pubic hairs and three other hairs left at the scene by a primary transfer and five of the hairs have fifteen to twenty similar characteristics as the known sample taken from appellant (R 2628 - 31).

Finally, the DNA expert testified that on analysis the known profile compared with the two swabs from Dr. Wood revealed a matching profile of the defendant with those taken from inside the victim. The statistical probability is 1 in 195,000. In all his years matching DNA profiles he had not found matching DNA profiles (R 2632 - 35).

Adding these five factors together removes any reasonable doubt that appellant was the perpetrator.

Appellant argues that with respect to the selling of the victim's watch, Mr. Leacock was unable positively to identify Washington; both Mizell and Leacock testified that appellant in court looked like the person who stole the watch (R 2290, 2294). Officer Darroch also testified that he identified appellant's photo as the person who sold him the watch (R 2329). Appellant argues that he could have innocently found the watch that his admissions at the correctional center were equivocal, and the hairs found at the scene of the crime -- consistent with appellant's might have been someone else's. The totality of circumstances, however, render it a virtual certainty that appellant was the perpetrator.

ISSUE VI

WHETHER THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR IS UNCONSTITUTIONALLY VAGUE.

If appellant is contending that the statutory aggravating factor, F.S. 921.141(5)(h) is unconstitutionally vague, he is mistaken. Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913 (1976).

If appellant is complaining about the jury instruction regarding the HAC factor being unconstitutionally vague as the former instruction was held in Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (1992), this Honorable Court should conclude that the claim is both procedurally barred and meritless.

It is procedurally barred because the trial court specifically invited the defense to submit an appropriate limiting instruction and appellant declined that opportunity (R 2721 - 35). Note the following colloquy:

> MR. MCCOUN: In our pretrial motions we argued that the heinous, atrocious and cruel aggravating factors was vague and therefore had due process implications I don't think we can vary from that.
>
> THE COURT; Okay. I want the record to be clear that I will give these definitions or not give them. I will read the last part because that has been approved by the United States Supreme Court. I will read any definitions that I said you might think more appropriate than these or I will read them if you think they are to your advantage. That's really the best I can do. This is not a definitely decided issue at this point.
>
> MR. LOUDERBACK: What you're saying is since you decided you're going to give it over our objection, that you will basically allow us

to request certain portions of it without, in your mind at least, waiving our overall objection to it being given at all. We're in a corner here and we can use as much or as little paint as we want to try to paint our way out.

THE COURT: I'm not trying to put you in a box. I want you to be allowed to preserve your objection, which is the objection of giving it all. I'm finding, based on the facts of the case, it can be argued and it could be found. My concern is once I decide to do that is in defining it in a fashion that is meaningful for the jury. And I will allow you to assist in any fashion you would like.

I am telling you if you decide to stand moot, if you decide to say: It's your job, Judge, I'm not going to help you out of this or tell you what we want, what I will read is not the definitions because I will read just what I told you it will read like.

The crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. The kind of crime intended to be included in heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily tortuous to the victim.

As I say, frankly, I would think that the definitions as they are included may be to a defendant's advantage. But if they are objected too, I think the U.S. Supreme Court said they are vague. You have to tell me if you object to them or not, that I can ask you to do. So you-all think about that, okay? We'll get together early in the morning?

(R 2723 - 25)

* * *

"The Court . . . . Now, you all will then do some thinking about the heinous, atrocious and cruel and what your position is to be. I

would like for you to kind of let them -- I think we'll put it in the way I said. We know that's been approved by the United States Supreme Court. Then I'm going to have to speak to you-all if you think you want the definition added, if you want something else added or if you want to say we don't want any of it.

MR. MCCOUN: I don't know how we can take a position other than it is vague. If the courts can't figure out what is appropriate, how will the jurors think what is appropriate?

THE COURT: I think the U.S. Supreme Court just figured it out as long as you add that other language it's okay, but they don't like the definitions because they say they are vague. It seems to me that part of it is that a request for all of it is really better than just the last part. If you're objecting to the whole thing, I won't give it because they said that's faulty.

You decide if you want it. If you want it, I'll give that part of it. If you don't want it, I'll give the last part of it and that may be wrong too. We're making up instructions here as we go because nobody knows exactly and I have no direction from the Florida Supreme Court because they seem to think that instruction is fine although they have not been told that it isn't. Hopefully, the standard jury instruction committee will come up with another one to be tested.

MR. LOUDERBACK: The supervisor sent it back saying they need more thought.

THE COURT: The Supreme Court in Clemmons, if you have an improper aggravator they can reweigh it, which the Florida Supreme Court won't do, or they can apply harmless error. But to apply harmless error, they say you can't just say -- you have to do it -- you have to say: Without it we have this and this, therefore, it's harmless beyond a reasonable doubt. The Florida Supreme Court hasn't done that. I think that's why they sent it back. Off the record.

(R 2733 - 35)

The Court gave the jury the following instruction without further defense comment:

> Number four, the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. The kind of crime intended to be include the as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily tortuous to the victim.

(R 2740)

Even if this Court were to conclude that appellant's failure to accept the trial court's invitation to propose an acceptable instruction did not constitute a default precluding appellate review, the claim would be meritless. Cf. Hall v. State, 614 So. 2d 473 (Fla. 1993), Preston v. State, 607 So. 2d 404 (Fla. 1992).

There can be no Espinosa error present since the jury recommended life imprisonment. And the United States Supreme Court's decision in Sochor v. Florida, 504 U.S. ___, 119 L.Ed.2d 326 (1992) noted that the Florida Court has consistently upheld heinousness in a strangulation case. 119 L.Ed.2d at 339 - 40.

Appellant's claim is both procedurally barred and meritless.

ISSUE VII

WHETHER THE LOWER COURT ERRED IN OVERRIDING THE JURY LIFE RECOMMENDATION.

Appellee cannot improve upon the cogent, well-reasoned and eloquent order of the lower court:

> "This would be the end of this sentencing order except for one thing -- the jury recommended that this court sentence the Defendant to life imprisonment, and not death. The law of Florida requires this recommendation to be given 'great weight.' The test for determining the propriety of an override was laid out in *Tedder v. State* 322 So. 2d 908, 910 (Fla. 1975) as follows:
>
> > In order to sustain a sentence of death, following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.
>
> Why might the jury have recommended life in this case? The jury in this case heard closing argument from defense counsel last. Counsel broke his closing argument into several parts. The first part was clearly a residual or lingering doubt argument (R 97 - 99). While this is effective argument in a circumstantial case, such as this case is, it is not proper mitigation. The Florida Supreme Court has consistently held that lingering doubt is not mitigating. The U.S. Supreme Court has stated that there is no constitutional right to have lingering doubt considered as a mitigating factor. *Franklin v. Lynaugh*, 487 U.S. 164 (1988). When this argument is made, without objection or the request for a curative instruction, it is quite possible a jury may believe it is a mitigating circumstance they are to consider.
>
> Another portion of defense counsel's argument was novel. He propounded to the jury that the fact that three of the four

aggravating circumstances that the prosecutor relied on were nothing more than warmed over rehashes of what he argued yesterday and do not work, and do not work to set this case in that special category of being a death case." (R 100) When speaking of the Defendant being incarcerated, he said "You know that an inherent part of their case in chief was that he was in prison at the time that he did that. It does not -- it is not some new factor, I submit, that amounts to an additional aggravation that would allow the death penalty (R 101). He argued the same as to the homicide being committed in the course of a burglary and sexual battery (R 102). He began the same argument on heinous, atrocious, or cruel when the state objected (R 103). The objection was made and sustained at the bench (R 104). The jury may have gotten two misconceptions from this argument: One, that if it was evidence at the guilt phase, it either didn't count as an aggravating factor(s), or didn't count as much. Two, that the State Attorney decide what was aggravating. This clever, but inappropriate, argument may have persuaded the jury.

Another part of the closing dealt with the lack of intent to kill. Since the Court was surprised by the argument, the State must have been also. Certainly they did not mention it in their closing argument. Since this Court has routinely allowed the state to close first and the defense to close last, the state didn't' ask for rebuttal argument. I would probably have given it to them. It is easy to make an argument against this as a non-statutory mitigating factor if you know it is coming. The jury may have been persuaded by this uncontroverted argument.

Later, the defense argued the Defendant's age was mitigating because he could be kept in prison for the rest of his life. As the Supreme Court said in *Echols v. State*, 484 So. 2d 568 (Fla. 1985), age without more is not mitigating Echols was fifty-eight years old. The judge did not find this fact

mitigating (and he overrode a jury recommendation of life.) The Supreme Court said at 575:

> If it (age) is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime, such as immaturity or senility. (Emphasis supplied)

In the *Echols* record, there was nothing mitigating about the defendant's age. Neither was there in this case. But the jury doesn't know all of this law.

And last, and perhaps most important, the jury is not privy, as is this Court, to the lengthy non-violent record of this Defendant. When they heard he was a hard worker, and he supported his children, this might have sounded mitigating. But, when you have all the facts, such as discussed in this order, it is clear there is not mitigation here. The Defendant has been in prison most of his life, not supporting his children, being a good father, or working hard. The jury could not have known this. They knew only that he went to prison in 1988 for a singular crime. If they considered these things mitigating, they could not be faulted. But, with full knowledge of Defendant's record of incarceration, it simply isn't so.

It is well known around this Courthouse that I do not advocate the death penalty. This has never interfered with any death case I have decided. I have sentenced men to die when the jury recommended it. Twice, I have overridden death recommendations when the law did not support them. Once, after I had sentenced a man to die, I wrote to the pardon board to suggest changed circumstances which no longer made the death sentence appropriate. The Florida Supreme Court agreed. I have sentenced men to life when the jury recommended it, when I personally did not agree with the life recommendation, but the mitigating circumstances were such that reasonable

> people could differ. Today is my hardest task to date. I have never sentenced a man to die when the jury did not recommend death. But, today, the law and the evidence in this case compel me to find that the aggravating circumstances present in this case so far outweigh the mitigating circumstances that a sentence of death for ANTHONY WASHINGTON is so clear and convincing that virtually no reasonable people, armed with all the facts and all the law could differ.
>
> (R 1591 - 94)[5]

Appellant contends that the trial court erred in having failed to rubber-stamp the jury's life recommendation.[6] He complains that Judge Schaeffer devoted "only about two pages" of her twenty-three page order to the override aspect. It is not clear whether appellant is implying that the twenty-one page mitigating and aggravating evidence is inadequate, irrelevant or accepted as unchallengeable in its correctness. If he intends to imply that little of importance pertaining to the issue is

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[5] The trial judge sub judice had acknowledged her own personal opposition to the death penalty during voir dire:

> "But you have to understand, in reality, I oppose the death penalty in all cases and I have imposed two death sentences." (R 2174)

[6] In the lower court Washington urged that in light of hte recommendation the court's hands "are tied" (R 1912). Of course, if the sentencing judge's hands are tied and she is a mere automaton to rubber-stamp what the jury recommends, the death penalty statue may be unconstitutional. See Russ v. State, 386 So. 2d 1191, 1197 (Fla. 1980); Dolinsky v. State, 576 So. 2d 271, 278 (Fla. 1991) (J. Ehrlich, concurring in part and dissenting in part)

contained therein, he is mistaken; the lower court patiently articulated that there were four valid statutory aggravating factors (capital felony committed while under a sentence of imprisonment, prior convictions of another felony involving the use or threat of violence [a 1988 burglary with assault or battery conviction and the August 1989 sexual battery of Mary Beth Weigers for which he was convicted in 1990], homicide committed while engaged in a burglary and sexual battery and the capital felony was especially heinous, atrocious, or cruel (R 1573 - 1580). Appellee will not detail here the graphic explicit findings made but for brevity purposes will simply refer the court to the attached appendix. Additionally, the trial court articulated and considered the statutory and nonstatutory mitigating evidence (R 1580 - 91), finding only certain character traits to be positive in mitigation but of minimal value in light of the abundant negative character tracts (R 1587). The lower court explained why the following proffered mitigation should not be found; age of thirty-two (R 1580 - 82), potential for rehabilitation (R 1584 - 850, the positive contributions by exemplary work, military or family records (R 1585 - 1587), alleged drug use (R 1587) and emotional or psychological problems including childhood and family background (a weak personality) (R 1587 - 88), the alleged lack of intent to kill (not reasonably established) (R 1588 - 91)

In Williams v. State, 622 So. 2d 456, 464 (Fla. 1993), this Court opined:

Our case law establishes that a trial judge's override of a jury's recommendation of life will be upheld only where the record supports the trial judge's finding that there is a reasonable basis upon which the jury could have based its recommendation. *Tedder v. State*, 322 So.2d 908 (Fla. 1975). In his sentencing order, the trial judge found:

> The jury's recommendation of [a] life sentence could have been based only on minor, nonstatutory mitigating circumstances or sympathy and was wholly without reason. "In this case the evidence of mitigation is minuscule in comparison with the enormity of the crimes committed . . . We agree that virtually no reasonable person could differ as to the appropriateness of the death sentence in this case." *Zeigler v. State*, 580 So. 2d 127, 131 (Fla. 1991)].
>
> In this case the sentence of death is so clear and convincing that virtually no reasonable person could differ, and a jury override in light of the standard pronounced in *Tedder v. State*, 322 So. 2d 908 (Fla. 1975), would be warranted.

Williams first argues that one reasonable basis for the jury's recommendation of life was in response to the lesser sentences received by the Frazier brothers. We disagree. Even with the elimination of two aggravating factors, "the evidence in this case provides no basis upon which the jury could have recommended life imprisonment in order to prevent disparity in sentencing." *Thompson*, 553 So. 2d at 158. The record unequivocally establishes that Williams was in charge and that he ordered his "enforcers" to recover his drugs and money and to kill anyone involved with the theft. Furthermore, the record also reflects that the Fraziers were less culpable because they disobeyed Williams' orders by allowing Crenshaw to escape and because they did not kill any of the victims.

> We also find that Williams' sentence of death is not disparate with the death sentences received by the actual triggermen since he specifically directed them to kill the victims. This was the type of criminal organization, enforcement-style killing in which we have upheld the death sentence. See *Antone v. State*, 382 So. 2d 1205 (Fla.), *cert. denied, 449* U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980). This is one of the types of murders to which our death sentence was intended to apply. We find that the trial court's consideration of the two aggravating factors that we have found to be inapplicable would not, beyond a reasonable doubt, have affected this sentence and conclude that the trial judge did not err in finding that no reasonable basis existed for the jury's life recommendation. As in *Robinson* and *Coleman,*, we conclude that, given the circumstances of the case, striking two aggravating factors "does not alter this conclusion because there is no reasonable likelihood that the trial court would conclude that the mitigating evidence outweighed the four valid aggravators." *Robinson; Coleman; Holton v. State,* 573 So. 2d 284 (Fla. 1990), *cert. denied*, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991).
>
> We further note that the jury's recommendation could have been based on defense counsel's emotional closing argument, which we find is similar to arguments that we have held "'overstep[] the bounds of proper argument.'" *White v. State*, 18 Fla. L. Weekly S184, S 186 (Fla. 1993) (quoting *Taylor v. State*, 583 So. 2d 323, 330 (Fla. 1991)). We conclude that the trial judge's override was warranted. *Francis v. State*, 473 So. 2d 672 (Fla. 1985), *cert. denied*, 474 U.S. 1094, 106 S.Ct. 870, 88 L.Ed.2d 908 (1986).

Accord, Porter v. State, 429 So. 2d 293, 296 (Fla. 1983) (defense attorney's description of electrocution might have been calculated to influence jury life recommendation through emotional appeal). See also Coleman v. State, 610 So. 2d 1283, 1287 (Fla. 1992):

[10] Coleman now argues that the trial judge erred in overriding the jury's recommendation of life imprisonment. In making this argument Coleman relies on cases such as *Ferry v. state*, 507 So. 2d 1373 (Fla. 1987), and *Carter v. State*, 560 So. 2d 1166 (Fla. 1990), in which the defendants presented overwhelming evidence in mitigation that provided reasonable bases for the juries' recommendations. In contrast, the potential mitigating evidence presented in the instant case is of little weight and provides no basis for the jury's recommendation. *Cf. Thompson v. State*, 553 So. 2d 153 (Fla. 1989) (defendant killed friend who stole money from him, five aggravating factors), *cert. denied*, 495 U.S. 940, 110 S.Ct. 2194, 109 L.Ed.2d 521 (1990); *Bolender v. State*, 422 So. 2d 833, 837 (Fla. 1982) (defendants killed four drug dealers, but victims' livelihood did "not justify a night of robbery, torture, kidnapping, and murder"), *cert. denied*, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983); *White v. State*, 403 So. 2d 331 (Fla. 1981) (execution-style killing of six victims during a residential robbery), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983). *Bolender*, especially, is on point with the instant case, and any sentence for Coleman other than death would be disproportionate. *See Correll v. State*, 523 So. 2d 562 (Fla.) (four victims), *cert. denied*, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988); *Ferguson v. State*, 474 So. 2d 208 (Fla. 1985) (execution-style killing of six victims warranted death); *Francois v. State*, 407 So. 2d 885 (Fla. 1981) (same), , *cert. denied*,, 458 U.S. 1122, 102 S.Ct. 3511, 73 L.Ed.2d 1384 (1982). We reach this conclusion, even though we have struck one of the aggravators found by the trial court, because there is no reasonable likelihood that the trial court would conclude that the mitigating evidence outweighed the four remaining aggravators. Any error was harmless. *Holton v. State*, 573 So. 2d 284 (Fla. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991); *Bassett v. State*, 449 So. 2d 803 (Fla. 1984).

And in Robinson v. State, 610 So. 2d 1288, 1291 - 92 (Fla. 1992):

> [9] Robinson also argues that the trial court erred in overriding the jury's recommendation of life imprisonment. As we did with Coleman, however, we disagree with this contention. Robinson relies on cases such as *Ferry v. State*, 507 So. 2d 1373 (Fla. 1987), and *Washington v. State*, 432 So. 2d 44 (Fla. 1983), where this Court reversed jury overrides. In the cases relied on, however, the defendants established overwhelming mitigating evidence that provided reasonable bases for their juries' recommendations. Here, on the other hand, the trial court found in mitigation only that Robinson had maintained close family ties and had been supportive of his mother. As to the other potential mitigating evidence, the court stated:
>
> > The remaining contentions are not borne out by the evidence, and even if they were, would have no mitigating value; defendant's education while incomplete was not altogether lacking and would not excuse or mitigate the vicious crimes committed; his low IQ did not impair his judgment or actions; he was not an abused child and this fact cannot serve to mitigate his conduct. Finally, the victim's background cannot be used to mitigate the sentence to be imposed and warranted under these facts.
>
> We agree that the potential mitigating evidence presented in this case does not provide a reasonable basis for the jury's recommendation. *Cf. Thompson v. State*, 553 So. 2d 153 (Fla. 1989) (defendant killed friend who stole money from him, five aggravators), *cert. denied*, 495 U.S. 940, 110 S.Ct. 2194, 109 L.Ed.2d 521 (1990); *Bolender v. State*, 422 So. 2d 833, 837 (Fla. 1982) (defendants killed four drug dealers, whose livelihood did "not justify a night of robbery, torture, kidnapping, and murder"), *cert. denied*, 461

> U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983); *White v. State*, 403 So. 2d 331 (Fla. 1981) (execution-style killing of six victims during a residential robbery), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983). As with Coleman, any sentence other than death for Robinson would be disproportionate. *See Bolender* (four victims; *Correll* (four victims); *Ferguson v. State*, 474 So. 2d 208 (Fla. 1985) (six victims); *Francois v. State*, 407 So. 2d 885 (Fla. 1981) (six victims), *cert. denied*, 458 U.S. 1122, 102 S.Ct. 3511, 73 L.Ed.2d 1384 (1982). Striking one of the aggravators does not alter this conclusion because there is no reasonable likelihood that the trial court would conclude that the mitigating evidence outweighed the four valid aggravators. Any error, therefore, was harmless *Holton v. State*, 573 So. 2d 284 (Fla. 1990), *cert. denied*, _(__ U.S. ___, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991); *Bassett v. State*, 449 So. 2d 803 (Fla. 1984).

This Court has previously approved jury override imposition of death sentences in situations such as the instant case. In Brown v. State, 473 So. 2d 1260 (Fla. 1985), for example, an eighty-one year old female was beaten, raped and asphyxiated in her own home and the same aggravating factors present there are present sub judice (homicide committed during a burglary and sexual battery, homicide by a person under a sentence of imprisonment and especially heinous, atrocious or cruel). And in Brown the defendant was not even the actual perpetrator of the sexual battery.

Another override case, Stevens v. State, 419 So. 2d 1058 (Fla. 1982) similarly involved the presence of four aggravating factors and this Court approved the sentence for the abduction, rape, mutilation and strangling of a convenience store clerk.

See also Echols v. State, 484 So. 2d 568 (Fla. 1985), Mills v. State, 476 So. 2d 172 (Fla. 1985).

Appellant mentions that the jury could give more than minimal weight to his positive character traits. What are they? As Judge Schaeffer noted below the potential for rehabilitation and ability to live within the prison system is extraordinarily weak: "Four violent felonies committed by this defendant while serving a sentence hardly qualify as good jail conduct." (R 1584). Even defense witness Dr. Merin acknowledged he was "not suddenly going to change" and would "continue to test the limits". (R 1585). Dr. Merin admitted appellant did not have a conscience yet and would pick on people weaker than he (R 1585).

Positive contributions to his community or society? There is no military record to applaud. As Judge Schaeffer explained, there was inconsistent evidence whether he paid child support for his children when he works, he is still not a good or financially responsible father; he has been in prison and deserts them by committing another crime (R 1586).

As to his work record the lower court explained the minimal work record testimony adduced from appellant's mother. What was positive was that the mother described her son as kind and loving toward her and not disobedient and that he wrestled and played football in high school. The court credited this minimal positive aspect of appellant; it does not suffice to support recommendation of life imprisonment over death considering the totality of circumstances. (R 1586 - 87).

Drug abuse? Appellant's mother had not personally seen it. Dr. Merin provided no testimony regarding it. In his P.S.I. appellant claimed to be a recreational user of cocaine but there is no claim that drugs or alcohol played any part in this murder; he was presumably drug free for the year he spent in prison when this crime occurred (R 1587).

Emotional or psychological problems? Appellant cannot cloak himself in the comforting garb -- as so many death row inmates do -- of asserted serious psychological problems; there was no deprived or abusive background. Appellant is of low average to average. I.Q. but above average on some of the tests. There is no evidence of brain impairment, or of psychosis, schizophrenia or paranoid delusions. Washington is neither psychotic nor neurotic. Rather he is a weak personality who became a bully who learned to exploit others. The defense expert Dr. Merin described him as an opportunist. As the trial court concluded, "it will be a sad day" when a bully -- opportunist -- weak personality who preys on those weaker than himself for his own desires and pleasures can expect this to be deemed mitigating (R 1588).

What else is mitigating? That Washington did not intend to kill this victim? That was one of the arguments urged by the defense to the jury. The trial court pointed to the testimony of Dr. Wood who explained her opinion that the seventeen rib fractures to the elderly victim was caused by kneeling on her chest with both knees. (R 1589 - 90). Moreover, the first cause

of death was strangulation/asphyxiation caused by appellant's choking the victim from a minimum of thirty to forty-five seconds to a maximum of two to three minutes (R 1590, R 1576). Having raped and disabled the victim he could have departed without capture. Instead he killed her. And the Weigers' rape incident did not demonstrate a lack of intent to kill Berdat; he attempted to choke/strangle Ms. Weigers a second time and left with the mistaken notion she too was dead (R 1591).

Appellant criticizes the trial court's sentencing order that the jury may have been swayed by improper defense counsel argument, that the jury may have improperly considered his age of thirty-two years to be mitigating and that the jury was unaware of his lengthy nonviolent criminal record. The trial court correctly explained that lingering or residual doubt is not an appropriate mitigating factor (R 1592). Franklin v. Lynaugh, 487 U.S. 164, 101 L.Ed.2d 155 (1988); King v. State, 514 So. 2d 354, 358 (Fla. 1987). Appellant cites the dissenting view of Justice Barkett in King v. Dugger, 555 So. 2d 355, 360 (Fla. 1990) who was of the view that a jury was entitled to mitigate a sentence because of lingering doubt. Suffice it to say that Justice Barkett's view has not commanded a majority view.

Secondly, it was eminently proper for the trial court to comment that it was inappropriate for the defense to suggest that if evidence supporting the aggravating factors came in during the guilt phase it was somehow either not really aggravating in nature or didn't count very much (R 1592). Also, it is the

legislature not the prosecutor that decides what constitutes a statutory aggravating factor.

Finally, with regard to the closing argument regarding appellant's intent to kill, the trial court's explanation refuting that thesis is more than adequate (R 1592 - 93, R 1588 - 91).

Appellant complains that the lower court erroneously rejected the age of thirty-two as mitigating. He does not cite any decision which demonstrates that the lower court's analysis is unreasonable. While it is true that those who are youthful and those suffering from the infirmities of aging may benefit, there is nothing in the record suggesting that either appellant's chronological age of thirty-two years or emotional/mental age meets such a description (R 1581). See Echols v. State, 484 So. 2d 568, 575 (Fla. 1985) (if age is to be accorded any significant weight, it must be liked with some other characteristic of the defendant or the crime such as immaturity or senility).

Lastly, the trial court opined:

> And last, and perhaps most important, the jury is not privy, as is this Court, to the lengthy non-violent record of this Defendant. When they heard he was a hard worker, and he supported his children, this might have sounded mitigating. But, when you have all the facts, such as discussed in this order, it is clear there is no mitigation here. The Defendant has been in prison most of his adult life, not supporting his children, being a good father, or working hard. The jury could not have known this. They knew only that he went to prison in 1988 for a singular crime. If they considered these things mitigating, they could not be faulted.

> But, with full knowledge of Defendant's record of incarceration, it simply isn't so.
>
> (R 1593)[7]

Appellant argues that consideration of his nonviolent record would not be permitted as an aggravating factor. While that may be so, this Court has consistently ruled that a trial court may avail itself of information unavailable to the jury (especially if the defense provides misleading data). See Engle v. State, 438 So. 2d 803 (Fla. 1983); Swan v. State, 322 So. 2d 485 (Fla. 1975).

Appellant contends that the lower court erred in rejecting Dr. Merin's testimony. He chastises the trial court's failure to accept his rehabilitation potential ("Four violent felonies committed by this Defendant while serving a sentence hardly qualifying as good jail conduct" -- R 1584). Washington relies on the possibility of rehabilitation. But Dr. Merin agreed that appellant would "continue to test the limits" and defendant -- in his thirties -- did not have a conscience yet (R 1585, R 1717). Dr. Merin's "hope" that appellant might change in the future is an insufficient predicate for a life recommendation. Reasonable

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[7] Also, earlier in the sentencing order the trial court explained that from 1978 to 1992 appellant has spent 10 years and 216 days in custody (R 1586).

minds could not disagree that death is the appropriate punishment in the instant case.[8]

The instant case is not unlike Marshall v. State, 6704 So. 2d 799, 805 - 06 (Fla. 1992) wherein this Court rejected a defense challenge to the trial court's override of a jury life recommendation. There, the presence of stipulated testimony by the defendant's father that Marshall did well in school until his early teens when his older brother influenced him to break the law, that his father loved him and his mother did not discipline him, did not provide a reasonable basis for the jury's recommendation and the mitigation presented paled in significance when compared to the multiple statutory aggravating circumstances found. Also, there, as here, the defense presented an inappropriate argument unsupported by the evidence.

This Court should approve the well-reasoned sentencing order of Judge Schaeffer.

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[8] Appellant cites Stevens v. State, 613 So. 2d 402 (Fla. 1992), a case where the murder may have been committed by a co-perpetrator outside the defendant's presence, the defendant was horribly abused as a child, was intoxicated at the time of the murder and felt remorse for his conduct -- none of which are present here.

ISSUE VIII

WHETHER THE LOWER COURT ERRED IN SENTENCING APPELLANT AS AN HABITUAL VIOLENT FELONY OFFENDER AND IMPOSITION CONSECUTIVE FIFTEEN YEAR MINIMUM MANDATORY PRISON TERMS FOR BURGLARY AND SEXUAL BATTERY.

Appellant contends that the lower court erred because (1) the state allegedly failed to establish that appellant had the predicate offenses necessary to qualify for treatment as such an offender, (2) the offense of sexual battery with physical force likely to cause serious bodily injury for which he was convicted was a life felony and (3) the three offenses arose from a single criminal episode.

The record reflects that at the hearing on August 14, 1992, the court received documentation of prior convictions without objection by the defense (R 1899). With respect to whether consecutive sentences for burglary and sexual battery could be imposed the defense stated:

> MR. LOUDERBACK: Judge, I can probably shorten this up a little bit. I think based on the law and the documentation that has been presented by the State that we should not argue that it would be inappropriate or unlawful for the Court to impose habitual offender sentences. Also, the law states that the Court's discretion for a consecutive sentence would be lawful. We're not in any way agreeing that would be appropriate, but as to both of those questions --
>
> MR. MCCOUN: If I can add one point to the consecutive aspect of this area; that, frankly, is not the status of the law today. It is not that which it has always been in the State of Florida. In fact, during the time period I have been a practicing attorney, it would have been in inappropriate

> and, in fact, in violation of the law to give consecutive sentences to the underlying felony. That law has changed. The State has provided us with a copy of the case, and I've given it to Your Honor, which suggests -- it's a different set of facts -- which suggests it is appropriate because this is an area of law that has changed in a relatively short period of time and may change again if our Supreme Court, for some reason, changes the law of Blackburger; and I want to make sure that the record reflects that we do have an objection to it in position of a consecutive sentence as being in violation of double jeopardy and due process principles, but we do recognize what the status of the law is now. It can be done.
>
> (emphasis supplied) (R 1901-02)

When the court made further inquiry whether there was any legal argument against habitualizing appellant, the defense responded:

> "We have nothing to present to the court aside from the objection that is on the record indicating that, at this point, that it would be unlawful for the court to do either or both."
>
> (R 1902 - 03)

As appellee reads the record, the defense urged below that the trial court could permissibly impose consecutive habitual sentences but that the defense was objecting on double jeopardy and due process grounds, in the event this Court changed the double jeopardy jurisprudence. Since appellant now seems to be changing his argument here from that presented below, the claim is not preserved for appellate review.[9] Steinhorst v. State, 412

[9] The double jeopardy and due process contentions have been rejected. Tillman v. State, 609 So. 2d 1295 (Fla. 1992); Hale v.

So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990).

With respect to the contention that the state failed to establish the predicate offenses necessary to qualify as such an offender, appellee repeats that Washington's failure to object below should be deemed a procedural default. When the trial court considered whether to impose habitual violent sentence, the court inquired:

> "Do you wish to be heard, Mr. McCoun or Mr. Louderback?

Mr. McCoun responded, "No, ma'am" (R 1905).

In any event, the predicate offenses are present. In addition to the burglary offenses discussed in the colloquy at R 1895 - 1905, appellant was also convicted of a sexual battery count in Pinellas County. See Perkowski v. State, 605 So. 2d 498 (Fla. 4th DCA 1992), affirmed Perkowski v. State, 616 So. 2d 26 (Fla. 1993); Miller v. State, __ So. 2d __, 18 Fla. Law Weekly D 2990 (2nd DCA 1993).

Appellant also complains that the offense of sexual battery with physical force likely to cause serious personal injury for which he was convicted in the Berdat episode, not subject to enhancement under the provisions of the habitual offender statute. Again appellee's failure to object below should be deemed a default, precluding appellate review. Moreover, while

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State, ___ So. 2d ___, 18 Fla. Law Weekly S 535 (Fla. 1993).

appellee recognizes such decisions as Lamont v. State, 610 So. 2d 435 (Fla. 1992), the Court should still affirm and any error must be deemed harmless in light of the accompanying burglary sentence and the imposition of a sentence of death on the murder count.

ISSUE IX

WHETHER ONE OF THE TWO WRITTEN JUDGMENTS IS EXTRANEOUS.

The record reflects that the trial court entered two written judgments for first degree murder, burglary and sexual battery, once on July 16, 1992 (R 1508 - 09) and once on September 4, 1992 (R 1623 - 24). Only one is necessary.

CONCLUSION

Based on the foregoing arguments and authorities the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert F. Moeller, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 24TH day of January, 1994.

OF COUNSEL FOR APPELLEE.

IN THE CIRCUIT COURT IN AND FOR PINELLAS COUNTY, FLORIDA

CRIMINAL DIVISION

CRC90-06491CFANO-M

FILED

SEP 4 1992

KARLEEN F. De BLAKER
CLERK CIRCUIT COURT
Deputy Clerk

STATE OF FLORIDA

vs.

ANTHONY N. WASHINGTON

_____/

SENTENCING ORDER

The Defendant was tried for the crimes of Murder in the First Degree, Burglary with a Battery, and Sexual Battery. The jury returned a verdict of guilty as charged on July 16, 1992. By agreement, the penalty phase trial began and ended on July 17, 1992. The jury, after hearing testimony and argument recommended that the Defendant be sentenced to life imprisonment, without possibility of parole for twenty-five years. The Court requested and received sentencing memoranda from both the defense and the State. Since the State was requesting that the Defendant be sentenced as an Habitual Felony Offender, the Court ordered a Pre-sentence Investigation (PSI). A sentencing hearing was set for August 14, 1992, to hear any additional testimony and argument. At the hearing on August 14, 1992, the Defendant was asked if his sentencing memorandum had listed or discussed all non-statutory mitigating circumstances the Defendant thought had been raised by the evidence. Defendant's co-counsel requested permission to submit a second memorandum listing and discussing additional non-statutory mitigation. Permission was given. The Court received additional evidence, principally dealing with the Defendant's habitual offender status. Additional argument was made. The Court set sentencing for September 4, 1992. Defendant's additional memorandum was received August 28, 1992. The State's response thereto was received August 31, 1992.

This Court, having heard the evidence presented in both the guilt and penalty phase of Defendant's trial, having heard additional argument on August 14, 1992,

having the benefit of a PSI, and having the benefit of two memoranda from the Defendant and two memoranda from the State, finds as follows:

AGGRAVATING FACTORS

1. The capital felony was committed by a person under sentence of imprisonment.

On August 31, 1988, the Defendant was sentenced to six years in prison for various crimes. (See Judgments and Sentences submitted at the penalty phase trial and at the hearing on August 14, 1992, and the PSI) He was imprisoned at the Largo Community Correctional Work Release Center for those crimes on the day of this murder. He left the center, purportedly to go to work, on the day of the murder. He returned to the center after the murder. It has been proved beyond any reasonable doubt that the Defendant was under a sentence of imprisonment when he committed the murder for which he is to be sentenced.

2. The Defendant was previously convicted of another felony involving the use or threat of violence to the person.

On August 31, 1988, the Defendant was convicted of burglary to an occupied dwelling with an assault or battery therein. A certified copy of a Judgement and Sentence for this crime was introduced in the penalty phase. The defense stipulated that Defendant was the same ANTHONY NEAL WASHINGTON named in the Judgment and Sentence.

On August 25, 1989, the Defendant broke into a motel room and raped and choked to unconsciousness the victim, MARY BETH WEIGERS. The victim testified to the facts surrounding this rape at the Defendant's penalty phase trial. The State introduced a certified copy of a Judgment and Sentence showing the Defendant was convicted of the charge of Sexual Battery on March 20, 1990. The victim identified the Defendant as the person who committed this crime and the defense stipulated that the Judgment and Sentence listing ANTHONY NEAL WASHINGTON, as the Defendant was the same Defendant on trial for murder.

Both convictions were prior in time to this murder conviction. Both convictions were for felonies involving the use or threat of violence to another person.

The aggravating circumstance that the Defendant was previously convicted of a felony involving the use or threat of violence to the person was proved beyond any reasonable doubt.

(As an aside, the Defendant was apparently convicted and served a sentence for the crime of robbery. The PSI lists this prior conviction and sentence. The defense was given an opportunity at the hearing on August 14, 1992 to dispute any matters contained in the PSI. This was not contested. However, since no judgment and sentence was received for this crime, either at the penalty phase trial or at the hearing before the Court on August 14, 1992, the Court did not consider this in aggravation, not finding it proved beyond a reasonable doubt.)

3. The capital felony was committed while the Defendant was engaged in the crimes of burglary and sexual battery.

The Defendant was charged and convicted by the jury of burglary to the home of and sexual battery on the victim of the murder. The evidence was ample to support both convictions. The burden of proof to convict the Defendant of these crimes was beyond a reasonable doubt. Therefore, the aggravating circumstance that this murder was committed while the Defendant was engaged in the crimes of burglary and sexual battery was proved beyond a reasonable doubt.

4. The capital felony was especially heinous, atrocious or cruel.

The victim of this murder was ninety-two years old. The evidence presented at the trial suggests she had begun her day as usual sitting on her porch reading the morning paper. Since she didn't like air-conditioning, the front door was open, while the screened door was closed. The Defendant entered the residence with the intent either to steal what he could find (the Court's theory) or to rape her (the State's theory). Exactly how the victim and the Defendant met in the house is known only to the Defendant. Either he saw the victim on the porch and went out to her porch, grabbed her and dragged her to the bedroom (the State's theory), or he went to the bedroom to look for valuables and the victim heard something unusual and went to the bedroom to investigate and found the Defendant (the Court's theory). What happened in the bedroom is not in dispute. This elderly, frail woman was knocked around hard enough to have her false teeth either knocked out or ripped out by the murderer. She was knocked around hard enough to have her hearing aid come loose and fall to the floor. She was knocked

around hard enough to cause her glasses to break. Her face had bruises and abrasions on her cheekbone, her eyelid, her forehead, her chin, and her nose. (R. 12) (Two transcripts are attached to this Order, Dr. Wood's trial testimony, and the penalty phase testimony and closing arguments. Dr. Wood's trial testimony will be referred to as T. with the corresponding page number. The penalty phase transcript will be referred to as R. with the corresponding page number.) The Doctor believed the injuries to the nose and cheek were caused by placing an object, such as a hand, over the victim's face and lower half of the nose. (T. 14) There was a recent fingernail mark on the roof of her mouth. (R. 12) This suggests the murderer pried open her mouth and tried to hold it open. For what, we can only shudder and imagine.

Mrs. Berdat had twenty-three bruises on her right arm and hand and about the same number of bruises to her left arm and hand. (T. 15) Many of those bruises came from the killer forcibly holding the victim's arms and hands, as she must have tried to fight off her attacker. (T. 16)

There were bruises and fingernail marks on the victim's legs and groin area. (T. 16, 18-19) These occurred when the Defendant pried the victim's legs open to get to her vagina. (T. 16)

The vagina had eleven separate areas of injury. (T. 20) Most were bruises. The skin was split open, (T. 20) and there was blood in her vagina. (T. 20) There were many well-preserved sperm cells in this victim's vagina. (T.21) The medical examiner opined that this ninety-two year-old victim had her vagina penetrated by a penis. (T. 22) The totality of the circumstances -- the bruises to the arms, the legs having to be pried apart, the bruises to the vagina, the splitting open of the victim's skin around the vagina and urethra, and the blood in the vagina shows this rape victim put up one hell of a fight but was no physical match for the brute strength of this Defendant.

Now this victim had been beaten about the head and face, had lost her hearing aid, had her glasses broken, had her teeth knocked or ripped from her mouth, and had been violently sexually assaulted. One can only imagine the horror and terror the victim had already experienced. But, the Defendant was not finished.

At this point in time, the Defendant, according to the medical examiner,

must have literally knelt on the victim's chest with both knees. (T. 26, R. 69) Because of her age and because she had osteoporosis, her bones were more brittle than those of a younger person. (R. 69) There were seventeen separate rib fractures to the victim's chest. (T. 24) The Defendant must have been kneeling on the victim's chest when he was choking her -- kneeling on another's chest is not a position for vaginal intercourse. As he was kneeling on her chest and it was literally breaking, he put his hands around the victim's neck. (T. 28-29) He must have slammed her head into the floor. (The medical examiner opined there was bruising on the tissues of her scalp on both the left and the right back part of the scalp which could only have been caused by something impacting against her head or her head impacting against an object.) (T. 27) He choked her with enough force to break her hyoid bone on the right and left. (T. 28) He choked her with enough force to cause four fractures of the cartilage that form the voice box -- two on the right, two on the left. (T. 28) There were bruises in the muscles of the victim's neck. (T. 28) According to the medical examiner, these injuries, as well as the external hemorrhaging about and within her eyes, are "classic examples of manual strangulation injuries." (T. 29) According to the doctor, the minimum amount of time to cause death by strangulation is thirty-five to forty-five seconds, and the maximum amount of time is two to three minutes. (T. 31) She could be no more definite as to the time it took Mrs. Berdat to die than these minimums and maximums. (T. 31-32) Dr. Wood opined at her penalty phase testimony that the victim would have been conscious for at least thirty to forty-five seconds of the strangulation. (R. 70)

Another cause of death to Mrs. Berdat was the flailed chest. (T. 29, R. 68) The medical examiner said these rib fractures would have been "very" painful. (R. 72)

So, after this victim was battered about, had her teeth ripped out, had her legs pried apart, and the entrance to her vagina torn while her body was entered by the Defendant's penis, he then got on top of her and broke seventeen ribs which caused her great pain. He put his hands around her throat and violently choked her. This brave lady must have continued to struggle causing the bruises to her head as she tried to break free, or else the Defendant pounded her head against the floor to stop her struggle. For at least thirty to forty-five seconds as she struggled for breath, this Defendant tightened his hands around her so violently he broke the bones and cartilage in her neck. It can only be described as merciful when she finally lost consciousness.

There can be little doubt that this victim was aware, as ANTHONY WASHINGTON literally choked the life out of her, that she was going to die. Nor can there be any doubt of the pain and horror she suffered during the entire ordeal before she mercifully lost consciousness and felt no more pain.

But, what is the legal status of the aggravating factor of heinous, atrocious or cruel? The U.S. Supreme Court has approved *Arizona's* "especially cruel" definition of "when the perpetrator inflicts mental anguish or physical abuse before the victim's death." This definition was approved as constitutionally sufficient. See *Walton v. Arizona*, 497 U.S. 639 (1990). In *Maynard v. Cartwright*, 486 U.S. 356, 364-365, the U.S. Supreme Court said it would approve of a definition that would limit the heinous, atrocious, or cruel circumstances to murders involving "some kind of torture or physical abuse".

In *Proffitt v. Florida*, 428 U.S. 242, 255 (1976), the U.S. Supreme Court said the heinous, atrocious, or cruel circumstance would not be vague or overbroad so long as it was defined to be the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." The Supreme Court reiterated its approval of this construction in *Walton v. Arizona, supra.* The problem is that the Florida Supreme Court adopted the whole *Dixon* instruction for the standard jury instructions. This includes the general definitions of heinous, atrocious, or cruel as contained in *Dixon v. State*, 283 So.2d 1 (Fla. 1973). These same definitions were struck down as vague in *Shell v. Mississippi*, 111 S.Ct. 313 (1990). The U.S. Supreme Court, in *Sochor v. Florida*, 60 U.S.L.W. 4486 (U.S. Fla. June 8, 1992) clearly indicates that the entire *Dixon* instruction is not acceptable:

> Sochor contends, however, that the State Supreme Court's post *Proffitt* cases have not adhered to *Dixon's* limitation as stated in *Proffitt*, but instead evince inconsistent and overbroad constructions that leave a trial court without sufficient guidance. And we may well agree with him that the Supreme Court of Florida has not confined its discussions on the matter to the *Dixon* language we approved in *Proffitt*, but has on occasion continued to invoke the entire *Dixon* statement, quoted above, (Which as "quoted above" was the Florida Standard Jury Instruction at the time of Washington's trial), perhaps thinking that *Proffitt* approved it all. *Sochor, supra,* at 4488. (Material in parentheses supplied by this Court)

This Court was aware of *Sochor* prior to Defendant's trial. This Court asked for guidance from defense counsel. They took the position that the circumstances of heinous, atrocious, or cruel was unconstitutional and should not be given period. This Court, therefore, read to the jury only that portion approved in *Proffitt*, and now expressly does not consider the *Dixon* language except the part approved in *Proffitt*. In other words, was this murder conscienceless or pitiless which is unnecessarily torturous to the victim?

The murder of Mrs. Berdat fits all three definitions approved by the U.S. Supreme Court. Particularly, as I must assume the Florida Supreme Court will follow the Florida definition approved in *Proffitt*, the murder was certainly conscienceless, it was certainly pitiless, and it was indeed unnecessarily torturous to the victim. The reason for the underlining of "to the victim" is so there can be no confusion regarding Dr. Wood's testimony at the penalty phase trial. She was asked "was there any evidence that this individual had been tortured?" And she answered, "Not torture as I think of it, no." (R. 72) We must remember that a medical examiner sees bodies that have been intentionally burned by scalding water and cigarettes. They see victims whose breasts or vaginas have been punctured by knitting needles. They see eyes that have been plucked from a victim while still living. They get hardened, and their job so requires. But torture as Dr. Wood thinks of it is not the test. The test here is was it torturous to Mrs. Berdat? Even the U.S. Supreme Court recognizes that strangulation of a conscious victim, as in the *Sochor* case, satisfies the heinous, atrocious, or cruel circumstance. In *Sochor*, *supra*, the Court, after stating the quoted portion, *supra*, went on to say:

> But however much that may be troubling in the abstract, it need not trouble us here, for our review of Florida law indicates that the State Supreme Court has consistently held that heinousness is properly found if the defendant strangled a conscious victim. (Citations omitted) We must presume the trial judge to have been familiar with this body of case law, which, at a minimum, gave the trial judge some guidance. Since the Eighth Amendment requires no more, we infer no error ....While Sochor responds that the State Supreme Court's interpretation of the heinousness factor has left Florida trial judges without sufficient guidance in other factual situations, we fail to see how that supports the conclusion that the trial judge was without sufficient guidance in the case at hand. *Sochor, supra*, at 4488 - 4489.

The Florida Supreme Court, in *Sochor v. Florida*, 580 So.2d 595 (Fla. 1991) said at 603:

> It can be inferred that 'strangulation, when perpetrated on a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable (citations omitted).

This trial judge is familiar with the *Proffitt* limitation approved by the U.S. Supreme Court. This trial judge is familiar with the Florida Supreme Court cases cited in *Sochor*,. This court has limited her analysis to the language of *Proffitt*, approved in *Walton*. This court is satisfied, beyond any reasonable doubt that the murder of Mrs. Berdat was conscienceless, it was pitiless, and it was unnecessarily torturous to Mrs. Berdat.

(As an aside, the State did not ask for the aggravating factor that the murder was committed for pecuniary gain. If it had, I would have read it to the jury. If they had argued it to me, I would have found the aggravating factor that the murder was committed during the commission of a sexual battery only, and that the murder was committed for pecuniary gain. (This is so there would be no double counting of aggravating circumstances.) The Defendant has been convicted of several burglaries where he was also convicted of a theft. He was once convicted of strong armed robbery and grand larceny. He is a thief. He burglarizes and steals. In this case, he ransacked the victim's bedroom, pulling out drawers, emptying her jewelry box, clearly looking for items he could steal and sell. He found and stole a watch. He sold it the day after the murder. If I had been satisfied I could find this aggravating factor without having given the defense a chance to respond to it, I would have. And, I would have found it had been proved beyond a reasonable doubt. However, not being certain of the state of the law that would permit the court to find an aggravating factor without giving the defense a chance to respond to it, I am not finding this aggravating factor, nor am I considering it.)

None of the other aggravating factors enumerated by statute is applicable to this case, and none other was considered by this Court.

Nothing except the statutory aggravating factors discussed in paragraphs 1-4 above was considered in aggravation. While there may be some concern about the

applicability of *Payne v. Tennessee*, 111 S.Ct. 2597 (1991) to Florida's sentencing scheme, especially with the recent addition to Florida's death penalty statute dealing with the admissibility of the character traits of the victim and the impact of the loss on the victim's family, the state attorney astutely did not ask this court to allow any such testimony before the jury. They did not attempt to introduce any such testimony at the hearing on August 14, 1992, before the court alone. While it is true the PSI includes the victim's son's statement, and while the court candidly admitted at the hearing on August 14, 1992, that she had seen a few letters before she asked her judicial assistant to keep all other letters received until after the sentencing, the court is well aware that even under *Payne*, the victim's family and friends' opinions as to what sentence should be imposed, or their opinions or characterizations about the defendant or the crime, are by law irrelevant to the sentencing process. They were not considered.

MITIGATING FACTORS

Statutory Mitigating Factors

1. The age of the Defendant at the time of the crime.

The Defendant requested this mitigating factor be read to the jury. The Florida Supreme Court dictates a mitigating factor should be read to the jury for their consideration if any evidence of it has been presented. It was proven that the Defendant was thirty-two years old when this crime was committed. The problem here is not in the proof. Clearly, the Defendant's age at the time of this murder was proven beyond any doubt. The real question is whether it is mitigating that the Defendant was thirty-two when he committed this crime.

The U.S. Supreme Court has clearly recognized that a Defendant's young age at the time of a murder is mitigating. In fact, they have said in a plurality opinion that no State can execute a fifteen-year-old child. *Thompson v. Oklahoma*, 487 U.S. 815 (1988). They have said that a sixteen-year-old and a seventeen-year-old can be put to death without violating the Eighth Amendment. *Stanford v. Kentucky*, 492 U.S. 361 (1989),but recognize that a youthful age is a mitigating cicumstance that must be considered. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). They have said that a young emotional age, while not an absolute bar to execution is mitigating. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

Various states have determined by statute that a defendant cannot be put to death if he is under a certain age -- the age of eighteen. (See statutes of California, Colorado, Connecticut, Illinois, New Hampshire, New Jersey, and Ohio). Several states (Arkansas, Kentucky, Maryland) have a statutory mitigating circumstance which reads "The youth of the defendant at the time of the crime." One state (Montana) lists as a statutory mitigating factor that the defendant was under eighteen at the time of the crime. This is not an absolute bar, as it is in the seven states listed above, but is a statutory mitigating circumstance.

Two states (New Mexico and Tennessee) have a prohibition against a death sentence for a mentally retarded defendant. One state (Virginia) lists mental retardation as a statutory mitigating circumstance.

One state has a statutory mitigator that reads the "youth" or "advanced age" of the defendant when the murder was committed (Tennessee).

Most states, like Florida, list as a statutory mitigator the "age of the defendant at the time of the crime." Does this mean any age, if proved, is mitigating. Of course not. Following the U.S. Supreme Court, Florida recognizes that a youthful age is a substantial mitigator. Also, Florida recognizes a youthful mental age as a mitigator. Florida has said that advanced age may qualify. In *Agar v. State*, 445 So.2d 326 (Fla. 1984) the Supreme Court said at 328:

> Next appellant argues that the trial court erred in not considering his age, 54, as a mitigating circumstance. This mitigating circumstance usually applies to those youthful in age because of society's responsibility for overseeing the welfare of the young. Since society also has the responsibility of protecting those suffering from the infirmities of aging (citations omitted), this mitigating circumstance may also be applied to older persons. However, we do not find at the time of the crime appellant had reached an age requiring special consideration. We therefore find no error in not finding his age to be a mitigating circumstance.

From a reading of the statutes of other states, from considering the U.S. Supreme Court cases, from considering the Florida Supreme Court cases, and finally from the testimony in the penalty phase from Dr. Merin that the Defendant was of low average to above average intelligence, there is nothing mitigating about

the Defendant's age, thirty-two, either chronological or emotional. If fifty-four is not old enough, certainly thirty-two is not old enough. This Court does not find the age of the Defendant to be a statutory mitigating factor.

The Court was not asked to read any other statutory mitigating factors to the jury. The Court was not asked to consider any other statutory mitigating factors. The Court has examined the record to determine if any other statutory mitigating factors could apply to this case. There are none so none are considered here.

Non-Statutory Mitigating Factors

The Court required the Defendant to list the non-statutory mitigating factors he felt had been raised from the evidence at either the guilt phase, the penalty phase before the jury, or the hearing before the Court alone. This is permissible so the Court does not have to guess the non-statutory mitigating factors the Defendant relies on. See *Lucas v. State*, 568 So.2d 18 (Fla. 1990); *Hodges v. State*, 595 So.2d 929 (Fla. 1992). The first sentencing memorandum, submitted by defendant's counsel, Frank Louderback, dated August 4, 1992, listed the following non-statutory mitigating factors:

1. Rehabilitation potential
2. Positive traits/family testimony
3. Employment history
4. Family background
5. History of drug abuse

While the first memorandum does not list this, it alludes to a possible non-statutory mitigating factor that could be listed as follows:

6. The Defendant did not intend to kill the victim. He used "strangulation as a means of dominance or escape as opposed to an intentional manner of infliction of injury or death" (Memorandum p. 4).

At the sentencing hearing before the Court alone, on August 14, 1992, the Court asked if all the non-statutory mitigation the defendant wished to be considered was in the memorandum. Defendant's co-counsel requested to submit

a supplemental memorandum which the court approved. This supplemental memorandum was submitted on August 25, 1992 by Defendant's co-counsel, Tom McCoun. It suggests the following non-statutory mitigation:

1) The Defendant's emotional or psychological problems or even the Defendant's "troubled personal life".

2) The potential in the Defendant for developing a more stereotypical conscience and the Defendant's ability to live within the prison setting.

3) The high improbability of the Defendant's planning this murder.

4) Defendant's positive personal traits.

5) Defendant's positive employment history.

6) Defendant's financial support for his family.

7) Defendant's involvement with drug abuse.

8) Defendant did not plan or intend to kill Mrs. Berdat.

Following the dictates of *Campbell v. State*, 571 So.2d 415 (Fla. 1990), this Court will now evaluate each mitigating circumstance proposed by the Defendant. The Court will categorize these requests by Defendant, as suggested in *Campbell, supra,* as follows:

1) Defendant's rehabilitation potential and/or the defendant's ability to live within the prison setting (first memorandum #1, second memorandum #2).

2) Defendant's positive contributions to his community or society, as evidenced by an exemplary work, military, family, or other record. (This broad category is suggested by *Campbell v. State, supra*, at footnote 4. Defendant suggests this broad mitigating category in his first memorandum, listed in #2 & #3 above, and in his second memorandum listed in #4, #5, and #6 above).

3) Defendant's drug abuse (first memorandum, #5; second memorandum, #7).

4) Defendant's emotional or psychological problems, including defendant's childhood and family background (first memorandum, #4; second memorandum, #1).

5) The Defendant did not intend to kill his victim (first memorandum, #6; second memorandum, #3 and #8).

Category 1. The Defendant's potential for rehabilitation and/or the Defendant's ability to live within the prison system.

There is no doubt that a Defendant's potential for rehabilitation is a mitigating circumstance. A Defendant's good jail conduct is also a mitigating factor. What is the proof of either of these in this case? Certainly the Defendant's past record is of no help to him in determining his potential for rehabilitation. The PSI, which he did not contest, and a copy of which is attached to this order, shows that since 1980 he has committed new crimes almost instantly upon his release from confinement except for a 2 1/2 year period from September, 1982 when he was released from prison after being sentenced to 10 years, until he was sentenced again in early 1985 to another three-year sentence. When he was released from this sentence in January, 1987, he was arrested almost instantly for a burglary with an assault or battery. He was sentenced to 2 1/2 years in June, 1987, and was released in January, 1988. He was arrested again in January, 1988 for two more crimes and must have bonded out for he was arrested again for two more crimes and was sentenced for all four crimes in August, 1988, to six years. This time he wound up at the Largo Work Release Center, presumably being rehabilitated enough to be released to go to work and come back to the Center. He rewarded the prison system's faith in him by committing the instant murder, with a burglary and sexual battery while still serving this sentence, and by committing yet another rape just eight days later on August 25, 1989, while he was still serving his sentence. Four violent felonies committed by this Defendant while serving a sentence hardly qualify as good jail conduct. This Defendant has shown, by his past crimes and conduct that he has certainly not been rehabilitated to date. He has not shown good jail conduct to date.

The evidence of future rehabilitation and good jail conduct comes from the opinions of Dr. Sidney Merin, who testified regarding this in the penalty phase. (R. 47 - 53) The essence of Dr. Merin's testimony is that the Defendant is capable of developing a conscience and he is capable of living in a closed confinement

situation and abiding by the rules. But, Dr. Merin added a caveat:

> "...[H]e is not suddenly going to change, should he be in prison, for the first year or two or whatever.... I would expect in the first period of time while in prison, and knowing that he may be there for a long time, he'll probably continue to test the limits in much the same manner as he had throughout his life. In the initial stages, we may find some opposition to the rules, but he is a quick learner when he has to learn and he will be able to abide by those rules and eventually develop the sort of conscience we could have hoped he would have developed when he was a youngster." (R. 47 - 48) (Emphasis added).

On cross examination, Dr. Merin admitted the Defendant did not have a conscience yet and that he would initially pick on people that were weaker than he was while in prison. He opined that the Defendant was a "bully" and that he had now "learned to behave in this way as a style of life." (R. 52-53). He once again said he believed this could be undone over a period of time, but concluded as follows:

> Q. (By the prosecutor): At this point in time, the way to make sure that this type of behavior doesn't manifest itself anymore is to make sure there is no opportunity to have that occur; isn't that true?
>
> A. (By Dr. Merin): No question about that, yes.

The totality of the Defendant's past criminal history, and his behavior in jail to date, weighed against the opinion of Dr. Merin of the hope of change in the future does not "reasonably convince" this Court of the existence of this mitigating circumstance. It has not been "reasonably established by the greater weight of the evidence", the standard for this Court. See *Campbell v. State, supra,* at 419. Accordingly, I do not find this mitigating circumstance to exist.

Category 2. Defendant's positive contributions to his community or society, as evidenced by an exemplary work, military, family, or other record.

There is no doubt that this can be a mitigating circumstance. The question is has it been reasonably established by the evidence in this case? There is no military record to discuss. The Defendant has never been in the military.

The Defendant's mother testified that the Defendant was the father of three children who resided in the Miami area. (R. 58) She indicated in the PSI that the two older children live with their maternal grandmother and the youngest lives with his mother. The Defendant in the PSI claims to have four children, from three different women, none of whom are apparently married to the Defendant. He says they all live with the mother of his youngest child and with him when he is not incarcerated. His mother testified that the Defendant did help support the children while he was working in Miami (R. 58). However, in the current PSI, it states she said in a 1990 PSI that he did not pay child support for any of the children. The Defendant says in the PSI he financially cares for his children when he is not incarcerated. In the best light, if you add up the time the Defendant has spent in prison or the county jail since 1978, and further assume he never spent so much as one day in jail on the many charges that were dismissed or no filed or nolle prossed (an unreasonable assumption, really), this Defendant has been in custody as of August 31, 1992, for ten years and 216 days. This means he was around to be a father and support his seventeen-year-old approximately six years, his sixteen-year-old(s) for approximately five years and his fourteen-year-old for approximately three years. So if he lives with his children, and if he supports them when he works, he is not what could be called a good or financially responsible father. Since these children have been old enough to remember their father, he has been in prison, and if he comes home to them, he almost instantly deserts them again by committing another crime. This is not an exemplary family record.

Let's examine his work record. Unfortunately, the same can be said for this potential mitigator. The Defendant's mother said he worked for his father when he lived in Miami, and was a hard worker. (R. 58) This is the only evidence of his working except that he was working in the masonry business when this murder occurred. We don't know for how long he had this job or whether or not he was a good worker. We know he did not work on the day of this homicide, and he was not at work on August 25, 1989, when he raped and strangled Ms. Weigers. He was transferred from Largo on August 29th because of a disciplinary problem. This doesn't sound like a good, loyal worker. The Defendant's father died June 23, 1986. There is no testimony regarding other jobs except as noted above. As indicated above from 1978 to 1992, the Defendant has spent at least ten years and 216 days in custody. The Defendant was in high school until 1975 and began his first county jail sentence in 1978. The minimal testimony of his mother cannot establish an exemplary work record for this Defendant in the face of all the

evidence to the contrary.

Mrs. Washington said her son had been kind and loving toward her. (R. 59). He had never been disobedient to her (R. 60). She said and the PSI verifies that he has a high school diploma, and that he wrestled and played football in high school. (R. 61). These facts are uncontroverted and therefore are found to be positive character traits, a mitigating circumstance. They will be given weight by this Court, although in light of the "negative" character traits discussed above, the weight to be given this "positive" evidence is minimal.

Category 3. Defendant's Drug Abuse

There is no doubt that drug and alcohol abuse has been allowed as a mitigating circumstance. Mrs. Washington said she heard rumors that when her son was on the street that he was on drugs, but she had never personally seen him take drugs (R. 59, 61). There was no testimony from Dr. Merin regarding any drug abuse. The Defendant, in the PSI, says he is a recreational user of cocaine, and denies the use of any alcohol. He may have used marijuana in the past. There is not enough evidence to reasonably convince the Court that Defendant's illegal use of drugs rises to a non-statutory mitigating circumstance in this case. Clearly, there is no assertion that drugs or alcohol played any part in this murder. We must remember the Defendant had been in prison for over a year when this crime occurred. We must assume, with no evidence to the contrary, that he had been drug free for this period of time. Since the evidence does not reasonably convince the Court of the existence of this mitigating factor, it is not found to be so. Even if it had been established, the fact that the Defendant was not on drugs when this murder occurred would afford this mitigator, if proved, very little weight.

Category 4. Defendant's emotional or psychological problems, including Defendant's childhood and family background.

The Defendant has a hard-working mother who has an admirable and difficult job. The Defendant's father had his own business while he was alive and apparently worked hard. There is no evidence in this record of any physical, sexual, or mental abuse of this Defendant by his parents. The Defendant was already in prison when his father died in 1986. His mother has not remarried. He has two brothers and one sister (none of whom testified in the penalty phase). He was raised in Liberty City in Miami, a place that is known to this court. The

Defendant's mother says she had no problems with the Defendant. He apparently was allowed to complete high school and participate in sports. This is not a deprived or abusive background that might give rise to a mitigating factor.

Dr. Merin tells us that the Defendant is of low average to average I.Q. (R.39). He is above average on some of his tests (R.39). There was no evidence of brain impairment. There is no evidence of psychosis, schizophrenia, or paranoid delusions (R. 39). He is neither psychotic nor neurotic (R. 39, 40, 44). His basic problem is having a weak personality while living in an area where he had to be tough or "you could be run over" (R.41). Thus, Mr. Washington, a weak person, became a "bully" to cope with his real personality. He learned to exploit persons to hide his own weakness (R. 42). Being a "bully" became a way of life for him. And so it has. He takes what he wants, whether it is money, property, or sex. Dr. Merin opines this started at a very young age and continues to this very day (R.51). (and will continue for "one, or two, or whatever" years in the future) Dr. Merin says he is an opportunist -- someone who takes advantage of situations presented to him. And so he did. Our murder victim had the misfortune of leaving her door open, an opportunity too great for this Defendant to ignore.

All this tells us is that this Defendant suffers no real emotional or psychological problems. He began his young life as a bully, and now is an opportunist who has adopted this as a way of life. He can't point to an abusive or deprived childhood for this -- only to a "weak" personality.

While this court would agree that emotional or psychological problems not reaching the level of statutory mitigating circumstances can be and should be considered non-statutory mitigating circumstances in an appropriate case, and, as suggested by the defense, a "troubled personal life" may give rise to a mitigating circumstance, there is simply no evidence in this case that calls for this conclusion. It will be a sad day if a "bully", an "opportunist", a "weak personality" that preys on those weaker than he is for his own desires and pleasures, can have this considered in mitigation of a death sentence. This Court does not find Defendant's psychological profile or his childhood or family background to be a mitigating circumstance in this case.

Category 5. The Defendant did not intend to kill his victim in this case.

There is no doubt that killing a victim, without any intent to do so, could be a non-statutory mitigating circumstance. This may occur, for example, in a case where the Defendant snatches a lady's purse and pushing her, she falls and hits her head on a hard pavement and dies from an aneurism to the brain. The Defendant is guilty of felony murder but it certainly can be argued and found in mitigation that the Defendant did not intend to kill the victim. Similarly, when a victim of a robbery chases the thief and dies of a heart attack. Similarly, if a person physically abuses a child where the injuries necessitate hospitalization and the hospital, through negligence, allows the child to die. These defendants may be guilty of Murder in the First Degree, and be death eligible, but are entitled to argue and have the Court find that the Defendant did not intend to kill. Now, let's compare this case. The Defendant argues that Dr. Merin's testimony shows the Defendant did not intend to kill.

> "Now, weak individuals, dependent personalities, will pick on weak individuals as a means for proving their strength, and their manhood and their masculinity. So he picks on a woman who is ninety-two years of age, who is, on the face of it, incapable of doing anything, and yet at ninety-two years of age, someone who is an individual he can take advantage of. But this is not -- he is not the sort of personality who would sit there and plan to kill someone as a way of avoiding detection. He may have wished to have disarmed her or rendered her incapable of doing anything against him." (R. 46).

The Defendant further points to Dr. Wood's testimony in support of this mitigator. He asks us to look at the second cause of death -- the flailed chest. He suggests the lack of bruising on the chest shows no beating or severe trauma, but instead the Defendant "leaning on the chest of the victim" (See Supplemental memorandum, p. 11). In actuality, Dr. Wood testified at both the trial and at the penalty phase that this was caused by the Defendant "kneeling on her chest" (R. 69). In her trial testimony, Dr. Wood was asked whether she had an opinion as to what caused the seventeen rib fractures:

> A. Given their location and the circumstances of this woman's death, it is my opinion that they're most consistent with an adult kneeling on her chest.
>
> Q. Kneeling with both knees, then, on top of the body?

A. Yes, causing injury both to the right and the left side. (T. 26)

The Defendant was not "leaning" on the victim's chest but was kneeling on it with both knees, hard enough to cause seventeen rib fractures.

The Defendant next points to the testimony of Ms. Weigers. He argues in his supplemental memorandum, p. 12, that if the Defendant had wished to bring about Ms. Weiger's death, he could have done so. He says, "This testimony was subject to the reasonable interpretation that the strangulation/choking had occurred to disarm Ms. Weigers and to allow the Defendant to flee." He says since this is a reasonable interpretation in the Weigers' rape, it is a reasonable interpretation in the Berdat murder.

Finally, the Defendant returns to the flailed chest argument in his second memorandum, pp. 12-13, as he again says the death was not intended in this case:

> This point is further supported by the evidence relative to the second cause of death, flailed chest. As pointed out in closing argument by the defense, this cause of death was not the result of a beating or torture or major trauma, but, in fact, was the result of the broad application of force, probably the knees and legs of the Defendant leaning against the chest of an elderly woman with brittle bones. There was no basis to conclude that the act of kneeling on this woman was done in order to bring about her death. Again, a reasonable jury could have concluded that the Defendant did not possess an intent to kill.

If Mrs. Berdat had died from a flailed chest alone, this argument would have some merit. But she didn't. The first cause of death was strangulation/asphyxiation. This was caused by the Defendant putting his hands around Mrs. Berdat's throat and choking her for between 30-45 seconds to up to two to three minutes (See heinous, atrocious, or cruel argument, *supra*,). No one claimed the Defendant planned to go to Mrs. Berdat's home to kill her. If, as Dr. Merin claims, he chose a weak, older woman to show his strength, manhood, and masculinity, he had already done that. He had already raped her. She was no match for him. He beat her, broke her, and raped her. He could have gone on his way. Even as he kneeled on her chest and her bones broke in seventeen places, he must have known she was not readily going to run after him and tackle

him and hold him for the police. She was old and frail. He had disarmed her. But when he then put his hands around her throat and choked the very life out of her, breaking her hyoid bone and the cartilage of her larynx, and kept his hands around her throat for no fewer than thirty seconds and up to three minutes, he did so for one purpose -- to kill her.

And, finally, the facts of the Weigers' rape, which the Defendant did admit, is of no help to him. Can it be seriously doubted that if the Defendant had merely wanted to "disarm Ms. Weigers and to allow the Defendant to flee", he would have left after he strangled/choked her to unconsciousness the first time. She was passed out -- unconscious. She was disarmed and the Defendant could have fled. Did he leave? He did not. He waited to see if she, a younger victim, might not die and when she came to, he choked/strangled her unconscious a second time, leaving then with the mistaken certainty that she was dead, as was Mrs. Berdat, his previous victim.

There is no reasonable doubt that this Defendant strangled Mrs. Berdat with his bare hands to bring about her death. And in her case he did so. The evidence pointed to by the Defendant to establish the mitigating circumstance that he did not intend to kill the victim does not rise to the level of reasonably convincing -- it was not reasonably established by the greater weight of the evidence. The Court does not find this non-statutory mitigating circumstance to exist.

This Court has now evaluated each category of mitigating evidence the Defendant has asked her to consider. This Court has found each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. The last step of the *Campbell* formula is to weigh the aggravating circumstances found against the mitigating circumstances found. The Court found four aggravating factors (See Aggravating Factors, *supra*) and a very small part of one category as a mitigating factor. (See Category 2 discussion, *supra*). This Court finds the aggravating factors far outweigh the non-statutory mitigating factor, and they do so beyond all reasonable doubt.

This would be the end of this sentencing order except for one thing -- the jury recommended that this court sentence the Defendant to life imprisonment, and not death. The law of Florida requires this recommendation to be given "great weight." The test for determining the propriety of an override was laid out in *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975) as follows:

> In order to sustain a sentence of death, following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Why might the jury have recommended life in this case? The jury in this case heard closing argument from defense counsel last. Counsel broke his closing argument into several parts. The first part was clearly a residual or lingering doubt argument (R.97-99). While this is effective argument in a circumstantial case, such as this case is, it is not proper mitigation. The Florida Supreme Court has consistently held that lingering doubt is not mitigating. The U.S. Supreme Court has stated that there is no constitutional right to have lingering doubt considered as a mitigating factor. *Franklin v. Lynaugh*, 487 U.S. 164 (1988). When this argument is made, without objection or the request for a curative instruction, it is quite possible a jury may believe it is a mitigating circumstance they are to consider.

Another portion of defense counsel's argument was novel. He propounded to the jury that the fact that three of the four aggravating circumstances that the prosecutor relied on were "nothing more than warmed over rehashes of what he argued yesterday and do not work, and do not work to set this case in that special category of being a death case." (R.100). When speaking of the Defendant being incarcerated, he said "You know that an inherent part of their case in chief was that he was in prison at the time that he did that. It does not -- it is not some new factor, I submit, that amounts to an additional aggravation that would allow the death penalty (R.101). He argued the same as to the homicide being committed in the course of a burglary and sexual battery (R.102). He began the same argument on heinous, atrocious, or cruel when the state objected (R. 103). The objection was made and sustained at the bench (R.104). The jury may have gotten two misconceptions from this argument: One, that if it was evidence at the guilt phase, it either didn't count as an aggravating factor(s), or didn't count as much. Two, that the State Attorney decided what was aggravating. This clever, but inappropriate, argument may have persuaded the jury.

Another part of the closing dealt with the lack of intent to kill. Since the Court was surprised by the argument, the State must have been also. Certainly they did not mention it in their closing argument. Since this Court has routinely allowed the state to close first and the defense to close last, the state didn't ask for

rebuttal argument. I would probably have given it to them. It is easy to make an argument against this as a non-statutory mitigating factor if you know it is coming. The jury may have been persuaded by this uncontroverted argument.

Later, the defense argued the Defendant's age was mitigating because he could be kept in prison for the rest of his life. As the Supreme Court said in *Echols v. State*, 484 So.2d 568 (Fla. 1985), age without more is not mitigating. Echols was fifty-eight years old. The judge did not find this fact mitigating (and he overrode a jury recommendation of life.) The Supreme Court said at 575:

> If it (age) is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime, such as immaturity or senility. (Emphasis supplied)

In the *Echols* record, there was nothing mitigating about the defendant's age. Neither was there in this case. But the jury doesn't know all of this law.

And last, and perhaps most important, the jury is not privy, as is this Court, to the lengthy non-violent record of this Defendant. When they heard he was a hard worker, and he supported his children, this might have sounded mitigating. But, when you have all the facts, such as discussed in this order, it is clear there is no mitigation here. The Defendant has been in prison most of his adult life, not supporting his children, being a good father, or working hard. The jury could not have known this. They knew only that he went to prison in 1988 for a singular crime. If they considered these things mitigating, they could not be faulted. But, with full knowledge of Defendant's record of incarceration, it simply isn't so.

It is well known around this Courthouse that I do not advocate the death penalty. This has never interfered with any death case I have decided. I have sentenced men to die when the jury recommended it. Twice, I have overridden death recommendations when the law did not support them. Once, after I had sentenced a man to die, I wrote to the pardon board to suggest changed circumstances which no longer made the death sentence appropriate. The Florida Supreme Court agreed. I have sentenced men to life when the jury recommended it, when I personally did not agree with the life recommendation, but the mitigating circumstances were such that reasonable people could differ. Today is my hardest task to date. I have never sentenced a man to die when the jury did not recommend death. But, today the law and the evidence in this case compel me to

find that the aggravating circumstances present in this case so far outweigh the mitigating circumstances that a sentence of death for ANTHONY WASHINGTON is so clear and convincing that virtually no reasonable people, armed with all the facts and all the law, could differ. Accordingly, it is

ORDERED AND ADJUDGED THAT ANTHONY NEAL WASHINGTON is hereby sentenced to death in the electric chair for the murder of ALICE BERDAT.

MAY GOD HAVE MERCY ON HIS SOUL.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida, this 4th day of September, 1992.

SUSAN F. SCHAEFFER, CIRCUIT JUDGE

Copies furnished to:

The Honorable James T. Russell, State Attorney
Philip J. Federico, Assistant State Attorney
Jeffrey Brown, Assistant State Attorney
Frank Louderback, Co-counsel for the Defendant
Thomas B. McCoun, Co-counsel for the Defendant
Anthony Neal Washington, Defendant