IN THE SUPREME COURT OF FLORIDA

CURTIS WINDOM,

Appellant,

v. Case No. 80,830

STATE OF FLORIDA,

Appellee,
_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts the statement of the case and facts as set out by the appellant subject to any necessary inclusions made in argument herein not specifically set out in appellant's statement.

SUMMARY OF ARGUMENT

I. The claim that the state exercised peremptory challenges in a discriminatory fashion is waived. Appellant has not met his burden of demonstrating the propsective juror was challenged solely because of race or ethnicity and that she was a member of a distinct group.

II. The state of Florida has chosen to admit victim impact evidence in enacting Section 921.141(7), Florida Statutes (1992). Pursuant to *Payne v. Tennessee,* 111 S.Ct. 2597 (1991), such evidence can properly be considered independent of aggravating circumstances. Community impact evidence is authorized by both section 921.141(7) and *Payne*. Section 921.141(7) does not punish as a crime an act previously committed which was innocent when done, or make more burdensome the punishment for a crime after its commission or deprive appellant of a defense so as to constitute *ex post facto* legislation. The legislature may properly alter rules of evidence.

III. Windom never alleged that his privately retained attorney was incompetent or asked for his discharge and ultimately approved of his performance, and no hearing was warranted concerning counsel's pretrial assistance.

IV. The photos of the victims were not gruesome and were introduced in conjunction with the medical examiner's testimony and depicted the location of lethal wounds and how they were inflicted.

V. Windom did not introduce any evidence that he acted in self-defense as a necessary predicate for the introduction of

evidence of the victim's reputation for violence. Impeachment evidence that a witness told a police officer someone removed drugs from the victim's body was irrelevant and collateral.

VI. Counsel indicated below that he saw nothing wrong with the jury instructions and was happy with them. The claim that the jury was improperly instructed on reasonable doubt is procedurally barred. Considered as a whole, the instruction was not improper.

VII. Defense counsel did not propose an instruction or object to the instruction as given on the CCP aggravating factor on vagueness grounds and the claim that the trial court erred in instructing on this factor is procedurally barred. If there was error, it does not fatally taint the sentences. This court can determine that such factor was, in fact, properly imposed. While the sentencing judge cannot be accorded the presumption that she knew and applied the law, because the United States Supreme Court views her as co-equal with the jury, this court is certainly entitled to such presumption.

VIII. The jury was properly instructed as to the finding and weighing of aggravating and mitigating factors by virtue of the standard penalty phase instructions.

IX. The murders were cold, calculated, and premeditated. Windom procured .38 shells in advance. He indicated he would make the newspapers. He selected victims with whom he had grievances. The killings were carried out as a matter of course. There was no provocation from the victims who were executed at close range. Windom even had to reload . Windom had no good faith but mistaken

belief that his actions were authorized by law and acted without pretense of moral or legal justification.

X. Contemporaneous convictions can be used to establish the prior violent felony aggravating factor where there is more than one victim.

XI. The sentencing court properly gave little weight to allegedly mitigating evidence that Windom saved his sister from drowning seventeen years ago, assisted people in the community, and supported his children, where his source of income was questionable.

XII. The sentence is proportional in this case based on two valid aggravating factors and weak mitigation and such sentence has been imposed for similar cold-blooded murders.

XIII. The multipartite claim that Florida Statutes Section 921.141 (1992) is unconstitutional is waived for failure to properly brief.

ARGUMENT

I THE PROSECUTOR DID NOT USE PEREMPTORY CHALLENGES IN A DISCRIMINATORY FASHION FOR THE PURPOSE OF EXCLUDING MINORITIES FROM THE JURY

Defense counsel suggested that the prospective jurors be brought in as a group for voir dire just on the death penalty, then they could all be put in the box and asked more general questions (R 13). Defense counsel indicated that he wanted to question Maria Lawrence, # 27/181 (R 17). Ms. Lawrence was not on the court's list of "neutrals" in regard to the death penalty (R 26).

Ms. Lawrence had previously filled out a jury questionnaire. In regard to her feelings about the death penalty she explained: "It is necessary when we consider that every choice a citizen makes also has social and citizenship implications. But I want to be absolutely sure of guilt." In regard to whether the death penalty should always be imposed in cases of felony murder she answered "Perhaps, I will seek more information on case." She indicated that her feelings regarding the death penalty would not prevent her from following the court's instructions regarding: (1) a finding of guilty or not guilty of first or second degree murder, manslaughter, or any lesser included offense, and (2) her verdict recommending either death or life imprisonment if the defendant is convicted of first degree murder. She also indicated that her feelings regarding the death penalty would not make it very difficult for her to follow the court's instructions regarding: (1) a finding of guilty or not guilty of the crime charged, and (2) her verdict recommending either death or life imprisonment if the

defendant is convicted of first degree murder. She indicated that she would be able to follow the judge's instructions as to sentencing and recommend the sentence required by those instructions even if that sentence was not consistent with her personal feelings. When questioned as to whether the death penalty should always be imposed in cases of murder she responded: "*Not sure. If it is murder, and the guilty person is a psychopath -- not redeemable.*" (R 236).

Ms. Lawrence was subsequently questioned by defense counsel. She indicated she was neutral in regard to the death penalty but "wouldn't make a blanket statement about it." (R 120) Defense counsel explained that "we present more evidence about good sides and bad sides, and we ask you to do a juggling act and decide his fate." Counsel then inquired "Can you do that without being slanted in any direction at all? Just listen to the evidence, listen to the law and plug those things in and do it?" Ms. Lawrence responded "Yes. I would tend to rest a lot on the law. I would rely heavily to the Judge explaining things to me." (R 122) She was not challenged for cause (R 123)

The seventeen prospective jurors with whom counsel did not have major problems were then brought in an questioned (R 195).

Prospective Juror #1 was black. So is the defendant. #1 had problems using the word "death penalty" although he did say the word "death." The court denied the state's challenge for cause (R 251). The state challenged #1 peremptorily. The defense questioned the challenge on racial grounds (R 250). The prosecutor

voiced a rational, neutral reason for excluding him, in that he felt it was very clear that he was not in favor of the death penalty. The defense did not object to that race-neutral reason. The court excluded #1 (R 251).

Four black prospective jurors then remained on the panel of thirty left to choose from (R 251). They were #s 6, 16, 18, and Marquita Anderson, who the prosecutor felt was black but the Judge felt may have been Hispanic (R 252).

The defense challenged Prospective Juror Haley, #16 (R 254). The state objected on the basis of *State v. Neil,* 457 So.2d 481 (Fla. 1984), and indicated that all the victims were black (R 254-255). Defense counsel explained that he wished to excuse the prospective juror because he was so strongly in favor of the death penalty (R 255). Mr. Haley's questionnaire reflects, however, that he did not think the death penalty should always be imposed in cases of murder and felt it depended on the circumstances. He largely favored it in cases of felony murder (R 237). The prosecutor agreed that the defense had given a racially neutral reason (R 255).

The state then peremptorily challenged Prospective Juror # 27, Maria Lawrence. The defense indicated it would like to question that choice, too, "assuming she is black." The prosecutor wanted to strike her because her response to the death penalty questions was a little bit less than neutral. He had a rating system with 3 representing the middle, and she scored 2.8. He also did not feel that she was a member of an established minority. The court

stated:

> ....We have no challenges, just for peremptories, if we don't give him some leeway. Same as you. I'm going to allow the strike if you want to strike her. I have her down as neutral regarding the death penalty, would rely heavily on the law.

(R 256). It was later established that Ms. Lawrence was East Indian. The court indicated that she was definitely not a member of a recognized minority. The state noted that she was obviously not black (R 257). The court had previously believed that she was Hispanic (R 256)

Prospective jurors #6 and 18, who were black served on the jury (R 258). The defense excused Prospective Juror Anderson from serving as an alternate (R 259).

The defense raised an objection to the state exercising a peremptory challenge on Ms. Lawrence, "assuming she is black." (R 256). After it was determined that she was East Indian and after the state offered its reason for striking the prospective juror the defense did not object to her exclusion on the basis of being an East Indian or attack the prosecutor's reason for striking her as pretextual. The state would submit that the issue is waived. *See, Castor v. State,* 365 So.2d 701,703 (Fla. 1978); *Bowden v. State,* 588 So.2d 225 (Fla. 1991).

There is an initial presumption that peremptory challenges will be exercised in a nondiscriminatory manner. *State v. Johans,* 613 So.2d 1319 (Fla. 1993). A defendant challenging the state's peremptory challenge has the initial burden of showing that the juror is being challenged solely because of race or ethnicity. Such a burden is not satisfied by just showing that the state used

a peremptory challenge to exclude a minority. The defendant has the burden of showing that the state engaged in a pattern of excluding minorities or showing a strong likelihood that the peremptory challenge was solely because of race or ethnicity. The defendant's initial burden is not waived even where the state volunteers its reason for the peremptory challenge before the defendant carried his initial burden. Where the defendant fails to satisfy his initial burden, whether the state had a racially neutral motivation for challenging the prospective juror is irrelevant. *Green v. State,* 572 So.2d 543 (Fla. 2d DCA 1990). The defense in this case never carried its initial burden. The state disagrees, in any event, that the prosecutor's reason was not race-neutral. In *Lucas v. State,* 568 So.2d 18 (Fla. 1990), this court declined to extend the doctrine prohibiting racially motivated peremptory challenges of black prospective jurors to peremptory challenges of prospective jurors based on their opinions regarding the death penalty. It is clear that the state's use of a peremptory challenge to dismiss a prospective juror is not racially discriminatory where such juror is opposed to the death penalty. *Holton v. State,* 573 So.2d 284 (Fla. 1990). *See, Fotopoulos v. State,* 608 So.2d 784 (Fla. 1992). In order to establish nonracial reasons for striking a juror the state does not have to establish grounds sufficient to have the juror excused for cause. *Happ v. State,* 596 So.2d 991 (Fla. 1992). In this case all the parties had a rating system. The judge had a list of "neutrals" and the defense had its own system for determining who it wanted to

question or who it did not have a major problem with. It is not dispositive that the state may have had its own scoring system. The fact remains that such score was based on the state's perception, which finds support in the record, that this juror had opinions regarding the death penalty that would not be as favorable to the state's position as in a majority of cases. Despite her lip service in support of the death penalty, her questionnaire reflects her personal criteria for imposition of the death penalty is "unredeemable psychopathy." As the trial court noted, leeway was given to the defense in the striking of black prospective jurors. In this regard, the trial court also had broad discretion is determining if peremptory challenges exercised by the prosecutory are racially motivated. *Dougan v. State,* 595 So.2d 1 (Fla. 1992).

Counsel now ingeniously contends that the prosecutor used his peremptory challenge for the improper purpose of excluding a juror of East Indian origin, despite the fact that no one below was able to successfully guess the ethnic origin of Ms. Lawrence. So much for the "identifying traits" and "physically visible characteristics" this court described in *State v. Alen,* 616 So.2d 452, 455 (Fla. 1993). As present counsel notes, the court and parties below did not have the benefit of the *Alen* decision, and this case is a premier example why *Alen* should not be applied retroactively. *State v. Neil,* 457 So.2d 481 (Fla. 1984), was not so applied. If *Alen* should be so applied, then the defendant has failed in his burden of demonstrating on the record that the prospective jury was a member of a distinct group or cognizable

class, which burden falls squarely on the defendant under *Neil*. 457 So.2d at 486. Such burden was hardly carried below by counsel proclaiming that "all people from Trinidad are black." Such burden is hardly carried by present counsel whose research indicates that Ms. Lawrence could be Eurasian, Indian, Pakistani, Asian, Burmese, Thai, Laotian, Cambodian, Vietnamese, Phillipino, Indonesian, Malaysian or a New Guinean. Initial Brief of Appellant p. 24-25. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court emphasized the defendant's right to a fair trial and equal protection. By 1992, the Court had lost its original focus and the issue became the juror's right not to be discriminated against. *Georgia v. McCollum*, 112 S.Ct. 2346 (1992). A defendant is now forced to live with a juror who, despite mouthing the correct platitudes concerning fairness, may reveal in his looks (unseen by the trial judge) at the defendant, who may also be a minority, a certain hostility that the defendant may intuitively know will fairly permeate and checker his decision. The state is also so limited. Appellant seeks to broaden further the class with which defendants, along with the state, may be dissatisfied to include "Continentals" or those coming from another side of this planet. Appellant does not explain, however, what "internal cohesiveness of attitudes, ideas or experiences" or even language is shared by a Thai and New Guineanian, since we are forced to guess at the actual ethnicity of the prospective juror, so as to make being an East Indian an identifiable group or class pursuant to *Alen*. 616 So.2d at 454. This court has previously found "Latin Americans" not to be an

identifiable or distinctive group, *Valle v. State,* 474 So.2d 796 (Fla. 1985), although *Alen* has applied the *Batson/Neil* doctrine to Hispanics. Designation as an East Indian is certainly a much broader classification than even that of being an American. Appellee would submit that such classification is much too broad. If such protection is to extended to those from groups of islands or other continents, then it would also extend to North Americans which would prohibit anyone in this country from being peremptorily challenged and sound a virtual death knell for the peremptory challenge.

II THE SENTENCING JUDGE DID NOT ERR IN PERMITTING THE STATE TO INTRODUCE EVIDENCE OF VICTIM IMPACT

Defense counsel objected to victim impact evidence below on *ex post facto* grounds and on the ground that such evidence was not applicable to the penalty phase (R PP 3-5).

The judge saw no *ex post facto* problem since the change was procedural. She felt that such evidence was important. She could visualize how the murder might have impacted the community, since it happened in broad daylight, in the middle of the day, on the street.

Defense counsel actually agreed with the judge, stating "So can I." Counsel then complained that one individual who was affected did not constitute a "community." (R PP 18).

The state argued that the statute was specifically written to be broad and makes reference to "members of the community," which can refer to an individual or have a collective meaning. The prosecutor pointed out that Winter Garden is an easily classifiable

community and that the incident happened in the children's backyard (R PP 19).

Defense counsel then inquired as to what the jury was to be told regarding the significance of such testimony, pointing out that such evidence was not an aggravating factor but "gratuitous slime." (R PP 19)

The prosecutor indicated that the basis for imposing the death penalty is the aggravating factors and that he was not going to argue that victim impact is a reason for recommending the death penalty (R PP 20).

The court indicated that it would allow such evidence but needed an instruction so that the jury would not be confused and think such evidence was an aggravator that they should consider. The prosecutor indicated that he "would be glad to consider whatever the defense suggested." (R PP 21).

In closing argument the prosecutor argued to the jury that the only possible mitigating evidence was that some of the witnesses had not seen Windom become violent before but that factor alone did not outweigh aggravating evidence of the cold, calculated and premeditated murders of three people plus the attempt to murder a fourth. The prosecutor concluded that "under no possible reasonable interpretation of the instructions or of simple fairness could you possibly conclude that meager mitigation outweighs what Curtis Windom has done." (R PP 88) In regard to the jury's consideration of victim impact evidence, the prosecutor stated as follows:

> Now, you heard testimony today from a witness Vickie Ward who told you a little about the impact of this

> crime on the community. It was the children in the community. That is not to be considered by you as an aggravating circumstance. You are not to consider that, determine whether there are aggravating circumstances in this case. But you are allowed to consider it in looking at the big picture in weighing the mitigating -- weighing the mitigating evidence and deciding how much weight to give that. You can consider that, because crimes don't happen in a vacuum. There was not simply three people out there, some of them ended up dead and some in jail. This has an impact. It is like when you drop a pebble in a pond, there are ripples, and ripples affect people. And in this case, the effect was on children.

(R PP 88-89)

No objection was made by the defense to the prosecutor's explanation of the import of victim impact evidence. (R PP 89). Defense counsel did not discuss the role of victim impact evidence in his closing argument but chose instead to eloquently rail against the death penalty (R PP 90-99).

At the conclusion of argument counsel were requested to approach the bench by the judge. The following colloquy occurred.

> THE COURT: Do you want this instruction in there? And while he is looking at that, I thought we would--
>
> MR. ASHTON: I remembered this as I was discussing it. You did say you wanted something.I did not prepare any --
>
> THE COURT: You said you were going to --
>
> MR. ASHTON: I thought we would get together,and I forgot about it.
>
> THE COURT: I want this much: why don't you--*what else do you all want about victim impact? He was going to say something about these instructions.Is that enough, do you want any other explanation?*
>
> MR. LEINSTER: *No, that is fine.*

(R PP 99-100)

The jury was subsequently instructed by the court that victim impact evidence is not an aggravating circumstance (R PP 102).

Victoria Ward is a police officer assigned to teach the DARE program at Dillard Street Elementary School (R PP 29) She was the witness through whom the victim impact evidence was presented. She testified that the children were kept late on the Friday of the murders (R PP 36). She taught the sons of victim Valerie Davis. Shawn, who was a mischievous fifth grader, was enrolled in another school after the incident and became withdrawn and kept his head on his desk. He slowly came out of it and began reacting to what was going on in class. He wrote a graduation essay about what happened. It consisted of two sentences: "Some terrible things happened in my family this year because of drugs. If it hadn't been for DARE, I would have killed myself." (R PP 31) Ms. Ward related that the crime had a broad affect on the children attending Dillard. They would still pretend to shoot each other, yelling "bang, bang!" But it no longer appeared funny to the child that was shot. It wasn't a game anymore, it was real. Some of the children asked questions but some of them did not want to talk about it (R PP 32). Many of the children acted afraid. They heard that something bad had happened and thought it may have happened to their own families, until they got home. Some fantasized that they saw or heard it or that it happened right outside their house although their homes were not near where the incident occurred. A third-grade white child in her weapons awareness class, who lived

far away from the neighborhood, wrote a book about "the Curtis Windom case." (R PP 33).

Murder is the ultimate act of depersonalization. It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back. *Payne v. Tennessee,* 111 S. Ct. 2597, 2612 (1991)(Justice O'Connor, concurring).

Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and after it happens other victims are left behind. Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, "survivors," who will suffer harms and deprivations from the victim's death. Just as defendants know that they are not faceless ciphers, they know that their victims are not valueless fungibles, and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents. Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt. The fact that the defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may

survive, should not in any way obscure the further facts that death is always to a "unique" individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable. *Payne, supra,* 111 S.Ct. at 2615 (Justice Souter, concurring)

"Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament." *Snyder v. Massachusetts,* 291 U.S. 94, 122 (1934) (Justice Cardoza) In *Payne,* the United States Supreme Court held that if a state chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. 111 S.Ct. at 2609. This state has chosen to *permit* the admission of victim impact evidence. Section 921.141 (7), Florida Statutes (1992) provides:

> **Victim impact evidence.**- Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the *community's members* by the victim's death.Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

This statutory provision was added by laws 1992, c. 92-81 sec. 1, effective July 1, 1992.

In *Hodges v. State,* 595 So.2d 929, 933 (Fla. 1992), this court recognized that the United States Supreme Court had receded from the holding in *Booth v. Maryland,* 482 U.S. 496 (1987). The court indicated that "the only part of *Booth* not overruled by *Payne* is

'that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment.'" 595 So.2d at 929. The cases relied on by appellant were either decided pre-*Payne*, or involved evidence admitted for some other purpose in the guilt phase that ran afoul of edicts other than those receded from in *Payne*.

Appellant's argument that victim impact evidence is "nonstatutory" is not well taken since it is expressly authorized by section 921.141(7). The fact that such evidence is not statutorily enumerated as an "aggravating" factor does not mean that it cannot be considered. Aggravating circumstances serve a channeling function in terms of sentencing discretion for finding a defendant death eligible. The defendant may then offer mitigation to demonstrate he is worthy of a lesser sentence. Much of such mitigation has no relevance to the circumstances of the crime. As Justice Rehnquist noted in *Payne*, "(T)his misreading of precedent in *Booth* has, we think, unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering 'a glimpse of the life' which a defendant 'chose to extinguish,' or demonstrating the loss to the victim's family and to society which have resulted from the defendant's homicide." 111 S.Ct.at 2607 (1991). The *Payne* Court decided that "there is nothing unfair about allowing the jury to *bear in mind that harm at the*

same time as it considers the mitigating evidence introduced by the defendant." 111 S.Ct. at 2609 The *Payne* Court was well aware of the fact that its decision allowed the state to put on evidence of a species of harm associated with the victim's personal characteristics *independent* of the circumstances of the offense, which are usually statutorily enumerated as "aggravating" factors. *See,* 111 S.Ct. at 2620 n.1 (Justice Marshall, dissenting). Since the death penalty may not be imposed in the absence of one statutorily defined aggravating circumstance, *see, Zant v. Stephens,* 462 U.S. 862, 876-79 & n. 14 (1983), which encompasses characteristics of the crime, there is no reason to aggregate this entirely discrete evidence into the general "aggravation" canister. Such evidence is also separately admissible to imbue the state's evidence with the full moral force it deserves. *Payne, supra,* 111 S.Ct. at 2608

Contrary to the appellant's assertion, *Payne* does authorize the introduction of "community impact" evidence of the type presented to the jury in this case. The opinion in *Payne*, as partially quoted above, is rife with references to harm in the context of "association of others," "group of survivors," "loss to society", etc. It is clear that the harm to be demonstrated is not just to the immediate family under a fair reading of *Payne.*

Contrary to appellant's assertion, to be admissible after *Payne,* such evidence need only contain information about the victim or the impact of his demise on his family or society. *Payne* overruled *Booth* and the requirement that victim impact evidence

relate directly to the circumstances of the crime. *Burns v. State*, 609 So.2d 600 (Fla. 1992), does not stand for such proposition. In fact, this court, in *Burns*, found no merit to Burns' *Booth* claim because the challenged evidence was of the type covered in *Payne*. 609 So.2d at 605. The evidence was admitted in the guilt phase and was still subject to other evidentiary restrictions since it was not actually offered as *Payne* evidence in the *penalty* phase.

Appellant has forfeited the right to complain of the use made of the evidence by the jury by his failure to propose a jury instruction and subsequent authorization of the instruction actually given.

In *Payne*, the Court stated that "While the admission of this particular kind of evidence -- designed to portray for the sentencing authority the actual harm caused by a particular crime -- is of recent origin, this fact hardly renders it unconstitutional. 111 S.Ct. at 2606 In *Collins v. Youngblood*, 110 S.Ct. 2715,2725 (1990), the Court indicated that a law violates the *Ex Post Facto* Clause only if it punishes as a crime an act previously committed, which was innocent when done; makes more burdensome the punishment for a crime after its commission; or deprives one charged with a crime of any defense available under the law in effect when the act was committed. This case hardly falls within those descriptions. *See also, Combs v. State*, 403 So.2d 418 (Fla. 1981). *Ex post facto* legislation is forbidden by the Florida Constitution. Fla. Const. Art I sec. 10. But this organic provision does not apply to changes that relate exclusively

to the mode of procedure. See Fla. Jur. 2d, CONSTITUTIONAL LAW sec. 296. The legislature has general power to establish and alter rules of evidence, subject to constitutional limitations. *Black v. State,* 77 Fla. 289, 81 So. 411 (1872); *Goode v. State,* 50 Fla. 45, 39 So. 461 (1905). The right to have one's controversy determined by existing rules of evidence is not a vested right, and the legislature has the power to change them within constitutional restrictions. The legislature may by statute change a rule so as to make certain evidence previously excluded admissible. Such statutes are *liberally* construed, and every reasonable doubt should be resolved in *favor* of their *constitutionality. Campbell v. Skinner Mfg. Co.,* 53 Fla. 632, 43 So. 874 (1907).

In *Dobbert v. State,* 375 So.2d 1069 (Fla. 1979), the appellant attacked section 921.141 in its entirety as an unconstitutional incursion into this court's power over practice and procedure. This court found the claim to have no merit. *See, also, Jent v. State,* 408 So.2d 1024 (Fla. 1981).

The remainder of appellant's various arguments were never made or entertained below and are procedurally barred. In any event, this court need only look at the marginal mitigation presented in this case, with an expectation of being relieved, to some degree, of moral culpability, to determine that something is missing in the process. The prevailing thought seems to be that since *Lockett v. Ohio,* 438 U.S. 586 (1978), precludes the state from limiting the sentencer's consideration of *any* relevant evidence that might lead the sentencer to decline to impose the death penalty, it is

perfectly alright to search through each day of a parasitic and predatory life to determine if in that panorama of self-gratification some act of kindness had been performed, no matter how remote. Yet not even a glimpse into the life of the victim was allowed. In deciding *Payne*, the Court did not just give back something to the victim or accord justice to the accuser, it came upon some essential balancing truths that the common-man instinctively knows.

III THE TRIAL COURT DID NOT ERR IN NOT CONDUCTING A HEARING ON THE COMPETENCY OF TRIAL COUNSEL

At the insolvency hearing Windom testified that his sister Gloria had hired Mr. Leinster (R 399). He indicated that he had not sold his car because since he had been "here" he never talked to a lawyer. When Windom first came to the fifth floor he saw Mr. Leinster (R 400). Mr. Leinster told him he would try to help him. The visit did not last long (R 401). At the motion to suppress hearing on August 14, 1993, Mr. Leinster indicated that depositions were set for the week before trial (R 559). At a status hearing on August 24, 1992, the court asked Windom if he was satisfied with the services of his lawyer so far. Windom indicated he really couldn't say because he didn't know what was going on in the investigation and was in the blind (R 462). Defense counsel indicated that he told Windom exactly what was going on and had talked to Windom about his version of events (R 463). He had visited Windom at least three times. Counsel indicated he would be happy to explain to Windom what would happen at trial (R 464). Counsel decided not to put on any witnesses in the penalty phase so

as not to open up the issue of cocaine involvement in the murders (R 41). Mitigation was ultimately put on before the judge in a separate hearing. Windom indicated he understood counsel's approach to the penalty phase and was in agreement with it. Windom also indicated that he felt counsel had done as good a job as he could do under the circumstances so far (R. 41)

In *Nelson v. State,* 274 So.2d 256 (Fla. 4th DCA 1973), the Fourth District Court of Appeal held that where a defendant, before the commencement of trial, requests the discharge of his court-appointed counsel, the trial judge should make an inquiry of the defendant as to the reason for the request and, if incompetency of counsel is assigned as the reason, the court should make sufficient inquiry of the defendant and counsel to determine whether there is cause to believe that counsel is not rendering effective assistance and if reasonable cause for such belief appears, the judge should make such finding on the record and appoint substitute counsel who should be allowed adequate time to prepare a defense, but if no reasonable basis for such belief appears, the trial judge should so state on the record and advise the defendant that if he discharges his original counsel the state may not thereafter be required to appoint a substitute. The procedure adopted by the Fourth District was approved by this court in *Hardwick v. State,* 521 So.2d 1071, 1074 (Fla. 1988). In the present case Windom never asked for the discharge of privately retained counsel and offered lack of time with counsel solely as a reason for his failure to sell his car, in regard to his status of

insolvency. Windom ultimately approved of counsel's performance. It is clear that a trial court is not required to conduct a full *Nelson* inquiry when incompetency is not the stated basis for a motion for discharge. *Johnson v. State*, 560 So.2d 1239, 1240 (Fla. 1st DCA 1990). Here there wasn't even a motion to discharge, no less specific allegations of incompetency.

In *Watts v. State*, 593 So.2d 198, 203 (Fla. 1992), this court found that the trial court did not err by failing to conduct further inquiry in connection with the defendant's request for another attorney . During jury selection, Watts informed the trial court that he was dissatisfied with his attorneys because they had not been to see him in jail. A short time later he requested that another attorney be appointed. Although no further inquiry was made at that time, defense counsel later addressed Watts' allegations and explained that he and co-counsel had seen Watts on a number of occasions and Watts' complaint was likely based on his lack of understanding of what occurred during those meetings. The present case is similar and after counsel evidently explained to Windom what would happen at trial no further complaints were heard.

Even if it could be said that there was error in some regard, it is certainly harmless as long as there remains the procedural vehicle of redress known as Florida Rule of Criminal Procedure 3.850, which is regularly and repetitively utilized by those sentenced to death.

IV RELEVANT PHOTOS OF THE VICTIMS, WHICH WERE NOT AT ALL GRUESOME OR INFLAMMATORY, WERE PROPERLY ADMITTED INTO EVIDENCE

Photographs introduced in conjunction with a medical

examiner's testimony which show the location of lethal wounds and how they were inflicted are relevant and admissible even where the manner of death is not in dispute. *Mordenti v. State*, 19 Fla. L. Weekly S61, S62 (Fla. Jan. 27, 1994) The pictures in this case were not so inflammatory as to create undue prejudice. The trial judge found that the photos of Johnny Lee only depicted tiny holes in his back, without any blood whatsoever. The I.D. photo was necessary and revealed the torso and head and showed where the injuries were in relation to the rest of the body. The x-rays were certainly not inflammatory. As the trial judge stated, "these are the least prejudicial photos I have ever seen -- there is absolutely not one drop of blood." (R 533) The photos of Valerie Davis reveal only a close-up of the gunshot wound, showing the position of the exit wound and the breast area where the wound is located (R 533-534). The photos of Mary Lubin show an injury under the chin and depict other injuries without gore and practically no blood R 534).

V THE TRIAL COURT PROPERLY REFUSED TO ALLOW THE TESTIMONY OF SERGEANT FUSCO FOR THE PURPOSE OF IMPEACHMENT ON A TOTALLY COLLATERAL MATTER

Windom explained to his attorney that the reason he shot Johnny Lee was because Lee was making threats that he was going to kill him. Windom supposedly told Dr. Kirkland that the murder was in self-defense. According to Windom and several other unknown witnesses, Lee was supposedly known to be a violent stick-up man who carried an Uzie (R 299). Counsel told the court that Windom told him Lee had a firearm on him at the time of the murder.

Counsel then indicated, "Whether or not that's true, I doubt I will be able to prove that." In response to the trial judge's inquiry as to whether the police found a firearm at the scene, counsel stated "I'm stuck with what my client tells me is his theory of the defense. I don't vouch for the truth of the matters." (R 301)

The defense attempted to establish Lee's alleged reputation for violence in the community through witness Jean Willis (R 298-299). Counsel admitted he did not think she ever heard Lee threaten Windom (R 300). Counsel claimed that Windom was going to testify and tie it together (R 299). Such testimony would supposedly establish the necessary predicate showing an act on the part of the victim to justify self-defense. The trial judge ruled that Willis would have to be put on in the defense case. Defense counsel indicated that he would leave her under subpoena (R 302).

Pamela Fikes testified that Windom drove up to Johnny Lee, said "My mother-fucking money, nigger," then shot him twice in the back, jumped out of the car and shot him three more times on the ground (R 313-314). On cross-examination she indicated that she did not see Lee with any kind of a weapon and did not see one in his car (R 319).

On the morning of the murders Windom told Jack Lee Luckett that Lee owed him $2,000.00 and he was going to kill him, after learning Lee had won $104.00 at the dog track (R 323). Windom said "You're going to read about me. I'm going to make headlines." (R 324). On cross-examination Luckett indicated that he and his brother, who witnessed Lee's murder, did not search Lee's body or

car or remove a weapon, jewelry, or anything else, before the police came (R 326).

Counsel later told the court that Windom was not claiming self-defense. Dr. Kirkland never testified as to any statements made by Windom that he acted in self-defense but rather testified about an unlikely fugue state. (R 580-594).

The defense called Luckett in its case and he testified that he didn't see anyone move Lee's body or take anything off it. He denied telling Sergeant Fusco that somebody took something off Lee (R 617); that Lee had drugs on him that someone on the street took; and also denied a rumor that he had taken them. He denied taking anything, including a gun, off Lee (R 618). On cross-examination he testified that he did not see Lee pull a gun on Windom before he was shot in the back (R 618).

The defense wanted to call Sergeant Fusco to impeach Luckett on whether someone else took drugs off Lee's body. Counsel claimed it tied in with his theory that the body was moved and there was time between the shooting and the arrival of the police for someone to take something off his person (R 620). The state argued that it wasn't relevant since there had been no allegation of self-defense and Windom wasn't testifying (R 621). The court agreed, noting that Sergeant Fusco was not there anyway (R 619-620). The trial judge ultimately ruled that she was not going to let that in since "That's going way too far." (R 621)

Windom never called Jean Willis in the defense case or testified himself.

When the defense of self-defense is raised, evidence of the victim's reputation may be admissible to show his propensity for violence and the likelihood that the victim was the aggressor; evidence of prior specific acts of violence may be admissible to show the reasonableness of the defendant's apprehension at the time of the slaying. A prerequisite to the introduction of such evidence is the laying of a proper predicate by the showing of some overt act by the victim at or about the time of the slaying that reasonably indicated a need for action by the defendant in self-defense. *Quintana v. State,* 452 So.2d 98 (Fla. 1st DCA 1984). Essential to that foundation is that the circumstances of the homicide must be such that they would tend to raise or support a case of self-defense. *Hodge v. State,* 315 So.2d 507 (Fla. 1975). Until the defendant introduces some evidence that he acted in self-defense, evidence as to the alleged violent proclivities of the deceased is not admissible. *Williams v. State,* 238 So.2d 137 (Fla. 1970). In the present case there was not the slightest evidence of any overt act by the victim which may be reasonably regarded as placing Windom in imminent danger by losing his life or sustaining great bodily harm. There was no evidence that Lee ever possessed a gun at the time he was murdered. Even if he had, the relevancy of such evidence would be extremely tenuous considering the fact that this was a drive-by shooting, in the back. Evidence touching upon a claim of self-defense is properly excluded in a murder prosecution where such defense is never sufficiently raised at trial by the defendant or any other witness. *Peak v. State,* 363 So.

2d 1166 (Fla. 1978).

In a homicide prosecution evidence as to the character of the deceased is admissible to show the fear of the defendant that the deceased was a threat to the life of the defendant or that there was a threat of great bodily harm to the defendant, and proof of such character is properly made by evidence of the deceased's general reputation in the community, and generally not by evidence of specific acts or general bad conduct. *Freeman v. State,* 97 So.2d 633 (Fla. 1957). There was no connection between any possible drug use on the part of Johnny Lee and the shooting of Lee in the back by Windom. Where there is no connection between the victim's use of drugs and a defendant's apprehension, evidence that a victim had been using drugs as part of a self-defense claim is not admissible. *Lozano v. State,* 584 So.2d 19 (Fla. 3rd DCA 1991). The trial judge properly found this evidence to be collateral.

VI THE CLAIM THAT THE JURY WAS INCORRECTLY INSTRUCTED ON REASONABLE DOUBT IS PROCEDURALLY BARRED.

At the conclusion of testimony in the guilt phase the court inquired if defense counsel wanted any other instructions. Counsel replied "I don't anticipate any. I have looked through them. I don't see anything wrong. Right now I'm happy with them-." (R 639) Counsel again reiterated that he was satisfied with the jury instructions (R 644) After the instructions were read defense counsel indicated that he was satisfied with the instructions as given (R 716). The instant Pearl Harbor appellate attack is procedurally barred. *See, Harris v. State,* 438 So.2d 787, 795 (Fla. 1983).

That a midwestern federal circuit court may hold the unique theory that instructing on reasonable doubt at all is playing with fire hardly indicates that the reasonable doubt instruction given in this case is infirm. Generally, even federal reviewing courts will not reverse where the instruction considered as a whole is not prejudicially erroneous. *Russell v. United States,* 429 F.2d 237, 239 (5th Cir. 1970) In *United States v. Shaffner,* 524 F.2d 1021 1023 (7th Cir. 1975), cited by appellant, the jury was not simply instructed that a reasonable doubt is not a possible doubt. The jury was further instructed that "If that were the rule, few men, however guilty they might be, would be convicted." 524 F.2d at 1023. Nevertheless the Seventh Circuit affirmed the conviction finding that the giving of the instruction did not violate the defendant's rights to be presumed innocent, to remain silent and to have the government bear its burden of proof. 524 F.2d at 1023 In *United States v. Cruz,* 603 F.2d 673, 675 (7th Cir. 1979), also cited by appellant, the Seventh Circuit again found no reversible error in an instruction which defined reasonable doubt as "a doubt founded on reason," a doubt that is not "purely speculative."

In the present case, the jury instruction did not just define a reasonable doubt as "not a possible doubt." The jury was told, as well, that a reasonable doubt is not a "speculative, imaginary or forced doubt." (R 706) It was further instructed:

> On the other hand, if, after carefully considering, comparing and weighing all the evidence there is not an abiding conviction of guilt, or if, having a conviction, it's one which is not stable but one which waivers and vacillates, then the charge is not proved beyond every reasonable doubt and you must

> find the defendant not guilty because the doubt is reasonable. It is to the evidence introduced upon this trial and to it alone that you are to look for that proof. A reasonable doubt as to guilt of the defendant may arise from the evidence, conflict in the evidence or lack of evidence.

(R 706).

The instruction at issue may not be judged in artificial isolation but must be considered in the context of the instructions as a whole (as set out above) and the trial record. *Cupp v. Naughten,* 414 U.S. 141 (1973). Considered as a whole, the instruction squarely puts the government to its burden of proof. A not guilty verdict is permitted under this instruction based on the slightest uncertainty. It is extremely doubtful in this case that any juror had even a whimsical question as to guilt when appellant chose to publicly carry out his executions.

The *Cage v. Louisiana,* 498 U.S. 39 (1990), standard for review of jury instructions, which looked to whether a jury "could have" applied the instructions in a manner inconsistent with the Constitution, was contradicted in *Boyde v. California,* 494 U.S. 370, 380 (1990), and disapproved in *Estelle v. McGuire,* 112 S.Ct. 475, 482, n.4 (1991). The Court in *Sullivan v. Louisiana,* 113 S.Ct. 2078, 2081 n.1 (1993), did not reach the issue of whether the instruction given would have survived review under the *Boyde* standard of "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution. 494 U.S. at 380. Since there was no error in the first place, the standard to be applied is not really in question, but appellee would submit that this instruction would survive under

Boyde, which should be the applicable standard since the instruction at issue is not fatally flawed as in *Cage*.

VII THE CLAIM THAT THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON THE VAGUE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDITATED IS PROCEDURALLY BARRED

Defense counsel objected below, as quoted by appellant, to the cold, calculated and premeditated aggravating factor on the ground that it was automatic in cases of premeditated murder (R PP 49-50). This is hardly sufficient to raise or preserve the claim now presented. Also, in order to preserve an objection, a party must object after the trial judge has instructed the jury. *Harris v. State*, 438 So.2d 787, 795 (Fla. 1983).

This court has previously held that the CCP factor is not unconstitutionally vague or overbroad. *Klokoc v. State*, 589 So.2d 219 (Fla. 1991); *Kelley v. Dugger*, 597 So.2d 262 (Fla. 1992). The terms of the CCP aggravator and the instruction do not require a "subjective" determination. This court is not faced with "pejorative" adjectives such as "especially heinous, atrocious or cruel," terms that "describe a crime as a whole." *See, Arave v. Creech*, 113 S.Ct. 1534, 1541 (1993). As was the case in *Arave*, the CCP terms "describe the defendant's state of mind: not his *mens rea*, but his attitude toward his conduct and his victim. The law has long recognized that a defendant's state of mind is not a 'subjective' matter but a *fact* to inferred from the surrounding circumstances." 113 S.Ct. at 1541. The Court in *Arave* declined to invalidate the "utter disregard" circumstance on the ground that the Idaho Supreme Court's limiting construction of "cold-blooded"

was insufficiently "objective." 113 S.Ct. at 1542. The Court reasoned that a sentencing judge reasonably could find that not all Idaho capital defendants are "cold-blooded" because some within the broad class of first degree murderers do exhibit feelings. 113 S.Ct. at 1543. Similarly, the terms of Florida's CCP aggravating circumstance are sufficiently limiting. Florida can treat capital defendants who plot or plan to kill as more deserving of the death penalty and such persons can be readily identified by the statutory language. Thus, a jury instruction tracking the statutory language of the CCP aggravator is not in error. The statute has also not been construed in an overbroad manner. *Harich v. Wainwright,* 813 F.2d 1082 (11th Cir. 1987).

Even if the jury found, and the trial court weighed, an invalid circumstance there is no fundamental error. Although *Espinosa v. Florida,* 112 S.Ct. 2926 (1992), mistakenly treats the jury and sentencing judge as co-equals, depriving the judge of the *Walton v. Arizona,* 497 U.S. 639 (1990), presumption that he or she knows and applies the law, this court's role in Florida's *tri*partite sentencing system was never considered in *Espinosa.* Even if jury error taints the trial judge, it stops there because this court is certainly entitled to the *Walton* presumption that it knows and applies the law it actually makes. Thus, given the fact that this court has sufficiently narrowed this factor in its decisions, which is not contested by appellant, there is no error, because on appeal this court will simply not let stand an aggravator that does not fit within the definitions evolved in caselaw in the first

place. It ought to be sufficient for this court to simply indicate that this aggravator fits within the narrowing constructions previously given by this court to the CCP aggravator. *Espinosa* seems more form than substance and only partially considered Florida's sentencing scheme.

VIII THE TRIAL COURT PROPERLY REFUSED TO GIVE APPELLANT'S REQUESTED SPECIAL JURY INSTRUCTIONS AT THE PENALTY PHASE

The standard jury instructions properly cover the weighing of aggravating and mitigating circumstances. *See, Kennedy v. Dugger,* 933 F.2d 905 (11th Cir. 1991). Those instructions properly inform the jury as to the finding and weighing of aggravating and mitigating circumstances and the jury need not be incorrectly told that the death penalty is reserved for only the most aggravated and unmitigated murders. Such a definition is too subjective and detracts from the proper standard instructions. No inapplicable aggravator was found. The jury need not have been instructed that only two out of the eleven aggravators were applicable. Such instruction would invade the province of the jury. Were it given, argument would probably be made that one of the aggravators would never have been found if the court hadn't steered the jury in that direction by suggesting that there was more than one aggravator. The remainder of requests are not argued or briefed and are not properly before the court. *Duest v. State,* 555 So.2d 849 (Fla. 1990).

IX THE SENTENCING COURT PROPERLY FOUND THAT THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION

The state met its burden of proving the cold, calculated and

premeditated aggravating factor beyond a reasonable doubt as to each of the murders.

The homicides should first be examined as a whole to determine Windom's intent as far as the CCP factor is concerned. In its entirety, this case is similar to *Cruse v. State*, 588 So.2d 983 (Fla. 1991). In *Cruse* there was an advance procurement of a weapon and vast amounts of ammunition, reloading, and a continuation of shooting despite lack of resistance or provocation from the victims. The killings were carried out, as in this case, as a *matter of course*. This court found such facts to be indicative of the existence of the CCP factor.

On the day of the murder Windom went to Walmart and purchased .38 shells for his gun (R 284-285). He appeared calm (R 285). He loaded the gun with five live rounds. After executing Johnny Lee with four shots, he ran back to Valerie Davis' apartment (R 295). He had a shot remaining. It was clearly intended for Davis. Although Windom obviously had an axe to grind with Kenneth Williams and actually saw Williams on the way to the apartment, he postponed shooting him until after he had done Valerie in (R 380). Valerie was on the telephone when she was shot (R 360). Windom announced that he was "tired" and "through" and executed her at close range with a bullet through the heart (R 368;350) There was no evidence of provocation or threatening motions on Valerie's part. Windom then reloaded and left. After informing Kenneth Williams that he did not like "police ass niggers," Windom shot him in the chest (R 340;382-383). Windom then went to an area behind Brown's Bar where

he could see the Maxi Recreation Center where Mary Lubin was (R 425;439). Windom looked mad (R 426). That he was intent on killing Lubin is apparent from the fact that he refused to relinquish the gun to three men who were trying to take it away from him (R 452). This court has also found that by virtue of reloading a gun, a defendant is afforded time to contemplate his actions and thereby chooses to kill his victim. *Phillips v. State,* 476 So.2d 194 (Fla. 1985); *see, also, Lara v. State,* 464 So.2d 1173 (Fla. 1985). When Mary's car came to a standstill at the intersection of 10th and Bay Street, Windom fired into it (R 439;450;453). Mary got out of the car and fell by a tree. He "hit" her again (R 428). It is patently clear that on February 7, 1992, Curtis Windom set about "making the headlines" he contemplated and spoke about to Jack Luckett, and proceeded to systematically, selectively, and deliberately eradicate all those against whom he had a grievance.

The evidence reflects no less than the fact that these murders were *executions.* This court has previously held that executions demonstrate the kind of heightened premeditation that will support finding the existence of the CCP aggravating circumstance. *Pardo v. State,* 563 So.2d 77 (Fla. 1990). Windom clearly had the intent to kill his selected victims. Like an avenging angel of death he first revealed his displeasure to them, one by one, prior to dispatching them at close range.

The CCP factor was also upheld under similar circumstances in *Provenzano v. State,* 497 So.2d 1177 (Fla. 1986), where the

defendant entered a courthouse with the intent of killing the officers and deliberately shot a bailiff at point blank range.

Appellant's fleeting attempt to fit this case into the "domestic dispute exception" should, and more importantly, *ought* to fail miserably for several reasons. First, Valerie Davis was not a spouse but only Windom's girlfriend (R 486). Windom only sometimes shared the Eleventh Street apartment with her (R 349;356). Secondly, this is not even a case of domestic confrontation or dispute between paramours. Any dispute centered not on personal but business relationships and did not revolve around passion but drug dealing, according to Windom's own admissions. Initial Brief of Appellant, p.62 n.20

The state would, furthermore, respectfully submit that the domestic dispute exception is an anomaly. A spouse is not relieved of legal responsibility for sexually battering his or her spouse simply because of their close relationship, *see, State v. Smith,* 401 So.2d 1126 (Fla. 5th DCA 1981), yet because of that same close relationship legal responsibility is diminished in the case of an even greater and, in fact, the ultimate harm -- murder. If marriage or association is not a license to rape it certainly shouldn't be an absolution for murder. The violent ills plaguing society will never cease until respect begins in the home.

It should be clear that in using the language "without any pretense of moral or legal justification" in the CCP aggravator the legislature contemplated a situation where a person wrongfully believed that his actions were morally or legally warranted. The

operative language is not "pretense" but "moral or legal justification," which if incorrectly believed to exist, reduces down to a pretense of the same. This aggravator was never intended to apply to a host of banal, sociopathic, reasons for killing, such as the desire to end large drug transactions, annoyance at a partner's parent or at the partner for ratting on drug dealing. It was certainly never meant to apply to mob-like tactics for welshing on a debt. This court has heretofore only recognized a pretense of moral or legal justification in those situations where a person believed they were in danger and preemptively struck, where there was no legal right of self-defense. *See, Christian v. State,* 550 So.2d 450 (Fla.1989); *Banda v. State,* 536 So.2d 221 (Fla. 1988).

Even if this factor was inappropriately found, the error is harmless beyond a reasonable doubt since the other convictions for capital felonies remain and the sentencing outcome would not change. *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986)

X THE SENTENCING COURT PROPERLY FOUND THE AGGRAVATING FACTOR OF A PRIOR VIOLENT FELONY

The judge found that Windom had been previously convicted of another capital offense or of a felony involving the use or threat of violence to the person based on that fact that he killed three people and seriously wounded a fourth and was found guilty on all four counts. Each capital felony served as a previous conviction for the others. Each of the first degree murder charges and the attempted first degree murder were considered felonies involving the use of violence for purposes of aggravation of the other first degree murder charges (R 355-356).

It is well-settled that contemporaneous convictions can be used to establish the prior violent felony aggravating factor where there is more than one victim. *Wasko v. State,* 505 So.2d 1314 (Fla. 1987); *Espinosa v. State,* 589 So.2d 887 (Fla. 1991); *Zeigler v. State,* 580 So.2d 127 (Fla. 1991).

Appellant's novel construction of the language of Section 921.141(5)(b), Florida Statutes (1992) must fail. Had the legislature wanted to achieve the effect appellant desires it would have made reference to a "sentence" or "previous sentence" rather than the reference "previously convicted." Furthermore, had the court misinterpreted the intent of the legislature, the legislature could have long ago revised the statutory language.

That appellant had no prior violent felony convictions prior to the homicides and attempted murder only indicates a heretofore unexposed propensity for violence which clearly manifested itself on February 7, 1992. In the absence of some mental disturbance appellant cannot be absolved of responsibility under this aggravating factor by virtue of the fact that his stored hostility combusted in a continuing eruption. In terms of "propensity" one might better ask "if he would do this what would he do next?"

XI THE SENTENCING COURT PROPERLY DETERMINED THE RELATIVE WEIGHT TO BE GIVEN EACH MITIGATING FACTOR

Evidence is "mitigating" if, in fairness or in the totality of a defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed. *Wickham v. State,* 593 So.2d 191 (Fla. 1991) Most of the mitigation presented does not even come close to fitting

that description and Windom is fortunate that the court took such a broad view of mitigation. Windom was not even entitled to the mitigating factor that he acted under extreme duress since such factor contemplates some external provocation. *See, Toole v. State,* 479 So.2d 731 (Fla. 1985). The other evidence Windom received the benefit of having accepted as mitigating is hardly probative of his moral culpability for the crimes. That he was willing to give away things purchased with money he never had to earn and liked some family members enough to prevent their deaths when he could easily do so, on one occasion for the price of only twenty dollars, hardly outweighs not only the aggravators but the havoc and destruction he wreaked on his family and community by his violent acts.

The judge's treatment of "mitigating" evidence hardly runs afoul of the decisions of this court. The judge found as mitigating the most tenuous of evidence. The relative weight given each mitigating factor is within the province of the sentencing court. *Campbell v. State,* 571 So.2d 415 (Fla. 1990); *Dailey v. State,* 594 So.2d 254 (Fla. 1991). Appellant is confused in regard to "little" and "no" weight. No factor found as mitigating was dismissed as having no weight. It was clearly within the province of the sentencing court to assign minuscule weight to this fringe mitigation.

XII THE DEATH PENALTY IS NOT DISPROPORTIONATE IN THIS CASE

It is true that the sentencing judge found only two aggravating circumstances, as appellant states, but those factors applied to each of the murders (R 355-363). Appellee has argued

elsewhere the applicability of aggravating factors and the weakness of mitigation. The sentence is proportional in this case based on the aggravating factors and weak mitigation and has been imposed in other similar cases. *See, Provenzano v. State,* 497 So.2d 1177 (Fla. 1986); *Cruse v. State,* 588 So.2d 983 (Fla. 1981).

XIII SECTION 921.141 FLORIDA STATUTES (1992) IS CONSTITUTIONAL

The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues and such claims should be deemed waived. *Duest v. State,* 555 So.2d 849 (Fla. 1990); *Medina v. State,* 573 So.2d 293 (Fla. 1990).

In the absence of any showing where these claims were raised and entertained and how they were disposed of, appellee raises the *affirmative defense* of procedural bar as to each and every issue. Appellee objects to the vexatious practice of lumping claims together in a boilerplate fashion in a final point with no indication where, or even if, these claims were ever raised below. The sole purpose for such practice is the hope that this court will dispose of such claims in a manner which may be later construed as a merits ruling in federal court so that now unworthy claims, never before raised, may be later entertained should they become fashionable. Appellant has a duty of candor to this court and should come forward with the history of each and every claim.

Appellant has also failed to demonstrate the applicability of these hypothesized principles to his own particular case.

Alternatively, appellant's claims are without merit as individually argued herein. In the event of error, appellee would submit that the appropriate sentence was still imposed and that any such error is harmless in the context of this case. *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986).

A majority recommendation has been deemed sufficient to recommend the death penalty. *Brown v. State,* 565 So.2d 304 (Fla. 1990). The cases cited by appellant apply to the guilt phase.

In *Walton v. Arizona,* 110 S.Ct. 3047, 3054 (1990), the United States Supreme Court held that aggravating circumstances are not separate penalties or offenses , but are *standards* to guide the making of the choice between the alternative verdicts of death and life imprisonment. *See also, Lowenfield v. Phelps,* 484 U.S. 231 (1988); *Hildwin v. Florida,* 109 S.Ct. 2055 (1989).

In the present case the jury was instructed in the penalty phase as follows:

> Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for his crimes of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law that will be now given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. Your advisory sentence as to what sentence should be imposed on this defendant is entitled by law and will be given *great weight by this court* in determining what sentence to impose in this case. *It is only under rare circumstances that this court would impose a sentence other than what you recommend.* Your advisory sentence should be based upon the evidence that you have heard

> while listening while -- excuse me, while trying the guilt or the innocence of the defendant and evidence that has been presented to you in these proceedings.

(R PP 22-23;101-102)(Emphasis added)

No request for a special instruction on this issue was made (R 329-351). No objection was made to the state's proposed instruction (R 352-354;R PP 49-78;99-101). No objection was made by the defense to the instruction as read (R PP 107). This claim is clearly procedurally barred. *Harris v. State,* 438 So.2d 787, 795 (Fla. 1983); *State v. Heathcoat,* 442 So.2d 694, 697-698 (Fla. 1983). The instruction as given stressed the gravity of the jury's undertaking and did not improperly describe the role assigned to the jury by local law and was not in error, in any event. *See, Dugger v. Adams,* 489 U.S. 401, 407 (1989).

Appellant has failed to demonstrate that any ambiguity in the role of the trial judge prevents evenhanded application of the death penalty. Appellant has not even divulged those instances in which constitutional error has been ignored because of the trial judge's ambiguous role. Evenhanded application is insured by virtue of Florida's *tri*furcated death penalty procedure. Regardless of what the trial judge does, this court certainly knows and applies its own law and is entitled to the *Walton v. Arizona,* 110 S.Ct.3049 (1990), presumption that it has so applied such law in making its decisions.

In legal contemplation judges, like litigants, are all equal before the law. Appellant has no right to any particular judge. *Kruckenberg v. Powell,* 422 So.2d 994 (Fla. 5th DCA 1982). This

would include judges of African-American ancestry. Appellant did not move to disqualify this particular judge as biased or question the sentence on such basis and this issue should be deemed to be procedurally barred. Appellee would submit that appellant has failed to demonstrate that he even has standing to raise such issue.

In *Sochor v. Florida,* 112 S.Ct. 2123, 2123 (1992), the United States Supreme Court indicated that review for harmless federal error is sufficient. Such review is as acceptable as independent appellate reweighing. The Florida death penalty statute is not unconstitutional under *Proffitt v. Florida,* 428 U.S. 242 (1976). *See also, Maynard v. Cartwright,* 108 S.Ct. 1853 (1988).

The very fact of appellate narrowing constructions of aggravating factors is in accordance with the "rule of lenity" since it narrows the class of persons eligible for the death penalty.

In *Herring v. State,* 446 So.2d 1049,1057 (Fla. 1984), this court found that evidence that the defendant first shot a store clerk in response to what he believed was a threatening movement and then shot him a second time after he had fallen to the floor was sufficient to show the heightened premeditation required to apply the CCP aggravator. In *Rogers v. State,* 511 So.2d 526,533 (Fla. 1987), this court receded from its holding in *Herring,* after concluding that "calculation" consists of a careful plan or prearranged design. It found that the trial court's finding that the murder was accomplished in a calculated manner was not

supported by the evidence which demonstrated the utter absence of a careful plan or prearranged design to kill anyone during the robbery of a supermarket, as the murder occurred as the defendant and co-defendant were fleeing from the scene of the unsuccessful robbery. Unlike the more impulsive factual scenario in *Herring,* the facts in *Swafford v. State,* 533 So.2d 270 (Fla. 1988), clearly show a careful plan or prearranged design to kill. Swafford shot the victim nine times, including two shots to the head at close range, and had to stop and reload his gun to finish carrying out the shootings. This court did not "resurrect" *Herring,* in *Swafford.* The opinion in *Herring* rated only a "*see*" and was discussed in the context of reloading, which demonstrated more time for reflection and heightened premeditation. There is no reference in the *Herring* opinion to reloading. In *Schafer v. State,* 537 So.2d 988,991 (Fla. 1989), this court found that the record did not support a finding that the murder of a robbery victim was committed in a cold, calculated, and premeditated manner, since there was no evidence to illustrate any prior calculation or prearranged plan or design. The defendant confessed that he had panicked when the victim caught him burglarizing her home. 537 So.2d at 990. There has been no inconsistency of decision. This court has previously held that the CCP factor is not unconstitutionally vague or overbroad. *Kelley v. Dugger,* 597 So.2d 262 (Fla. 1992); *Klokoc v. State,* 589 So.2d 219 (Fla. 1991). Appellant has shown nothing to the contrary. Appellant certainly cannot complain that this factor was not narrowed prior to the time he went to trial.

In *Raulerson v. State,* 358 So.2d 826,834 (Fla.1978), the court found the HAC factor present even though a pistol shot caused immediate death as the crime was committed during the course of a robbery and immediately after a rape, there were many shots fired, and the deceased was well aware his life was in danger from the moment he entered the restaurant. This was not a sudden attack but part of a general robbery scheme. Raulerson had shot and killed a police officer. The United States District Court granted a habeas corpus petition and directed that a new sentencing hearing be held. On appeal to this court the HAC factor was again challenged and considered. This court had several intervening years to narrow this factor. See, *Williams v. State,* 386 So.2d 538,543 (Fla. 1980). It ultimately held that the HAC factor was not applicable as the murder, while utterly reprehensible, was not accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim. 420 So.2d 571. The *Raulerson* case merely demonstrates that this court carefully and diligently narrowed this factor and applies such constructions consistently and will correct any misapplication. Since the HAC factor was not found and applied in Windom's case he lacks standing to complain of the narrowing of the factor by this court, in any event.

The "felony murder" aggravating circumstance has not been liberally construed in favor of the state. One undertaking a felony is held to the foreseeable consequences of his conduct. In many cases murder is a planned consequence. Aside from the

willingness to do whatever is necessary to accomplish the underlying felony, a defendant should be properly held accountable where he plans for such contingency as well.

The "hinder government function or enforcement of law" factor was also not applied in appellant's case and he lacks standing to complain that such factor has been broadly interpreted.

The practice of procedurally defaulting claims not properly raised is authorized by the United States Supreme Court. *Wainwright v. Sykes,* 433 U.S. 72 (1977).

Retroactivity principles have not been capriciously used. In *Campbell v. State,* 571 So.2d 415 (Fla. 1990), this court held that the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. In *Gilliam v. State,* 582 So.2d 610, 612 (Fla. 1991), the sentencing order did not enumerate the statutory mitigating factors on which evidence was presented although the order did recite the statutory aggravating factors that were found proved and the reasons supporting the findings, as well as the nonstatutory mitigating circumstances that the court found proved. This court held that in view of the trial judge's findings regarding nonstatutory mitigating circumstances, it could be assumed that he followed his own instructions to the jury in considering the statutory mitigating circumstances, despite the fact that he did not enumerate them. 582 So.2d at 612. The court did not reach the

issue of whether the order complied with *Campbell* because it found that *Campbell* was not a fundamental change of law requiring retroactive application, in regard the preparation of a sentencing order. 582 So.2d at 612. In *Nibert v. State,* 574 So.2d 1059 (Fla. 1990), the evidence established that the victim had been stabbed seventeen times and the murder was HAC. The defendant, however, established mitigating circumstances of physical and psychological abuse, remorse, good potential for rehabilitation, influence of extreme mental or emotional disturbance, and substantial impairment of capacity to control behavior. This court found, therefore, that the death penalty was disproportional. *Campbell* was merely cited for the proposition that a mitigating circumstance must be reasonably established by the greater weight of the evidence, which the court had already held in *Rogers v. State,* 511 So.2d 526,534 (Fla. 1987), and that where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. 574 So.2d at 1061-62. In *Maxwell v. State,* 603 So.2d 490 (Fla. 1992), the trial court committed a *Hitchcock v. Dugger,* 481 U.S. 393 (1987), error which required a new sentencing hearing. The *Campbell* decision was not even cited. *Nibert* was cited along with a host of other cases preceding *Campbell* standing for the not-at-all-novel proposition that where a mitigating factor is proven it must be found. 603 So.2d at 490. Thus, it appears that the principles of *Campbell* are not even new, except as applied to the preparation of sentencing orders which requirement has only

prospective application.

Since 1985 this court has determined that *Tedder v. State,* 322 So.2d 908 (Fla. 1975), means precisely what it says, that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. *Cochran v. State,* 547 So.2d 928, 933 (Fla. 1989). Appellant does not reveal what other off-shoot doctrines are also inconsistently applied and the state is too claim-weary to begin to speculate.

As previously argued, the aggravating factors are not elements of the crime but standards. *See, Walton, supra.* There is no constitutional requirement that the jury render written findings, no less indicate unanimous agreement as to the applicability of each aggravating circumstance. *See, Hildwin v. Florida,* 109 S.Ct. 2055 (1989); *Jones v. State,* 569 So.2d 1234 (Fla. 1990). The process by which a convicted murderer is sentenced to death in Florida is not at all similar to accounting principles. A jury recommendation is based on a weighing of the totality of aggravating circumstances against the totality of mitigating circumstances. Double jeopardy concerns are not implicated by the rendering of an advisory recommendation. *Spaziano v. Florida,* 468 U.S. 447 (1984). Jury error should not be presumed since the jury in Florida does not reveal the aggravating factors on which it relies. *See, Sochor v. Florida,* 112 S.Ct. 2114, 2122 (1992).

Section 921.141, Florida Statutes (1992) provides that a defendant may present matters in mitigation to the jury and the

judge in the penalty phase of a capital case. A condemned prisoner may also present mitigating information to the Governor of this state in clemency proceedings. That the procedural vehicle for presenting mitigating evidence is not Florida Rule of Criminal Procedure 3.800(b) hardly calls into question constitutional principles. It certainly does not in this case where the defendant actually had a separate mitigation hearing before the judge.

The claim that the death penalty statute shifts the burden to the defendant to prove sufficient mitigating circumstances exist which outweigh aggravating circumstances is without merit. *Kennedy v. Dugger,* 933 F.2d 905 (11th Cir. 1991). The automatic aggravating circumstance claim was rejected in *Lowenfield v. Phelps,* 484 U.S. 231 (1988). It is presently before the Court again in *Tennessee v. Middlebrooks,* No. 92-989.

The claim that the jury was unconstitutionally instructed not to consider sympathy was decided against appellant in *Saffle v. Parks,* 494 U.S. 484 (1990). Mitigating circumstances are not designed to be the subject of sympathy, in any event. Their importance lies in determining whether a defendant is of such legal responsibility as to be a candidate for a sentence less than the ultimate one. In a nonstatutory context a terrible childhood is relevant not to cause the jury to feel as much sympathy for the defendant as it does for the victim but to make a determination whether that background would have had such a profound affect on the defendant so as to inexorably lead him to the situation in which he finds himself or to reduce his level of responsibility so

as to preclude imposition of the ultimate sentence.

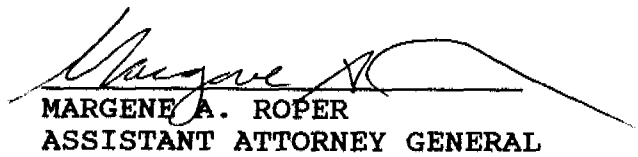
There is no question that the death penalty is constitutional. *Patten v. State*, 598 So.2d 60 (Fla. 1992); *Thomas v. State*, 456 So.2d 454 (Fla. 1984). The mere possibility that the electric chair may, at some unknown time in the future, malfunction, is not a concern for the courts. *Buenoano v. State*, 565 So.2d 309 (Fla. 1990); *Louisiana ex rel. Frances v. Resweber*, 329 U.S. 459 (1947).

CONCLUSION

Based on the foregoing argument and authorities, appellant's judgments and sentences of death should be affirmed as to each and every murder. The judgment and sentence for attempted murder should likewise be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been hand delivered to Assistant Public Defender Christopher S. Quarles, 112 Orange Avenue, Suite A, Daytona Beach, Florida, 32114, in his basket at the Fifth District Court of Appeal, this 24th day of February, 1994.

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