IN THE SUPREME COURT OF FLORIDA

SEAN PATRICK ESTY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 80,598

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

Appellee is respectfully unable to accept appellant's Statement of the Facts, which is incomplete, and drawn predominantly from the defense case, which, of course, was rejected by the jury. Further, appellant's recitation contains references to matters excluded by the court below (Initial Brief at 5), as well as totally unfounded, and gratuitous, attacks upon the victim, unsupported by the record, i.e., Lauren "found other boys to chase" (Initial Brief at 4). Accordingly, the state submits the following:

The victim and defendant met in 1990 in the ROTC program at Pensacola High School; Esty was three years Lauren Ramsey's senior (R 822). The two began dating, and, on Christmas Eve 1990, Esty was caught in the victim's bedroom, at her grandparents' home (R 813); appellant had put a ladder up to the window and had climbed through into the victim's bedroom (R 814). Likewise during that same time period, Mrs. Ramsey discovered her daughter missing from her bedroom one night (R 822). Esty's mother returned Lauren to her home at around 2:00 a.m. that morning (R 822). According to Esty's friend, Spencer Davis, Esty was originally quite fond of Miss Ramsey, but that in the months prior to her death, "they had something of a falling out", and he became disillusioned with her (R 686-687). Around August of 1991, Esty told another friend, Henry Lusane, that he hated the victim and that he wanted Lusane to have sex with her out of spite (R 651-652). The victim's close friend, Michelle Primm, testified, however, that around Thanksgiving of 1991, she had gone Christmas shopping with Lauren Ramsey, and that, at such

time, the victim had purchased a "troll" doll as a gift for appellant; she stated that she saw Miss Ramsey wrap this gift in Mickey Mouse wrapping paper, and write upon it, "To Sean, Love, Lauren" (R 667-668).

Lauren Ramsey went to see her doctor in mid-December, 1991, and, on Friday, December 20, 1991, her doctor informed her that she was four weeks pregnant (R 802-805). Dr. Montgomery testified that she gave the victim until the following Monday afternoon, December 23, 1991, to tell her mother, or the doctor would do so herself; she testified that Lauren was very angry about being given this deadline (R 802-805). The victim spent Saturday night with her grandparents, and went to church the next morning (R 815). She visited relatives that day, and her grandmother testified that she went to bed at around 10:00 p.m. on Sunday evening (R 817). The next morning, Mrs. De La Rue went to awaken Lauren, and could not open the bedroom door (R 824). The victim's mother came over and determined that the door was locked from the inside, and that the window to Lauren's room was open and that she was missing (R 824); the window screen was found out in the yard (R 824). Mrs. Ramsey testified that Lauren had been planning to visit a friend in Colorado on Christmas Day (R 999-1000).

Lauren Ramsey's bruised, beaten and bloody body was found on the beach at Langdon Battery near Fort Pickens at around noon on December 24, 1991 (R 591-593). The victim had sustained very massive injuries to the left side of the face and head (R 857). Her skull was fractured, as were both her upper jaw and mandible

(R 857). Dr. Havard testified that the head wounds were consistent with having been inflicted with a baseball bat, and that the force of some of the blows had been so intense that the bones on the left side of her skull had broken into fragments, with some being driven into the brain itself (R 861-862). The entire left side of Miss Ramsey's face was bluish-purple, with additional bruises to her right eye, and lacerations to her left eye, forehead, chin and neck (R 857-858). The pathologist found incised wounds, or stab wounds, to the victim's neck, chest, forearm and hands (R 858-861); he stated that the stab wound to the chest had passed through one of the lungs (R 860-861). Dr. Harvard specifically identified many of the wounds to the hands as defensive wounds, stating that the victim had been attempting to grab the knife as she was being stabbed (R 859-860). The pathologist also noted a number of incised wounds to the left ear, which had left parallel lines, which he stated could have been inflicted with a machete (R 857, 862). Dr. Havard testified that he believed that the stab wounds had been inflicted prior to the head wounds, given the fact that the former wounds had bled copiously (R 862). The witness confirmed that the fifteen-year-old victim had been pregnant (R 862-863).

Investigation of the crime scene led to the discovery of the victim's eyeglass frames, which were near her body, as well as her wristwatch, which was in the brush area above her head (R 601-603); after the victim's body was removed, one of the lenses from the eyeglasses, as well as a hair barette, was recovered (R 624). Significantly, a black plastic-handled butcher knife with

a bent handle was found on the right side of the trail across from the victim's body (R 602). Likewise, a piece of broken baseball bat was found in the heavy brush east of where the victim's body had been (R 615, 618, 632). Subsequently, the piece of Mickey Mouse wrapping paper with the notation, "To Sean, Love, Lauren", was found under a bush at the battery (R 626, 637, 639). Likewise, on January 18, 1992, a machete was retrieved from the underbrush around Langdon Battery, directly across the roadway from where the victim's body had been found (R 757-760). Although no fingerprints or blood were found on the knife, an expert witness testified that the knife was consistent with the cut marks on the victim's sweater (R 807-808). Esty's palm print was, however, found on the handle of the broken bat (R 713-714). Additionally, analysis of the bat indicated that the bat had been painted black, with some pink paint added to certain areas; paint fragments, consistent with those from the bat, were found on the victim's clothing (R 789-791). Likewise, a spot of blue paint was found on the machete, which was later found to be consistent with some paint found on one of appellant's "boffo" sticks (R 791).

If there was one thing that everyone who knew Esty agreed about, it was that he loved weapons. Esty's room at home, as well as his car, were virtual arsenals, complete with knives, bats and machetes (R 647, 656, 687). Prior to the murder, a number of Esty's friends noted appellant's possession of a black bat with pink tacks pushed into it, which Esty referred to as the "purple people beater" (R 687). Esty hung around with a number

of other young males his age who called themselves the "War Pigs", and who engaged in a number of activities, including playing Dungeons and Dragons and "boffoing"; "boffoing" means having sword fights with swords made from PVC pipes (R 684-686). Esty's friend, Spencer Davis, testified that while occasionally injuries occurred during "boffoing", such were limited to bruises, as opposed to cuts (R 686).

On the night of December 22, 1991, Esty picked up a young lady named Lisa Bolton and took her to a teen dance at the Seville Quarter, at around 6:00 p.m.; according to Miss Bolton, the two were not "actually dating" at this time (R 698-699). Esty gave her eight dollars for the admission charge, and left at 7:00 p.m., promising to return at midnight to pick her up (R 700). At this time, she stated that Esty was wearing bluish-green pants, and green t-shirt and white tennis shoes (R 701). Appellant did not reappear until after midnight, and, at such time, wore a long black trenchcoat and combat boots (R 701-702). At this time, appellant was accompanied by Wade Wallace, and Miss Bolton noted that Esty had his hand wrapped in a t-shirt (R 703-704). She stated that Esty told her that his hand had been cut in a boffo match with Wallace earlier that evening, and that he had only noticed it when blood began dripping onto his boot (R 703-704).

The police subsequently executed a search warrant on Esty's home and vehicle on January 10, 1992 (R 728). The authorities retrieved a set of boffo sticks, a machete, a long black trenchcoat and a pair of combat boots from Esty's room;

additionally, a written "itinerary" was found in his mother's dresser drawer, such document setting forth appellant's movements at the time of the murder (R 728-734). The police likewise retrieved a number of significant items from appellant's vehicle (R 743-744). Wedged between the seats of the car and emergency brake was a sales receipt from Albertson's; the sales receipt reflected purchase of a butcher knife on December 22, 1991, at 10:16 p.m. (R 747). Testing of the driver's seat, as well as the exterior of the car, indicated the presence of blood (R 754-755). In the trunk, the officers found a troll doll lying underneath a Christmas package (R 749). There were likewise two greeting cards from the victim to the defendant (R 749, 904); the cards were found in a compartment under the carpet of the trunk (R 750). Additionally, a pair of black military boots was found inside a brown paper bag in the trunk (R 753).

Examination of the black trenchcoat revealed the presence of a bloodstain on the front hem of the coat, which was not immediately visible (R 764-765). The expert testified that the bloodstain was consistent with medium velocity spatter, which, itself, was consistent with having occurred during a beating (R 764-766). Blood was also detected on the combat boots taken from appellant, and both the boots and coat were submitted to FDLE for further testing. Analysis revealed human blood, containing the EAP-B enzyme, on both items; this enzyme was found in the blood of Lauren Ramsey, and, indeed, is found in forty percent of the caucasion population, but, significantly, was found <u>not</u> to exist in Esty's blood, thus eliminating him as the source (R 921-934).

The stain on the coat was also submitted to DNA testing (R 936). It was determined that the bloodstain matched the victim's genotype, and that the probability of such match was five percent (5%); factoring in the presence of the EAP-3 enzyme, the probability dropped to two percent (2%) (R 981-987).

After the murder, appellant admitted to Spencer Davis and Lisa Bolton that he could have been the father of Lauren Ramsey's baby (R 691, 705). Esty also told Davis that he realized that he was a suspect in the murder, and that, accordingly, he had thrown away the studded bat, because he thought it would "look bad" to have it, given the fact that Lauren had been beaten to death (R 691). Esty likewise told another friend, Christopher Clarke, that he had thrown away the bat, so that the police would not harrass him; appellant also claimed that he had been clearing brush at the battery a week or two prior to the murder, and that at such time, he "lost" his machete in the underbrush (R 657-659).

When Esty himself testified at trial, he gave a different version of events. He claimed to have lost the machete in November, stating that he had intended to clear the brush away at Langdon Battery, so that he and his friends could have a "boffo match" there. Esty stated that he had attempted such undertaking at night, because he knew it was illegal to chop brush at a state park, and that the machete had somehow slipped out of his hand (R 1229-1231); appellant claimed to have been to Langdon Battery twice and stated that one could barely see the road from the battery (R 1268-1269). Esty also maintained that he had thrown

the baseball bat into a dumpster behind a Taco Bell several days prior to the murder, rather than afterwards (R 1228-1229). Esty, of course, denied buying the butcher knife at Albertson's or murdering Lauren Ramsey (R 1233-1234). Appellant also stated that he had taken apart the boffo stick which had inflicted his cut and tossed it off a bridge, so that it could not injure anyone else (R 1261-1262). Esty finally stated that he had himself purchased the troll doll as a "joke" (R 1266).

SUMMARY OF ARGUMENT

Appellant presents twelve (12) issues on appeal, nine in regard to his conviction, and the remainder as to his sentence of death. Three of the points relate to what can be regarded as pretrial errors. Denial of appellant's motion to suppress evidence was not error, in that no knowing presentation of false statements or omission of material facts was demonstrated, in regard to search warrant affidavit; the trial court's conclusion that probable cause remained, even should the additions and deletions urged by defense counsel be undertaken, remains correct. As to the voir dire issue, Esty has failed to demonstrate that illiteracy per se is grounds for a cause challenge to a venireman, or, more significantly, that the venireman he wished to challenge was actually illiterate; further, given the fact that the trial court gave the defense four extra peremptory challenges, the fact that Esty was allegedly "forced" to utilize one on this prospective juror did not prejudice him. Further, no valid claim of error is presented in regard to any change of venue. Counsel's only request for such was made orally, in the midst of voir dire, and was not accompanied by any required documentation; no ruling was obtained until mid-trial. The record in this case, in any event, does not demonstrate the existence of prejudicial pretrial publicity or a great difficulty in selecting an impartial jury.

Esty presents three evidentiary issues. His contention that the trial court should not have admitted evidence that the victim was pregnant is not preserved, in that no objection was ever interposed below; the fact of the victim's pregnancy was, in any

event, not admitted for its sensational value, but rather due to its relevance to motive. Esty's claim as to the admission of alleged "bad act" testimony is likewise without merit. Although the trial court granted the state leave to present evidence concerning the fact that the defendant had had sex with the victim a month prior to the murder (a fact which could have made him the father of her unborn child), this evidence was not, in fact, introduced until Esty himself brought it up, without objection, when testifying in the defense case; it remains relevant to motive. Further, the fact that the defendant told one of his friends that he hated the victim and wanted this other individual to have sex with her out of spite was obviously relevant as to intent or the existence of ill-will between the parties. Likewise, appellant's attack upon the state expert's reliance upon population studies published in a recognized scientific journal is totally without merit, in that experts are entitled to rely upon such matters and hearsay is not a viable objection under those circumstances.

Appellant's final alleged trial errors are simply not compelling. No discovery violation occured in regard to the state's disclosure of a rebuttal expert witness eight days prior to his testimony, and, in any event, the trial court conducted a sufficient inquiry into the matter; the defense was afforded an opportunity to speak with or depose the witness prior to his testimony. Appellant's attack upon the standard jury instruction on reasonable doubt is not preserved for appellate review, and, in any event, has conclusively been rejected by caselaw. Finally, appellant was not entitled to a mistrial, in regard to

one alleged improper comment by the prosecutor during closing argument; the court below sustained defense counsel's objection, and delivered an immediate curative instruction which dissipated any prejudice. Although the evidence against Esty is circumstantial in nature, it is also compelling, and, indeed conclusive. No basis exists for reversal of his conviction of first-degree premeditated murder.

Appellant's sentence of death is the result of the trial judge's override of the jury's recommendation of life in prison. The state suggests that the trial court did not err in doing so, in that, despite Esty's relative youth and lack of criminal record, the life recommendation was not reasonable. This was truly a homicide which was outside the norm of capital felonies. Appellant murdered the fifteen-year old victim in this case by stabbing her with a butcher knife, slashing her with a machete and pulverizing her skull with a baseball bat. This crime was carried out in a remote location and was carefully, and coldly, planned. The Primmary mitigation presented below was that Esty, while possessing a genius-level I.Q., was basically a "normal teenager". The fact that Esty could find family and friends to attest to his good character was simply insufficient to mitigate this heinous offense, and the instant sentence of death should be affirmed. Appellant's attack upon the cold, calculated and premeditated aggravating circumstances is without merit, and the trial court did not err in failing to formally find in mitigation Esty's age, given the many circumstances which demonstrated his maturity.

ARGUMENT

ISSUE I

DENIAL OF APPELLANT'S MOTION TO SUPPRESS EVIDENCE WAS NOT ERROR

As his first point on appeal, Esty contends that the trial court erred in denying his Motion To Suppress Evidence, on the grounds that there were misrepresentations and omissions in the affidavit which was used to secure the search warrant for Esty's vehicle and residence; appellant's Primmary authority for this proposition is a decision of the First District Court of Appeal, State v. Van Pieterson, 550 So.2d 1162 (Fla. 1st DCA 1989). Defense counsel filed a motion to this effect, to which the state filed a response (R 1895-1900; 1901-1916). The trial court held a hearing on the motion on July 9-10, 1992 (R 1921-2035; 2040-2054). At the conclusion of the hearing, Judge Jones denied the motion, finding that, even with the additions and deletions urged by the defense, probable cause for issuance of the search warrant still remained (R 2054-8). At trial, it would appear that counsel renewed his motion at the time that the contested evidence was admitted (R 726, 740). Although appellant continues to assail the judge's ruling on appeal, appellee would contend that no error has been demonstrated, and that the instant conviction should be affirmed. First, however, the relevant facts will be reviewed.

(A) Relevant Facts Of Record

In his suppression motion of June 30, 1992, defense counsel alleged that the search warrant affidavit was deficient in nine (9) specific respects (R 1895-1900). Specifically, counsel

argued that: (1) the affidavit had failed to allege that the broken bat, found at the scene, had not been recovered until the next day; (2) the affidavit had included statements from Steven Joye, in regard to his having seen a vehicle leaving the scene, when, in fact, Joye denied making such statement; (3) the affidavit omitted reference to the fact that the victim, Lauren Ramsey, had allegedly told Jason Jordan that the father of her baby had recently been in trouble with the law and that a previous boyfriend of hers named James had been violent towards her; (4) that the affidavit had omitted information from Michelle Primm to the effect that Ramsey had used to date James Presley and that he had been violent towards her, and that, allegedly, Ms. Ramsey had had sexual relations with David Spates and Wade Wallace; (5) that the affidavit had omitted reference to the fact that Wade Wallace had allegedly received immunity for his statements, that Wallace had given inconsistent statements and had been threatened with perjury prosecution and that Wallace had been arrested on December 17, 1991 for fleeing or eluding a police officer; (6) that the affidavit included statements from a former girlfriend of appellant, Jodi Pedigo, in regard to her relationship with Esty, and that, in subsequent conversations, Ms. Pedigo had denied such allegations; (7) that the affidavit omitted reference to the fact that the piece of wrapping paper found at the scene had in fact, been found by civilians, as opposed to law enforcement personnel; (8) that the affidavit omitted reference to testimony from one Jeremy Coleman to the effect that Lauren Ramsey had stated that she had been bruised by a boyfriend other than Esty around Thanksgiving and (9) that the

affidavit omitted reference to testimony elicited from witnesses to the effect that the victim had a reputation for being "easy".

The state filed a very specific response to these allegations. Thus, in its responsive pleading, the state argued that: (1) the affidavit had simply alleged that the broken bat had been "located" at the scene (a fact which was not controverted) and that no allegation had been made as to the time of its recovery; (2) that, despite Joye's current position, the witness had in fact informed Officer Martin that he had seen the car in question and that, as alleged in the affidavit, Officer O'Neal, had attempted to verify this, speaking with Joye's mother who had related "substantially the same information"; (3) that the affiant had not placed credence in any account by Ramsey, allegedly to witness Jordan, that Esty might not be the father and that the affiant had found no corroboration for any assertion that James Presley could have been the father of the victim's unborn child; (4) that the affiant had not included any assertions by Michelle Primm in regard to James Presley, in that Presley was in ninth grade and had never even kissed Ms. Ramsey, whereas Primmm had told the officer that Ramsey had snuck out of the house to be with Mr. Esty around Thanksgiving and had told Primmm that she could be pregnant after having unprotected sex with him in October of 1991; (5) that Wade Wallace was never offered blanket immunity and in fact was specifically advised that he could be prosecuted, and that, additional information, not alleged in the affidavit, was used in evaluating the probative value of Wallace's testimony, such as the fact that Ramsey had been sneaking out of her grandparents' home to meet

with Esty, Esty had been caught in bed with Ms. Ramsey at her grandparents' home, Esty had admitted being on Pensacola Beach in the late evening of December 22, 1991 and that Esty and Wallace had been at the Waffle House on Davis Highway between 9:00 and 10:00 p.m. on December 22, 1991; (6) that, despite Ms. Pedigo's current statements, she had advised the authorities that Esty had made harassing phone calls to her and that Esty had broken into the apartment in which Ms. Pedigo was living; (7) that, although the identity of the discoverers of the wrapping paper had not been alleged, the affidavit had clearly stated that the evidence had not been discovered until January 6, 1992 and, in fact, the civilians had been investigating the murder when they found the items; (8) that, although no mention had been made of the victim allegedly having sex with David Spates, the authorities had firm evidence that Ms. Ramsey had sex with Esty in December of 1991 and (9) that even if all omitted matters were added, and all allegedly misleading matters deleted, probable cause would still remain (R 1901-1916).

Six witnesses testified at the suppression hearing, the Primmary witness being Officer O'Neal of the Escambia County Sheriff's Department, who had drawn up the affidavit (R 1959-2001). O'Neal was specifically questioned as to the nine matters at issue. He stated that he had not included in the affidavit the fact that the baseball bat had not been seized on the first day, because he knew that it had been observed and located at such time (R 1961-2). He stated that while he had never spoken with Steven Joye, another officer, Investigator Martin, had done so, and that he had spoken with Joye's mother, who had relayed

substantially the same information that Martin had received from the young man (R 1962). He stated that Jason Jordan had been interviewed by the FBI on December 26, 1992, and that he had been present at such time (R 1966). O'Neal testified that Jordan had been aware that Ms. Ramsey was pregnant, that she would not identify the father, and that when Jordan had asked her if was Esty, the victim refused to answer (R 1967). O'Neal testified that, while Jordan had related that the father of the baby had allegedly recently been in trouble with the law or in jail, he had not included this information in the affidavit because he had concluded, "after speaking with all of the people involved" that Ms. Ramsey had been trying to shield Esty (R 1967-8). The officer also testified that he had omitted reference to James Presley in the affidavit due to his belief that the individual could not have been the father of the victim's baby, as there had been no physical relationship between the two (R 1972). As to Ms. Ramsey's alleged reputation for promiscuity, O'Neal stated that the only evidence allegedly in support of such was a remark which Esty himself had made to one of the witnesses (R 1973). As to Wade Wallace, the witness stated that, as to immunity, Wallace had only received use immunity for the statements actually made on one occasion (R 1975); he stated that, while Wallace's subsequent statement differed in some respects from one previously made, it was corroborated in many respects by other witnesses (R 1976). As to the identity of the individuals who had discovered the wrapping paper, O'Neal stated that, in his view, while the fact that the paper had been found was pertinent, the fact that its discoverers were civilians had not seemed

important (R 1984). The officer testified that he had interviewed a witness named Coleman, and that the latter had related to him that he had seen Esty push Lauren Ramsey against the car (R 1987); he stated, however, that he had not included information from Coleman to the effect that the latter had advised him that Lauren Ramsey had stated that she had been bruised by an ex-boyfriend who had dropped out of school and was trying to go back (R 1987). O'Neal testified that some of the witnesses with whom he had spoken had indicated that they had suspected David Spates; the officer stated, however, that he had ascertained that Spates had been out of the area several months prior to the murder (R 1989).

On cross-examination, O'Neal stated that no "deal" had been made with Wade Wallace, and that the allegations in the witness's statements had been corroborated by other witnesses, such as Lisa Bolton and Angie Coffman (R 1993); no promises had been made to Wallace to the effect that he would not be prosecuted for any crime (R 1994). The witness stated that there were additional matters about Esty which could have been included in the affidavit, such as the fact that Esty had been caught in bed with the victim at her grandparents' house and that once when she was missing, she had been found at appellant's home (R 1991). O'Neal testified, in regard to the alleged omissions from the search warrant affidavit, that he had not intended to mislead the magistrate in any way, but that it was simply impossible to include in an affidavit every single fact and lead developed in a case (R 1994-5); he later stated,

> I can't put every lead and every bit of information and every person I speak to on any case in an affidavit... If I did, the judge would be reading every piece of paper from every officer. There wouldn't be enough judges to read the affidavits that officers present (R 1997).

Two other officers who had assisted in preparation of the affidavit, or who had provided information, were also called (R 2009-2020; 2047-2052). FBI Agent Kinard testified that he had interviewed Wade Wallace, Jodi Pedigo, Pamela Allen, Lisa Bolton, Michelle Primmm, Catherine Esty, Melissa Dadura, Henry Lusane, Nora McConnico, Corryn Zimmerman and Angela Coffman (R 2012). He stated that he had been present at more than one of Wallace's interviews and that, while the witness had added information to his statements on occasion, he "stuck with the same basic story line" (R 2014). He stated that during his interview of Ms. Pedigo, she had stated that Esty had not been living at the apartment at the time that he had broken in (R 2015); she had told the agent that Esty had punched through the window and that the police had been called (R 2016). Likewise, he stated that the witness had told him that she had received a number of harassing telephone calls after she had broken up with Esty, and that "it had sounded like Sean Esty's voice with his hand over the speaker part of the phone" (R 2015); a trace had been put on the phone and, at one point, it indicated that the call had come from Esty's home (R 2017). Kinard stated that, even if Ms. Pedigo had not stated that she was "100% certain" that it had been Esty, he had felt "very comfortable" that she was sure that it had been appellant (R 2018). The witness also stated that he had heard that Esty had previously been in trouble with the law

for vandalism (R 2019-2020). Investigator Martin of the Escambia County Sheriff's Department testified that he had been the initial investigator in the case and that he had spoken with Steven Joye by telephone, at which time the witness related to him having seen a medium dark car on Sunday night leaving the Langdon Battery and heading for Ft. Pickens (R 2049-2050); he stated that he had no reason to believe that Joye had assumed that the homicide had occurred on Monday (R 2050).

The defense also called a number of other witnesses. Thus, Adam Bruce, a friend of appellant, testified that he lived in Pensacola Beach and that he had suggested "boffoing" with appellant on the weekend of the homicide (R 2004). Investigator Gaines of the Escambia County Sheriffs Department testified that he had previously searched the scene and had failed to discover the piece of wrapping paper; he stated, however, that he had not looked under the particular bush where it was discovered (R 2021-4). Ida Devoe testified that she had recovered the piece of wrapping paper on January 5, 1992 at a bush near Langdon Battery; although a civilian, she had specifically been investigating the murder of Lauren Ramsey because she was concerned that her son-in-law might be involved (R 2025-2031). Jodi Pedigo, who now testified that she was in love with Esty and planned to marry him (R 2047), stated that Esty, in fact, had lived at the apartment which he had broken into and that she had considered the telephone calls to be "pranks" (R 2043-4); she likewise claimed not to have stated that Esty had been the one to make the calls (R 2045-6). Although Steven Joye did not testify, it was stipulated that the witness would now testify that he, in fact,

had stated that he had seen the car in question on Monday, as opposed to Sunday night, and that it had not been at the battery (R 2053-4).

The search warrant affidavit itself was also introduced into evidence (R 1806-1817). The affidavit included reference to statements by Jason Jordan to the effect that Lauren Ramsey had been pregnant and had been advised by her gynecologist that such information would be revealed to her mother by Monday, December 23, 1991 (R 1810); Jordan had spoken with Ramsey at 5:30 p.m. on December 22, 1991, and she had advised him that she was going to meet with the child's father to discuss a possible abortion (R 1810-11). Likewise, the affidavit included reference to statements from Lauren Ramsey's friend, Michelle Primmm, to the effect that the victim had been deeply troubled after speaking with her doctor a week prior to the murder and that Ramsey and Esty had had sexual relations as recently as six weeks prior to the murder (R 1811). The affidavit included statements from Wade Wallace, to the effect that he had been a friend of appellant for several years, and that appellant had told him a week before the murder that the victim was pregnant and that he was concerned that he could be the father; Esty had stated, however, that he would "take care of the situation" (R 1811). Wallace likewise added that he had been with appellant on the night of December 22, 1991 at approximately 9:30 p.m. at the Waffle House on Davis Highway and, at such time, they had engaged in a "boffo" match; he stated that appellant had suffered no visible injury at that time (R 1812). Wallace claimed that appellant had told him that he was going to meet the victim that night, and that two hours

later, he had seen Esty at the Seville Quarter in Pensacola, at which time appellant had a bleeding cut on his left hand (R 1812); Wallace claimed that Esty had advised him that he had "taken care of his problem" (R 1812).

The affidavit also included representations concerning how the victim had been murdered, i.e., stabbed with a knife and beaten, and that an ecko knife and broken black and pink baseball bat had been found at the scene (R 1809-1810). A number of witnesses, including Pamela Allen and Jodi Pedigo, had described Esty's collection of weapons, both at his home and in his vehicle, which had included knives, swords and baseball bats, including one which was black with pink markings (R 1812, 1813). Pamela Allen stated that Ramsey had told her that she had slept with appellant in December of 1991 (R 1812). Jodi Pedigo stated that Esty had had a bad temper and that he had once broken the window of an apartment when she would not let him in; the affidavit likewise included representations that Pedigo stated that Esty had telephonically harassed her afterwards (R 1812-13). Additionally, the affidavit included statements from Lisa Bolton, to the effect that she had seen Esty at the Seville Quarter in Pensacola at 12:15 a.m. on December 23, 1991, and that, at such time, Esty had had a severe laceration to the back of his left hand (R 1813); she also noted that, within the preceding hours, Esty had changed from tennis shoes to combat boots and that there was blood on one of the boots (R 1813). Further, the affidavit contained representations that Michelle Primmm had stated that she had seen Ms. Ramsey buy a troll doll for Esty's Christmas present and wrap it in Mickey Mouse type wrapping paper; on

January 6, 1992, a torn piece of Mickey Mouse christmas wrapping, with the inscription, "To Sean, Love, Lauren" had been found at the crime scene (R 1814). Additionally, the affidavit included statements from Michael Figart and Jeremy Coleman to the effect that Esty and the victim had previously been a couple and that Esty had indicated to Coleman that he had slept with Ramsey and she was "easy" (R 1814-15). Both witnesses stated that they had once seen Esty grab Lauren Ramsey and slam her against a car door, such action leaving bruises on her neck and face (R 1815). The affidavit also included, of course, representations as to what Steven Joye had said about seeing a vehicle comparable to Esty's near the crime scene on the night of December 22, 1991 (R 1810).

After considering all the testimony, Judge Jones found that the inclusion of the Joye testimony in the affidavit had not been a willful fraud upon the court or the result of a reckless disregard for the truth; the court additionally found, however, that even if it were excluded from the affidavit, probable cause would remain (R 2055). As to the omission from the affidavit of representations that the victim had told Jason Jordan that the father of the baby had been in jail or had recently been in trouble with the law, the court found that such was a material omission and that the evidence should have been presented to the magistrate; the judge found, however, that such omission was not willful or reckless and further held that the information would be considered as if it were part of the affidavit (R 2055-6). As to the omission from the affidavit of the fact that civilians had discovered the wrapping paper, the court again found a material

omission, but one which was not willful; the court suggested that the omission had been reckless, and stated that he would not consider the information (R 2056-7). As to all the other matters, the court found no willful fraud upon the court, and further found that after including omitted items and deleting those "that need to be deleted", and then "taking the affidavit as it then remains", sufficient probable cause existed to justify issuance of the search warrant (R 2057-8). Accordingly, the motion to suppress was denied (R 2058).

(B) Argument

As noted, Esty contends on appeal that the trial court erred in denying his motion to suppress, in that, allegedly, material omissions and misrepresentations were made in the search warrant affidavit. The state would suggest instead that the testimony set forth above clearly underscores the correctness of the circuit court's conclusion that probable cause remained, even taking all of appellant's allegations at face value. In this case, defense was afforded a hearing, pursuant to Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and simply failed to sustain its burden of proof, especially in regard to the allegations concerning Wade Wallace. The most that can be said is that the police in this cause did not include every conceivable fact in the affidavit, which, of course, is not constitutionally required, cf. U.S. v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990), and that various individuals who spoke to the police officers were subject to impeachment or contradiction, again hardly an uncommon occurrence. The officer who prepared the affidavit did not engage in any knowing presentation of false

or misleading statements nor were any material omissions made with reckless disregard for the truth. Accordingly, the instant motion to suppress was properly denied.

Of the nine matters identified below, several merit little discussion. Thus, appellee is respectfully unable to discern even a potential constitutional violation in the fact that the affidavit did not specifically allege that the broken bat had not been recovered until a day after its discovery or that the piece of wrapping paper was found by civilians, as opposed to law enforcement officials; the affidavit, in all material respects, correctly alleged the location of these items and the time at which they were discovered/seized. Likewise, the police officers were not negligent in relying upon statements from Jodi Pedigo and Steven Joye, despite the fact that these witnesses later chose to modify their statements; contrary to the representations in the Initial Brief (Initial Brief at 21), the police, in the form of Investigator Martin, did talk to Joye personally, and elicited the information contained in the affidavit, and Officer O'Neal spoke with Joye's mother, who corroborated his testimony (R 2049-2050, 1962). As to the omission from the affidavit of representations concerning the victim being "easy", O'Neal testified that the only basis for the victim's alleged reputation for promiscuity was a remark made by Esty himself (R 1973).

Much of the appellant's ire is directed toward the utilization in the affidavit of what is characterized as "uncorroborated school house chatter" and "gossip" (Initial Brief at 21-2), and the omission from the affidavit of allegations

concerning the victim's other alleged "boyfriends." The fact remains, however, that the authorities were investigating a murder, and that, accordingly, it was relevant to determine the relationship between the defendant and the victim. While, apparently, Esty was not the only young man in whom the victim might have had an interest, his sexual relationship with her made him a logical suspect, given her pregnancy. The officers were aware that Lauren Ramsey had had unprotected sex with Esty in October and December of 1991, that she had previously gotten into trouble for sneaking out to meet him, that he had once been caught in her bed at her grandparents' home and that a witness had seen Esty push Ramsey against a car, injuring her; there were no such specific allegations in regard to Ramsey's other alleged "boyfriends", such as David Spates, whom the authorities determined had been out of town at the time of the murder (R 1989) or James Presley, whom the authorities determined had had no physical relationship with Ms. Ramsey (R 1972).

Esty, however, was not the focus of the police investigation solely due to his sexual relationship with the victim. Thus, there had been sworn testimony from Michelle Primm to the effect that the victim had wrapped a Christmas present for Esty in Mickey Mouse paper, and that a piece of such paper, with the notation, "To Sean, Love, Lauren" had been found at the murder scene. Likewise, there was testimony concerning Esty's weapon collection, including the fact that he had a black bat with pink markings, such latter weapon comparable to that found in pieces at the scene. Finally, there was testimony placing Esty on the beachside close to the time of the murder and testimony from Lisa

Bolton, to the effect Esty had changed clothes on the night of the murder and that there were bloodstains on his combat boots when she came into contact with him. While it is apparently appellant's complaint that the police ignored other suspects, Esty has failed to come forward with any other evidence which would place another individual at the crime scene and/or in possession of one of the murder weapons; likewise, Esty has failed to allege or demonstrate that any other individual was seen at the beachside at the critical point in time with or without bloodstains on his clothes. It was not incumbent upon the officer to include in the affidavit every unverified lead or bit of gossip involving the victim's sex life, and appellant has failed to demonstrate that there was reckless disregard for the truth or omission of any material facts in the preparation of the affidavit in this regard.

The final matter relates to Wade Wallace, and the fact that the police failed to tell the magistrate "that Wade Wallace had severe credibility problems"; appellant infers the existence of such problems from the fact that the state did not call Wallace at trial (Initial Brief at 17). This, however, is sheer speculation, in that the record does not reveal the reason why neither side called Wallace at trial.[1] What is, however, more significant is that Esty failed to call Wallace at the suppression hearing. Thus, although appellate counsel now

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[1] As might be expected, the defense, in its closing argument, made much of the state's failure to call Wallace (R 1397-8). It is interesting to note, however, that included in the presentence materials is a letter from Esty, in which he states that lab tests rule Wallace out as the father of the victim's baby (R 2238).

alleges that Wallace gave "inconsistent statements", the only testimony presented below, from Agent Kinard, was that, while Wallace had added information in his statements, he had "stuck with the same basic story line." (R 2014). Likewise, although appellate counsel finds great significance in the fact that Wallace was given use immunity for each statement which he made, something which is standard procedure (R 1975), there is also uncontroverted testimony that Wallace was never promised immunity from prosecution for any crime (R 1994). Allegations in the Initial Brief notwithstanding, it would not appear that Wallace ever told the authorities that he had slept with the victim, and it was Esty, rather then Wallace, who had gotten into trouble with the law for acts of vandalism to cars with a baseball bat (R 2019-2020). The testimony actually presented at the Franks hearing below hardly demonstrates that Wallace's credibility was so nonexistent that all of his statements must be discounted or that a lack of probable cause would result, should such occur.

In light of the above, the sole case relied upon by Esty, State v. Van Pieterson, is clearly distinguishable. In such case, the appellate court affirmed an order of suppression, based upon a finding of lack of probable cause. In Van Pieterson, the affidavit was based solely upon the statements of one witness, who had never previously acted as an informant, and the affidavit failed to include such material facts as the fact that the informant had originally denied all knowledge of the offense and had only given a statement after being promised immunity for his participation in the crime; the affidavit also failed to include information concerning the fact that the informant had been

promised immunity from prosecution for a drug offense, in exchange for his statement. The court concluded that these matters, all of which had come to light through the testimony of the informant at the Franks hearing, should have been included in the affidavit and that, had they been, was a substantial possibility that probable cause would not have been found.[2] In this case, Wallace received no promise of immunity from prosecution, and Esty failed to demonstrate that the witness gave statements which contradicted each other in any material fashion. Further, Wallace was one of many witnesses who offered testimony to the officers, and excision of his testimony in toto (which is not required) would still leave sufficient probable cause for issuance of the search warrant. Cf. State v. Schulze, 581 So.2d 610 (Fla. 2d DCA 1991) (where omitted facts related solely to reliability of informant but did not contradict existence of probable cause, suppression not warranted; Van Pieterson distinguished).

While it is the state's position that the officers in this case conducted themselves at all times properly, this court's words in State v. Chapin, 486 So.2d 566, 568 (Fla. 1986), would seem highly appropriate;

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2 This legal standard, which is apparently derived from People v. Aston, 703 P.2d 111 (Cal. 1985), is more generous to the defense than that suggested by Franks itself. The state would respectfully contend that the proper standard is set forth in United States v. Colkey, supra, to the effect that a material omission from an affidavit can only provide relief to a defendant if its inclusion in the affidavit would negate probable cause. See, LaFave, Search and Seizure, §4.4 (1994 Pocket Part at 50-54).

> Petitioner appears to misapprehend the limited nature of the Franks inquiry into search warrant affidavits. It is not the truth of the information in the affidavit which is critical but rather the affiant's belief that it is true. The fact that the police acted negligently, made an innocent mistake, or might have conducted an investigation in a different manner, does not prove, or even establish a presumption of, bad faith or reckless disregard of the truth. (footnote omitted).

Officer O'Neal's only "crime" was that he did not deluge the magistrate with every conceivable fact elicited during the investigation, something which he correctly recognized would have placed the judge in the role of an investigator (R 1997). Given the uncontradicted facts regarding Esty's relationship with the victim, his presence at the scene and his possession of a weapon comparable to that used in the murder, all facts corroborated from a number of witnesses, the court below was correct in concluding that, minor imperfections aside, probable cause existed for issuance of the warrant. See, e.g., Power v. State, 605 So.2d 856, 862 (Fla. 1992) (affidavit's failure to indicate prior rape victim had also identified persons other than defendant not material, given fact that probable cause still existed based on other facts); Johnson v. State, 513 So.2d 1388 (Fla. 4th DCA 1987), cert. denied, 528 So.2d 1182 (Fla. 1988) (fact that affidavit included inaccuracies as to time and place of drug buy irrelevant to existence of probable cause); Antone v. State, 382 So.2d 1205, 1211 (Fla. 1980) (fact that affidavit erroneously included assertion that defendant kept counterfeit currency in bedroom not cause for suppression, where probable cause otherwise existed); Stipp v. State, 355 So.2d 1217 (Fla.

4th DCA), cert. denied, 364 So.2d 893 (Fla. 1978) (where affidavit reflected existence of probable cause, following excision of incorrect and false statements, suppression not required). No relief is warranted as to this claim, and Esty's conviction of first-degree murder should be affirmed in all respects.

ISSUE II

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE TRIAL COURT'S DENIAL OF A CAUSE CHALLENGE TO PROSPECTIVE JUROR JOHNSON

Esty next contends that he is entitled to a new trial, because the trial court denied his cause challenge to prospective juror Johnson. Such challenge was levied due to the fact that Johnson was allegedly illiterate, and, following its denial, appellant utilized a peremptory challenge on the venireman; because there remained an allegedly unacceptable juror, Esty contends that he has standing to pursue this claim on appeal. The state disagrees on all counts. Appellant has not only failed to demonstrate that illiteracy per se is sufficient grounds for a cause challenge, but has also failed to demonstrate that the venireman at issue was incapable of performing his duties as a juror; further, despite the fact that the defense utilized a peremptory challenge on this juror, the fact that the defense requested, and received, an additional four challenges should render moot any alleged error in this regard. The instant conviction should be affirmed in all respects.

The record in this case indicates that all eighty of the prospective jurors filled out questionnaires, as to their views on the death penalty and any knowledge of the case; only those

indicating knowledge of the case were individually voir dired. Although Johnson's questionnaire indicated that he was not familiar with the case (R 2091), the prosecutor suggested that, because the venireman's name had apparently been spelled wrong on the form, it might be appropriate to inquire as to Johnson's ability to read (R 266). The examination conducted, however, was extremely brief, Johnson simply reiterating his answers on the questionnaire to the effect that he had no knowledge of the case, through newspapers or television (R 266-7). As to the death penalty, Johnson stated that he did "not exactly" believe that death was an appropriate sentence, but thought that he could follow the law (R 267). The extent of defense counsel's inquiry was to ask Johnson whether he had personally filled out the questionnaire or whether someone else had filled it out for him; the venireman replied that his wife had filled it out (R 267). There was no further inquiry, and no challenge by either party at such time (R 267).

The next day, at the bench conference, defense counsel asked if the court was going to utilize written jury instructions (R 533). Upon being advised that such was the case, defense counsel stated that he challenged Johnson for cause, because he could allegedly neither read nor write and would be disadvantaged as a juror (R 533-4). The prosecutor pointed out that there was no per se requirement of literacy and that the instructions would, in any event, be read aloud to the jury (R 534). Defense counsel specifically advised the court that he had no legal authority for his position (R 534), stating, "I'm not representing to the court that there is any such law," i.e., to the effect that a juror's

inability to read or write constituted grounds for a cause challenge (R 535). The court denied the defense challenge for cause, and defense counsel subsequently utilized a peremptory challenge to remove Johnson (R 536-7); the court noted that one of the bases for its ruling was the fact that there seemed to be no law on the subject (R 537).

Defense counsel subsequently requested additional peremptory challenges, claiming that he had been forced to expend his original challenges on those who had knowledge of the case, after his cause challenges to such veniremen had been denied (R 539). Judge Jones granted Esty an additional two challenges, whereupon defense counsel immediately tendered the jury (R 539-540). Counsel then exercised the additional challenges, and complained that he was back in the same position; he requested additional challenges to strike veniremen Howell, Pfeiffer, Mastron and Smith whom he claimed had "significant knowledge of the case" (R 541). The court again granted an additional two challenges to the defense, and, once again, defense counsel immediately tendered the jury (R 541-2); defense counsel then used two of the challenges upon Howell and Pfeiffer (R 542-3). Defense counsel then asked for an additional challenge to remove prospective juror Adams adding, however, that there were still "at least four jurors" whom he wanted off, who had significant knowledge about the case; defense counsel, however, failed to specifically identify those veniremen (R 544). The court asked defense counsel if he wished to withdraw his last strike, so as to be able to utilize such on Adams, but counsel declined this offer (R 543). The following exchange then took place:

> THE COURT: So one additional peremptory challenge in your opinion would not cure your problem?
>
> MR. LOVELESS [defense counsel]: I doubt it. Probably not, Judge because of the next, there's one, two, three -- there are three more remaining on there for which cause has been denied and there are two others I have objections to so I can't represent to the court that one would cure any problem (R 544).

Counsel's request for additional peremptory challenges was denied (R 545).

It is the state's position that Esty's claim - that, due to Mr. Johnson's alleged illiteracy, the venireman should have been stricken for cause - fails in at least three critical respects. First of all, assuming that illiteracy per se could serve as a basis for a cause challenge (a position which, as argued below, appellant has failed to substantiate), there has been no showing that Johnson was, in fact, illiterate. The purpose of voir dire is, of course, to determine, inter alia, whether a legal cause for challenge exists as to the prospective jurors. Cf. Mitchell v. State, 458 So.2d 819, 821 (Fla. 1st DCA 1984). In this case, defense counsel asked Mr. Johnson a grand total of one question - whether he had personally filled out the questionnaire. Johnson's answer, that his wife had done so, says nothing as to his own ability to read or write. Defense counsel never asked Johnson whether he could read or write, and there is no record evidence to support a contention that he is in fact illiterate. It would seem axiomatic that a party who wishes to have a venireman excused on the basis of cause bears the burden of demonstrating the predicate facts establishing the grounds for

the challenge. Esty unquestionably failed to do so sub judice. See, e.g., Mills v. State, 462 So.2d 1075, 1079 (Fla. 1985) (trial court did not abuse its discretion in denying challenge for cause to juror based on partiality, due to "lack of support presented for charges for partiality"). It, of course, is unquestionably axiomatic that a trial court's ruling upon a cause challenge, or the competency of a challenged juror, is reviewed under the abuse of discretion standard, and that, in order to be afforded relief on appeal, a defendant must demonstrate manifest error. See, e.g., Christopher v. State, 407 So.2d 198, 200 (Fla. 1981); Hooper v. State, 476 So.2d 1253, 1256 (Fla. 1985); Cook v. State, 542 So.2d 964, 969 (Fla. 1989). Given the fact that Esty quite literally gave the court below nothing to work with, no abuse of discretion has been demonstrated.

Assuming that this court finds any factual basis for the instant cause challenge, there still remains, however, an absence of legal authority. As noted, the court below specifically asked defense counsel if he had any legal authority for the proposition that illiteracy justified a challenge for cause, and counsel below answered that he did not. This does not bode well for the instant appeal. Cf. Lucas v. State, 376 So.2d 1149, 1151-2 (Fla. 1979) (court would not indulge in presumption that trial judge would have made erroneous ruling, had defense counsel cited applicable law to him). Indeed, on appeal, Esty's appellate counsel concedes that "juries of essential illiterate people" have been deciding cases "for hundreds of years" (Initial Brief at 25). No legal authority has been cited to this court for the proposition that a prospective juror's inability to read or write

should constitute an automatic ground for per se excusal, and it should be noted that the applicable statutes do not so provide. Cf. §40.013 Fla. Stat. (1991) (jury disqualification statute, listing, inter alia, as grounds for exclusion those who are "physically infirm", but noting that those who are deaf or hearing impaired are not automatically barred). While, for many of the reasons cited in the Initial Brief, it might have been inconvenient in certain respects for Mr. Johnson to have served as a juror in this case, such legal authority as does exist holds that, at common law, illiteracy did not serve as a bar to jury service, and it would appear that many states continue to follow this position. Cf. Annotation, Intelligence, Character, Religion or Loyalty Tests of Qualifications of Juror, 126 ALR 506 (1940); Am Jur 2d, Jury, §111 (1969). In Rollins v. State, 148 So.2d 274, 276 (Fla. 1963), this court specifically held that a venireman's "limited education" did not render him unqualified to serve, and it should be noted that in Spencer v. State, 615 So.2d 688 (Fla. 1993), this court emphatically disapproved the action of a trial judge who had excused two prospective jurors based on alleged lack of intelligence. Because appellant has failed to demonstrate error in either fact or law, in regard to the judge's ruling below, reversible error has not been demonstrated.

To the extent that this court disagrees, appellee would still contend that reversible error has not been demonstrated, and that Esty's reliance upon Trotter v. State, 576 So.2d 691 (Fla. 1990) is misplaced. If the trial court committed error in denying Esty's cause challenge to Mr. Johnson, this error "cost" Esty one peremptory challenge, inasmuch as Esty was allegedly

"forced" to utilize such challenge to remove the prospective juror. It would seem, however, that the trial court below more than compensated for any error in this regard, by affording Esty an additional four peremptory challenges. The fact that, at the conclusion of voir dire, defense counsel could still find a basis to complain as to one of the jurors who actually sat has no causal relationship to the court's prior ruling as to Mr. Johnson, and appellee would specifically question Esty's standing as to bring this claim. See Cook, 542 So.2d at 969 (defendant could not secure relief in regard to denial of cause challenge to two jurors, unless both rulings were shown to be erroneous, inasmuch as court had granted defendant one additional challenge).

Further, under the particular facts of this case, it is difficult to see how Esty was "forced" to accept any unacceptable juror. Cf. Rollins, 148 So.2d at 276; Pentecost v. State, 545 So.2d 861, 863 n.3 (Fla. 1989). Despite the protestations of defense counsel below, the judge was extremely liberal in allowing challenges for cause, and specifically granted ten of the defense challenges, allegedly based upon pretrial publicity (R 225, 233, 314, 324-5, 328, 368-9, 451, 465-6, 471, 490-1, 513). Although the court did deny fifteen other defense challenges for cause, including that of Mr. Johnson, (R 238, 247, 253, 263, 287, 304, 336-7, 377, 391, 456, 478, 496-7, 503, 524, 536-7), such fact does not dictate that Esty is entitled to relief. Even if all of these rulings were erroneous (something which is not asserted on appeal), Esty, of course, was afforded fourteen peremptory challenges. While he did expend eight of

these peremptory challenges on those whom he had previously unsuccessfully sought to challenge cause (R 531 (Nightengale, Allison); R 532 (Reddick, Coleman); R 536-7 (Kane, McCrary, Johnson, Pickett), Esty chose to utilize the remaining six peremptory challenges upon jurors whom he had never previously sought to challenge or whom he had never previously described as objectionable (R 537, 540-4); interestingly, defense counsel took this tactic, after specifically requesting additional peremptories so as to be able to remove those whom he had unsuccessfully sought to challenge before. In any event, defense counsel obviously could have used any of these six additional challenges against prospective juror Adams, at any time, had he truly wished to do so, and he was not "forced" to accept this juror; this is particularly true, given the trial court's offer to allow Esty to withdraw a prior strike and use it on Adams (R 543). Accordingly, Esty lacks standing to raise this claim. Cf. Aguilera v. State, 606 So.2d 1194 (Fla. 1st DCA 1992) (defendant could not complain on appeal of court's wrongful denial of cause challenge to prospective juror, who actually sat on defendant's jury, where, inter alia, defense counsel failed to utilize available peremptory challenge against juror).

Finally, the state would simply observe that there was nothing truly objectionable about Mr. Adams; Adams is the only juror specifically identified by defense counsel below as one whom he would have stricken, had additional peremptory challenges been granted, and, further, it should be noted that Adams is the only juror who actually served on Esty's jury, whom defense counsel had previously sought to challenge on any basis. In Hall

v. State, 614 So.2d 473 (Fla. 1993), this court disposed of a comparable claim of error by looking to the qualifications of the juror whom defense counsel allegedly would have stricken, had additional peremptory challenges been allowed. This court found, in Hall, that the trial court had not erred in failing to grant additional peremptories, given the fact that the juror in question, Cavanaugh, had not been "tainted" by pretrial publicity. A similar holding is warranted sub judice. In his questionnaire, Adams stated that he had formed no opinion as to Esty's guilt or innocence and that he could put aside any prior knowledge and be fair and impartial (R 2142). During his individual voir dire, Adams stated that the only knowledge which he had about the case was simply that a murder had occurred and that the victim's body had been found on the beach (R 451-452); he assured the court that he could put aside any prior knowledge in the deliberations (R 452). Adams maintained these positions during extensive cross-examination by defense counsel (R 452-455), and in denying the cause challenge, Judge Jones made specific findings to the effect that the juror had no disability due to prior knowledge (R 456). Given the fact that there is no constitutional requirement that prospective jurors be totally ignorant of the facts of the case, see, e.g., Murphy v. Florida, 421 U.S. 794, 800-801, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), Puiatti v. Dugger, 589 So.2d 231, 235 (Fla. 1991), and the fact that it is uncontroverted that this particular juror's knowledge was simply limited to the fact that a murder occurred, defense counsel's concerns as to Mr. Adams were totally unfounded. Cf. Hall, supra. Accordingly, reversible error has not been

demonstrated, and the instant conviction should be affirmed in all respects.

ISSUE III

DENIAL OF ESTY'S PROCEDURALLY-DEFECTIVE AND UNTIMELY MOTION FOR CHANGE OF VENUE WAS NOT ERROR

As his next claim, Esty maintains that Judge Jones erred in denying his motion for change of venue, in that, allegedly, an "extraordinary number of prospective members of the venire" had prior knowledge of the facts of the case (Initial Brief at 29). Appellate counsel concedes that "winning this issue will be extraordinarily difficult" (Initial Brief at 31), but nevertheless argues that due to the "extensive media coverage" and defense counsel's alleged dissatisfaction with the jury ultimately selected, venue should have been changed (Initial Brief at 32-3). The state disagrees on all counts, and would suggest that because no sufficient motion for change of venue was ever filed in this cause, Judge Jones did not abuse his discretion in failing to move the trial. The instant conviction should be affirmed in all respects.

As to the sufficiency of the motion sub judice, it must be noted that Fla.R.Crim.P. 3.240 specifically provides that motions for change of venue shall be: (1) in writing; (2) accompanied by affidavits of two or more persons setting forth the factual basis; (3) accompanied by a certificate of good faith and (4) filed no less than ten days prior to trial. In this case, the most that can be said to have occured is that, on the day voir dire was to commence, defense counsel stated orally that he wanted to move for a change of venue, due to the fact that his

"impression" after reading some of the jury questionnaires was that a significant percentage of the venire had indicated prior knowledge (R 44-5). Counsel immediately stated, however, that he was aware that "the cases indicate that we should at least make [an] attempt to select a jury." (R 45). Judge Jones stated that he would take the motion under advisement (R 45). Despite the fact that defense counsel, as noted, requested additional peremptory challenges, defense counsel never formally renewed his request for change of venue prior to the swearing of the jury (R 549). In fact, defense counsel never formally renewed the motion at all, and it was only when the state rested its case that Judge Jones formally denied the motion, noting that it had never been called up for a ruling prior to such time (R 1334).

The motion in this case was plainly insufficient, as being oral and unaccompanied by any of the requisite affidavits or certificates; it was also untimely, and essentially abandoned by defense counsel below. Under this court's precedents, no claim of error has been preserved for review. See e.g., Allen v. State, 174 So.2d 538, 540 (Fla. 1965) (where motion for change of venue not accompanied by affidavits, such "fatally defective" and "judge could have properly done nothing but deny it."); Provenzano v. State, 497 So.2d 1177, 1181-2 (Fla. 1986) (claim in regard to failure to change venue not preserved, where defense counsel orally made motion for change of venue, but no written motion ever filed, or ruled upon, by court).

Further, to the extent that any valid motion was presented below, appellant has failed to demonstrate an abuse of discretion in the court's ultimate ruling; it is, of course, well-

established that an application for change of venue is addressed to the sound discretion of the trial court and that a ruling thereupon will not be overturned on appeal absent a palpable abuse of discretion. See, e.g., Geralds v. State, 601 So.2d 1157, 1159 (Fla. 1992); Gaskin v. State, 591 So.2d 917, 919 (Fla. 1991); Davis v. State, 461 So.2d 67, 69 (Fla. 1984). As this court held in Manning v. State, 378 So.2d 274, 276 (Fla. 1978), the test for change of venue is:

> Whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

In order to meet this test, it is the defendant's burden to demonstrate that the general atmosphere of the community is decidely hostile to him; such showing could be made either through the existence of inflammatory publicity or great difficulty in selecting a jury. See, Holsworth v. State, 522 So.2d 348, 350 (Fla. 1988); Copeland v. State, 457 So.2d 1012, 1017 (Fla. 1984); Provenzano, supra. Esty has entirely failed to sustain his burden of proof in this regard, and it is worth noting that the record itself does not even contain any of the newspaper or media accounts of this case, thus rendering appellate counsel's observations in this regard totally speculative.

The record in this case, in fact, indicates that the jury was selected with relative ease and that publicity was not a major problem. The eighty prospective jurors in this cause did

fill out pretrial questionnaires as to their knowledge of the case and their views on the death penalty; the record does not support any suggestion that this questionnaire was utilized solely due to the existence, or nature, of any pretrial publicity (R 1937). Of the eighty responses, nineteen (19) or approximately twenty five percent (25%) indicated a complete lack of knowledge as to the case on the part of the prospective jurors (R 2085, 2091, 2095, 2099, 2106, 2107, 2108, 2112, 2113, 2119, 2122, 2123, 2125, 2133, 2141, 2145, 2146, 2151, 2157). As best as can be determined from the remainder, of those sixty-one indicating knowledge of the case, forty (40) or approximately two-thirds (2/3), indicated that they could set aside any prior knowledge, whereas only nineteen (19) indicated a fixed opinion (R 2083-2162). These numbers are hardly indicative of a community "saturated" in publicity, in which Esty could not receive a fair trial. Cf. Provenzano, supra.

Following some initial excusals based upon the jurors' views on the death penalty and other matters, fifty-seven (57) members of the venire were individually examined as to their knowledge of the case; those nineteen who had indicated a complete lack of knowledge as to the case in their questionnaires were not individually examined (R 227-526). The vast majority of those examined indicated that their "knowledge" of the case was sketchy at best, usually being limited simply to the fact that a murder had occurred at Fort Pickens (R 234, 238, 242, 247, 254, 263, 269, 270, 279, 288, 293-4, 297, 300, 305, 316, 318, 338, 346, 349, 370, 378, 382-3, 392, 399-400, 405, 412-13, 414-15, 429, 424, 433-4, 452, 457, 467, 479, 487, 497, 499-500, 503-04).

Those with greater familiarity with the case, or who had espoused an inability to be impartial, were excused (R 225, 233, 313-14, 324-5, 328, 369, 446, 448, 451, 465-6, 471, 490-1, 513).

All of those jurors who actually served - Piotrowski, Whitworth, Hurley, Evans, Williams, Mastron, Robbins, Adams, Guttman, Bell, K. Smith and Martin - had indicated that they could be fair and impartial, and set aside any prior knowledge (R 264, 271-2, 347-8, 379, 425, 452, 467, 527-8; 2095, 2098, 2108, 2119, 2122, 2123); indeed, five - Piotrowski, Hurley, Williams, Guttman and Bell - had been among those indicating absolutely no knowledge of the case whatsoever. Of the remaining seven, defense counsel, following individual voir dire, had only challenged Mr. Adams, and as noted in Issue II, supra, counsel possessed more than enough opportunities to peremptorily challenge this juror, should such have truly been desired. An abuse of discretion has not been demonstrated in regard to the trial court's ruling upon any valid motion for change of venue. See, e.g., Geralds, supra (denial of motion to change venue not error, where, inter alia, all jurors who served stated affirmatively that they could put aside any prior knowledge; Gaskin, supra, (same); Davis, supra, (same, where several jurors who served indicated prior knowledge of case); Copeland, supra, (same, even where every member of jury panel had indicated some prior knowledge of case). The instant conviction should be affirmed in all respects.

ISSUE IV

ADMISSION OF EVIDENCE CONCERNING THE APPELLANT'S SEXUAL RELATIONSHIP WITH THE VICTIM WAS NOT ERROR

Esty next contends that he is entitled to a new trial, because the state introduced evidence below to the effect that he had had sex with the victim a month prior to her death and that he once urged a friend of his to have sex with Lauren Ramsey "out of spite" because he hated her. Appellant argues that this evidence was improper "Williams Rule" evidence, which simply went toward his bad character and prejudiced him before the jury; appellant maintains that the incidents occurred too far removed in time to be relevant and were not similar to the murder for which Esty was on trial. For the reasons set forth below, appellee would contend that reversible error has not been demonstrated. No claim of error has been preserved for review in regard to the first matter, and both matters were properly admitted to show motive or existence of premeditation. Contrary to appellant's contention, neither of these matters was introduced to show "bad character" on the part of appellant, and no reasonable possibility exists that the jury viewed the evidence in this light.

The record indicates that, prior to trial, the state filed a formal notice, pursuant to §90.404(2) Fla. Stat. (1991), stating that it intended to offer evidence at trial pertaining to the fact that Esty had committed a sexual battery on the victim, in violation of §800.04, during the last ten days of November 1991, and, further, that this evidence was relevant to, inter alia, motive or intent (R 2037-8). The defense countered by filing a

motion in limine, seeking to preclude the introduction of any evidence pertaining to "any alleged sexual contact between the defendant and Lauren Ramsey", on the grounds that such related only to Esty's "bad character" (R 2078-9). The matter was not taken up again until after the jury was sworn (R 556). At this time, the prosecutor stated that the evidence at issue was relevant to show motive, and that the relationship between the victim and the defendant was, of course, relevant (R 556-7). The court ruled that the state could properly introduce evidence concerning the incident which had occurred during the last ten days of November of 1991, as such was relevant to motive or the existence of premeditation, but that a proffer would be required, should any other specific acts of sexual involvement between the parties be offered; the court also ruled that the state could properly introduce evidence as to the relationship between the victim and the defendant (R 558-563).

Subsequently during the trial, the state called Henry Lusane, a schoolmate of Esty's (R 644). Lusane testified that he had been acquainted with the victim, and that, on occasion, appellant had discussed Lauren Ramsey with him (R 647-8). At this point, the defense requested a proffer, and the state indicated that the witness would testify that Esty had told him that he hated Ms. Ramsey and wanted Lusane to get her pregnant, out of spite (R 649). The defense objected that this evidence was irrelevant and prejudicial, and such objection was overruled (R 649-650). The witness then stated that, during the second year that he had known Esty, Esty had told him that he hated the victim and that he wanted Lusane to have sex with her out of

spite (R 651-2); Lusane estimated that this could have occured in late August of 1991, and stated that he had considered it to be a joke at the time (R 653).

Despite the court's ruling on the motion in limine, it would not appear that the state actually introduced, in its case-in-chief, any testimony concerning Esty having sex with the victim in November of 1991. At most, state witnesses testified that Esty had originally been fond of Ms. Ramsey, but that they had had a falling-out and he had become disillusioned with her (R 686-7); likewise, state witnesses testified, without objection, that Esty had told them, after the murder, that the victim had been pregnant and that he could have been responsible (R 691, 705). It was Esty himself who stated, on cross-examination, that he had in fact had sex with the victim in November of 1991; no objection was interposed by defense counsel (R 1244). Likewise, again without objection, Esty confirmed that he had told others that he could have been the father of the victim's unborn child (R 1248-9). As noted in the Initial Brief, Esty testified on cross-examination that he had not believed that having sex with the fifteen year-old victim had been against the law (R 1263); no objection was interposed in regard to this testimony. Esty did concede, however, that if Ms. Ramsey had been pregnant by him, he would have been in trouble (R 1265-6). In closing argument, the prosecutor made reference to the fact that Esty had had sex with the victim five weeks prior to the murder (R 1373), but no reference was made to whether such act had constituted a crime, and no reference was made to Lusane's testimony concerning appellant's statement to him.

Given what did, and did not, occur at trial, appellant's point on appeal is rather difficult to grasp. Although the court below plainly granted the state leave to introduce evidence concerning the fact that Esty had had sex with the victim four to five weeks prior to her murder, it would not appear that the state actually introduced such evidence in its case-in-chief. As best as can be determined, it would appear that this evidence was not elicited until Esty himself mentioned it on cross-examination (R 1244). As noted, no contemporaneous objection was interposed in regard to this testimony. Although there had been a prior limine motion, caselaw clearly provides that this claim of error has been waived, in the absence of subsequent and contemporaneous objection. See, e.g., Lawrence v. State, 614 So.2d 1092, 1094 (Fla. 1993); Maharaj v. State, 597 So.2d 786, 690 (Fla. 1992); Correll v. State, 523 So.2d 562, 566 (Fla. 1988).

Assuming that this court disagrees, error has nevertheless not been demonstrated. The fact that Esty had had sex with the victim in late November is relevant, because, inasmuch as she was four weeks pregnant when murdered (R 805), Esty could have been the father, as he himself admitted. The fact of paternity, as well as Esty's hostile feelings toward the victim, provided him with a motive for the murder. As this court observed in Craig v. State, 510 So.2d 857, 863 (Fla. 1987), evidence of motive should not be kept from the jury merely because it may reveal commission of crimes not charged. In this case, it is not necessary to utilize the full extent of the Craig holding, in that, contrary to the representations in the Initial Brief, the jury in this case had no basis to believe that this sexual activity

constituted a crime; all that this jury heard was Esty's statement that he did not believe that any crime had been committed, such statement uncontradicted by either evidence or argument by the state (R 1262-5). Error has not been demonstrated, cf. Maharaj, supra (evidence concerning victim's accusations against defendant relevant to motive and properly admitted), Craig, supra (evidence that defendant stole cattle from victims relevant to show motive for murder), Heiney v. State, 447 So.2d 210 (Fla. 1984) (evidence as to defendant's prior crime relevant as to motive), and appellant's reliance upon Garron v. State, 528 So.2d 353 (Fla. 1988) is misplaced.

Although appellant's claim of error in regard to the admission of Lusane's testimony is apparently preserved for review, reversible error has similarly not been demonstrated. The state proceeded against Esty under a theory of premeditated murder. Esty's statement to Lusane, several months before the murder, definitely indicated hostility toward the victim, and it is well-established that evidence from which premeditation can be inferred includes "previous difficulties between the parties." See, e.g., Sireci v. State, 399 So.2d 964, 967 (Fla. 1981). Esty has failed to demonstrate that this statement of his was too remote to be relevant, see, e.g., Webster v. State, 93 So. 300, 141 Fla. 369 (1940), and, in light of this court's prior precedents, this evidence was clearly admissible. See, e.g., King v. State, 436 So.2d 50, 54-5 (Fla. 1993) (evidence that defendant had previously beaten victim twenty-three days prior to murder properly admitted as to premeditation); Herzog v. State, 439 So.2d 1372, 1376-7 (Fla. 1983) (evidence that defendant had

previously threatened victim, tried to induce victim into "fast-draw contest" and that victim had been seen with two black eyes properly admitted as going toward matters other than defendant's bad character); Jackson v. State, 545 So.2d 260, 264 (Fla. 1989) (evidence that defendant physically abused wife prior to murder proper to show motive). This remark of Esty's, even if totally tasteless and hostile, was hardly "a crime", and, even if erroneous, its admission was truly harmless. See, e.g., Lawrence, supra (evidence that defendant "jiggled old women out of their money" improperly admitted, but error harmless as these "few objectionable words" did not become a feature of the trial). No reasonable possibility exists that any error addressed herein contributed to Esty's conviction, see, State v. DiGuilio, 491 So.2d 1129, (Fla. 1986), and the instant conviction should be affirmed in all respects.

ISSUE V

FUNDAMENTAL ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO ADMISSION INTO EVIDENCE OF THE FACT THAT THE VICTIM WAS PREGNANT

In a somewhat related claim, Esty contends that the trial court committed fundamental error, in admitting into evidence the fact that the victim was pregnant. Appellate counsel's usage of the term, "fundamental error", is apparently a concession that, in fact, no contemporaneous objection was interposed below, and that, in fact, no claim of error has been preserved for review. It is likely that the reason trial counsel did not interpose any objection in regard to this matter below was that he understood the relevancy of the evidence at issue. The fact that the victim was pregnant was not introduced for its sensational value, but

rather due to the fact that it was a facet of the crime, and relevant to motive. Fundamental error has not been demonstrated, and the instant conviction should be affirmed in all respects.

The record in this case indicates that defense counsel below did not argue in his motion in limine that the state should be precluded from introducing evidence as to the victim's pregnancy (R 2078-9), and numerous state witnesses testified, without objection, that the victim had been pregnant (R 691, 705, 805, 863); during the defense case itself, Esty himself offered comparable testimony (R 1248-9). Both the state and defense, without highlighting the matter, mentioned Ramsey's pregnancy in closing argument (R 1373, 1395). The only fair reading of the record below is that the learned trial judge was on absolutely no notice that any claim of error could, or would, exist in regard to the admission of evidence concerning the victim's pregnancy.

This court has consistently held that, in order for a claim to be reviewed on appeal, it must have been the specific contention asserted as legal grounds for an objection, motion or exception below. See, e.g., Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982); Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Bertolotti v. State, 565 So.2d 1343, 1345 (Fla. 1990); Occhicone v. State, 570 So.2d 902, 906 (Fla. 1990). The purpose of the contemporaneous objection rule, of course, is to conserve valuable judicial resources and to allow the trial court an opportunity to correct any error at an early stage of the proceedings. See, Clark v. State, 363 So.2d 331, 334-5 (Fla. 1978); Castor v. State, 365 So.2d 701, 703 (Fla. 1978). Due to Esty's failure to object below, this claim is procedurally

barred, and appellant has failed to demonstrate why the contemporaneous objection rule should not apply. See, e.g., Capehart v. State, 583 So.2d 1009, 1013-14 (Fla. 1991) (defendant's failure to object at trial procedurally barred claim in regard to admission of testimony at trial as to personal characteristics of victim; claim of fundamental error rejected).

Assuming that any further argument is necessary, Esty has failed to demonstrate the existence of any error, fundamental or otherwise. The fact that Lauren Ramsey was pregnant was not gratuitously admitted for its sensational value, cf. Vacjek v. State, 477 So.2d 1034 (Fla. 5th DCA 1985), but, rather, due to its relevancy. The evidence below reflected that Lauren Ramsey had been told by her doctor, in mid-December, that she was pregnant (R 803). On Friday, December 20, 1991, Dr. Montgomery told the victim, who was, of course, a minor, that she would tell Ramsey's mother herself if Lauren did not reveal her pregnancy by Monday afternoon (R 804). Dr. Montgomery stated that the victim was very angry with her for being given such a deadline. Apparently, Ms. Ramsey did not tell her mother, and on Sunday, December 22, 1991, the day before the "deadline", disappeared from her grandparents' home; she was last seen at 10:00 p.m. that night, but, when her mother and grandmother went to awaken her the next morning, she was gone (R 824).

The victim and defendant unquestionably had a meeting on the night of December 22, 1991. There was testimony that Ramsey had previously bought a Christmas present for Esty, a "troll" doll, and had wrapped such in Mickey Mouse paper (R 668, 672); in fact, Michelle Primm saw Ms. Ramsey write on the wrapping paper,

"To Sean, Love Lauren" (R 668). After the victim's body was discovered at Langdon Battery, a piece of Mickey Mouse paper, with a notation, "To Sean, Love, Lauren" was found in a bush nearby (R 636, 639). Additionally, a search of the trunk of Esty's vehicle revealed a troll doll lying under a Christmas package, along with two greeting cards from Lauren Ramsey (R 749-750). Further, inter alia, a piece of broken baseball bat, with Esty's palm print upon it, was found at the scene, such weapon consistent with that utilized to bludgeon Ms. Ramsey to death (R 720-1, 619).

The victim's pregnancy linked the victim to the defendant, who admitted to several persons that he could have been responsible, and that such fact could have gotten him into trouble (R 691, 705, 1265-6). The fact that the state did not have direct evidence that Esty was aware of the victim's pregnancy prior to the murder is neither dispositive nor particularly significant. The victim's pregnancy was not a "feature" of the trial, and Esty has failed to demonstrate that its admission into evidence deprived him of fundamental fairness. Cf. Downs v. State, 572 So.2d 895, 900 (Fla. 1990) (fundamental error must rise to level of denial of due process where the interests of justice present a compelling demand for its application). Such showing has not been made sub judice, and the instant conviction should be affirmed in all respects.

ISSUE VI

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO DR. SINHA'S TESTIMONY CONCERNING POPULATION STUDIES

Esty next contends that the trial court committed reversible error in "refusing to require the state's expert on blood identification" to provide a proper predicate for his testimony, under §90.705(2), Fla. Stat. (1991) (Initial Brief at 46). Although citing absolutely no caselaw, appellate counsel insists that "resolution of this issue is simple" (Initial Brief at 47), and, after some discussion of the number of "white Eskimos living in the Bahamas" (Id. at 48), contends that the defense was deprived of a fair opportunity to voir dire or examine this witness. Appellee must respectfully confess that the state finds this issue on appeal rather difficult to follow. In any event, the record does not reflect any basis for reversal in this regard, and the instant conviction should be affirmed in all respects.

The record in this case indicates that, on June 5, 1992, the prosecutor served the defense with an amended discovery response, which included the report of Dr. Sinha of GenTest Laboratory concerning DNA testing on a bloodstain on Esty's coat (R 3916-3925). In this report, the doctor concluded that the blood on Esty's coat was consistent with that of the victim, and that the specific genotype at issue was found in 4.8% of the caucasian population; the report indicated that the population study utilized in determining the frequency with which such match occurred was that set forth in an article in the American Journal of Human Genetics, and, apparently, involved utilization of the

Hardy-Weinberg equilibrium. (R 3925). The defense filed no pretrial motion seeking to exclude this evidence or to prevent Dr. Sinha from testifying.

During the state's case-in-chief, the state initially called Lonnie Ginsberg, a forensic serologist with the FDLE Crime Lab (R 920). Ginsberg testified that he had examined the bloodstain on Esty's coat, and had determined that the stain was blood, which contained a specific enzyme abbreviated as EAP-B (R 929). The expert testified that although Lauren Ramsey's blood contained this enzyme, that of Sean Esty did not (R 929-930). The witness likewise testified that he had examined the bloodstain on Esty's boots, and that such had also contained EAP-B, suggesting that it could have come from Lauren Ramsey, but not Esty (R 933); Esty, of course, had stated that this blood had come from a cut on his hand, which he had suffered during a "boffo" match with Wade Wallace (R 703-4). Ginsberg testified that approximately 40% of the caucasian population had this enzyme in their blood (R 934). The witness testified that the bloodstain from the coat had been sent to a lab in Louisiana for further DNA testing (R 935); Ginsberg testified that DNA testing or polymerase chain reaction analysis, was generally accepted in the scientific and legal community (R 936).

After calling the GenTech biologist who had isolated the DNA strains, the state called Dr. Sinha (R 963). Sinha, a biochemist, was the director and president of GenTech; he testified that he had a Ph.D. in chemistry and had taught at various medical schools in the fields of proteins and DNA (R 963-4). The doctor testified, in great detail, about the DNA

process, and stated that, in his view, the bloodstain on the coat matched Lauren Ramsey's genetic type (R 979). When the prosecutor asked the witness in what frequency of the population such a match would occur, the defense objected, contending that no predicate had been laid (R 979). At the bench, defense counsel stated that the witness had done no population studies personally and that he would be relying upon hearsay, should he testify in regard to such (R 980). The court overruled the objection (R 979-980), and Dr. Sinha testified that, in determining the frequency of a genetic match of this type, he had relied upon population studies published in the Journal of Human Genetics, which he described as "one of the top journals of human genetics published in America, very well established recognized scientific journal." (R 981); he indicated that he was unaware of any publication which contradicted these results (R 981). The witness stated that only 5% of the caucasian race could match the sample supplied, but further stated, after factoring in the EAP-B result, that such statistic would shrink to 2% (R 982-3).

Defense counsel examined the witness extensively as to DNA testing and the usage of population studies (R 988-998). Pressed as to the source of the population studies utilized, the witness stated that the study presented in the Journal of Human Genetics had come from Drs. Erlich and Helmuth, and had been drawn from data in California and Canada, involving some six hundred to seven hundred individuals (R 991-2). He stated that about five hundred and eighty-seven of these individuals had been caucasian (R 992). He stated that if at any time he was uncertain as to the race of the individual involved, he utilized the "ceiling

principle" and chose the group most beneficial to the defendant (R 993-4). Dr. Sinha testified that, if he had utilized statistics for the black or hispanic populations, the frequency of a match would have dropped to either 2.7 or 1.8% (R 998). The defense never subsequently moved to strike the testimony of Dr. Sinha, nor was any contrary expert presented by the defense. These matters were discussed briefly by the state in closing argument (R 1378, 1381-2), and defense counsel, at such time, pointed out to the jury that the witness had not personally performed the population study, upon which he had relied (R 1394).

As in Issue IV, supra, it is, perhaps, instructive to look to what is, and what is not, being asserted on appeal. Appellee does not view the defense objections below, or the actual presentation on appeal, as constituting an attack upon the admissibility, or reliability, of DNA evidence or the population studies utilized in determining the frequency of a genetic match. This type of evidence has consistently been admitted in Florida, see, e.g., Andrews v. State, 533 So.2d 841 (Fla. 5th DCA 1988), cert. denied, 542 So.2d 1332 (Fla. 1989), Martinez v. State, 549 So.2d 694 (Fla. 5th DCA 1989), Robinson v. State, 610 So.2d 1288 (Fla. 1992), and trial counsel below certainly never put the trial court on notice of any such challenge. See Correll, 523 So.2d at 567 (inquiry into reliability of scientific evidence, which is of the same type as has previously been admitted in other cases, only required when opposing party makes timely request, "supported by authorities indicating that there may not be general scientific acceptance of the technique employed.").

Here, defense counsel, through discovery, was on notice for more than a month of Dr. Sinha's test results, as well as the fact that he had utilized population statistics printed in the American Journal of Human Genetics (R 3925). Defense counsel, of course, never sought to preclude the admission of this testimony, nor did he ever specifically attack its reliability at trial.

The basis for trial counsel's objection below was that Dr. Sinha had not personally conducted the population studies which he had utilized, and that his reference to them in his testimony would be "hearsay". This contention is utterly without merit, and, carried to its "logical" extreme, would seem to suggest that only Sir Isaac Newton could testify as to the principles of gravity or that only the Wright brothers could testify as to aerodynamics. It is, of course, well established that the hearsay rule provides no obstacle to expert testimony predicated, at least in part, upon tests, records, data or opinions of others, as long as such information is of a type reasonably relied upon by experts in the field. See, e.g., Bender v. State, 472 So.2d 1370, 1371 (Fla. 3rd DCA 1985); Burnham v. State, 497 So.2d 904, 906 (Fla. 2nd DCA 1986), cert. denied, 504 So.2d 766 (Fla. 1987); Capehart, 583 So.2d at 1012-13 (medical examiner properly allowed to testify as to cause of victim's death, despite fact that witness had not performed autopsy, in that witness relied upon reports which were "of a type reasonably relied upon by experts in the field"); §90.704 Fla. Stat. (1991).

In People v. Contreras, 615 N.E.2d 1261, 1267-8 (Ill. App.2 Dist. 1993), the Illinois appellate court rejected a claim of

error identical to that sub judice. Thus, in such case, the state called a forensic geneticist to testify as to his conclusions concerning a DNA test which he had performed. The witness was prepared to testify that he had utilized two population data bases, as a basis for his statistics, such data bases published in the American Journal of Human Genetics, as well as in another publication. As here, the doctor stated that he had taken the frequencies derived from these data bases and applied the "Hardy-Weinberg equilibrium" to determine the frequency of a match. The defense, as here, argued that the geneticist could not rely upon these data bases because "he had no independent knowledge of the procedures used by the authors upon which he relied." The court held,

> ... in this case, Wahl testified that the information from which he generated his statistics is the type reasonably relied upon by experts in the field of genetics and serology. The fact that Wahl's knowledge regarding the population data bases taken from the studies was limited to what he read in the publications does not invalidate his finding. It is permissible for experts to premise their testimony on information and opinions obtained from the reading of standard publications in their fields (citations omitted). The population data bases which formed the basis for the statistics generated by Wahl were published by the American Association of Blood Banks and the American Journal of Human Genetics, recognized publications in the field.

The court similarly concluded that Contreras' objections as to the statistics simply went toward their weight, and not toward their admissibility. Id.

Assuming that any valid claim of error is presented, a result similar to that in Contreras should obtain. Once given a

chance, Dr. Sinha testified that he had relied upon published literature in the American Journal of Human Genetics, a well-recognized publication in the field and one whose studies had never been attacked (R 981). Esty has done nothing, either on trial or on appeal, to call into question the validity of the statistics or the testimony as to the probability of a match; the Hardy-Weinberg equilibrium, utilized in determining the statistical frequency, has been specifically approved in other DNA cases. See, e.g., Andrews, supra; Martinez, supra. On cross-examination, defense counsel was allowed to fully examine the witness as to the composition of the population base and the consequences of racial misidentification; in all respects, defense counsel failed to demonstrate any fallibility in the data and, in fact, demonstrated that even if data bases regarding non-caucasians had been utilized, the odds of a match would lessen, as opposed to increase (R 990-998). While it might not have been inappropriate for the court to have held a formal voir dire or proffer prior to allowing this testimony, cf. §90.705(2),[3] the state would suggest that such was not mandatory, given, inter alia, the untimeliness of any objection under Correll.

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[3] The state does, however, question the applicability of this statute for at least two reasons. First of all, Dr. Sinha was never formally qualified as an expert, although any such omission in this regard was truly harmless, given the fact that his qualifications are unrefuted in the record. See, Johnston v. State, 497 So.2d 863, 870 (Fla. 1986). Secondly, the state would contend that, in offering the testimony at issue, the witness was not offering an opinion, but rather simply stating a fact, in that the frequency of the genetic match at issue is the type of evidence which could be determined by simply looking to a statistical study set forth in the journal article.

Further, the lack of any formal predicate or voir dire as to the population data base surely constitutes harmless error at best, given the fact that defense counsel, when given the opportunity on cross-examination, was never able to demonstrate any fallibility in the studies at issue, and the record reflects absolutely no basis upon which the trial court could have excluded this testimony, regardless of whenever such request was made. Cf. Steinhorst, 412 So.2d at 338 (restriction of defense counsel's cross-examination of witness harmless error, as desired matters otherwise came before the jury through direct and cross-examination of witness at issue, as well as others); Corbett v. State, 602 So.2d 1240, 1243 (Fla. 1992) (restriction of defense cross-examination harmless error, where desired matters otherwise came before jury); Jones v. State, 360 So.2d 1293, 1298 (Fla. 3rd DCA 1978) (premature admission of defendant's confession harmless error as corpus delicti subsequently established). Finally, even should the admission of Dr. Sinha's entire testimony be regarded as erroneous, any such error was harmless beyond a reasonable doubt under State v. DiGuilio, supra. The important thing about the blood sub judice was not so much that it was consistent with that of Lauren Ramsey, but that it was entirely inconsistent or incompatible, with that of Esty. Through the testimony of the FDLE serologist, the state established that this blood could not have been Esty's, given the presence of the EAP-B enzyme, and Dr. Sinha's testimony in this regard as to further DNA testing was simply icing on the cake. The instant conviction should be affirmed in all respects.

ISSUE VII

APPELLANT HAS FAILED TO DEMONSTRATE THE EXISTENCE OF A DISCOVERY VIOLATION, OR THE INADEQUACY OF ANY HEARING THEREON, IN REGARD TO REBUTTAL WITNESS RODRIGUEZ

Esty next contends that the trial court committed reversible error, in failing to conduct an adequate hearing, under Richardson v. State, 246 So.2d 771 (Fla. 1971), in regard to the state's alleged discovery violation involving rebuttal witness Rodriguez. Appellate counsel concedes that the witness was disclosed to the defense on July 16, 1992 (Initial Brief at 50), which was eight (8) days prior to his testimony, but argues, pursuant to Neimeyer v. State, 378 So.2d 818 (Fla. 2nd DCA 1980), that such "late" disclosure was as bad as no disclosure at all. Appellant maintains that this allegedly tardy disclosure prejudiced the defense, looking to the substance of the expert's testimony[4] and the fact that defense counsel was allegedly unable to effectively cross-examine the state's witness, given the fact that the defense had previously released its own expert witnesses. Appellee would respectfully contend that the record does not support Esty's claims, in that: (1) no discovery violation occurred and (2) to the extent that any late disclosure occurred, sufficient inquiry was had and relief afforded. Judge Jones allowed the defense as much time as they wished to speak with Dr. Rodriguez prior to his testimony (R 1281-3), and no

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[4] This, of course, is irrelevant to the prejudice inquiry under Richardson. See, Smith v. State, 500 So.2d 125, 126 (Fla. 1986).

other reasonable remedy was suggested by the defense below. Reversible error has not been demonstrated.

The record in this case indicates that on July 16, 1992, the state formally listed Dr. William Rodriguez, a forensic anthropologist, as a material witness; the amended discovery response indicates that it was served upon Esty's counsel by hand-delivery (R 3937-3940). Rodriguez was one of seven witnesses added at this time (R 3939). On July 13, 1992, the state had disclosed the existence of Dr. Meek of LSU and, on June 29, 1992, in its reciprocal discovery, the defense had disclosed, "entomologist, name and address to be provided" (R 3930, 3950). As appellant notes in his brief, the time of the victim's death was recognized as a point of controversy early on, and, indeed, at a pretrial hearing on July 9, 1992, there was discussion as to both sides retaining expert entomologists who would testify as to the condition of the fly eggs on the victim's body (R 1942-1955). On July 20, 1992, as voir dire was about to commence, defense counsel formally asked the court for leave to expend $450.00 so that the defense entomologist, Dr. Wells of LSU, could use an electron microscope to study the eggs. The relief was granted, and, at the same time, the defense asked the prosecutor whom he had talked to at LSU, and the assistant state attorney replied, "Lamar Meek." (R 28-30).

On the second day of trial, July 22, 1992, the state called the pathologist, Dr. Everett Havard, and such witness testified as to his conclusions concerning the victim's death (R 852). The witness stated that, at the time of the autopsy, he had noticed the presence of fly eggs around the victim's neck area (R 857).

Dr. Havard estimated that the victim, who had been found on December 24, 1991, had been dead from 24 to 36 hours previously to such time (R 868). Defense counsel cross-examined the witness extensively as to his ability to establish the time of death, and forced Dr. Havard to concede that he was not an entomologist (R 869-879). Just as the witness stepped down, defense counsel stated that he wanted to talk to the next witness, "an out-of-town witness that was added", prior to his testimony (R 879). Upon being informed, however, that the next witness was in fact "the weatherman", counsel withdrew his request, stating, "I thought it was one of the entomologists." (R 879).

During the defense case, Esty called, on July 23, 1992, Dr. Wells of LSU, an entomologist (R 1130). The witness stated that he had studied some of the fly eggs found on the victim's body, and that his conclusion was that it was most likely that the eggs had been deposited on the afternoon of December 23, 1991, suggesting that the victim had not been dead until such time (R 1143); Dr. Wells did concede, however, that his findings were not inconsistent with the victim having been dead at midnight on December 22, 1991 (R 1145-6). Defense counsel's examination of the witness was extremely comprehensive, indicating counsel's familiarity with the subject matter (R 1130-1145, 1146-7). The defense then called Dr. Arnall, a medical examiner from another part of Florida, who disputed Dr. Havard's conclusions as to the time of death (R 1149, 1154); the defense witness concluded that Lauren Ramsey had died between noon December 23 and noon December 24, 1991 (R 1154). Once again, defense counsel's examination of this witness was thorough and comprehensive, touching upon such

matters as lividity, blanching, the rate of decomposition, marbling and autolysis (R 1154-1177). At this point, proceedings recessed for the day (R 1195-7).

The next day, July 24, 1992, the defense presented the testimony of Esty himself, which was extensive (R 1199-1273), and then rested (R 1274). At this point, the state began its rebuttal case and announced that it would call Dr. Meek (R 1274). Defense counsel then complained that the defense was "being inundated with new witnesses", and stated that there had been no opportunity to talk with either Dr. Meek or Dr. Rodriguez, who had apparently come out of the witness room, as opposed to Dr. Meek (R 1275). Judge Jones asked defense counsel if these witnesses had been disclosed and counsel stated that they had been (R 1276); counsel, however, requested an opportunity to speak with the witnesses prior to their testimony (R 1277). After the court agreed, though, defense counsel then changed tactics and claimed, for the first time, that in fact Dr. Rodriguez had not been disclosed, and that the defense would be severely prejudiced should he be allowed to testify (R 1277-8). The court then asked for clarification from both parties as to whether, in fact, the witness had been disclosed, and both the prosecutor and defense co-counsel Roane stated that he had been, on July 16, 1992, eight days previously (R 1278-9); the prosecutor then briefly proffered the witnesses expected testimony (R 1279).

Defense co-counsel Loveless, however, insisted that the witness should not be allowed to testify, and the Judge asked,

> ...Specifically what I need to know is what is the nature and the extent of the prejudice that this testimony would cause? If in order to determine that, you need to talk to this witness, then I'll give you an opportunity to do that (R 1279-1280).

Counsel then proclaimed that, although he could depose the witness, such act would be pointless, because he had released the two defense experts and put them on a plane that morning; Loveless stated that he "wasn't a doctor", and he could not effectively cross-examine the state expert (R 1280). Judge Jones asked, logically, why no prior attempt had been made to determine the nature of Dr. Rodriguez's testimony, given his disclosure on the 16th, and defense counsel claimed that he had never seen the witness's name (R 1280-1). The court reiterated that it would allow the defense an opportunity to speak with both state experts prior to their testimony, even offering to recess the proceedings (R 1281). Counsel Loveless stated, inexplicably, that he had "already talked to Dr. Rodriguez", but continued to complain that he was simply too unknowledgeable to ask him anything else (R 1281); counsel agreed that no further inquiry would be of any value (R 1281-2).

The state then called Dr. Rodriquez, a forensic anthropologist, who, like defense counsel, also turned out not to be a doctor (R 1283, 1323). The witness testified that he disagreed with Dr. Arnell and believed that the victim could have been killed on December 22, 1991 (R 1293-1304); he stated, however, that he had reviewed Dr. Wells' report and he did not view such report as inconsistent with his own opinion (R 1309). Defense counsel Loveless then conducted an extensive cross-

examination of this witness (R 1310-1326). One interesting thing elicited by defense counsel was that Rodriguez had only been approached about testifying on the prior Thursday, the same day that his identity had been disclosed to the defense (R 1312, 3939). After the witness's testimony, a lunch recess was held, during which, apparently, defense counsel talked to Dr. Meek (R 1330). The state, however, elected to rest without calling Dr. Meek (R 1330-3).

As noted, it is appellant's contention that a discovery violation occured and that the court below failed to conduct an adequate inquiry under Richardson. Neither contention can withstand strict scrutiny. Appellant has cited no precedent for the proposition that eight days notice is insufficient when the state adds a witness. See, e.g., Smith v. State, 515 So.2d 182, 183 (Fla. 1987) (state's submission of additional witness list on day of trial not discovery violation, especially where, inter alia, defense afforded opportunity to depose additional witnesses). While the state is, indeed, under a continuing obligation to make "prompt" disclosure of additional witnesses, see Fla.R. Crim.P. 3.220(j), and, in capital cases, days can unquestionably matter, cf. Cooper v. State, 336 So.2d 1133, 1138 (Fla. 1976), Esty has still failed to demonstrate that the time afforded the defense to prepare was inadequate sub judice; on cross-examination of Dr. Rodriguez, defense counsel demonstrated that, in fact, the witness had been disclosed to the defense on the same day that the state announced it would need his services (R 1312). Appellant's reliance upon Neimeyer v. State, in which the state lulled the defense into a false sense of security, by

not advising them that a critical witness was going to change his testimony until the morning of trial itself, is obviously distinguishable. It is clear from this record that the defense was on notice for a considerable period of time that the state would be utilizing an entomologist, although the precise identity of such witness may not have been determined until later. Cf. Cooper, 36 So.2d at 1138 (state's inadvertent failure to list ballistic expert as witness not grounds for relief, where, inter alia, defense on notice that ballistics test performed and "it should have been obvious" that the state would utilize such expert"); Banks v. State, 590 So.2d 465, 467 (Fla. 1st DCA 1991) (no discovery violation where defense "implicitly on notice" as to allegedly undisclosed witness). Given the fact that defense counsel Roane conceded that the defense had been aware of this witness since July 16th (R 1278-9), the only fair reading of the record below is that the trial court, entirely properly, found no discovery violation. See, e.g., Heath v. State, 594 So.2d 332, 333 (Fla. 4th DCA 1992) (even though trial court did not "incant the words, 'I find no discovery violation requiring further inquiry'", such was "unavoidably the substance of what he did conclude.").

Despite this finding, cf. Justus v. State, 438 So.2d 358, 365 (Fla. 1983), Judge Jones, did, indeed, afford Esty a hearing, consistent with Richardson, in which to inquire into and resolve this matter; rather than censure, the judge deserves credit for the tolerance and patience with which he endured the antics of defense counsel below. It is, of course, well-established that a court's failure to formally call an inquiry a "Richardson"

hearing, or to make formal findings concerning each of the pertinent Richardson criteria, is not a basis for reversal. See, Wilkerson v. State, 461 So.2d 1376, 1379 (Fla. 1st DCA 1985); Baker v. State, 438 So.2d 905, 9906 (Fla. 2nd DCA 1983), cert. denied, 447 So.2d 885 (Fla. 1984); Ansley v. State, 302 So.2d 797, 798 (Fla. 1st DCA 1974). In this case, the court fully inquired into the facts and circumstances of the alleged violation and specifically pressed the defense as to the existence of any prejudice and their desired remedy, cf. State v. Hall, 509 So.2d 1093, 1097 (Fla. 1987); Wilder v. State, 587 So.2d 543, 548-9 (Fla. 1st DCA 1991); defense counsel below never requested a continuance. The only "prejudice" in this case was self-inflicted by the defense itself. Defense counsel had been on actual notice for days that the state would call either Dr. Meek or Dr. Rodriguez as rebuttal witnesses, and the fact that the defense chose to release their own experts prior to such time cannot be laid at the state's doorstep. See, Wilkerson, supra (witness should not have been excluded, where prejudice to other side was self-inflicted).

Further, Judge Jones was entitled to be more than a little skeptical of defense counsel's protestations of ineptitude, given the fact that, the previous day, this same attorney had extensively examined the defense's own expert entomologist and pathologist, and, at such time, elicited relevant testimony on all the matters considered important to the defense; of course, counsel's actual cross-examination of Dr. Rodriguez likewise belied his claim of incompetence. The judge's offer to recess the proceedings to allow defense counsel further opportunity to

depose the witnesses was more then reasonable, and sufficient to cure any prejudice. See, e.g., Wilder, supra (where trial court afforded defense opportunity to talk to witness prior to testimony, such offer declined by defense counsel, remedy sufficient to cure any prejudice); Sireci, 399 So.2d at 968-9 (no further relief warranted in regard to alleged discovery violation, where defense given an opportunity to speak with witness prior to testimony); Zeigler v. State, 402 So.2d 365, 372 (Fla. 1981) (breach of discovery sufficiently remedied by allowing defense to speak with witness prior to testimony). Absolutely no error has been demonstrated sub judice, and the instant conviction should be affirmed in all respects.

ISSUE VIII

APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR IN REGARD TO THE PROSECUTOR'S CLOSING ARGUMENT AT THE GUILT PHASE

As his next issue, Esty contends that he is entitled to a new trial, due to improper prosecutorial argument at the guilt phase. The record in this case reflects that, in his initial closing argument, the prosecutor discussed such matters as Esty's considerable weapon collection, as well as the brutality with which the crime was committed (R 1373-5). In the defense closing argument, Esty's counsel ridiculed the prosecutor for this former reference, claiming that the assistant state attorney was "getting onto" the defendant, and, referring to Esty sarcastically, stated, "He plays Dungeons and Dragons. He collects weapons. He did it.... Whooo, he's a bad guy." (R 1395). In his rebuttal, the prosecutor described Esty as a

"dangerous, vicious, cold-blooded murderer", whom the police, prosecutors and judges could not protect us from (R 1407-8). The defense immediately objected, and such objection was sustained (R 1408). Defense counsel's motion for a mistrial was denied, although the court immediately instructed the jury to disregard the prosecutor's last remark, stating, "You shall not consider that in any way whatsoever in your deliberations." (R 1408-9). On appeal, Esty contends that this curative instruction was ineffective, and that a mistrial should have been granted.

It is, of course, well-recognized that a motion for mistrial is addressed to the sound discretion of the trial court, and that a court's ruling thereupon will not be overturned on appeal, unless a clear abuse of discretion is shown. See, e.g., Durocher v. State, 596 So.2d 997, 1000 (Fla. 1992); Davis v. State, 461 So.2d 67, 70 (Fla. 1984). A mistrial, of course, is only appropriate where the error committed is so prejudicial as to vitiate the entire trial, see, Duest v. State, 462 So.2d 446, 448 (Fla. 1985), Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982), and prosecutorial error alone cannot warrant automatic reversal of a conviction, unless the error involved is so basic to a fair trial that such can never be treated as harmless. See, State v. Murray, 443 So.2d 955, 956 (Fla. 1984). As this court has recognized, the trial judge is in the best position to monitor the conduct of the attorneys in his presence, see, Jackson v. State, 498 So.2d 406, 411 (Fla. 1986), and presumably, likewise in the best position to appreciate the consequences of any misstatement. See, James v. State, 334 So.2d 83, 84 (Fla. 3rd DCA 1976) (trial judge, "who is in a position of experience and

intimacy with the case which cannot be duplicated by any other tribunal", determines whether the jury would be so prejudiced by a remark as to render their subsequent verdict unreliable). Further, although this court understandably held in Geralds v. State, 601 So.2d 1157 (Fla. 1992), that a curative instruction could not remedy the prejudice caused by the prosecutor's improper reference to previously-excluded evidence concerning the defendant's criminal record, this court, in other cases, has recognized the ameliorative effect of such instruction. See, e.g., Buenoano v. State, 527 So.2d 194, 198 (Fla. 1988) (curative instruction sufficient to dissipate any prejudice caused by improper reference to uncharged criminal conduct on part of defendant); Mason v. State, 438 So.2d 374, 377-8 (Fla. 1983) (mistrial not required in regard to prosecutor's comment during closing argument at guilt phase, to the effect that if defendant were turned loose, he would do what he had done previously, where court sustained objection and instructed jury to disregard comment; "While such instruction alone does not eliminate fundamental error, it is further evidence that the relatively immaterial comment did not require a reversal.").

Appellee would respectfully contend that this case should be resolved in accordance with Mason. The fact that the prosecutor described Esty as a cold-blooded killer, who had committed a vicious crime, was to a large extent simply forceful advocacy on his part, and, even if erroneous, hardly so tainted the proceedings that no fair verdict could result. See, e.g., Darden v. State, 329 So.2d 287 (Fla. 1976) (prosecutor's reference to defendant as "animal" who belonged on leash insufficient to merit

relief); Breedlove v. State, 413 So.2d 1, 8, n.10 (Fla. 1982) (description of murder as "savage, brutal and vicious and animalistic attack" no basis for relief); Craig, 510 So.2d at 865 (prosecutor's repeated reference to defendant as liar did not exceed bounds of permissible argument); Biondo v. State, 533 So.2d 910, 911 (Fla. 2nd DCA 1988) (prosecutor's reference to defendant as "slime" improper, but not sufficiently egregious to warrant mistrial); Holton v. State, 573 So.2d 284, 288-9 (Fla. 1990) (prosecutor's reference to defendant's "twisted mind" slightly exceeded bounds for fair comment but, at most, "warranted a mild rebuke from the trial court"). As this court observed in Darden, when a crime is truly heinous, it is difficult to use language which is a fair comment, without shocking the feelings of a normal person. Darden, 329 So.2d at 290. Here, appellant murdered his fifteen-year old pregnant girlfriend by stabbing her with a butcher knife, slashing her with a machete and pulverizing her skull with a baseball bat. Anyone capable of these acts would seem to fit the description of "vicious" and "cold-blooded".

The objectionable portion of the prosecutor's remarks, presumably, relates to his description of Esty as "dangerous", and the implication that society could not be protected from him; this latter "theme" was, of course, not fully developed, given the defense objection and the court's immediate curative instruction. To the extent that this remark was improper, it surely did not so taint the proceedings below that no fair verdict could be returned. The evidence against Esty was far more compelling than opposing counsel admits, and the comment at

issue played no part in the jury's decision to reject the implausible defense asserted on appellant's behalf. While the state's case against Esty was circumstantial, in the sense that there was no eyewitness to the murder or subsequent inculpatory confession, the evidence was, nevertheless, both damning and chilling.

Esty's palm print was found on the broken bat which had been used to bludgeon Lauren Ramsey to death (R 713-14). Although, at trial, Esty testified that he had disposed of the bat prior to the murder (R 1228-9), he had previously told one of his friends, who testified for the state, that he had only disposed of the bat after he had become a suspect in the case (R 691). Esty's car contained a receipt for the purchase of a butcher knife, in all respects identical to one of the murder weapons; such knife was purchased at 10:16 p.m. on the night of the murder (R 747). Esty never explained this fact. A machete was found at the scene, consistent with one utilized in the murder; Esty claimed to have previously "lost" his machete at the battery, while clearing brush for a "boffo match" (R 757, 657-9, 1261-2). It was uncontroverted that the victim bought a troll doll as a Christmas gift for the defendant, and that she wrapped it in Mickey Mouse paper and wrote, "To Sean, Love, Lauren" upon it; an identical troll doll was found hidden in the trunk of Esty's car, which likewise had bloodstains both inside and outside, and the torn wrapping paper was found at the scene. Esty is known to have changed clothes on the night of the murder, and bloodstains were found on his trench coat and combat boots. While Esty maintained that this represented his blood, from a laceration on the back of

his hand, this was proven to be scientifically impossible, given the presence of an enzyme which Esty's blood does not possess. Esty, of course, had previously had a romantic and sexual relationship with the victim, which apparently soured, and, in all likelihood, he was not ecstatic about the possibility that he was the father of her unborn child, whose existence had not yet been made known to Ramsey's mother; Lauren Ramsey was murdered on the eve of the "disclosure deadline" given to her by her doctor, and Esty specifically testified that he knew he would be "in trouble" if it turned out that he was father of that child (R 1265-6).

In short, the instant verdict of guilt was based upon fact and evidence, and not upon inflamed passion. This court, and others, have previously determined that remarks comparable to those sub judice do not require the granting of a mistrial or deprive a defendant of fundamental fairness. See, Mason, supra (prosecutor's suggestion that defendant would "do the same thing" if "let loose" insufficient to merit mistrial); Burr v. State, 466 So.2d 1051, 1053-4 (Fla. 1985) (prosecutor's remark that there were people in the case who were "scared" and that defendant "executed" people not so inflammatory as to merit mistrial); Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (same case as Darden v. State, supra; United State Supreme Court finds no basis for relief in prosecutor's argument that death penalty was "only way" to ensure that the defendant would not get out and kill again). Appellant's reliance upon Garron v. State, supra, is misplaced, in that, inter alia, it is not presumed that jurors are led

astray by the impassioned eloquence of counsel, see, Blair v. Stone, 406 So.2d 1103, 1107 (Fla. 1981), and, under the particular facts and circumstances of this case, it cannot be said that the remarks at issue might have influenced the jury to reach a more severe verdict of guilt than they would have otherwise. See, Breedlove, supra. While the judge did not affirmatively rebuke the prosecutor before the jury, as appellant apparently would have preferred (Initial Brief at 60), the giving of an immediate curative instruction surely conveyed to the jury that the matters at issue should play no part in their deliberations. There is no reasonable reason to believe that the jury disregarded this instruction, and reversible error has not been demonstrated. The instant conviction should be affirmed in all respects.

ISSUE IX

FUNDAMENTAL ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO THE TRIAL COURT'S USAGE OF THE STANDARD JURY INSTRUCTION ON REASONABLE DOUBT

As his final attack upon his conviction of first-degree murder, appellant contends that the trial court erred in utilizing the standard jury instruction on reasonable doubt. Citing to, inter alia, Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), Esty's appellate counsel attacks the instruction sub judice, specifically as to its usage of the term, "abiding conviction." It is the state's position, however, that no viable claim of error has been preserved for appeal, in that such objection as was interposed below was completely unspecific, and the instant legal arguments were never presented to the trial court in any meaningful fashion. Should preservation be found,

it is clear that Cage is distinguishable from Florida's standard jury instruction, as courts have previously found, and that Esty is entitled to no relief as to this claim.

The record in this case indicates that, although the trial court specifically advised counsel for both sides to submit any special jury instructions in advance, and, presumably, in writing (R 913-14), the defense submitted no proposed instruction on reasonable doubt. Rather, during the charge conference, defense counsel stated that he felt compelled to object to the first two sentences of the standard jury instruction on reasonable doubt, as not setting forth a correct statement of the law (R 1341-2). Counsel prefaced this "objection" by stating, however, that he had "no authority for this", and, indeed, later apologized to the court for not being able to provide any legal authority for his position (R 1341-2). The objection was overruled (R 1342). Immediately prior to the actual instructions, defense counsel stated that the basis for his prior objection had been in the instruction's usage of the terms "possible, speculative, imaginary or forced doubt", which he found to be "totally inappropriate" (R 1410-11). The court then delivered the standard jury instruction on reasonable doubt, and, at defense counsel's request, additionally instructed the jury on circumstantial evidence (R 1417-1420).

As noted above, it is the state's position that no claim of error, or, most certainly, not that claim of error now advanced, has been preserved for appeal. Courts have held that when a party requests an instruction which is not part of the standard instructions, such request must be submitted in writing in order

to preserve the issue. See, Pittman v. State, 440 So.2d 657, 659 (Fla. 1st DCA 1983); Watkins v. State, 519 So.2d 760, 761 (Fla. 1st DCA 1988); Fla.R.Crim.P. 3.390(c). This is surely a reasonable requirement, in that the alternative is what occurred sub judice. While it is apparent that trial counsel disliked the standard jury instruction on reasonable doubt, the basis for his "objection" remains a complete mystery, as does any remedy which the trial court was to fashion. This claim is waived.

Further, just as reasonable doubt is not a "speculative or imaginary one", a contemporaneous objection sufficient to preserve an issue for appeal is not a generalized or amorphous one. As this court observed in Castor v. State, supra, an objection must be specific enough to both apprise the trial court of the putative error and to preserve the issue for intelligent review on appeal; this court observed that an objection must be explicit enough to direct the attention of the trial judge to the purported error in a way which allows him or her to respond in a timely fashion. In this case, all that Judge Jones learned, belatedly, at the charge conference was that defense counsel did not think that portions of the standard instruction were correct, and that he had absolutely no legal authority to support his position.[5] This type of "knowledge" is not worth having. This claim is waived. See, e.g., Kujawa v. State, 405 So.2d 251, 252 n.3 (Fla. 3rd DCA 1981) (objection that jury instruction "violated the defendant's constitutional right" too generalized

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[5] As in Claim II, supra, defense counsel's inability to cite any precedent for his position does not bode well for this point on appeal. Cf. Lucas, supra.

to preserve claim of error, as trial court "not expected to guess which phrase, clause, or amendment of the Constitution is offended"); Courson v. State, 414 So.2d 207, 209-210 (Fla. 3rd DCA 1982) (in order to preserve for appellate review an objection to the giving or the failure to give a jury instruction, a defendant must state distinctly the matter to which he objects and the grounds for his objection); Wenzel v. State, 459 So.2d 1086 (Fla. 2nd DCA 1984).

To the extent that it is contended that trial counsel's subsequent statement of "grounds", immediately prior to the jury charge, cured the omission below, such argument would be unavailing. From trial counsel's later statement, all the court could determine was that, for reasons best known to himself, defense counsel found usage of the terms, "possible, speculative, imaginary or forced doubt", totally inappropriate (R 1410-11). In this court, Esty's appellate counsel reserves his ire for the term, "abiding conviction of guilt" (Initial Brief at 68). It is beyond dispute that a defendant cannot object to a matter on one ground in the trial court, and on another on appeal. See, Rodriguez v. State, 679 So.2d 493, 499 (Fla. 1992); Occhicone v. State, 570 So.2d at 905-6. Because the specific legal argument now asserted on appeal was never raised below, this claim is procedurally barred. See, Occhicone, supra; Bertolotti, supra; Steinhorst, supra.

To the extent that any further argument is necessary, the state would simply observe that this court has consistently upheld this jury instruction against constitutional challenge. See, e.g., Brown v. State, 565 So.2d 304, 307 (Fla. 1990);

Gaskin, 591 So.2d at 920. Further, in Woods v. State, 596 So.2d 156, 157-8 (Fla. 4th DCA), cert. denied, 599 So.2d 1281 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct. 256, 121 L.Ed.2d 188 (1992), the Fourth District specifically rejected any contention that Cage invalidated Florida's standard jury instruction on reasonable doubt. The court noted, entirely correctly, that the instruction at bar is not susceptible to interpretation by a reasonable juror as authorizing conviction by a degree of proof below that mandated by due process; Florida's instruction does not use such terms as "grave uncertainty" or "moral certainty", both of which the United States Supreme Court found objectionable. Assuming that any viable point on appeal has been presented, reversible error has not been demonstrated, and the instant conviction of first-degree murder should be affirmed in all respects.

ISSUE X

THE SENTENCER'S FINDING OF THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS NOT ERROR

In sentencing Esty to death, Judge Jones found two (2) aggravating circumstances - that the homicide had been especially heinous, atrocious or cruel, under §921.141(5)(h), Fla.Stat., (1991), and that the homicide had been committed in a cold, calculated and premeditated manner, under §921.141(5)(i), Fla. Stat., (1991); in mitigation, the judge found that Esty had no significant criminal history, pursuant to §921.141(6)(a), Fla. Stat., (1991). On appeal, appellant wisely does not challenge the first aggravating circumstance, but contends that the trial court erred in finding that relating to heightened premeditation,

in that the killing sub judice allegedly occured "during an emotional frenzy" (Initial Brief at 73). In seeking reversal of this aggravating factor, Esty Primmarily relies upon Cannady v. State, 620 So.2d 165 (Fla. 1993), Maulden v. State, 617 So.2d 298 (Fla. 1993), Santos v. State, 591 So.2d 160 (Fla. 1991) and Douglas v. State, 575 So.2d 165 (Fla. 1991). These cases are clearly distinguishable, in that, inter alia, this case is notable for the absence of passion, rather its ascendancy. This aggravating circumstance was properly found, and the instant sentence of death should be affirmed in all respects.

In his sentencing order, Judge Jones set forth the factual basis for his finding (R 2378-9). Thus, the sentencer noted that the murder was committed "in a secluded area with which the Defendant was personally familiar and where he felt safe." (R 2378). The court found heightened premeditation, in the fact that Esty had changed his clothes before meeting with the victim, had purchased the butcher knife at Albertson's, and had brought the baseball bat and machete with him (R 2378). The court likewise noted the precision of Esty's plan, and the thorough and methodical manner in which the murder was effected, concluding,

> The Court finds that the instant crime was a vicious scheme in its origin, operation and execution and was a cold, calculated plan, ruthlessly and mercilessly devised and executed by an exceptionally intelligent individual, to kill Lauren Ramsey. This is precisely the kind of heightened premeditation and cold calculation that would permit this factor be to a part of the weighing process (R 2379).

Appellant has failed to demonstrate any error in these findings.

On appeal, Esty initially complains that there is no evidence that the victim was actually killed at Langdon Battery, where she was found (Initial Brief at 69). This argument is frivolous. While it is true that there were no footprints or bloodstains actually found at the scene, such omission can be explained by the fact that it had rained prior to the discovery of the body (R 884). In determining the applicability of an aggravating factor, a trial court may apply a "common-sense inference from the circumstances." See, Gilliam v. State, 582 So.2d 610, 612 (Fla. 1991). It would defy all common sense to suggest that Lauren Ramsey was killed anywhere other than where she was found. Not only was her body found at Fort Pickens, but so was an extensive amount of physical evidence - her wristwatch, her eyeglass frames, one of the lenses from the frames, a hair barette, the piece of Christmas wrapping paper, the butcher knife, the machete and the broken baseball bat. These items were not conveniently stashed in a pile, but were strewn all around the battery area, some so well hidden in the bushes or undergrowth that they were not found until weeks after the murder. Sean Esty testified that he had been to Langdon Battery in the past and that one could "barely see" the road from the battery (R 1268-9); although the battery is located in a national park, one would not expect such area to be greatly populated between 10:00 p.m. and midnight on a December Sunday night, the most logical time for this murder to have occurred. The trial court was correct in considering the fact that this murder occurred in a secluded location, with which Esty was familiar, as part of the evidence supporting this aggravating

factor. See, Huff v. State, 495 So.2d 145, 153 (Fla. 1986) (cold, calculated and premeditated aggravating factor properly found, in case where defendant murdered his parents, where, inter alia, murders "committed in a wooded and secluded area with which the appellant was personally familiar and where the appellant felt safe."); Koon v. State, 513 So.2d 1253 (Fla. 1987); Stano v. State, 460 So.2d 890 (Fla. 1984).

Appellant next attacks the trial judge's reliance upon the fact that Esty brought the baseball bat and machete to the scene, and specifically purchased the butcher knife immediately prior to the murder stating that, "merely procuring a weapon does not mean this aggravating factor applies." (Initial Brief at 70). This court, of course, has consistently held that this aggravating circumstance can be shown by such factors as "advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course." See, e.g., Trepal v. State, 621 So.2d 1361, 1367 (Fla. 1993); Cruse v. State, 588 So.2d 983, 992 (Fla. 1991); Swafford v. State, 533 So.2d 270, 277 (Fla. 1988); Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984). While, apparently, Sean Esty had a penchant for riding around in a vehicle containing machetes and baseball bats, his purchase of the butcher knife was obviously in furtherance of an objective already well-planned. See, Eutzy, supra; Cruse, supra. Further, Esty's change of wardrobe on the night of the murder, however "ritualistic" one might choose to describe it, was also part of this plan; a long black trenchcoat would obviously protect Esty's clothes from bloodstains, and black combat boots would tend to show such blood less readily than

white tennis shoes. The judge did not err in considering these factors.

Further, the judge's conclusion, that this was a thorough and methodical killing, is fairly supported by the record, and appellant's contrary representation - that the murder occurred during an "emotional frenzy" - is sheer fantasy. There is nothing in this record to suggest that Sean Esty was anything less than calm, cool and collected throughout the night of this murder. Lisa Bolton, who was in his company both before and after the crime, never noticed any excess emotion on his part (R 696-706). Esty's mother, who testified at the penalty phase, stated that appellant had not been acting unusually in December, prior to the victim's murder (R 1482), and one defense witness specifically described appellant as "very calm" (R 1493). If Esty truly was a volcano of erupting passions, one might expect those who came into contact with him most frequently to have noticed this fact. The only "basis" for appellant's argument is that, during the penalty phase, the defense expert stated that some of his test results indicated "emotional immaturity" on Esty's part (R 1455); this testimony will be discussed in more detail in Issue XI, infra. Dr. Larson stated that someone with this immaturity, or underlying insecurity, would "handle" such by "clowning around" or "being theatrical" (R 1455). Appellee sees a world of difference between "clowning around" and bashing someone's head in with a baseball bat. The cases upon which appellant relies on appeal - Cannady, Maulden, Santos and Douglas - all contain uncontroverted evidence of emotional distress or disturbance on the part of the defendant, usually the

result of an ongoing passionate dispute with the victim at the time that the murder occured. In the case sub judice, there has not been a scintilla of evidence to support any such assertion, and Esty's arguments in this vein are totally unfounded.

Furthermore, the fact that the victim and defendant might once have had a romantic or sexual relationship does not mean that this aggravating circumstance is forever barred, especially where, as here, the murder did not occur during a time of emotional upheaval. See, e.g., DeAngelo v. State, 616 So.2d 440, 442 (Fla. 1993) (fact that defendant's motive might have been "grounded in passion" did not preclude finding of CCP aggravating factor, where crime itself contemplated well in advance). This court has affirmed the finding of this aggravating circumstance in cases much more "passionate" than this. See, e.g., Arbelaez v. State, 18 Fla.L.Weekly S500 (Fla. September 23, 1993) (aggravating circumstance properly found where defendant murdered child of woman who had spurned his romantic overtures; murder occurred as part of cold, calculated plan for revenge); Klokoc v. State, 589 So.2d 219 (Fla. 1991) (father's murder of daughter to "get back at" ex-wife properly found to be cold and calculated); Porter v. State, 564 So.2d 1060 (Fla. 1990) (defendant's murder of former lover and new boyfriend properly found to be result of heightened premeditation); Turner v. State, 530 So.2d 45 (Fla. 1987) (defendant's murder of woman whom he believed had destroyed his family cold and calculated, even if based upon delusion). Additionally, there is nothing about the actual manner in which the killing occurred which would suggest the existence of blind rage, cf. Mitchell v. State, 527 So.2d 179 (Fla. 1988) (victim

stabbed one hundred and ten (110) times), and this court has previously found the existence of heightened premeditation in the fact, inter alia, that the defendant used multiple weapons. See Davis v. State, 586 So.2d 1038, 1040 (Fla. 1991) (use of butcher knife, and then second knife, to continue brutal slaying, supported finding of CCP). No error has been demonstrated in the sentencer's finding of this aggravating circumstance. See, e.g., Huff, supra; Cruse, supra; Eutzy, supra; DeAngelo, supra. The instant sentence of death should be affirmed in all respects.

ISSUE XI

THE SENTENCING JUDGE'S OVERRIDE OF THE JURY'S RECOMMENDATION OF LIFE WAS NOT ERROR

Appellant next attacks, under Tedder v. State, 322 So.2d 908 (Fla. 1975), Judge Jones' override of the jury's recommendation of life. Appellant concedes that, except for the conclusion, the court's sentencing order "could serve as a model", given its full consideration of all the mitigating evidence proffered by Esty (Initial Brief at 81); appellant suggests, however, that the trial court's rejection of some of the non-statutory mitigation was "mean" (Initial Brief at 82). The state would respectfully contend that neither the record below nor the Initial Brief reveal any reasonable basis upon which the jury in this case could have relied to recommend life; apparently, the most that opposing counsel can come up with is the following:

> Is Sean Esty an Albert Einstein, Isaac Newton or Robert Oppenheimer? Is he a Norman Schwarzkopf or Douglas MacArthur in embryo? A Mother Teresa or Sam Walton? Probably not. (Initial Brief at 80).

These questions, while undoubtedly thought-provoking, do not provide the answer to the critical inquiry before this court. Because this crime was truly beyond the norm of capital felonies, and because the defense below totally failed to provide any reasonable basis for a jury recommendation of life, the facts suggesting a sentence of death are so clear and convincing that no reasonable person could differ. Cf. Williams v. State, 622 So.2d 456, 464 (Fla. 1993); Zeigler v. State, 580 So.2d 127, 131 (Fla. 1991). Accordingly, the instant sentence of death should be affirmed in all respects.

At the penalty phase below, the defense presented ten (10) witnesses (R 1448-1527). Some of these witnesses - appellant's former baby-sitter (R 1484-9), the person who gave Esty his first haircut (R 1489-1492), and a priest who had only come into contact with him after he was incarcerated (R 1520-7) - obviously had little of any relevancy to offer, and their testimony could only have simply engendered sympathy for the defendant. Other witnesses, such as the mother of Esty's current girlfriend and two of his young female friends (R 1494-1509), offer what may be characterized as general "good boy" testimony, which, while not totally irrelevant, offered nothing substantial in the way of ameliorating Esty's guilt. The remaining witnesses - Esty's teacher, Esty's mother and a mental health expert - are the type of witnesses who could have provided a reasonable basis for the jury's recommendation, but who, in this case, did not. Esty's teacher, Brenda Coates, who, no doubt coincidentally, was also the wife of the Episcopal priest who visited Esty in prison, testified that appellant had been in a

number of her math classes, and that she liked him (R 1510-13, 1517); she, however, was not familiar enough with his situation to explain why he had been expelled from the International Baccalaureate Program (R 1513)[6]. Esty's mother testified that appellant was a "very loving child", but that he had been hurt by his parents' divorce when he was ten (R 1478, 1473); she stated that appellant's father had a drinking problem, and that, as a result, appellant tended to avoid alcohol and those who imbibed, such vows, to her knowledge, ones which he had kept (R 1474-5). She also testified that appellant had been very close to his grandmother, who had died in 1987 (R 1479-1480). In her view, appellant was "incapable of violence", and she stated that he had not behaved unusually around the time of the murder (R 1482-3).

Dr. Larson, the defense expert, began his testimony by stating that his tests had indicated no mental illness on Esty's part, and that, in his view, none of the statutory mitigating circumstances applied (R 1452, 1456-7). The most that the doctor could say was that the results of the MMPI were consistent with a "mild personality syndrome", and that persons who scored comparably to Esty often engaged in "theatrical" activities, such as "clowning around" (R 1455); contrary to any allegations in the Initial Brief (Initial Brief at 81, 86), Dr. Larson never specifically testified that Esty had, in fact, ever been under stress in his life. Dr. Larson, also, confirmed that Esty had a genius-level I.Q. of between 123 and 143 (R 1453-4). The expert

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6 According to the presentence investigation report, Esty was terminated from the program due to insolency and his disregard for authority (R 2231).

specifically identified Esty's high I.Q. as a non-statutory mitigating circumstance, and additionally so identified his lack of criminal record and "good rehabilitation potential" (R 1457-8). Dr. Larson had met with Esty once for four hours (R 1466). In his closing argument to the jury, defense counsel suggested that a life sentence was appropriate, given Esty's age, lack of criminal record, exceptional intellectual ability, "strong potential for rehabilitation", and the fact that he had "caring family and friends" (R 1566-9). Counsel concluded his argument with the following,

> Your job is to follow the law and I suggest to you that if you find that the law requires you to tell the Judge that the State of Florida ought to kill Sean Esty then maybe we need another law because if the State of Florida has to kill him, I suggest to you we've got real problems. (R 1569-1570).

The jury was out less than fifty minutes before returning a life recommendation (R 1575-1576).

As noted, Judge Jones found one statutory mitigating circumstance - that relating to Esty's lack of a significant criminal history (R 2380); the judge's rejection of the statutory mitigating circumstance relating to age is discussed in detail in Issue XII, infra. As conceded by appellant (Initial Brief at 81), the judge's order, in all material respects, complies with such precedents of this court as Campbell v. State, 571 So.2d 415 (Fla. 1990), in that it contains detailed discussion of all of the nonstatutory mitigation urged by Esty below (R 2383-2395). The court found that Esty's "less than ideal family situation", i.e., the divorce of his parents and the death of his grandmother, did not constitute relevant mitigation, in that the

defense expert had never identified such matters as playing any part in his "diagnosis" of appellant, such diagnosis, of course, of minimal impact itself (R 2384-5); the court likewise noted that, despite these family problems, appellant had been able to flourish in a challenging and advanced academic environment, maintain a job, enroll in college, form many friendships, and, further, that "his family gives him emotional support." (R 2385). The court found that Esty's alleged "good employment history" was not supported by the record, in that no direct evidence had been presented in that regard, and similarly rejected the contention that Esty had a "potential for rehabilitation" (R 2385-2386, 2391-2392).

Judge Jones found that, even if established by the evidence, the general "good character" evidence offered in Esty's behalf would only be entitled to slight weight, in that such did not reveal "any penchant for charity or generosity to others or exemplary behavior which exceeds the bounds society expects of any good citizen or above what would be expected for a typical, normal young man" (R 2390); a similar conclusion was reached in regard to Esty's school and civic accomplishments, which were submitted to the judge in documentary form (R 2393-2395). Judge Jones found that Esty's superior knowledge and IQ, a matter which was supported by the record, did not constitute mitigation, in that such tended to reinforce appellant's "responsibility for his awareness and understanding of the nature and consequences of his actions." (R 2390-2391). The court found that override of the jury's recommendation was proper, and appropriate, in that such recommendation, "unless resulting from sympathy", "could have

been based only on minor, mitigating circumstances and was without any reasonable basis in the record." (R 2395).

The judge's conclusion was correct, and should be affirmed. The fact that Esty had no significant criminal history - the only matter demonstrated below whose mitigating value was unquestioned - does not render the instant life recommendation reasonable. This court has explicitly held that even the presence of valid mitigation does not absolutely preclude a jury override. See Pentecost v. State, 545 So.2d 861, 863, n.3 (Fla. 1989); Burch v. State, 522 So.2d 810, 813 (Fla. 1988). In fact, this court has previously affirmed sentences of death arising from jury overrides, in instances in which this statutory mitigating circumstance has been found, see, e.g., Zeigler, supra, Thomas v. State, 456 So.2d 454 (Fla. 1984), Hoy v. State, 353 So.2d 826 (Fla. 1977); significantly, in both of the latter cases, the statutory mitigating circumstance pertaining to age had also been found. Without wishing to appear unduly harsh, the state would simply observe that Esty's lack of a prior criminal history may, in large part, be attributable to his relative youth. If an individual of fifty years has no criminal history, one may safely assume that such is a result of conscious forbearance on his or her part. If an individual of eighteen has no significant criminal history, such may, in large part, be the result of lack of opportunity, and the fact that Esty has chosen to make his criminal "debut", as it were, by committing the most serious offense possible - first degree premeditated murder - can hardly be regarded as an encouraging sign. Dr. Larson's speculation that Esty has the potential for rehabilitation has no

foundation in fact, given the fact that this was his first offense, and was properly discounted. See Torres-Arboledo v. State, 524 So.2d 403, 413 (Fla. 1988) (expert's testimony as to defendant's high intelligence and potential for rehabilitation did not provide reasonable basis for jury recommendation of life).

The question then becomes whether the jury's life recommendation can be made reasonable based upon evidence which was rejected by the court. The state would contend that it cannot. As set out more fully in Issue XII, infra, Esty's age did not constitute "mandatory mitigation" in this case, in that it was not related to any other factor, such as immaturity, which could ameliorate his guilt, see Eutzy, supra; Dr. Larson's speculative suggestion that Esty's test results were consistent with "emotional immaturity" which would allegedly manifest itself in the form of "clowning around", was not reasonably supported by the evidence, and, indeed, was contradicted by all of the other defense witnesses, who described Esty as a "normal teenager" (R 1490, 1496, 1517, 1524). Interestingly, this alleged "emotional immaturity" was never submitted to either the jury or judge as a basis for a life sentence, and the sentencer's failure to accord it any weight was not error. Cf. Thompson v. State, 553 So.2d 153 (Fla. 1989) (trial court did not err in overriding jury's recommendation of life, and in rejecting testimony of defense expert as to existence of alleged organic brain damage, where such testimony was unpersuasive, contradicted by other witnesses, and based solely upon one hour interview with defendant). Despite Esty's physical age, his genius-level IQ obviously

removes him from the "norm" of average teenagers his age, and such factor, as opposed to borderline intelligence, cf. Scott v. State, 603 So.2d 1275 (Fla. 1992), provides a basis to hold Esty more fully accountable for his actions, rather than the reverse. As this court observed in Echols v. State, 484 So.2d 568, 575 (Fla. 1985), another jury override case, "age is simply a fact", which "every murderer has." Esty has failed to demonstrate that his age provides a reasonable basis for the jury's recommendation sub judice. See Thomas, supra (jury override approved where defendant twenty years old); Hoy, supra (jury override approved where defendant twenty-two); Mills v. State, 476 So.2d 172 (Fla. 1985) (same); Porter v. State, 429 So.2d 293 (Fla. 1983) (same).

Likewise, Esty has failed to demonstrate that the nonstatutory mitigation presented below provides a reasonable basis for the jury's recommendation. Contrary to the representation in the Initial Brief, the judge was not simply being "mean" in rejecting the generalized testimony as Esty's alleged good character and good deeds. This court has previously held that such matters did not provide a reasonable basis for a life recommendation, where, as here, the evidence in aggravation is strong. See Zeigler, 580 So.2d at 130-131 (jury override approved, where judge found that uncontradicted testimony as to defendant's "good, compassionate character" and participation in civic and community projects insufficient basis for life recommendation; the court described appellant's character as "no more good or compassionate than society expects of the average individual"); Torres-Arboledo, supra (expert testimony as to defendant's high intelligence and potential for rehabilitation

insufficient to support jury's recommendation of life); Echols, supra (testimony that defendant was business man, church-goer, family man and generally a law abiding citizen insufficient to make life recommendation reasonable, given, inter alia, nature of crime committed by defendant). Further, the fact that Esty maintains close family ties is an insufficient basis to mitigate this sentence. See, e.g., Robinson, supra (defendant's close family ties and support of his mother insufficient to justify life recommendation); Coleman v. State, 610 So.2d 1283, 1287 (Fla. 1992) (same); Marshall v. State, 604 So.2d 799, 806 (Fla. 1992) (fact that defendant's father loved him insufficient basis for life recommendation). The record in this case is simply devoid of any reasonable basis for the jury's recommendation of life, and the sentencing judge did not err in overriding it.

This case is, perhaps, notable for what is not in the record. In many of the cases in which this court has overturned jury overrides, the defendants therein could accurately have been described as something of victims of society themselves. See, e.g., Scott, supra (override improper in case where defendant abandoned by mother as infant, brain-damaged and of borderline intelligence, physically abused and self-destructive); Hegwood v. State, 575 So.2d 170 (Fla. 1992) (override improper where defendant seventeen years old, mentally defective and suffered impoverished childhood); Brown v. State, 526 So.2d 903 (Fla. 1988) (override improper where defendant eighteen, had borderline intelligence and history of substance abuse, and had suffered disadvantaged childhood and child abuse). Sean Esty has led a life of luxury compared to these individuals. Further, there is

absolutely no evidence that Esty was impaired, through drug, drink or emotion, at the time of the murder, or that another individual was involved; such factors were present in the two cases relied upon by appellant. Cf. Perry v. State, 522 So.2d 817 (Fla. 1988) (jury's recommendation of life reasonable, in light of uncontroverted evidence that, inter alia, defendant committed crime during period of "psychological stress" and defendant's life had taken downhill turn); Wasko v. State, 505 So.2d 1314 (Fla. 1987) (jury override proper where, inter alia, jury could have believed that co-defendant received disparate treatment). Accordingly, the sentencing judge's conclusion that the jury's recommendation was based simply upon sympathy, or "minor mitigation", is supported by the record and correct, and the instant sentence should be affirmed. Cf. Zeigler, supra; Robinson, supra; Coleman, supra; Marshall, supra.

Finally, the state would also observe that the jury's relatively swift return of a recommendation of life in this case could have been unduly influenced by the final portion of the defense closing argument, in which Esty's counsel suggested that "another law" was needed if the jury was at all inclined to tell the judge that the State of Florida "ought to kill Sean Esty" (R 1569-1570). The State of Florida does not "kill" individuals lawfully sentenced to death, and defense counsel's attempts to urge the jury to disregard the law and/or to put the sole responsibility for Esty's "killing" on their shoulders was totally improper. This court has affirmed other jury overrides where the life recommendation could have been the product of inflammatory and inaccurate defense arguments. See, Francis v.

State, 573 So.2d 672, 676-7 (Fla. 1985); Porter, supra; Williams, supra. In order for the jury in this case to have convicted Esty, they had to have found that this was a premeditated offense, and that no other theory of liability was submitted to them. It was not reasonable for them to recommend life, based upon the aggravation present sub judice, and the paucity of relevant or material mitigation presented for their consideration. This capital felony is outside the norm - the well-planned and coldly executed murder of a young defenseless, and no doubt trusting, victim by butcher knife, machete and baseball bat - and Esty's relative youth and lack of prior record, under all of the facts and circumstances of this case, do not provide a rational or reasonable basis for the jury's recommendation of life. Cf. Hoy, supra (jury override proper in double murder, despite defendant's youth and lack of record); Thomas, supra (same, even where only one death sentence imposed); Dobbert v. State, 328 So.2d 433 (Fla. 1976) (jury override proper, where sentence of death primarily based upon brutal and heinous nature of killing). The instant sentence of death should be affirmed in all respects.

ISSUE XII

THE SENTENCER'S FAILURE TO FORMALLY FIND ESTY'S AGE IN MITIGATION WAS NOT ERROR

As his final claim, Esty contends that Judge Jones committed reversible error, under Ellis v. State, 622 So.2d 991 (Fla. 1993), in failing to find Esty's age of eighteen (18) as a statutory mitigating factor. In his sentencing order, the judge set forth in some detail his reasons for rejecting this

mitigating circumstances, and, citing to such precedents as LeCroy v. State, 533 So.2d 750 (Fla. 1988), Deaton v. State, 480 So.2d 1279 (Fla. 1985), and Cooper v. State, 492 So.2d 1059 (Fla. 1986), held:

> The age of the Defendant at the time that he murdered Lauren Ramsey was 18 years and is not a factor. Although he resided in his mother's home, he came and went as he pleased, he had his own telephone, and he had a job and was attending college. Defendant is an exceptionally intelligent adult, completely capable of understanding the criminality of his act. (R 2382).

Appellee would respectfully contend that the judge's findings are more than supported by the record, and that Esty's reliance upon Ellis is misplaced. The instant sentence of death should be affirmed in all respects.

In Ellis, this court recently held that when a murder is committed by a minor, the mitigating factor of age must be found and weighed. Ellis, 622 So.2d at 1001. Esty's problem is that he was not a minor at the time that he murdered Lauren Ramsey; as he concedes in his brief, he was eighteen years old (Initial Brief at 85). One who is eighteen years of age is an adult, not a minor. See §39.01(7), Fla.Stat. (1991) (definition of a "child"); §743.07, Fla.Stat. (1991) (statute removing "disabilities of nonage" from those eighteen or older). Accordingly, this case is governed by this court's traditional holdings to the effect that there is no per se rule which pinpoints a particular age as a mitigating factor, see, e.g., Peek v. State, 395 So.2d 492, 498 (Fla. 1980), and that, in order for a defendant's age to constitute a mitigating circumstance, it must be linked to some other characteristic of the defendant,

suggesting, inter alia, a reason to ameliorate the enormity of the offense. See Eutzy, 458 So.2d at 759; Echols v. State, 484 So.2d 568, 575 (Fla. 1985). Esty has failed to demonstrate error.

Regardless of the fact that Esty was born in 1973, he surely is one of the most intelligent persons on death row, having an IQ of 123; the expert testified, in fact, that this could be an understatement, in that prior test results had indicated an IQ of 143 (R 1453-4). Esty was a high school graduate, enrolled in college, and had maintained employment at a local steakhouse. Although he lived at home, such was obviously an arrangement of convenience, in that he came and went as he pleased, and, in all material respects, conducted himself as an adult. The allegation of "emotional immaturity" is based solely upon the defense expert's interpretation of his test results. It was not based upon any direct testimony from the doctor, or anyone else, as to any specific action of Esty's which allegedly demonstrated such "emotional immaturity"; indeed, the picture of Esty which emerges from the testimony of the defense witnesses at the penalty phase is one of a "normal" teenager, as opposed to one who has been stunted emotionally (R 1490, 1496, 1517, 1524). The assertion of "emotional immaturity" is not reasonably established by the greater weight of the evidence, cf. Campbell v. State, 571 So.2d 415, 419-420 (Fla. 1990), Nibert v. State, 574 So.2d 1059, 1061-2 (Fla. 1990), and the sentencer's rejection of Esty's age as a mitigating circumstance was not error, under the particular facts and circumstances of this case. See Deaton, supra (defendant's age of eighteen not mitigating, given the fact, inter alia, that

he conducted himself as an adult); Cooper, supra (defendant's age of eighteen not mitigating, where defendant was mature and understood wrongness and consequences of his actions); Jackson v. State, 366 So.2d 752, 757 (Fla. 1978) (defendant's age of eighteen, and lack of significant criminal history, entitled to minimal, if any, weight). The instant sentence of death should be affirmed in all respects.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the instant conviction of first-degree murder and sentence of death should be affirmed in all respects.

Respectfully submitted,

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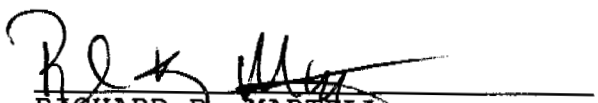

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to David A. Davis, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 10 day of December, 1993.

RICHARD B. MARTELL
Assistant Attorney General