IN THE SUPREME COURT OF FLORIDA

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DAVID ALLEN GORE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 80,916

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR ST. LUCIE COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

## TABLE OF CITATIONS

Statutes/Rules — Pages

IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| DAVID ALLEN GORE, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| vs. | ) | Case No. 80,916 |
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| STATE OF FLORIDA, | ) | |
| | ) | |
| Appellee. | ) | |
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## PRELIMINARY STATEMENT

Appellant, DAVID ALLEN GORE, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the record will be by the symbol "R," followed by the appropriate page number(s).

## STATEMENT OF THE CASE AND FACTS

On August 17, 1989, Gore's death sentence was vacated by the United States District Court for the Middle District of Florida based on a violation of Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987). The district court found that Appellant was precluded from presenting evidence of drug and alcohol abuse, and the dominance exercised by Waterfield over appellant. Gore v. Dugger, 763 F.Supp. 1110 (M.D. Fla. 1989). That ruling was affirmed in Gore v. Dugger, 933 F.2d 904 (11th Cir. 1991). Appellant's resentencing was conducted in November 1992.

Appellee accepts appellant's statement of the facts to the extent that they are an objective account of the facts adduced at trial. However, the following additions are necessary in order to present a complete and accurate representation for the Court,

In opening statement, defense counsel outlined for the jury the sum and substance of his mitigating evidence. According to counsel, Gore's entire life was influenced by Freddie Waterfield. (R 1723-1729). Gore's participation in the murder was a result of that influence. Although Waterfield was as equally culpable for the murder, he was only convicted of manslaughter, (R 1733). Gore suffers from the disease of alcoholism, and he was under the influence of alcohol at the time of the crime. (R 1730-1732). Months prior to the murder, appellant went through a terrible divorce. (R 1730).

Regan Martin, the surviving victim, testified that Gore repeatedly threatened to kill the two girls. (R 1928-1929, 1942). Waterfield never threatened them. (R 2014). There was very little conversation between Gore and Waterfield. (R 2013, 2014). Gore pulled the girls out of the truck when they arrived at the house. (R 1933). She heard Gore threaten to kill Lynn while Lynn was gagging. (R 1942). She never smelled alcohol on Gore. His eyes were not bloodshot and he never slurred his words. (R 1995-1996). Gore was in complete control. (R 2072). He never looked to Waterfield for approval. (R 2041). After Waterfield initially entered the house, she heard Gore and Waterfield whispering. (R 1932). After that she never heard his voice or saw him again. (R 2014, 2063, 2077). Waterfield did not sexually assault Martin. (R 2085).

Michael Rock testified that the man turned and looked at Rock and then jogged back to the house. (R 2154). He never staggered and did not appear to have problem running. (R 2155). Rock got a good look at the man, whom he later identified as Gore. (R 2154-2158). He rode his bike home as fast as he could and called the police. (R 2156).

Detective Redstone stated that the murder occurred at approximately 3:35 p.m. on July 26, 1983. (R 1751, 1758). The murder occurred at the home of Gore's parents, who were away on vacation. (R 1756). The police arrived at Gore's residence at 4:02 p.m. (R 2163). The police knocked on the front door, but no one responded. (R 2169). At 4:23 p.m. an emergency call came into

the police station. The person said that he heard screams from a nearby orange grove, and that a man was chasing a woman. The woman was injured. (R 2173). A second call was placed to "911" at 4:25 p.m. (R 2174). The caller said that the screams were farther away from the house. (R 2174). The calls originated from the Gores' home. (R 2172). Lynn Elliott's body was found in the trunk of a car in the driveway. (R 2179). Redstone, an expert in field sobriety tests, opined that when Gore was arrested he was not under the influence of alcohol. (R 2299-2300). There were no obvious signs of alcohol impairment. (R 2209, 2312).

Captain Dubois testified that at the time of Gore's arrest Gore was alert and responsive. (R 2409). There was no smell of alcohol, and his eyes were not bloodshot. (R 2411).

Daniel Nippes testified that Gore's jeans had saliva and sperm in the crotch and fly area. (R 2476). If Waterfield did sexually assault Lynn Elliott, he could not have been the only one to do so. (R 2476). According to Nippes, the forensic evidence is consistent with Elliott being forced to perform oral sex. (R 2477). There was no semen, saliva or hair found on Waterfield's clothes. (R 2483-2485).

The medical examiner testified that Elliott's injuries were very painful. (R 2512-2516). The abrasions to her hip, shoulder, and knees were consistent with being dragged. (R 2509). All injuries occurred before death. (R 2530-2532).

## APPELLANT'S CASE

George Stoke's had limited contact with Gore while they were growing up. (R 2722).

William Bowling, appellant's brother-in-law, testified that Gore's father was a good, genuine man. (R 2769). Waterfield did not live in Vero Beach for three years prior to the murder. (R 2767). Bowling did not see appellant that day. (R 2772). He could not say that appellant was under the influence of alcohol on the day of the murder. (R 2776).

Dr. Maher, a psychiatrist, testified that he interviewed appellant on October 14, 1992, for two hours, and on the night before his testimony for an additional hour. (R 2897). Maher did not know all of the facts about the murder and did not think that it was necessary to know about them. (R 2902). Maher did not speak to Waterfield. (R 2912).

Maher opined that Gore was intoxicated the day of the crime. The basis for that opinion came from Gore's statement, Regan Martin's statement, and the fact that a half-empty vodka bottle was found in the house. (R 2914-2917). He further relied on the fact that Gore's earlier conviction for armed trespass involved alcohol. (R 2928). He stated that he relied heavily on Gore's statement to him. (R 2918). Gore told Maher that he did not have an erection that day and that he did not ejaculate. (R 2912-2922). Gore also told Maher that Waterfield was not there for most of the crime, and that Gore acted on his own. (R 2942, 2954). Waterfield was not the cause of Lynn Elliott's murder. (R 2964).

Alva Gore, appellant's father, testified that his family never went hungry or without medical attention. (R 3028). He and appellant were close. His wife, appellant's mother, stayed home and took care of the children growing up. (R 3027). Appellant's eyes would turn red and his speech would slur when he drank. (R 3037).

Dr. Peter Malacuso testified that he reviewed appellant's DOC file which does not indicate that Gore had a history of substance abuse. (R 3086). Gore did not drink while he was in prison for two years. He got out of jail four months before this crime occurred. (R 3089). Appellant told the doctor that he had twenty to twenty-four ounces of vodka before the murder, (R 3104). Dr. Malcuso did not speak to the police.

## STATE'S REBUTTAL

Officer Raymond testified that he did not smell alcohol on Gore when he was arrested. (R 3219) . There is no question in his mind that he was not under the influence of alcohol that day. (R 3219).

Dr. Cheshire testified that, in his opinion, it was not possible for appellant to have ingested that much alcohol and not show signs of impairment. (R 3433, 3441). Gore knew what he was doing that day. He tried to divert the police's attention by calling "911." Appellant is smart and a quick thinker. (R 3446). He was not under Waterfield's influence during the commission of this crime. (R 3446).

The trial court found the following six aggravating factors: (1) the capital crime was committed by a person under sentence of imprisonment; (2) appellant was previously convicted of another capital offense or of a felony involving the use or threat of violence to some person; (3) The crime was committed while appellant was engaged in both kidnaping and sexual battery; (4) the murder was committed for the purpose of avoiding a lawful arrest; (5) the capital felony was heinous, atrocious or cruel; and (6) the capital felony was cold, calculated and premeditated. (R 4564-4569).

The trial court did not find any credible evidence to support a finding of any of the statutory mitigating factors. (R 4570-4572). The court did find as non-statutory mitigating evidence that appellant exhibited exemplary conduct in prison and has the capacity to be a model prisoner in the future; that he comes from an impoverished childhood; that he showed exemplary behavior at trial; that appellant loves his children; and that appellant may have been depressed at the time of this murder. (R 4572-4575).

The trial court found insufficient evidence to support non-statutory mitigation that appellant confessed to the crime; that Waterfield was treated disparately; that appellant had a history of alcoholism and a history of depression. (R 4572-4576).

## SUMMARY OF ARGUMENT

Issue I - Appellant alleges that the trial court erred in denying several cause challenges, This issue is not preserved for appeal. In the alternative, appellant cannot establish that any juror who sat in his case was objectionable.

Issue II - The jury was properly instructed on the sentencing alternatives they were to consider. Appellant was not precluded from arguing to the jury that he would never be paroled from prison if he were given a life sentence.

Issue III - Appellant's conviction for armed trespass of a conveyance satisfied the aggravating factor of "prior violent felony".

Issue IV - There was sufficient evidence to establish the aggravating factors of "avoid arrest," "cold, calculated and premeditated," and "heinous, atrocious or cruel."

Issue V - The jury was properly instructed regarding mitigating evidence. The trial court properly declined to give appellant's special jury instruction regarding mercy.

Issue VI - The trial court properly refused to give the myriad array of special jury instructions requested by appellant. Appellant's challenge to the jury instructions regarding the aggravating factors was not preserved for appeal. In the alternative, the instructions were constitutionally sound.

Issue VII - The state did not violate its prior agreement with Gore regarding his convictions for five other murders.

Issue VIII - The state's argument to the jury was proper.

Issue IX – The trial court properly denied appellant's request to challenge the identification made of Gore by eyewitness Michael Rock. Appellant was not precluded from cross-examining Rock regarding that identification.

Issue X – Appellant was not precluded from presenting his statement implicating Waterfield in the murder.

Issue XI – The trial court properly allowed Dubois to testify about the inconsistencies in the evidence. If error, it was harmless error beyond a reasonable doubt.

Issue XII – The state was properly allowed to talk to its witness during a break in the direct examination.

Issue XIII – The trial court never precluded appellant from addressing the court prior to sentencing.

Issue XIV – Judge Vaughn's temporary assignment to conduct a portion of circuit court matters in addition to his county court duties was permissible.

Issue XV – The trial court correctly ordered Gore to submit to a psychological examination by a state psychiatrist.

Issue XVI – There was no retroactive application of law to Gore's resentencing.

## ARGUMENT

## ISSUE I

### WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S CAUSE CHALLENGES

Appellant claims that the trial court erred in denying cause challenges on the following people: Mr. Patterson, Mr. Donithan, Ms. Agostini, Mr. Wales, Mrs. Kramer, Mr. Miller, Ms. Arcomone, Mr. Gehart. As a result, the a jury panel contained the following four objectionable jurors: Mr. Donithan, Ms. Kramer, Ms. Arcomone, and Mr. Tobin.[1] This claim should be denied either based on procedural default or on the merits,

To preserve this issue, an appellant must exhaust all his peremptory challenges, request additional strikes, and indicate whom he would strike if his request for additional challenges was granted. If his request is denied, an appellant must then demonstrate that the panel contained an objectionable juror. Pentecost v. State, 545 So. 2d 861, 863 n.1 (Fla. 1989), and Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990).

In the instant case, appellant has not preserved this issue for appeal. Appellant attempted to challenge for cause Kramer, Arcomone and Donithan. His cause challenges on all three were denied. (R 1328, 1382-1388, 1430). Appellant requested three additional strikes, informing the court that he would exercise them

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[1] Although appellant characterizes Tobin as an objectionable juror, he was never challenged for cause before the trial court.

on Kramer, Tobin, and Arcomone.[2] He was given one additional strike, yet he failed to use that strike on any of the three jurors he identified as objectionable. Given appellant's acquiescence to those jurors, this issue is not preserved for appeal. Cf. Rhodes v, State, 638 So. 2d 920, 924 (Fla. 1994) (finding that after passing up opportunity to rehabilitate juror and then affirmatively acquiescing to judge's decision to excuse juror waives issue for review); Gunsbv v. State, 574 So. 2d 1085, 1088 (Fla. 1991) (finding that failure to object to the trial court's procedure wherein the court sua *sponte* discharged jurors waived issue for appellate review).

Were this issue properly preserved, the trial court's rejection of appellant's cause challenges was nevertheless correct. A juror is competent as long as he can lay aside any prejudices or biases he may have and render a verdict solely on the evidence. Lusk v. State, 446 So. 2d 1038, 1041 (Fla.), cert. denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984). Deciding if a juror should be excused for cause should be based on what is observed and heard. Since the judge must evaluate the credibility of the responses, the court possesses discretion in its decision. Pentecost v. State, 545 So. 2d 861 (Fla. 1989). A challenge for cause is not appropriate simply because a person has a strong opinion about any particular subject. See Fitzpatrick v. State, 437 so. 2d 1072, 1075 (Fla. 1983) (ruling that strong feelings in

[2] Appellant did not seek an additional strike on Donithan.

favor of the death penalty do not render a prospective juror incompetent in capital cases). As long as jurors indicate that they are able to abide by the court's instructions, irrespective of personal feelings, a cause challenge need not be granted. Penn v. State, 574 So. 2d 1079 (Fla. 1991). If there is record support for the judge's conclusions regarding juror competency, reversal is not warranted. Johnson v. State, 660 So. 2d 637, 644 (Fla. 1995). With these principles in mind, the state submits that appellant has not established error.

Appellant claims that juror Kramer should have been stricken because (1) she stated that, in her personal view, sympathy and mercy should not be considered in a capital sentencing procedure; and (2) Ms. Kramer, a rape victim, gave ambiguous responses to questions concerning her ability to be impartial.[3] She stated on more than one occasion that she could and would put aside her personal feelings and follow the judge's instructions, even if those instructions were in opposition to her personal feelings. (R 573, 579). She unambiguously stated that her prior experience as a rape victim would not in any way affect her ability to be impartial. (R 1162-1167). The trial court's denial of a cause

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[3] Aside from the procedural default raised at the outset, there exists an additional reason which precludes review with respect to Kramer. When appellant's challenge for cause was denied, he possessed several peremptory strikes, yet Kramer was not stricken. Given appellant's failure to rectify the alleged error by removing her peremptorily, review should be denied. See Pentecost v. State, 545 So. 2d 861, 863 n.1 (Fla. 1989) (finding that to establish that an objectionable juror existed, defendant must use existing peremptory strike on juror who was unsuccessfully challenged for cause).

challenge to Ms. Kramer was proper. (R 1323-1324). See Fitzpatrick, 437 So. 2d at 1072 (ruling that, as long as personal feelings can be put aside in favor of following the law and applying evidence, juror is competent).[4]

Appellant claims juror Tobin was an objectionable juror, but merely makes a conclusory argument that Tobin was incompetent, without citing to any record support for his assertion. (Initial brief at 33). As a result, this claim is not properly presented to this Court, and should be deemed waived. Cf. Duest v. State, 555 So. 2d 849, 852 (Fla. 1990) (ruling that issue in appellate brief which merely references a pleading filed in trial court will not preserve issue for appellate review), rev'd on other grounds sub nom. Duest v. Singletary, 967 F. 2d 472, cert. denied, __U.S.__, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993). Regardless, appellant never requested that Tobin be challenged for cause. Moreover, when appellant asked for three more strikes, one ostensibly to be used on Tobin, defense counsel never stated the reasons why Tobin was objectionable. (R 1403-1406). Given appellant's failure to demonstrate that Tobin was objectionable, review is precluded. See Trotter v. State, 576 So. 2d at 693 n.5.

In any event, there is no indication in the record that Tobin was incompetent to sit as a juror. He stated that he would not form an opinion regarding his recommendation until he heard all of

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[4] To the extent that any of her responses were ambiguous, it was well within the trial court's discretion to deny appellant's cause challenge. See Watson v. State, 651 So. 2d 1159, 1162 (Fla. 1994).

the evidence. (R 962). He stated that he would be fair and impartial and would follow the law as instructed by the court. (R 496, 499, 543). He also expressed positive feelings towards appellant's proposed mitigation. Tobin stated he would keep an open mind to any psychiatric testimony (R 1137), and he further stated that he had been exposed to a relationship where one person had an unnatural influence over another. (R 1137). Appellant cannot demonstrate that Tobin was an objectionable juror. See Fitzpatrick, 437 So. 2d at 1072.

Appellant claims that juror Arcomone was objectionable because she would not consider sympathy. (R 1383). Again, sympathy is not a basis for excusal. Regardless, all of her responses indicate that she would follow the law and lay aside any bias. She stated that she was in favor of the death penalty, yet she would not automatically vote for it. (R 676-677, 1290). She would base her recommendation on the law and the evidence. (R 677). Although she is personally against sympathy as a consideration in these proceedings, she would follow the law as instructed. (R 1290). She expressed positive attitudes towards appellant's theory of mitigation. Her personal views indicated that she believed mental health professionals are helpful (R 1018), that alcoholism is a disease which she would consider if instructed to do so (R 1085), and that she could appreciate the fact that one person can have an influence over another (R 1152). She clearly stated that she would follow the court's instructions and consider both aggravating and mitigating factors. (R 1289-1290). Thus, given her overall

responses, including those assertions that she could follow the law, the trial court properly denied a cause challenge against Ms. Arcomone. See Johnson v. State, 660 So. 2d 637, 644 (Fla. 1995) (reiterating rule of law that jurors who have expressed strong feelings are still competent to sit as jurors as long as they can put aside feelings and follow the court's instructions).

Appellant also claims Mr. Donithan was incompetent to sit as a juror because he believed in the death penalty and would vote for death without hearing any evidence. (R 1426). His responses clearly demonstrated however that he could put aside his personal beliefs and follow the law. (R 1260). He would follow the law, even if it meant he had to go against his personal feelings. (R 1291). Even though he favors the death penalty, he would look to the aggravating and mitigating factors and follow the law, just as jurors should. (R 1293). Simply because his personal views are in favor of the death penalty does not indicate that he was an incompetent juror. See Johnson, 660 So. 2d at 644; Fitzpatrick, 437 So. 2d at 1072.

Finally, although stricken peremptorily, appellant claims that the trial court should have stricken for cause jurors Patterson, Agostini, Wales, and Miller. Each one, however, stated that they would follow the judge's instructions regardless of their personal beliefs or knowledge of the case. (R 539, 543, 536, 794-795, 467, 492, 1299-1300, 1357-1360). Moreover, Patterson said that the death penalty was reserved for special murder cases and that he would use common sense, listen to the instructions, and apply the

law to the facts. (R 543, 536, 539). Agostini stated that she remembered the case from when it was in the papers, but that she did not remember what she read about it. (R 779-780). She unequivocally stated that she would base her decision solely on what she heard in the courtroom. (R 467, 793-795). Finally, her familiarity with the victim's family is deminimus because her husband played softball thirty years ago with a man that used to date the victim's mother. (R 795). Wales said that he would weigh the aggravating and mitigating factors and keep an open mind to all that was presented. And Miller stated that she could vote for life or death if it were appropriate (R 611), that she would follow the law even if she did not agree with it, and that she would be able to set aside any knowledge of the case. (R 817-820). The trial court properly denied all of appellant's challenges for cause. See Johnson, 660 So. 2d at 644; Fitzpatrick, 437 SO. 2d at 1072; Bundy v. State, 471 So. 2d 9, 20 (Fla. 1985).

## ISSUE II

WHETHER THE STATE MISLED THE JURY REGARDING APPELLANT'S PAROLE ELIGIBILITY

Appellant claims that the state misled the jury into believing that if he were sentenced to life he could be released from prison now or within fifteen years of resentencing. The state allegedly committed the transgression by: (1) objecting to the defense's attempt to tell the venire that appellant's sentencing options were either death in the electric chair or life without the possibility of parole, which the trial court sustained (R 971-973);[5] (2) continuing to misrepresent the sentencing alternatives during the cross-examination of Robert Stone; (3) objecting to appellant's requested jury instruction, which the trial court sustained;[6] and (4) incorrectly advising the trial court as to how to answer two jury questions, which the trial court adopted.

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[5] Appellant also states that two people in the venire, Agostini and Maynard, mistakenly thought that appellant's sentence was simply twenty-five years rather than life. Appellant mischaracterizes the record. Defense counsel explained to Agostini that a life sentence meant that appellant would not be eligible for parole for twenty-five years. It did not mean that he would only serve twenty-five years. (R 1230-1231). Maynard stated that she did not think that appellant would live long enough to be eligible for parole. (R 853-854). Defense counsel did not even attempt to correct any alleged misunderstanding regarding Maynard's perception. In any event, neither Maynard nor Agostini sat as jurors in this case. (R 3640-3642).

[6] Appellant requested that the jury be instructed that the possible sentencing alternatives were death or life. The judge denied the instruction since it was not a correct statement of the law. The court relied on the standard jury instructions. (R 3273-3279).

A review of the record demonstrates that a majority of this issue is not preserved for appeal, as appellant is presenting a different argument on appeal than that which was raised below. See Occhicone v. State, 570 So. 2d 902, 905-906 (Fla. 1993) (holding that to preserve issue for appeal, same argument on appeal must have been specifically made to trial court). Here Appellant is raising the issue as prosecutorial misconduct. In the trial court, however, Appellant never made such a claim. Rather, he defended his right to inform the venire, he failed to object to the cross-examination of Mr. Stone, he defended the applicability of his special instruction, and he advised the trial court differently regarding the jury questions. Thus, the issue is not one of prosecutorial misconduct, but one of allegedly erroneous rulings by the trial court. Cf. Parker v. State, 641 So. 2d 369, 375-376 n.8 (Fla. 1994) (holding that to preserve issue regarding prosecutorial comment, appellant must object when comments are made and request a curative instruction).

To the extent appellant challenges the trial court's ruling precluding his argument to the venire, appellee submits that the trial court's ruling was proper. The trial court precluded such an argument since it was an erroneous statement of the law. (R 971-973). Appellant's possible sentencing options were death in the electric chair or life in prison without the possibility of parole for twenty-five years. Stewart v. State, 549 So. 2d 171, 175 (Fla 1989).

To the extent Appellant challenges the trial court's denial of a special jury instruction, appellee would submit that the trial court's ruling was proper for the identical reason stated above. Appellant wanted to inform the jury that the possible sentencing options were either death or life in prison without the possibility of parole. However, Appellant could not present the court with any authority for this position. Nor could appellant present the Court with any authority to show that appellant would not be eligible for parole. (R 4947-4956). Appellant's proposed instruction is not a correct statement of the law.[7] Stewart v. State, 549 So. 2d at 175 (jury properly instructed that possible sentence is either death in the electric chair or life without the possibility of parole for twenty-five years); cf. Bedoya v. State, 634 So. 2d 203 (Fla. 3rd DCA 1994); Maynard v. State, 660 So. 2d 293, 297 (Fla. 4th DCA 1995).

Appellant also argues on appeal that the state elicited false information during the cross-examination of Robert Stone regarding appellant's current parole status for his prior convictions.[8] This portion of the issue is also not preserved for appeal for three

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[7] Although appellant claims that the state's objection to this special instruction was misleading, he does not explain how that is so. The legal sentence to which appellant could be sentenced was death or life in prison without the possibility of parole for twenty-five years. Given that the special instruction did not reflect that fact, the trial court properly denied appellant's request.

[8] Appellant was convicted of three counts of sexual battery against Regan Martin and two counts of kidnaping, one against Regan Martin and one against Lynn Elliott. (R 3200-3201).

reasons. First, any error was invited because defense counsel elicited the "objectionable" testimony on direct examination. Cf. Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983) (appellant's failure to object to admissibility of testimony at trial, thereby foreclosing trial court's inquiry into matter, precludes complaining of trial court's actions on appeal).

In response to questioning by defense counsel, Mr. Stone testified that appellant had been sentenced to five terms of life imprisonment, one for the kidnaping of Ms. Elliott, one for the kidnaping of Ms. Martin, two for two counts of sexual battery against Miss Elliott, and one for the sexual battery against Miss Martin. The two life terms for kidnaping were to run concurrently, and the three life terms for the sexual batteries were to run concurrently, but the last three terms were to run consecutively to the first two terms. Finally, he testified that none of the life sentences had a mandatory minimum of twenty-years. (R 3200-3202). Appellant cannot now complain that an error occurred since it was initiated/invited by him. See Wuornos v. State, 644 So. 2d 1012 (Fla. 1994).[9]

Second, appellant did not object to any of the state's questions or Robert Stone's answers during his testimony on cross-

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[9] The state also contends that appellant received a benefit to which he was not entitled. Stone was allowed to testify about the punishments even though this jury had no role in those other convictions. See Nixon v. State, 572 So. 2d 1336 (Fla. 1990); cf. Jackson v. State, 530 So. 2d 269, 274 (Fla. 1991) (evidence from present parole commissioner that philosophy is not to grant parole to someone convicted of a capital offense is irrelevant to appellant's character).

examination. Without objection, Mr. Stone was allowed to reiterate that appellant was basically serving two life sentences and could receive parole any time from the Parole Commission. (R 3203). Finally, appellant waived any opportunity to correct any allegedly improper testimony by waiving redirect examination. (R 3203). Consequently, those portions of this claim are not properly before the court. See Pope, 441 So. 2d at 1076; cf. Watts v. State, 593 So. 2d 198 (Fla. 1992) (finding that failure to bring to trial court's attention failure to comply with statutory requirements precludes review); Wuornos, 644 So. 2d at 1018 (finding that appellant could not complain about state's use of hearsay on cross-examination when appellant opened door to same by using hearsay on direct).

In any event, Stone's testimony was not a misstatement of the law. Since appellant's crimes were committed before October 1, 1983, he was eligible for parole on the noncapital offenses. Appellant's reliance on Turner v. State, 645 So. 2d 444 (Fla. 1994), and Weller v. State, 547 So. 2d 997 (Fla. 1st DCA 1989), are misplaced. Turner involved consecutive sentences for two counts of capital murder. Consequently, both counts were subject to the minimum mandatory twenty-five-year sentence. Weller involved concurrent sentences which included one with a minimum mandatory fifteen-year sentence. In the instant case, appellant's prior life felonies do not include any minimum mandatory sentences-- a fact noted by defense counsel. (R 3202). Thus, Stone's testimony

regarding appellant's parole eligibility for the prior convictions was factually and legally a correct.

Finally, appellant's complaint of state misconduct with regards to the jury's two questions is also not preserved for appeal. Appellant's reasons for rejecting the trial court's proposed answers at trial are different from the reasons now being raised on appeal. Consequently, review is precluded. Occhicone, 570 So. 2d at 905-906. Regardless, if any error occurred it was invited by appellant. During deliberations, the jury came back with two questions. First, the jury asked if appellant would be getting credit for the time he has already served. The state asked that the jury be told the truth, i.e., appellant would, in fact, get credit for time served. (R 3622). Appellant objected and stated:

> It may be a correct statement of the law, but that's not sufficient to give it. The better argument is that it unduly emphasizes this issue before the jury by specifically instructing them on that. And therefore, we would ask you just answer it by saying that you can't answer the question, they have to rely upon the instructions previously given.

(R 3627). As noted above, appellant conceded that he would, in fact, get credit for the time he has already served. Now, on appeal, he argues that the state attempted to mislead the jury. Appellant cannot be heard to complain on appeal after conceding the issue at trial. Cf. Wuornos, 644 So. 2d at 1018.

In any event, there was no misleading information given to the jury. In response to appellant's suggestion that the trial court

tell the jury to rely on the previous instructions, the state pointed out that there was no previous instruction given regarding the issue. The trial court told the jury that appellant, in fact, got credit for time served since the day of his incarceration on July 23, 1983. (R 3629). The trial court did not abuse its discretion in answering the jury's question, as the answer was a correct statement of the law. See Downs v. State, 572 So. 2d 895, 900-901 (Fla. 1990); Section 921.161, Fla. Stat. (1993); Waterhouse v. State, 596 So. 2d 1008, 1015 (Fla. 1992).

Appellant alleges that the trial court's answer to the second question was also misleading and false. The jury asked if and when appellant would be eligible for parole with respect to the two life sentences he is currently serving. (R 3629). The state requested that the jury be told to rely on their recollection of the evidence. (R 3630). The defense objected, arguing that the evidence presented on this issue may not have been a correct statement of the law. (R 3630). The state countered with the fact that, if the evidence was erroneous, it was appellant's own fault. The trial court agreed that, since there was evidence presented on the issue, he would tell the jury to rely on such evidence. Appellant cannot demonstrate an abuse of the trial court's discretion. See Garcia v. State, 492 So. 2d 360, 366 (Fla. 1986), sentenced rev'd on other grounds, 622 So. 2d 1325 (Fla. 1993) (referring jury to the applicable portions of the instructions with regard to their inquiry without further instruction was proper).

Finally, any further claim regarding an allegation of misrepresentation by the state is belied by the record. In Simmons v. South Carolina, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994), the United States Supreme Court reversed a death sentence where the state falsely[10] argued that appellant would be released from prison if he were not sentenced to death. The error was exacerbated by the trial court's refusal to allow the appellant to rebut the state's argument. In the instant case, appellant cannot cite this court to any argument made by the state regarding appellant's possible parole status. At no time did the state ever argue that death was the only appropriate sentence, since appellant would be eligible for parole in fifteen or twenty-five years. The state simply objected to appellant's attempts to mislead the jury with respect to the state of the law regarding the legal sentence for his capital conviction.

Nor is this case similar to this Court's recent opinion in Hitchcock v. State, 21 Fla. L. Weekly S139 (Fla. March 21, 1996). Under the unique circumstances of that case, this Court ruled that the state could not make an argument that a life sentence would result in the defendant's parole because Hitchcock's resentencing occurred so close to the expiration of the minimum mandatory sentence. Id. at 140. In the present case, there was no argument by the state regarding appellant's parole status. (R 3527-3587). Furthermore, resentencing in the instant case was not close to the

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[10] Under South Carolina law, appellant would not have been eligible for parole.

expiration date of the twenty-five-year minimum mandatory sentence. Consequently, the state's refusal to concede to appellant's attempt to misinform the jury regarding his legal sentence was not improper.

More importantly, appellant was never precluded from arguing as mitigation that he would not be released on parole given his prior convictions. In fact, defense counsel told the jury:

> That's where you can consider that ten years--almost ten years after this crime has been committed, the tragedy that has gone on, the tragedy for everybody. That's where you can consider whether or not there is some mitigation here that could lead you to believe that we should stop the killing. That's where you can consider as Mr. Stone told you that my client has not one but two life sentences already. That's where you can consider the age of my client right now. That's where you can consider if you impose a third life sentence whether or not my client will ever get out of prison.
>
> And I respectfully submit to you that if you return a life sentence without the possibility of parole for twenty-five years, with additional life sentences that he already has, that my client will die in prison. He will never get out. And when you go back and you consider this, I want you to keep an open mind. The society has a right to protect itself. We don't have to kill to protect ourselves. Thank you.

(R 3609-3610).

In summation, given the fact that the jury was properly instructed regarding the law, the state never relied upon appellant's possible parole, and appellant did argue in mitigation that in all likelihood he would not be released on parole, there is no error. See Nixon v. State, 572 So. 2d 1336, 1345 (Fla. 1990)

(jury aware of appellant's noncapital priors, and counsel argued that those convictions should be considered in mitigation); Waterhouse, 569 So. 2d at 1015 (finding no error in informing jury that defendant receives credit for time served, as defendant is not precluded from presenting evidence that might cause jury to recommend life). Therefore, this Court should affirm appellant's sentence of death.

## ISSUE III

WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE APPELLANT'S CONVICTION FOR ARMED TRESPASS IN ORDER TO PROVE THE AGGRAVATING FACTOR OF "PRIOR VIOLENT FELONY"

Appellant alleges that the trial court erred in allowing the state to rely on his prior conviction for armed trespass in order to prove the aggravating factor of "prior violent felony."[11] Specifically, appellant claims that violence is not inherent in the crime of "armed trespass," the facts do not support the circumstance, the state waived its right to rely on that conviction when it failed to argue that factor at Gore's first sentencing proceeding, and the state's reliance on the armed trespass cannot be considered harmless error. Appellant's arguments are without merit.

Relying on Ford v. State, 374 So. 2d 496 (Fla. 1979); Lewis v. State, 398 So. 2d 432 (Fla. 1981), and Elam v. State, 636 So. 2d 1312 (Fla. 1994), appellant argues that this circumstance must be narrowly construed, and thus the facts of this case do not demonstrate the requisite violence. These cases do not support appellant's position. In Lewis, this Court determined that convictions for breaking and entering with intent to commit a felony, escape, grand larceny, and possession of firearm by a convicted felon did not involve any real threat to a victim. Since the facts/circumstances of these crimes are not known, let

[11] Section 921.141 (5)(b), Fla. Stat. (1993).

alone discussed, Lewis offers little or no guidance or support for appellants' position. Likewise in Ford, breaking and entering, and sale of narcotics also do not involve any real threat of violence to a person. This Court rejected the following finding made by the trial court:

> The defendant had been found guilty of breaking and entering to commit a felony, which would obviously involve the threat of violence to the person of anyone whom he might have confronted on the premises. Further, he had admitted the unlawful sale of narcotics drugs, which likewise involves a threat to the safety of the members of the public.

Ford, 374 So. 2d at 501 (emphasis added). Again the threat of violence is mere speculation as the circumstances of the prior offenses are not present. Finally, in Elam, this Court noted that the crime of solicitation is not inherently violent. Again, the threat of actual violence is tenuous. Discussions with another about committing a crime of violence do not involve any real pending threat of violence.

In the instant case, the threat of violence to a victim was present. As a matter of fact, actual violence was imminent but the victim saw appellant hiding in the backseat of her car before she got into it. The facts surrounding the prior violent felony are as follows:

> Inside the victims' car, in which David Allen Gore was found, the police found a loaded .357 Magnum handgun and police scanner. The police also found David Allen Gore's car nearby. In David Allen Gore's car was a pair of handcuffs and rope which was recently purchased.

> The Court finds that the facts of this crime clearly show that this offense involved the threat of violence to the victim. One does not enter another's automobile without permission armed with a loaded .357 Magnum firearm without contemplating, at the very least, the threat of violence to the victim. In addition, the Court notes the police scanner found in the Defendant's possession. The testimony showed that with this device one may listen to and monitor police communications. The testimony showed the Defendant had prior training and experience as an auxiliary deputy sheriff.

(R 4565). Clearly the facts of this case demonstrate that Gore's prior conviction for armed trespass involved the threat of violence to another person. Cf. Johnston v. State, 497 So. 2d 863, 871 (Fla. 1986) (sustaining prior violent felony aggravator based on conviction for burglary irrespective of fact that harm did not come to intended victim); Brown v. State, 473 So. 2d 1260, 1266 (Fla. 1985) (sustaining prior violent felony aggravator based on conviction for arson of an unoccupied structure); Mann v. State, 453 So. 2d 784 (Fla. 1984) (sustaining prior violent felony aggravator based on conviction for burglary with intent to commit unnatural carnal intercourse).

Also without merit is appellant's claim that the state has waived any opportunity to rely on this aggravator since it was not pursued at the original sentencing. This Court has rejected that argument. Preston v. State, 607 So. 2d 404 (Fla. 1992) (holding that resentencing is a totally new proceeding; consequently, resentencing court is not bound by original court's findings).

Appellant also contends that it was error to allow the state to present evidence concerning the underlying facts of the armed trespass. The case law is contrary to appellant's position. E.g., Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Stewart v. State, 558 So. 2d 416, 419 (Fla. 1990) (citing to Elledge v. State, 346 So. 998 (Fla. 1977).

To the extent that it was error to consider the armed trespass, it must be considered harmless beyond a reasonable doubt as there were other prior violent felonies to sustain the finding of this aggravator. There were the contemporaneous convictions for the kidnaping of Regan Martin, as well as three counts of sexual battery on Regan Martin. (R 4565). See Sweet v. State, 624 So. 2d 1138, 1143 (Fla. 1993); Johnson v. State, 465 So. 2d 499, 506 (Fla. 1985). The state argued to the jury that appellant's conviction for armed trespass, as well as his convictions for sexual battery and kidnaping, were appropriate considerations for the factor. (R 3558-3560). The jury was so instructed. There was no greater emphasis on the armed trespass. Furthermore, the armed trespass, including details of same, was also properly before the jury since that conviction formed the basis for appellant's status as a person under sentence of imprisonment. (R 3378-3379, 3557, 3611-3612, 4564). Brown, 473 So. 2d at 1266. Thus, there is no reasonable possibility that the jury's recommendation of the trial court's ultimate sentence would have been different. Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988);

Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S. Ct. 955 (1992).

## ISSUE IV

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDINGS OF THE "AVOID ARREST" FACTOR, THE "COLD, CALCULATED, AND PREMEDITATED FACTOR," AND THE "HEINOUS, ATROCIOUS OR CRUEL" FACTORS.

Appellant contends that there was insufficient evidence to support the trial court's findings with respect to three of the six aggravating factors found by the trial court. A review of the facts adduced at resentencing demonstrate that there was sufficient evidence to establish all of the aggravating factors relied upon by the trial court.

Appellant's first challenge is to the "avoid arrest" factor. Appellant's argument is based on the following two reasons: (1) there is no evidence to support the State's claim during closing argument that Gore intended to kill the victims from the very beginning, and (2) the trial court erred in relying upon Ms. Elliott's escape attempt as the sole reason for finding the existence of this aggravating factor.

In applying this factor, this Court has required that the evidence show that the only or dominant motive for the murder was witness elimination. The ability to identify the defendant standing alone is insufficient. Perry v. State, 522 So. 2d 817, 820 (Fla. 1988). This Court has also said that proof of this factor does not require an admission by the defendant. Circumstantial evidence, and the accompanying logical inferences drawn therefrom, alone will support a finding of "avoid arrest."

Swafford v. State, 533 So. 2d 270, 276 (Fla. 1988) (kidnaping gas station attendant and taking her to remote area where she was raped and stabbed was sufficient to sustain "avoid arrest" aggravator).

Unlike in Robertson v. State, 611 So. 2d 1228 (Fla. 1993), and Geralds v. State, 601 So. 2d 1157 (Fla. 1992), there was more evidence to establish this factor than the mere fact that the victim could identify the defendant. And unlike in Perry, 522 So. 2d at 820, no other motive was suggested, much less established, for killing Lynn Elliott. Here, while handcuffed and naked, Ms. Elliott ran down a long driveway in an attempt to escape. Appellant grabbed her, dragged her towards a tree, and shot her twice in the face and head. Lynn Elliott had just experienced and witnessed the antecedent crimes of kidnaping and sexual battery upon herself and her friend, Regan Martin. In addition, Appellant never attempted to conceal his identity, he was under sentence of imprisonment for armed trespass, and he told Regan Martin that he was going to kill them anyway. (R 1946). This aggravating factor was found by the trial court in appellant's original sentencing and sustained by this Court on appeal. Gore v. State, 475 So. 2d 1205, 1210 (Fla. 1985). Appellant has not presented this Court with any reason to strike this aggravating factor which is based on the same facts as before. There was more than sufficient evidence to establish that the dominant motive for the killing of Lynn Elliott was to avoid arrest. See Swafford, 533 So. 2d at 276; Harrich v. State, 437 So. 2d 1082 (Fla. 1983) (sustaining "avoid arrest" aggravator where two girls were kidnaped and taken to remote area

where they were sexually assaulted and shot in the head); cf. Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988) (sustaining "avoid arrest" aggravator where defendants discussed killing victims in front of them and then did so as they attempted to flee); Hall v. State, 514 So. 2d 473, 477 (Fla. 1993) (sustaining "avoid arrest" aggravator where defendant kidnaped, raped and killed a woman in a secluded area).

Next, appellant attacks the trial court's finding that the murder was "cold, calculated and premeditated."[12] Appellant claims that there was insufficient evidence to prove that he intended to kill his kidnaped victims prior to the commencement of the criminal episode. The record belies appellant's claim.

Shortly after picking up Regan Martin and Lynn Elliott, appellant placed a gun to Martin's head. (R 1922). He then handcuffed the girls to each other and took them back to the home of his parents. (1927). Appellant knew he would have complete privacy there since his parents were away on vacation. (R 1929). Appellant never attempted to hide his identity. Appellant placed the girls in separate bedrooms and tied their hands and feet. (R 1937). Appellant went back and forth between the two rooms committing sexual assaults on the girls. He repeatedly threatened to kill them both and at one point admitted that he intended to kill them anyway.[13] (R 1928, 1946). He also told Martin that he

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[12] Section 921.141(5)(h), Fla. Stat. (1993).

[13] Contrary to appellant's assertion, his statement to Martin that he was going to kill them anyway was made while Lynn Elliott

intended to keep them imprisoned for two to three days. (R 1942). During the criminal episode, appellant monitored police activity on a scanner. When appellant realized that Lynn Elliott was attempting to escape, he ran after with a gun, caught her, dragged her to a tree and shot her in the face and head at close range. Lynn Elliott was naked and her hands were still handcuffed when she was shot. This evidence demonstrates that appellant had always intended to kill both Martin and Elliott after their abduction and sexual batteries. See Hall v. State, 614 So. 2d 473, 478 (Fla. 1993) (sustaining "CCP" factor where defendant abducted seven-month pregnant women to secluded area where she was raped, beaten and shot); Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988) (sustaining "CCP" factor where defendants planned robbery ahead, cut phone lines, and discussed murders in front of victims); Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988) (sustaining "CCP" factor where defendant abducted store clerk to remote area where she was raped and shot nine times). The fact that Ms. Elliott's vein attempt to save her life resulted in her death sooner than appellant had anticipated does not negate that her murder was committed in a cold, calculated and premeditated manner without any pretense of more or legal justification. See Asay v. State, 580 So. 2d 610, 613 (Fla. 1991) (sustaining "CCP" factor

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was still alive. The comment was made during one of the sexual batteries committed on Martin. The evidence shows that all of the sexual batteries took place before Ms. Elliott attempted to escape.

even though murder did not proceed as originally planned); Walls v. State, 641 So. 2d 381, 387-388 (Fla. 1994).

Appellant's reliance on Gore v. State, 599 So. 2d 978, 987 (Fla. 1992), is misplaced. In Gore, the decomposed body of a girl was found anywhere from two weeks to six months after the killing. The medical examiner testified that death could have occurred by either strangulation or stabbing. Id. At 980. In rejecting the state's contention that the murder was cold, calculated and premeditated, this Court noted "the lack of evidence of the circumstances surrounding the murder itself . . . ." Id. at 987. Thus, the state could not meet its burden.

No such deficiency exists in the instant case. There is no speculation on when and how Ms. Elliott died. Such evidence is established through the testimony of two eyewitnesses: Regan Martin and Michael Rock. Furthermore, appellant's own statements to Martin regarding his murderous intent leaves no room for speculation. This Court originally upheld the trial court's finding that this murder was cold, calculated and premeditated. Gore, 475 So. 2d at 1211. Appellant has not presented this Court with any facts or case law that would call into question that original ruling.

Appellant also challenges the trial court's finding that this murder was heinous, atrocious or cruel.[14] Because Gore's murder weapon was a gun, he assumes that the "HAC" aggravator should not

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[14] Section 921.141 (5)(h), Fla. Stat. (1993).

apply. Such is not the law. The dispositive factor in deciding whether or not a murder can be characterized as "heinous, atrocious or cruel" is whether "the facts exhibit a desire to inflict a high degree of pain or an utter indifference to or enjoyment of the suffering of another." Chesire v. State, 568 So. 2d 908, 912 (Fla. 1990). The facts of the instant case evidence such a desire on the part of Gore. Gore kidnaped two young teenagers. He took them to his house and separated them. He took off their clothes, bound their hands and feet, and sexually battered both of them repeatedly. Through the entire episode, Gore repeatedly threatened to kill them. In a futile attempt to escape, Lynn Elliott ran out of the house naked and handcuffed. Appellant caught her, dragged her along the ground, and shot her twice in the head as she screamed. The trial court properly found this murder to be "heinous, atrocious and cruel." (R 4567-4568). See Wyatt v. State, 641 So. 2d 1336,1340 (Fla. 1994) (sustaining "HAC" factor where twenty minutes of abuse, including rape of one of the victims, preceded shootings); Douglas v. State, 575 So. 2d 165, 166 (Fla. 1991) (sustaining "HAC" factor where defendant forced victims to perform sexual acts prior to shooting victim in the head); Wuornos v. State, 644 So. 2d 1012, 1019 (Fla. 1994) (sustaining "HAC" factor where victim suffered bruises and abrasions, evincing an effort to avoid attack); Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988) (sustaining "HAC" factor where defendant kidnaped victim took her to isolated area, raped and shot her); Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988) (sustaining "HAC" factor

where victims of home invasion shot during attempt to run away upon hearing assailants discuss the need to kill victims in their presence).[15]

[15] This Court has previously made a finding that Gore's death sentence is proportional. There has been nothing presented at resentencing to overturn that finding. Harich v. State, 437 So. 2d 1092, 1086-1087 (Fla. 1983).

## ISSUE V

WHETHER THE JURY WAS MISLED REGARDING THE ROLE OF SYMPATHY AND MERCY IN MITIGATION

Appellant claims that reversible error was committed when the trial court erroneously allowed the state to create a false impression that mercy and sympathy should not be considered as mitigation in sentencing. Such misrepresentation was accomplished through the following: (1) the state misinformed the prospective panel that mercy and sympathy had no place in their decision; (2) the trial court limited appellant's questioning on voir dire; and (3) the trial court refused to give a special instruction which was designed to dispel any confusion caused by the state's improper questioning. Appellant's argument is not supported either factually by the record or by the case law.

Without objection the prosecutor told the venire that sympathy is not allowed to be a part of the decision process. (R 467). Therefore, to the extent this issue is an attack on the prosecutor's comment, the issue is not preserved for appeal. See Parker v. State, 641 So. 2d 369, 35 n.8 (Fla. 1994). The prosecutor went on to explain that the jury must weigh the aggravating and mitigating factors against one another in deciding upon a recommendation. (R 467-481). The prosecutor's comments were a correct statement of the law. Mercy or sympathy standing alone is not a proper consideration for the jury. Dougan v. State, 595 So. 2d 1, 4 (Fla. 1992) (sympathy for a defendant grounded in

the juror's own emotions invites arbitrary and capricious results which are constitutionally prohibited).

Shortly thereafter, the prosecutor commented to the panel: "Let me ask you something. I mentioned sympathy before. Do you think that you should base your decision on sympathy for or against anyone in a case like this?" (R 496). Appellant objected, claiming that, although sympathy standing alone was not a proper consideration, sympathy rooted in mitigation could be considered by the jury as proper mitigation. (R 497). The state agreed with appellant's assessment; however, the prosecutor's questioning was designed to find out what the jurors' personal feelings were regarding sympathy and mercy. (R 498-499). Based on the state's explanation, the Court overruled appellant's objection. The state was allowed to ask prospective jurors what their personal feelings were regarding the appropriateness vel non of considering sympathy as a factor in a sentencing decision. (R 499, 542, 546, 564-566, 572-573, 586, 604, 605-606, 608, 613-614, 702, 631-632, 639, 661, 684, 687, 694, 723-725, 738, 740). While allowing the state to continue such questioning, the Court repeatedly told appellant that he would also be allowed to engage in any further inquiry regarding the issue. (R 548, 941-943). The state's inquiry regarding the panel's personal feelings was permissible. See Lusk v. State, 446 So. 2d 1038, 1041 (Fla.) (stating that juror competency focuses on the ability of a person to put aside personal feelings and biases) cert. denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed 2d 158 (1984); Morgan v. Illinois, 504 U.S. __, 112 S.Ct. 2222, 119 L. Ed

2d 492 (1992) (questioning of potential jurors regarding partiality and biases is constitutionally mandated). The state never attempted to mislead the venire regarding the proper use of mercy. Consequently appellant's allegation that the state created or affirmed in the minds of jurors that sympathy was not a valid consideration is not supported by the record.[16]

Equally without record support is appellant's claim that appellant was precluded from conducting a proper voir dire. During appellant's questioning the state objected to appellant's attempt to misinform the jury that they would be receiving a jury instruction about mercy. (R 935-936). The trial court sustained the state's objection regarding the potential special instruction; however, appellant was never precluded from eliciting any information from the venire regarding sympathy. To the contrary, the state suggested the following:

> PROSECUTOR: First of all, Judge, I maintain that the question was never propounded to them the way that Mr. Nickerson

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[16] In support of the allegation that the state misinformed the jury regarding mercy, appellant points this Court to the partial response of juror Kramer. At one point during voir dire, she seemingly agrees with a question posed by defense counsel that her feelings about mercy were a result of the state's questioning. (R 1204). However, appellant fails to apprise this Court of Kramer's entire answer. She later stated that she misunderstood the question posed by counsel. Her views regarding the relevancy vel non of sympathy were not created by the state. They were her own personal views held by her prior to jury selection. (R 1275-1277). The record is completely void of any evidence that the state's inquiry led anyone to any particular conclusion regarding this issue. To the contrary, everyone who was asked stated that any personal feelings expressed during voir dire were present before the inquiry. (R 1191, 1194, 1195-1196, 1198, 1204, 1208, 1213, 1277-1278).

> just recited. That the question that was asked of them was, do you think as your personal opinion that you should base your decision on sympathy for or against anyone. That is a generic question.
>
> Now, as far as rehabilitation, what we asked is what these people thought. They walked into this courtroom thinking that way. They grew up thinking that way. That's just too bad. That's just the way they think on that issue. But to allow the Defendant to ask them a question as "if you find" question, to the jurors is asking them to commit on the law.
>
> Again, I have no problem with the question, do you think mercy should be part of any decision here? And if they say no, them asking them without instructing the question for them but asking them, what is the mitigating circumstances convince you that mercy is appropriate?

(R 944-945). The trial court permitted counsel to make the appropriate argument to the venire/jury regarding the consideration of mercy if it is grounded in the evidence. (R 941-942). The trial court told appellant that he would grant counsel great latitude during such an inquiry. (R 949-951). Appellant did, in fact, make the inquiry of the jurors about sympathy and mercy rooted in mitigation. (R 911-913, 1204-1219). Any juror who expressed a personal opinion that mercy and sympathy standing alone was irrelevant also said that they would follow the judge's instructions regarding the issue. (R 1194, 1198, 1206, 1209-1210, 1211, 1280, 669, 677, 734-736, 762, 766, 912-913). Appellant cannot point this court to any comment, instance, or circumstance involving any member of the venire who said he or she could not, or

would not consider mitigation if they were instructed to consider same.

Appellant next claims that the trial court precluded questioning of the venire regarding their views about the relevance of an impoverished childhood. The record reveals, however, that defense counsel questioned eighteen jurors about this subject. (R 1031-1043). The state only objected when defense counsel attempted to ask a prospective juror how he would view such evidence if he were instructed to consider it. (R 1043). The trial court sustained the objection, and defense counsel proceeded with proper questioning on the subject. (R 1043-1051).

Also belied by the record is appellant's similar claim that he was precluded from asking the venire questions about whether they would consider as mitigation the control/influence over the defendant by another. (R 1144-1148). Defense counsel questioned numerous jurors about this subject. (R 1136-1144). Such questioning continued until the state objected to appellant's attempt to get the jury to commit to an answer. (R 1144). The trial court made the following ruling:

> COURT: I'll sustain the objection. You can ask them if the Judge were to instruct you in consideration or you can consider the aspect of Mr. Gore's character, will you follow that instruction? That's perfectly legitimate because then their answer is yes, I would or, no, I wouldn't.

(R 1148). After the trial court's ruling, defense counsel continued his inquiry into the venire's personal feelings about the proposed mitigation of domination over a person. (R 1149-1157).

Contrary to assertions otherwise, Appellant was allowed to and did conduct extensive voir dire on a variety of issues involving mitigation, including those discussed above. Members of the venire were asked their opinions about the importance of psychologists (R 1015-1032), the relevance of an impoverished background on a person's character (R 1032-1053), the effect of alcoholism on a person's life (R 1053-1128), their knowledge of anyone who had ever been subjected to the strong influence of another person. (R 1130-1157). The record conclusively demonstrates that appellant was given every opportunity to explore any and all areas of mitigation that he chose. Unlike the situation in Gore v. State, 475 So. 2d 1205 (Fla. 1985), appellant was given every opportunity to propound questions to the venire regarding their bias or prejudice. More importantly, appellant is unable to demonstrate prejudice. He can not demonstrate that the jury included any person who could not perform the duties of a juror in accordance with the instructions given by the trial court. See Id. at 1207-1208.

Appellant also claims that the trial court erred in denying his request for a special instruction regarding mercy. The request was made after the state objected to appellant's suggestion to the jury that they, in fact, would be instructed on the issue. (R 935-936, 937-938). Appellant asked the court to give a special instruction regarding mercy. (R 936-938). Appellant claimed that the instruction became necessary because the state had been misleading the jury into thinking that mercy engendered through mitigating evidence was not appropriate. (R 938-939).

During the jury instruction conference, appellant requested the following instruction:

> THE COURT: All right, No. 10, the Defense propose I instruct the jury as follows: "Mitigating circumstances are those factors which in fairness of mercy may be considered as extenuating or reducing degree of blame to the offense.
>
> Mitigating circumstances also include any aspect of David Alan Gore's background and life which may create reasonable doubt about the question of whether death by electrocution is the only appropriate sentence for David Alan Gore."

(R 3302). Appellant explained that the instruction was necessitated by the state's misrepresentation during voir dire regarding the role of mercy. (R 3302-3302). Appellant also suggested that the instruction better describes the mercy component of mitigation. (R 3303). The state argued that the instruction was not a correct statement of the law since the state is not required to prove that death is the appropriate penalty beyond a reasonable doubt. (R 3303). The trial court ruled that since mercy standing alone was not apart of the standard instructions, he would not give such an instruction. (R 942). However, the standard instructions did inform the jury that the sentencing recommendation should be based on the facts found from the evidence and the law. Therefore, the trial court would permit counsel to argue to the venire that it would be appropriate for them to consider mercy that was grounded in the evidence. (R 941-942, 949-951). Based on a finding that the instruction was an inaccurate statement of the law, the trial court's ruling was proper. See

Dougan, 595 So. 2d at 4. The jury was properly instructed regarding mitigation. (R 3614). Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988) (standard jury instruction on non-statutory mitigation is constitutional); Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991)( "catch-all" instruction properly instructed jury to consider and weigh any constitutionally relevant evidence.)

In summation, appellant cannot demonstrate that the venire was under any mistaken belief regarding consideration of mitigation, nor was he precluded from questioning the venire about any relevant material. Furthermore, the trial court properly denied his request for an instruction on mercy. This claim must be denied. See Gore, 475 So. at 1207; Dougan, 595 So. 2d at 4; Jackson, 530 So. 2d at 273.

## ISSUE VI

### WHETHER THE PENALTY PHASE JURY INSTRUCTIONS WERE ERRONEOUS

Appellant claims that the trial court erred in instructing the jury on various aggravating circumstances. Initially, appellant challenges the prior violent felony instruction, because the facts did not support it, and the state's requested instruction was erroneous. Regarding the first alleged error, appellee relies on its argument made in Issue IV, supra. As to the second challenge appellant objected to the state's instruction and requested language that this circumstance only applies to life-threatening crimes, based on Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981). (R 3368-3369, 4443). Appellant argued that intent to commit a violent crime is insufficient and that contact with the victim is required. The trial court rejected appellant's argument, relying on Johnson v. State, 465 So. 2d 499, 505 (Fla. 1985). The jury was instructed as follows:

> Two, the Defendant has previously been convicted of another capital offense or of a felony involving the use or threat of violence to some person. I do instruct you that the crime of sexual battery is a felony involving the use or threat of violence to another person. The crime of kidnaping is a felony involving the use or threat of violence to another person. The crime of trespass of a conveyance while armed may or may not be a felony involving the use or threat of violence to another person depending upon the circumstances of the offense. You may consider an armed trespass conviction in regards to this aggravating circumstance only if the evidence presented convinces you beyond a reasonable doubt that the Defendant had previously been convicted of armed trespass

> and that the offense involved the use or threat of violence to another person.

(R 3611-3612). The trial court's ruling was proper. See Johnson, 465 So. 2d at 505 (finding aggravating factor of prior violent felony permissible for burglary conviction if circumstances of burglary involve entering a place with the intent to commit a crime of violence); Sweet v. State, 624 So. 2d 1138, 1143 (Fla. 1993) (stating that trial court should instruct jury to consider individual circumstances of crime to determine if felony was violent).

Next, appellant challenges the constitutionality of the jury instruction on "cold, calculated and premeditated."[17] To preserve an issue for appeal, an appellant must make a specific objection or propose an alternative instruction, and raise the issue on appeal. Walls v. State, 641 So. 2d 381, 387 (Fla. 1994). By pretrial motion, appellant challenged the constitutionality of the aggravating factor, claiming that definition of the terms "cold," "calculated" and "premeditated" were required to avoid inconsistent application of the factor. (R 4363). During the charge conference, the state acknowledged that the instruction needed to be amended. (R 3399). Relying on the seminal case of Rogers v. State, 511 So. 2d 526 (Fla. 1987), the court and the state invited defense counsel to interject or propose whatever language from Rogers that they deemed appropriate. (R 3401-3406). Counsel rejected the invitation but maintained that the instruction as

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[17] Section 921.141(5)(c), Fla. Stat. (1993).

amended was still deficient. Consistent with his written motion regarding the aggravator, appellant ultimately stated that the aggravator itself was still unworkable. (R 3409). To the extent that appellant only objected to the constitutionality of the factor, any challenge now regarding the applicable instruction is waived. See Espinosa v. State, 626 So. 2d 165, 176 (Fla. 1993). Furthermore, appellant's failure to specify the basis for his objection to the instruction preludes review. See Windom v. State, 656 So. 2d 432, 439 (Fla. 1995) (finding general objection to jury instruction not sufficiently specific to preserve issue for review). Moreover, rejecting repeated requests for an alternative also waives the issue for appeal. See Walls, 641 So. 2d at 387; Gunsby v. State, 574 So. 2d 1085, 1088 (Fla. 1991) (declining opportunity to cure error at trial waives issue on appeal). Finally, appellant failed to argue below, as he does here, that the amended instruction expanded rather than narrowed its application, thereby causing the jury to apply the "careful plan or pre-arranged design" requirement to the kidnaping and sexual battery charges, rather than the murder. By failing to make this argument below, he has failed to preserve it for review. See Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990).

Regardless, appellant cannot demonstrate error. The trial court, even without the benefit of this Court's opinion in Jackson v. State, 648 So. 2d 85 (Fla. 1994), gave a constitutionally sound limiting instruction. As noted in Rogers, a careful plan or pre-arranged design is required. Although the

instruction given in the instant case was not as expanded as the substitute instruction fashioned by this Court in Jackson, the jury was sufficiently instructed that the plan to murder must have been devised prior to the killing. (R 3612-3613).

To the extent that this Court finds error in the instruction given, it must be considered harmless. See Walls, 641 So. 2d at 387. Relying on its argument made in Issue IV, supra, the state submits that this factor, which was sustained after appellant's original sentencing, would be applicable under any definition of the terms. Id.

Lastly, appeal appellant challenges the constitutionality of the jury instruction for the aggravating factor of "heinous, atrocious or cruel".[18] He claims that the instruction given by the court was unconstitutional for the following two reasons: (1) the instruction does not make it clear to the jury that this circumstance only applies to crimes that are conscienceless or pitiless and which are unnecessarily torturous; and (2) the instruction did not inform the jury that torturous intent is also required. Initially, the state submits that review by this Court is barred because the challenges raised on appeal were not presented to the trial court. (R 3380-3397). Occhicone, 570 So. 2d at 905. Defense counsel made general allegations that the standard instruction was vague, over broad, and ambiguous. According to counsel, "No matter how you define it you can't make it

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[18] Section 921.141(5)(h), Fla. Stat. (1993)

constitutional." (R 3386). Despite repeated requests to explain the deficiency, counsel refused.[19] Thus, they failed to preserve for review the arguments made on appeal. Id.; Windom, 656 So. 2d at 439.

To the extent that this Court finds the issue to be preserved, the instruction given to the jury has been upheld by this Court. (R 3613). Hall v. State, 614 So. 2d 473, 478 (Fla. 1993); Preston v. State, 607 So. 2d 404, 410 (Fla. 1993); Power v. State, 605 So. 2d 865, 864 (Fla. 1992). Even if this Court were to find that this instruction was unconstitutional, any error must be considered harmless. This Court upheld the existence of this factor after the original sentencing. Gore, 475 So. 2d at 1210. The same horrible facts were established at resentencing. (R 4567-4568). Relying on its arguments in Issue IV, supra, the submits that the finding of this factor would be upheld under any definition of the aggravating factor.

Next Gore argues that the trial court erred in failing to give a doubling instruction regarding the aggravating factors of "CCP" and "avoid arrest" because they both relied on a single aspect of the crime. Although appellant filed a written motion requesting a doubling instruction, the motion did not specify which factors were applicable to his request. Nor did appellant specify which factors

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[19] In the initial brief appellant claims that the defense asked for "limiting language which goes to contemplation of death, prior to the act, and/or kidnaping." Appellant fails to point out that immediately following that request, defense counsel abandoned that position and refused to suggest any limiting instruction. (R 3386 lines 23-25).

merged after the state objected to the instruction. (R 3291). Although appellant later claimed that "under sentence of imprisonment" merged with "prior violent felony", he never challenged the merger of "CCP" and "avoid arrest." Thus, appellant has not preserved this issue for review. See Occhicone, 570 So. 2d at 905.

In any event, there was no error. The "avoid arrest" aggravating factor, focuses on the motive for the murder of Lynn Elliott. The "CCP" factor, on the other hand, focuses on the manner in which Lynn Elliott was killed. See Stein v. State, 632 So. 2d 1361, 1366 (Fla. 1994) (Rejecting doubling claim because "CCP" and "avoid arrest" focus on different aspects of crime.) Lynn Elliott was killed to avoid arrest for the repeated sexual batteries committed upon her and Regan Martin. The facts also demonstrate that her execution was carried out in a cold, calculated and premeditated manner. There was no improper doubling of aggravating circumstances in the instant case. Hodges v. State, 595 So. 2d 929, 934 (Fla. 1992) (no doubling in findings that sole purpose for killing was to hinder the lawful exercise of government function and the murder was cold, calculated and premeditated); Fotopoulos v. State, 608 So. 2d 784, 793 (Fla. 1992) (proper to find that killing was done to avoid detection for the sexual batteries and the killing was done in a carefully designed plan); Larzelere v. State, 21 Fla. L. Weekly S147 (Fla. March 28, 1996) (finding that killing was done in a cold, calculating and premeditated manner and killing was done in order to receive life

insurance proceeds is permissible). To the extent this Court finds that the it was error not to provide the jury with a doubling instruction, any error must be considered harmless. There were four additional aggravating factors found by the trial court to be weighed against no statutory mitigating factors and very little non-statutory mitigating factors. (R 4569-4577). Armstrong v. State, 642 So. 2d 730, 739 (Fla. 1994); Durocher v. State, 596 So. 2d 997, 1001 (Fla. 1992).

Appellant claims that the trial court erred in denying numerous special jury instructions. First, appellant claims that the jury should have been instructed regarding specific nonstatutory mitigation as well as a general instruction regarding mitigation. This Court has repeatedly held that such an instruction is not required, as the "catch-all" jury instruction is sufficient. Appellant was free to argue to the jury anything he desired regarding specific nonstatutory mitigation. (R 3313-3318). See Dougan v. State, 595 So. 2d 1, 5 (Fla. 1992); Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991); Mendyk v. State, 545 So. 2d 846, 849 (Fla. 1989).

Nor did the trial court err in refusing to give a special requested instruction regarding principals, and the sentence received by Freddie Waterfield. Appellant was free to argue to the jury the alleged disparate treatment of Waterfield. (R 3350-3351). Mendyk, 545 So. 2d at 849 n.3. Appellant alleges that the trial court also erred in refusing to give other special instructions all relating to aggravating circumstances, the burden of proof required

in finding an aggravator, and the weighing process. The trial court properly ruled that all the special instructions were in fact covered by the standard instructions. See Robinson, 574 So. 2d at 111; Mendyk, 545 So. 2d at 849.

## ISSUE VII

WHETHER THE STATE'S PRESENTATION OF THE TESTIMONY OF THE FORMER PROSECUTOR, ROBERT STONE, VIOLATED A PRIOR AGREEMENT

Appellant claims that by presenting the testimony of Robert Stone in its case-in-chief, the state violated two prior agreements that were entered into in 1984. Those two agreements consisted of appellant's guilty pleas to five other murders in exchange for the state's assurance that those convictions would not be used in any other proceeding against appellant. (R 3878-3893, 5055-61). To ensure that the agreements would not be violated, appellant filed a motion in limine. (R 3741). After much argument, the trial court ruled that the state would not be allowed to introduce any evidence regarding the previous murders in its case-in-chief. (R 3741-3753, 3800, 3899, 3901, 3886-3928). That agreement remains in effect, as the state never sought to, nor did the state ever introduce any evidence regarding appellant's five prior murder convictions. (R 3893). Consequently, the 1984 agreements have not been breached and are not relevant to this issue.

Appellant's real challenge is to the state's presentation of evidence which rebutted Gore's claim of disparate treatment. The

trial court properly allowed the state to present this rebuttal evidence after appellant opened the door to such an inquiry. Defense counsel argued during opening statement to the jury that Waterfield had a tremendous effect on appellant while they were growing up. Defense counsel also told the jury that at Waterfield's trial, the prosecutor, Robert Stone, argued that Waterfield was just as guilty as Gore for the murder of Lynn Elliott, and therefore should be convicted of first degree murder. Defense counsel further told Gore's jury that despite Stone's argument proclaiming Waterfield's equal culpability, Waterfield was only convicted of manslaughter. (R 1725-1729, 1732-1733). The state objected, arguing that what was said by a prosecutor at the trial of a codefendant is of no consequence in this case. Defense counsel responded as follows:

> That was-- basically, Your Honor, the legal proposition is that this was an admission that the State of Florida made and it's admissible in this case because Mr. Stone is under subpoena. I intend to call him as a witness in this case. Therefore, my argument is appropriate because I believe that the evidence will show that Mr. Stone did make this argument in Mr. Waterfield's case. That it is, in fact, an admission against the State of Florida and it is relevant and most certainly relevant in this case right here.

(R 1736). The trial court sustained the state's objection, finding that the opening argument of Stone, an advocate, regarding what he thinks the evidence would show in Waterfield's case is not relevant. (R 1742). Defense counsel still was allowed to argue that Waterfield did not receive a sentence of death. (R 1742).

Through cross-examination of several state witnesses, defense counsel presented the idea that Waterfield's participation in the murder of Lynn Elliott was equal to that of Gore. For example, Regan Martin testified on cross that Waterfield did most of the talking during the drive to Gore's residence. (R 2060). Appellant never ordered or directed Waterfield to drive to any location, and Waterfield knew were he was going. (R 2060). Upon arrival at Gore's house, Waterfield went into the residence first. (R 2061). Although Martin never saw Waterfield in the house, she did hear his voice and she never heard his truck leave. (R 2061). Martin was also impeached with a prior statement where she indicated that it was Waterfield and not Gore who probably tied up Lynn Elliott. (R 2067). In addition, Detective Redstone testified on cross-examination that the distance between Gore's residence and Waterfield's place of business was only three-quarters of a mile. He further elicited testimony that any trip from Gore's residence to Waterfield's business would even be quicker if one were to cut through the orange groves behind Gore's house. (R 1842-1843). Criminologist Daniel Nippes was also asked on cross-examination about the possibility that Waterfield committed a sexual battery on Lynn Elliott. (R 2483-2485).

Based on the cross-examination of these witnesses, the state sought to present the testimony of the original prosecutors, Robert Stone and James Midelis. The state argued that the defense made an issue of Waterfield's alleged disparate treatment through cross-examination of state witnesses, thereby opening the door to the

state's rebuttal witnesses. (R 2568-2570). Before ruling, the trial court heard the state's proffer from Stone and Medelis. Stone testified that appellant was listed as a witness for the state at Waterfield's trial for the first degree murder of Lynn Elliott. (R 2537-2538). Gore was to testify that there was a prearranged plan to pick up the two girls and that Waterfield participated in the entire crime. (R 2540). Based on appellant's anticipated testimony, Stone told Waterfield's jury that Waterfield was just as guilty as Gore, and laid out the expected testimony of Gore for the jury. (R 2541-2542). Prior to his scheduled testimony however, Gore decided to change his testimony to say that Waterfield was not present when Elliott was tied up, sexually assaulted and killed. (R 2544). Without appellant's statement there was no evidence that a plan existed between the two, since Waterfield testified that he left the house prior to the sexual assault and the murder. (R 2551-2552). Given Gore's change in testimony, the state's case against Waterfield was devastated. (R 2553). Ultimately, the state did not call Gore, and Waterfield was convicted of manslaughter. (R 2543-2544).[20]

The state argued that the proffered testimony was necessary to explain the following: (1) why the state originally charged and pursued a first degree murder conviction against Freddie Waterfield; and (2) why Waterfield ultimately was only convicted of

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[20] Medelis's proffered testimony was similar to that of Stone. (R 2554-2566).

manslaughter.[21] The state sought to dispel the erroneous implication being presented by appellant that Waterfield was as culpable as Gore yet received a lesser sentence. By originally agreeing to testify for the state regarding Waterfield's active participation in the crime, but later changing his testimony, thereby devastating the state's case against Waterfield, appellant created the "disparate treatment". (R 2570). Thus, the state argued that, given appellant's prior actions, it should be allowed to put Waterfield's participation/culpability into proper perspective. (R 2570-2574).

Appellant responded that since the defense had not presented any evidence to open the door Stone's testimony was not admissible. (R 2578). The trial court ultimately ruled, however, that appellant had opened the door through: (1) questioning on voir dire, (2) opening argument, and (3)cross-examination of Martin, Nippes and Redstone. It also based its ruling on the fact that appellant was not waiving any argument with respect to the mitigating circumstance of "no significant history of prior criminal history." (R 2612). The trial court rejected appellant's claim that Stone's testimony would violate the original agreement involving the five murders, and it admonished both sides to stay

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[21] Stone and Medelis were listed by the defense as witnesses regarding the same information. (R 2647-2649).

clear of any mention of the five prior murder convictions. (R 2613, 2680-2682).[22]

Thereafter, Stone testified that Waterfield was charged with the first degree murder of Lynn Elliott. He was convicted of manslaughter and received a fifteen-year sentence. (R 2696-2697). Appellant was to testify for the state regarding Waterfield's involvement. In a deposition, Gore stated that Waterfield had planned the kidnaping and sexual assault. Waterfield tied up Lynn Elliott and sexually assaulted her. (R 2699). When she attempted to escape, Waterfield gave appellant a gun and told him to shoot her. (R 2700). His opening argument to Waterfield's jury was based on Gore's deposition and his willingness to testify to same. (R 2700). During the trial, however, appellant stated that he would not testify in accordance with his prior statement because it was not true. Therefore, the state did not call him. (R 2700-2701). Without Gore's testimony, the state could not establish a plan between the two men. (R 2703).

On appeal appellant claims that it was error to allow the testimony of Robert Stone based on Long v. State, 610 So. 2d 1280 (Fla. 1992), and Burns v. State, 609 So. 2d 600 (Fla. 1992), neither of which is applicable. In Long, this Court found that the admission of Long's prior murder convictions was in violation of Williams v. State, 110 So. 2d. 654 (Fla.), cert. denied, 361 U.S.

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[22] To the extent that appellant argues that Stone's testimony was a part of the prior agreement, the state argues that appellant violated that agreement by not testifying truthfully. (R 2616-2628).

847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959). In the instant case, Stone's testimony was not introduced as Williams rule evidence as it did not involve collateral crimes. Rather, it was admitted to rebut defendant's claim of "disparate treatment." See Maggard v. State, 399 So. 2d 973 (Fla. 1981) (ruling rebuttal evidence of potential mitigation admissible once defense opens the door); Wuornos v. State, 644 So. 2d 1000, 1009 (Fla. 1994) (permitting state to rebut defense claim regarding mitigation once it has been presented); cf. Wuornos v. State, 644 So. 2d 12, 1017 (Fla. 1994) (finding evidence of collateral crimes properly presented to controvert defendant's theory of mitigation); Muehlman v. State, 503 So. 2d 310, 315 (Fla. 1987) (allowing state to present a complete picture of appellant's prior criminal history once defendant makes it an issue in the case).

In Burns, this Court determined that a defendant does not open the door to rebuttal evidence by stating a position or claim through defense counsel's argument. In the instant case, the trial court ruled that appellant had in fact presented his evidence of Waterfield's disparate treatment through cross-examination of at least three state witnesses. (R 2579-2580). Consequently, Burns is distinguishable and offers no support for appellant's argument. See Edwards v. State, 530 So. 2d 936, 937-938 (Fla. 4th DCA 1988) (holding that defendant who opens door on cross-examination of state witness will not be heard to complain about admissibility of evidence brought on redirect). Furthermore, and more importantly, since Gore's original statement was not true, his culpability as

compared to that of Waterfield's warrants the "disparate treatment" he received. See Cook v. State, 581 So. 2d 141, 143 (Fla. 1991) (finding rejection of claim of disparate treatment proper since accomplices' level of participation was less than defendant's); Steinhorst v. State, 638 So. 2d 33, 35 (Fla 1994) (finding that defendant who actually shot the victim cannot rely on disparate treatment as a mitigating factor). Thus, the trial court properly allowed the state to present the testimony of Robert Stone.

To the extent this Court finds error, it must be considered harmless. As noted above, appellant stated that he was going to call Stone and Midelis regarding Stone's opening argument to the Waterfield jury. (R 1736, 2647-2649). Consequently, the state would have been allowed to ask Stone the very same questions on cross. Cf. Valle v. State, 581 So. 2d 40, 41 (Fla. 1991) (finding state could have presented rebuttal evidence of lack remorse once defendant presented evidence of remorse in mitigation). Furthermore, in light of the circumstances of the crime, the weight of the aggravating circumstances, and the minimal amount of mitigation found by the trial court, any error in admitting Stone's testimony must be considered harmless beyond a reasonable doubt. Id.

## ISSUE VIII

### WHETHER THE STATE ENGAGED IN IMPROPER ARGUMENT TO THE JURY

Appellant alleges that the state is guilty of prosecutorial misconduct as a result of improper comments during closing arguments. This court has recognized that wide latitude is permitted in arguing to a jury. Breedlove v. State, 413 So. 2d 1, 8 (Fla.), cert. denied, 459 U.S. 882, 103 S. Ct. 184, 74 L. Ed. 2d 149 (1982). A trial court's determination regarding the propriety of comments is discretionary and absent an abuse of that discretion, an appellate court will not disturb that ruling. Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990), cert. denied, 111 S. Ct. 2076, 114 L. Ed. 2d 471 (1991). In order to prevail on appeal, appellant must demonstrate that the "comment inflamed the minds and passions of the jurors so that their verdict reflected an emotional response to the crime of the defendant rather than the logical analysis of the evidence in light of the applicable law." Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985). With these principals in mind, appellant has not been able to demonstrate an abuse of the trial court's discretion, let alone any reversible error.

The first comment was an invitation to the jury to look at what the defendant has said and done in light of their contention that he is a caring person. Such a comment is permissible. See Craig v. State, 510 So. 2d 857, 865 (Fla. 1987) (finding

permissible prosecutor's reference to defendant's evidence and asking jury to draw a certain conclusion).

The second comment challenged was the prosecutor's statement to the jury that appellant probably did not realize that when he called "911" the police would be able to trace the call to his house. Appellant objected, claiming that the state was arguing facts not in evidence. (R 3555). The trial court properly overruled the objection, as the comment was a logical inference from the evidence. See Mann v. State, 603 So. 2d 1141 (Fla. 1992) (finding proper prosecutor's argument telling jury to draw inference from evidence).

The next argument complained of is the prosecutor's comments referring to this case as a blueprint for the "HAC" factor and stating that "this case cried out for the death penalty." These comments were followed by the prosecutor's directive to the jury to consider the evidence and determine whether aggravating and mitigating factors existed. (R 3584). The prosecutor's comments were proper. They were suggestions to the jury that the facts warranted findings of the aggravating factors and not mitigating circumstances. See Mann, 603 So. 2d at 1143; Craig, 510 So. 2d at 865; Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993) (ruling that prosecutor may highlight inconsistencies in the evidence).

Appellant also alleges that the prosecutor impermissibly referred to his parole eligibility in violation of Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989). Appellant misinterprets the record. At no time did the state ever argue that death was the

appropriate penalty based on appellant's parole eligibility. The prosecutor anticipating defense argument, commented that appellant would tell the jury that he should receive life because he will not be eligible for parole. He then told the jury that, under the facts, appellant has no right to ask them for a life sentence. The comment was permissible. Cf. Parker v. State, 641 So. 2d 369, 375 (Fla. 1994) (characterizing the defense's theory as fantasy is permissible).

The final comments objected to were the prosecutor's reference to the terror going through the minds of the girls, as well as the circumstances during the chase and murder. Again, these comments were proper. They were a direct reference to the testimony of Regan Martin regarding the actions and reactions of both she and Elliott once they realized that they were being kidnaped. That evidence is relevant to establish "HAC". Throughout the ordeal Ms. Elliott and Ms. Martin were constantly threatened. At one point, Gore stated that he was going to shoot them anyway. See Jones v. State, 612 So. 2d 1370, 1374 (Fla. 1993) (finding permissible prosecutor's invitation to jury that to think about the time period preceding the death of the victim).

To the extent this court finds that the trial court abused its discretion, and the comments were therefore outside the scope of the jury's deliberations, any error must be considered harmless. The comments cannot be considered so egregious that they have tainted the validity of these proceedings. See Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (finding "Golden rule"

argument, although impermissible, not so outrageous as to taint the validity of the jury's recommendation).

## ISSUE IX

WHETHER THE TRIAL COURT ERRED IN REFUSING TO HEAR A MOTION TO SUPPRESS IDENTIFICATION THAT SHOULD HAVE BEEN RAISED DURING THE APPEAL OF APPELLANT'S CONVICTION

Appellant claims that the trial court erred in refusing to hear a motion to suppress the identification of Gore by eyewitness Michael Rock. The basis of the motion was that the line-up identification was unconstitutionally suggestive. (R 339). The trial court questioned the relevancy of the motion, since this was a penalty phase proceeding. (R 340). Appellant relying on Downs v. State, 572 So. 2d 895 (Fla. 1990), and Douglas v. State, 575 So. 2d 165 (Fla. 1990) argued that it would be unfair to preclude the defense from putting on evidence, yet allow the state to present evidence in aggravation that essentially would be a reintroduction of the guilt phase. (R 341-342). The state countered that resentencing is not a redetermination of guilt; therefore, the motion to suppress identification was irrelevant. (R 345-347). In denying the motion to suppress identification, the court ruled as follows:

> I am in no way going to bar or prevent or restrict full questioning or cross-examination of any witnesses presented by the State or the Defense, for that matter, at this point. I think anything that anyone testifies to here in the courtroom is fair game for the defense to cross examine as to what they saw, didn't see, hear, didn't hear, anything like that. I am not going to restrict that. Don't interpret anything I say to restrict that. But I find it would be inappropriate to permit a Motion to Suppress to be raised on an out-of-court identification to the issues in a

> penalty proceeding. It's similar seems to me that Chandler defense requested the Court to give an instruction on the voluntariness of an alleged confession, and that was refused by the court as I understand it upheld on appeal. I don't think that would be a relevant issue in this case, so I'll deny any Motion to Suppress out-of-court identification by Mr. Rock of Mr. Gore. It's just --- it doesn't seem pertinent to this particular issue as Mr. Gore's guilt has been determined, that he was convicted of the crime. So I'll deny your Motion to Suppress any out-of-court identification.

(R 399-400).

The trial court's ruling was correct. Resentencing is not a forum to relitigate a defendant's guilt. Chandler v. State, 534 So. 2d 701, 703 (Fla. 1988). Furthermore, the state is allowed to present evidence regarding the underlying facts of the case. Id.; Lucas v. State, 568 So. 2d 18, 21 (Fla. 1990). The trial court properly allowed appellant the opportunity to cross-examine any witness they chose, including Michael Rock. Consequently, appellant was not precluded from presenting anything in mitigation. (R 2160).[23] There was no error. Cf. Waterhouse v. State, 596 So. 2d 1008, 1015 (Fla. 1992) (finding that judge properly precluded defendant from presenting evidence of guilt at resentencing in

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[23] Appellant asserts that the issue as to who actually shot Lynn Elliott is open. **(Initial brief at 74).** Yet, appellant admitted to his own mental health expert that he, in fact, shot and killed Lynn Elliott. (R 344, 2942, 2954). After refusing to testify against his cousin, Freddie Waterfield, Appellant also told the prosecutor Robert Stone, that Waterfield was not present during the sexual battery and killing of Lynn Elliott. (R 2544, 2700). Counsel's statement that the issue of who actually killed Ms. Elliott is belied by his client's own words that appear in this record.

light of fact that defendant was given opportunity to cross-examine witness regarding evidence of sexual battery).

Additionally, appellant asserts for the first time on appeal, the following arguments that were not raised before the trial court; (1) denial of an opportunity to litigate his motion to suppress identification violates his right to confront witnesses against him in violation of Engle v. State, 438 So. 2d 803 (Fla. 1983) and Specht v. Patterson, 386 U.S. 605 (1967); and (2) the use of Rock's identification tainted the sentencing proceedings with unreliable evidence; and (3) vicarious application of the "HAC" factor violated Omelus v. State, 584 So. 2d 563 (Fla. 1991).[24] Since these arguments were not raised before the trial court, review is precluded. See Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990) (precluding review of argument raised on appeal which was different than argument raised below).

In any event, appellant cannot demonstrate how he was precluded from confronting any witness against him. As noted

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[24] Appellant also raises on appeal the claim that the inability to litigate his motion to suppress identification is a violation of Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2 401 (1972). This issue is precluded from review as it should have been raised on direct appeal of appellant's conviction. See Henry v. State, 649 So. 2d 1361, 1364-1365 (Fla. 1994); Hart v. State, 5 So. 2d 866, 867 (Fla. 1942) (finding that when appeal is taken of conviction and case is affirmed, but remanded for resentencing, subsequent review is limited to matters arising from remand only); cf. Eutzy v. State, 541 So. 2d 1143 (Fla. 1989) (finding that issue not raised in initial motion or in direct appeal will not be considered on appeal of subsequent motion); Love v. State, 559 So. 2d 198, 200 (Fla. 1990) (determining that failure to raise issue from district court of appeal in first appeal to Supreme Court bars review in supreme court after resentencing).

above, the trial court expressly ruled that appellant was not to be precluded from cross-examining any witness. (R 399-400). Nor does appellant explain how Michael Rock's identification taint the sentencing proceedings. Lastly, appellant's reliance on Omelus v. State, 584 So. 2d 563 (Fla. 1991), is misplaced. Omelus involved the erroneous application of the "HAC" factor to a defendant who was neither present at the murder nor had any knowledge as to how the murder was to be carried out. Gore cannot make any such argument given his admissions that Waterfield was not present during this crimianl enterprise. Appellant's veiled attempt to relitigate his guilt must be denied.

## ISSUE X

WHETHER THE TRIAL COURT PROPERLY REFUSED TO ALLOW INTRODUCTION OF A STATEMENT PREVIOUSLY SUPPRESSED

Appellant claims that the trial court erred in refusing to admit a statement he had made at the time of his arrest implicating Waterfield in the crime.[25] He contends that the statement implicating Waterfield should have been admitted because the state opened the door by eliciting from Detective Redstone the nature of other comments made by Gore at the time of his arrest. He further speculates that the trial court felt compelled to rule against admission because Judge Vocelle barred its admission at Gore's trial in 1984. The record reveals, however, that appellant opened the door to this testimony. However, when the state warned defense counsel that, by eliciting the statement, he was opening the door to all of appellant's statements, defense counsel protested. After reviewing transcripts from the original trial, during which appellant's statements were suppressed, the trial court agreed with the state and ruled the statements inadmissible. Under the circumstances, the trial court's ruling was proper.

This issue arose during the direct examination of Detective Redstone. The state presented evidence through Redstone to rebut appellant's alleged mitigation that he was intoxicated at the time of the crime. (R 2209). Redstone was asked to describe appellant's actions and reactions to police commands and

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[25] The actual statement was: "Freddy was in on this one." (R 2295).

communications at the time he was apprehended. (R 2209-2210). On cross-examination, defense counsel asked Redstone about his training in field sobriety tests, whether he read Miranda warnings to appellant, and how far away from appellant he was when he observed appellant's behavior. (R 2255-2256). Defense counsel persisted in his questioning, trying to establish that appellant's actions were very restricted, and therefore it was not easy for Redstone to make a determination whether Gore was under the influence at the time of the crime. (R 2256-2260). Defense counsel then questioned the witness about the factual circumstances surrounding the giving of Miranda warnings:

> DEFENSE COUNSEL: Right. Okay. So when you say he was read his rights, that didn't -- that didn't require anything on Mr.. Gore's -- he wasn't given a Miranda card to read was he?
>
> WITNESS: Yes.
>
> DEFENSE COUNSEL: He wasn't given a card? Was that a yes? Do you recall him saying yes to those questions?
>
> WITNESS: Yes, he said he understood his rights and he wanted to make a statement to get some things off his chest.

(R 2260).

Rather than limiting that testimony, defense counsel continued to question Redstone, which led Redstone to repeat at least two more times Gore's statement that "he had something to get off his chest." (R 2260-2261).[26] Defense counsel then asked if appellant

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[26] A review of the transcript indicates that both defense counsel and the trial court incorrectly state that the admission of Gore's statement "I have something to get off my chest" was

had made any other statement after receiving Miranda warnings. The state objected, knowing the likely response. "Well, if you ask him this question, what he's going to say -- a motion to suppress following what he said was, 'I want to get some things off my chest.' He said, 'Freddie was in on that one.' That was moved to be suppressed." (R 2261-2262).

During the ensuing discussion about whether the statement was, in fact, suppressed by Judge Vocelle, the state argued:

> They moved to suppress it and here's why. When he says Freddy was is on this one, that's inference, [that] there was more and that's why they moved to suppress it, and the judge granted the motion to suppress. This evidence was not elicited at the trial. The state does not have a care in the world if Mr. Nickerson wants to bring this evidence out. But if he does then all the evidence should come out regarding his statements. He can't have his cake and eat it too.

(R 2263-2264). Appellant responded that they were trying to elicit that statement only to counter the state's argument that Gore was not under the influence. (R 2265, 2286). The court warned appellant, however, that by pursuing this line of questioning he was potentially opening the door to other suppressed statements made by appellant. (R 2267).

At that point, the court dismissed the jury to try and ascertain what was, in fact, suppressed at the original trial. (R 2268-2269). After reviewing the transcripts, defense counsel stated:

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elicited by the state. (R 2286-2287, 2289).

> DEFENSE COUNSEL: I understand having read the record now, I understand there was a stipulation that apparently Judge Vocelle made a finding on the parties. And I believe that what has been elicited from this officer is the same thing that the State elicited at the trial and that the State elicited here on this examination, which is "I have something to get off my chest."
>
> I would not go into any question about Freddy is in on this one. Did he make any statements with respect to Mr. Waterfield. I would not go into where the gun is. I would not go into did he ask for an attorney. Because that's what I understand the statements are.

(R 2286-2287). With both parties appearing to be in agreement, the court ruled as follows:

> One thing at a time. Based on the previous ruling of Judge Vocelle in the initial proceeding back in 1984, it's clear to this Court in reviewing that record and considering the arguments of counsel on the issue about the statements made by Mr. Gore to law enforcement at his arrest to the effect of "Freddy is in on this one," and a statement regarding the location of the gun in the house. Because the prior agreement is inadmissible, and I will sustain the objection to any questions attempting to elicit those statements in order to be consistent with Judge Vocelle's ruling in the prior proceeding.

(R 2288-2289, 2295-2296).[27]

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[27] At appellant's original trial, his statement that he wanted to get something off his chest was admitted without objection to show that appellant's later statement at the police station was voluntarily given. (Original record at 2269, 2276-2277). However, the parties stipulated that the following information would not be admitted at trial: Gore's statement that "Freddy was in on this one," and any response Gore made to police when he was asked to tell them where he put the gun. (Original record at 1242-1244, 1249-1250, 2271, 2277).

Appellant agreed with the ruling until the state indicated that it was going to have Redstone repeat the entire statement that was admitted at the original trial.[28] At that point, appellant argued that the state would then be opening the door to the other statement, "Freddie was in on this one." (R 2292). The court rejected appellant's argument, and Redstone was allowed to repeat appellant's entire statement. (R 2295-2296, 2313). The remainder of the testimony elicited on cross-examination and redirect centered mainly on Gore's physical condition, and whether he was under the influence of alcohol. (R 2297-3315).

On appeal, appellant claims that the trial court erroneously limited his cross-examination of Redstone. In order to demonstrate reversible error, appellant must demonstrate that the trial court abused its discretion in limiting cross-examination. See Maggard v. State, 399 So. 2d 973, 975 (Fla. 1983). Appellant must also show that the testimony being sought during cross-examination relates to credibility or is relevant to matters brought out on direct. Steinhorst v. State, 412 So. 2d 332, 337 (Fla. 1982).

As the record reveals, defense counsel elicited from Detective Redstone appellant's statement that "he had something to get of his chest." However, before counsel could elicit the statement, "Freddie was in on this one," the state informed the trial court that this statement had been suppressed at the original trial.

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[28] The statement that was admitted at the original trial was as follows: "He said that he wanted to get something off his chest, to make a statement, and then he wanted to see a lawyer." (R 2293).

Although the state, in fact, had no objection to the admission of this statement, it argued that its admission would open the door to the admission of other statements regarding the gun. After reviewing the transcripts from the original trial, appellant agreed that the statement had been suppressed, and agreed not to elicit it. Thus, in keeping with the parties' understanding of the original order of suppression, the trial court ruled the statement inadmissible.

When the state indicated, however, that it intended to elicit the entire statement admitted at the original trial, appellant claimed that the state would open the door to admission of the statement implicating Waterfield. When the trial court rejected that argument, Appellant made a conscious decision to abide by the prior order of suppression. As the movant, he could have withdrawn his objection to the admission of the statements previously suppressed, but he knew that if one statement came in, they would all come in. So, he decided to abide by the suppression order. Only, now, he tries to claim that the state opened the door, and he was wrongly precluded from admitting the one self-serving statement that "Freddie was in on this one."

To support his claim that such statement was admissible cross-examination, defense counsel made the following argument:

> DEFENSE COUNSEL: There was substantial examination by this officer about Mr. Gore's motor movements, about his speech, and I'm simply trying to show there wasn't that much speech, there wasn't that much motor movements. All of this is happening at 14

> feet. I didn't bring up this inquiry, this is inquiry the State went into.

(R 2265). This argument was disingenuous at best. If the defense wanted to show that appellant did not say or do enough for Redstone to determine whether he was intoxicated, then the admission of all of appellant's statements and actions would have been required, not just the one self-serving statement. Section 90.108, Fla. Stat. (1991); Long v. State, 610 So. 2d 1276 (Fla. 1992). As the state noted in the trial court, however, appellant's real motive was to show Waterfield's involvement: "And the reason they're bringing this out is to try to show somehow Waterfield is more involved than he actually was. They are definitely opening the door to other things by going into this." (R 2265).

Appellant does not, and cannot, explain how the self-serving statement implicating his cousin in this murder, by itself, is relevant to the subject matter elicited on direct examination, i.e., whether appellant was under the influence of alcohol at the time of the crime. To the contrary, the more appellant spoke, the more apparent it became that appellant was not under the influence of alcohol at the time of the crime. However, appellant did not want to elicit all of his statements, only the one implicating Waterfield. Thus, appellant simply cannot demonstrate that his statement was relevant to anything elicited on direct examination. Edwards v. State, 530 So. 2d 936, 938 (Fla. 4th DCA 1988).

The facts in this case are akin to those in Wyatt v. State, 641 So. 2d 1336, 1339 (Fla. 1994). On appeal, Wyatt complained

that the state's presentation of his handwriting samples from his prison file was reversible error since the jury was made aware of his criminal past. This Court rejected that claim because the state offered to forego use of the prison file if appellant would stipulate to the identity of the handwriting. Wyatt refused. Therefore the state had no choice but to prove identity of the handwriting with the only available sample, i.e., his prison file. Similarly, in the case sub judice, the state had no objection to the admission of Gore's statement implicating Waterfield, as long any other statements made at that time would be admissible. Appellant refused. He cannot now complain of error. Id; Edwards, 530 So. 2d at 938.

As for the trial court's finding that the statement implicating Waterfield had been suppressed at the original trial and would remain suppressed, its ruling was correct under the circumstances. As noted, appellant could have waived his previous motion to suppress, but he was not willing to do that. He only wanted to elicit the statement implicating Waterfield. Thus, given appellant's argument that the statement implicating Waterfield was admissible, but the statements about the gun were not admissible, the trial court ruled that all of them would remain suppressed. This was not error. Section 90.108, Fla. Stat. (1991); Long v. State, 610 So. 2d 1276 (Fla. 1992).

If this Court finds, however, that appellant should have been allowed to elicit the testimony, any error must be considered harmless. See Pace v. State, 596 So. 2d 1034, 1035 (Fla. 1992)

(finding limitation of cross-examination to be harmless given the little significance of the evidence). If appellant genuinely believed that the testimony was so important, he could have called Redstone as his own witness, but he did not. Id; Steinhorst, 412 So. 2d at 337.

## ISSUE XI

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO PRECLUDE THE PARTIES FROM TALKING TO THEIR WITNESSES DURING RECESSES IN THEIR TESTIMONY

After a recess, but prior to the resumption of direct testimony of state witness Regan Martin, appellant asked the court to preclude the parties from speaking to the witnesses during breaks in their testimony. (R 1978). Defense counsel could sight no authority for his request, except to say it has been generally his experience that such a rule be instituted. (R 1978). The state invited defense counsel to identify any alleged impropriety that appellant may be suggesting had occurred during the recess, and to question the witness. (R 1982). Appellant declined. (R 1983). The court denied the request, since there was no prohibition to such contact, and there was no allegation that anything improper was done. (R 1983).

A similar request was made during the break in the testimony of state witness Michael Rock. (R 2128-2129). Again, the judge denied the request, ruling that it would be beyond his discretion to tell either party that they are not allowed to talk to a witness

during a break. (R 2129). Again, defense counsel could not point the court to any authority otherwise. (R 2129).

On appeal, Gore alleges that the court's refusal to preclude such communication is a violation of Geders v. United States, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976), Stripling v. State, 349 So. 2d 187 (Fla. 3d DCA 1977), and Bova v. State, 392 So. 2d 950 (Fla. 4th DCA 1981). This issue is not preserved for appeal, however, since appellant is making a different argument than that which was raised at trial. Occhicone v. State 570 So. 2d 902, 904 (Fla. 1990).

In any event, appellant's claim has no merit. The cases cited by appellant are not dispositive. All three cases involve the preclusion of defense counsel from talking to his client during a recess in the defendant's cross-examination. The competing concerns of preventing counsel from coaching a witness during cross-examination, and protecting a defendant's right to consult with his attorney during recess must be balanced. Bova, 392 So. 2d at 954-955; Stripling, 349 So. 2d at 192. No such concerns are present here. The witness was testifying on direct examination. An attorney is entitled to confer with his own witness about testimony the witness will give. Kingery v. State, 523 So. 2d 1199, 1204 (Fla. 1st DCA 1988). Appellant cannot demonstrate that the trial court erred by not precluding that exchange.

## ISSUE XII

WHETHER THE TRIAL COURT ERRED IN ALLOWING A WITNESS TO COMMENT ON THE TRUTHFULNESS OF APPELLANT'S INCONSISTENT STATEMENTS

Appellant claims the trial court erred in allowing Captain DuBois to give his personal opinion regarding the veracity of Gore's taped statement. Appellant's objection was made during the direct testimony of Captain DuBois. It was during his testimony that appellant's taped confession was played to the jury. (R 2418-27). In that statement, appellant admitted that he chased Lynn Elliott down the driveway as she was trying to escape. (R 2426-27). Contrary to the eyewitness testimony of Michael Rock, Gore stated that he caught her and brought her back to the house. (R 2424-27). Gore also stated that, while he was out chasing Elliott, Waterfield was in the house with Martin. (R 2424-27). When the state asked Captain DuBois if he had found that Gore was lying about Waterfield's presence, defense counsel objected that DuBois did not have any personal knowledge about when Waterfield left, and that DuBois was not qualified to give an opinion regarding the ultimate issue. (R 2430-2432). The state argued that DuBois's statement was based on the testimony of Regan Martin. (R 2432). Furthermore, it argued that Gore should not be allowed to perpetrate a fraud on the court, since Gore ultimately admitted that Waterfield was not at the house during the crime. (R 2432-2433). The court allowed the question to be asked based on the

fact that Regan Martin testified that Waterfield was not at the house. (R 2436).

On appeal, appellant complains that DuBois' statement amounted to reversible error. Appellant's argument that DuBois had no personal knowledge upon which to base his answer is incorrect. In effect, the state asked DuBois if he had learned through is investigation whether appellant's statement that Waterfield was still in the house was untrue. Claiming that DuBois had no personal knowledge was the functional equivalent of claiming that DuBois' answer was based on hearsay. Yet, hearsay is admissible in a resentencing proceeding as long as the opposing party has an opportunity to rebut it. Section 921.141(1), Fla. Stat. (1993). Appellant had such an opportunity. Moreover, Martin testified that Waterfield was no longer in the house, and appellant admitted during Waterfield's trial that Waterfield was not there. Thus, this argument is without merit.

Second, the statement was not intended to invade the province of the jury. At first blush, it would appear that the officer's response was improper. In Capehart v. State, 583 So. 2d 1009, 1013 (Fla. 1991), this Court determined that it was improper to ask a police officer whether the defendant's statements implicating someone else were true in light of the officer's investigation. However, Capehart is distinguishable on two grounds. First, in the instant case, the context of the question was entirely different. Through the cross-examination of Martin, Nippes and Redstone, appellant attempted to convey to the jury that Waterfield was

equally culpable for the murder of Lynn Elliott. (R 1842-43, 2060-61, 2067, 2483-85). As previously discussed, Gore has admitted that he lied about Waterfield's participation in the case. (R 2699-2701). He told his own mental health expert that Waterfield was not present during the crime. (R 2942, 2954). Yet, appellant has consistently tried to preclude the state from demonstrating otherwise. His objection to the officer's statement now is nothing more that a veiled attempt to elude the consequences of his own prior admission regarding Waterfield's participation. The officer's statement was properly admitted. See Bonifay v. State, 626 So. 2d 1310, 1312 (Fla. 1993) (permitting state to present evidence at penalty phase of defendant's prior crimes in order to present more complete picture or to correct any misperceptions); Phillips v. State, 476 So. 2d 194, 196 (Fla. 1985) (permitting the state to present negative testimony about the defendant to discredit his alibi and explain the context of his incriminating admissions).

Capehart is also distinguishable because the testimony in that case was presented at the guilt phase. 583 So. 2d at 1013. This Court has repeatedly held that the rules of evidence are relaxed at the penalty phase. Chandler v. State, 534 So. 2d 701, 703 (Fla. 1988), cert. denied, ___ U.S. ___, 109 S. Ct. 2089, 104 L. Ed. 2d 652 (1989). Evidence which familiarizes the jury with the underlying facts is admissible at the penalty phase. Hitchcock v. State, 21 Fla. L. Weekly S139 (Fla. March 21, 1996). Appellant was not precluded in any way from rebutting the officer's testimony.

Consequently, the officer's statement was properly admitted in order to present a more accurate picture for the jury.

To the extent this Court finds that it was error, it must be considered harmless. DuBois' single objected-to statement, when viewed in the context of this entire record, was harmless error beyond a reasonable doubt. Regan Martin testified that she did not see or hear Waterfield shortly after they arrived at the house. (R 1933, 2077). The physical evidence conclusively demonstrates that Gore had sex with both victims. There was no semen, saliva or hair found on Waterfield to link him to any sexually assault. (R 2473-2485). Michael Rock, an eyewitness to the murder, testified that he saw Gore shoot Lynn Elliott. His testimony is in total and complete contradiction of Gore's taped statement in which he says that he chased Lynn Elliott and brought her back to the house, and that Waterfield was still there. And most importantly there is Gore's own admission that he lied about the extent of Waterfield's participation in the crime. Capehart, 583 So. 2d at 1013.

## ISSUE XIII

WHETHER THE TRIAL COURT AFFORDED APPELLANT AN OPPORTUNITY TO BE HEARD PRIOR TO SENTENCING

Appellant complains that the trial court erred in not hearing from him personally before reaching its sentencing decision. Citing to Spencer v. State, 615 So. 2d 688 (Fla. 1993), appellant claims that the error is tantamount to an improper waiver of mitigation, as well as a refusal by the trial court to consider all mitigation proposed by the defense; thus, reversal is required. Appellant's argument is not preserved for review. In the alternative, the claim lacks merit, both factually and legally.

Although appellant now complains that the trial court somehow refused or simply failed to consider mitigation, he fails to direct this Court to any evidence which supports his claim. Appellant did not request to address the court until the day of sentencing. (R 3672). Given appellant's failure to inform the court, or otherwise object, to the court's procedure, he cannot now complain of error. Cf. Gunsby v. State, 574 So. 2d 1085, 1088 (Fla. 1991) (failing to object to procedure used by trial court regarding inquiry of prospective jurors waives challenge to court's actions on appeal). Moreover, appellant's reliance on Spencer is misplaced since Spencer issued after appellant's final sentencing. See Armstrong v. State, 642 So. 2d 730, 737-738 (Fla. 1994) (finding Spencer prospective only).

Appellant was never precluded from addressing the court at any time. He presented numerous witnesses at the penalty phase. (R

2717-3204). After the jury rendered its unanimous recommendation for death the court asked appellant if there was anything additional that needed to be addressed. (R 3643). Appellant responded negatively. (R 3643). At that time, the court set the sentencing hearing almost thirty (30) days from the conclusion of the penalty phase. The hearing was set for December 8, 1992. (R 3644). At that time the trial court noted that he had received a letter from appellant's sister. Copies were forwarded to both sides. (R 3647). Appellant was again asked if there was any legal reason why sentence should not be imposed. Again, appellant responded negatively. (R 3647). Appellant cannot complain of error. See Rivera v. State, 547 So. 2d 143, 146-147 (Fla. 1989) (failing to advise court of additional evidence precludes complaint on appeal); cf. Sullivan v. State, 303 So. 2d 632 (1976) (declining opportunity to correct error waives issue for appeal).

In any event, the substance of appellant's statement to the court at sentencing had been presented through the testimony of Dr. Maher:

> Well, the records indicate first of all that Mr. Gore has not received any disciplinary reports, has not had offenses against the rules of the institution or anything while he's been there. He appears to have the -- records indicate and he indicates that he has adapted very well to the prison environment. He has in effect found a place in the prison. He ministers in a religious way to other inmates. He corresponds with various people about his activities in prison. He depends on the prison, the institution to set his structure, to tell him what to do, where to do it. He depends on and relies on this prison structure to tell him what the

> rules are, to do what's right and to follow those rules. And in this extremely structured, clear setting environment he appears to function quite well.

(R 2889-2890). Again, Appellant was provided a full and fair opportunity to present evidence at sentencing. This claim should be denied. Armstrong, 642 So. 2d at 738.

## ISSUE XIV

WHETHER IT WAS ERROR FOR A COUNTY COURT JUDGE TO PRESIDE OVER APPELLANT'S CAPITAL SENTENCING PROCEEDING

Appellant complains that an administrative order temporarily assigning Judge Vaughn to preside over this case constitutes reversible error under Payret v. Adams, 500 So. 2d 136 (1986). In a motion to disqualify Judge Vaughn, filed before trial, Gore claimed that Judge Vaughn's tenure as acting circuit judge had exceeded the time limits allowed by Payret. The trial court denied the motion, ruling that it was legally insufficient. (R 4935). The trial court's ruling was proper.

In Crusoe v. Rowls, 472 So. 2d 1163 (Fla. 1985), this Court upheld successive assignments totaling two and one-half years. The gravamen of the court's ruling was that the assignment must be temporary. If the assignment involves just a portion of time devoted to circuit court, then this Court suggested six months as a reasonable amount of time. If the assignment was exclusively devoted to circuit court matters, then the duration of the assignment should be considerably shorter, e.g., sixty (60) days. Id. at 1165.

In Payret, this court disapproved of reassignments that continued for five years. This Court noted in the opinion that "respondents conceded that for all intents and purposes, he is the circuit judge for the Glades district." Id. at 138.

Recently in Wild v. Dozier, 21 Fla. L. Weekly S57, 58 (Fla. Feb. 8, 1996), this Court stated that, to be considered a proper temporary assignment, the court must look at more than just the duration of the individual assignment. "The successive nature of the assignment, the type of case covered by the assignment, and the practical effect of the assignment on the circuit court jurisdiction over a particular type of case also must be considered."

In the instant case, the facts support the contention that Judge Vaughn's original tenure followed by one additional six-month period was a proper temporary assignment. By administrative orders of November 21, 1991, and January 6, 1992, (exhibits A),[29] Judge Vaughn was assigned to hear a portion of circuit court matters. (Exhibit D).[30] The temporary appointment commenced on January 1, 1992, and was to terminate on June 30, 1992. (Exhibit A). However on April 13, 1992, it became necessary to assign Judge Vaughn to this case because Judge Wild, who had been presiding, granted a defense motion to recuse himself. (R 4358, Exhibit B). Consequently it then bacame necessary to extend Judge Vaughn's assignment. On August 19, 1992, Judge William Hendry issued an Amended order which extended the temporary assignment of Judge

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[29] Please see accompanying Motion To Supplement the Record.

[30] For the convenience of all parties, appellee has attached a copy of Administrative Order No. 91-06. The Nineteenth Judicial Circuit was comprised of the following divisions: appellate; civil; probate, guardian and trust; criminal; and juvenile. (Exhibit D). Appellee requests this Court to take juducual notice of this order.

Vaughn for one additional six-month period from July 1, 1992, through December 31, 1992. (R 4932; Exhibit C).

In an attempt to distinguish this case from the terminal effect of Wild, Gore asserts in his brief that Judge Vaughn's assignment to circuit court cases was in lieu of his county court duties. Appellant does not direct this court to any portion of the record in support of that asserted fact. There is nothing to suggest in this record that Judge Vaughn's continuing duties as county court judge were ever suspended. The logical inference from the administrative orders is that the limited duties assigned to Judge Vaughn in the circuit court were in addition to his duties as county court judge. The administrative order does not include any directive suspending his otherwise continuing duty as a county judge. To the contrary, the record supports the logical conclusion that Judge Vaughn did continue to carry out county court functions.

During argument regarding the motion to disqualify Judge Vaughn, defense counsel relied heavily upon this Courts' suggestion that if a county court judge is assigned to spend only a portion of his time doing circuit court work, the assignment should be for six months. (R 4930). At no time did counsel assert or argue that Judge Vaughn's original tenure for six months was in violation of Crusoe's suggestion regarding the length of the assignment. At no time did defense counsel argue or characterize Judge Vaughn's assignment as being comprised of circuit court matters exclusively. There is simply no record support for such a claim.

In conclusion, Judge Vaughn's original assignment was for a six-month period, and only included limited matters from a portion of the divisions of the circuit court. The successive assignment only became necessary once Judge Wild was removed from Gore's case. There are no facts to suggest that the assignment ever usurped the circuit court's jurisdiction or created a de facto permanent circuit judge by administrative order. Therefore, this claim is without merit. Cf. J.G. v. HoltzenDorf, 21 Fla. L. Weekly S122 (March 14, 1996).

## ISSUE XV

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE'S EXPERT TO EXAMINE APPELLANT IN ORDER TO REBUT MITIGATING EVIDENCE

Gore argues that the trial court erred in allowing the state's expert to examine him prior to the penalty phase. Prior to trial, the state requested the examination in light of the fact that Gore was going to present the testimony of two mental health professionals relating to statutory and nonstatutory mitigating evidence. (R 4841). Citing to Rule 3.780(b), Florida Rules of Criminal Procedure, the state argued that it was entitled to rebut Gore's claim of mitigation at the penalty phase, because this Court has stated that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 199). Given the trial court's responsibility in determining mitigation, it was imperative that the state be given a fair chance to present evidence that would rebut the proposed mitigation. (R 4842-4843, 4844, 4847, 4850). Appellant countered that the state can rebut the proposed mitigation through other available means, i.e., cross-examination, and that there is no authority for the request. (R 4856-4861). Relying on Henry v. State, 574 So. 2d 66, 70 (Fla. 1991), and Burns v. State, 609 So. 2d 600 (Fla. 1992), the trial court granted the state's request:

> It seems to this court in order to accommodate basic fairness, that the State

should have equal access to the Defendant to rebut any testimony or evidence regarding any mitigating factors, either statutory or non-statutory that the Defendant's mental health expert may testify to.

It seems clear to me that the basic fairness requires that once the point is reached, that the Defense has listed a person, mental health expert as a witness, they have now injected this issue that the status of the Defendant's mental health into the trial. And the State, in order to properly prepare and rebut, if necessary, the Defense testimony, they should have equal access to the Defendant with an expert of their choosing to examine the Defendant.

It would be inappropriate, I think, to restrict the State to rebut any mental health expert to simply to cross-examination, or of the expert, or impeachment. To me, that doesn't seem to be a level playing field when the Defense can have the Defendant interviewed or examined by a mental health expert and inject that issue, and then prevent the State from having their own examination and present any rebuttal that they wish. The State would be disadvantaged at that.

Now the jury can determine, if they wish, if it turns into a battle of the experts, which expert they wish to give credibility to or which they want to believe or disbelieve; that's certainly the jury's decision, not mine. But I think that evidence, that testimony should at least be presented to the jury, and the State would have a right to rebut that testimony, if they consider it appropriate.

Now, being consistent with my previous Motion-- Order on the Defense Motion in Limine, I'm not going to permit it in the State's case in chief, only for rebuttal purposes only if that becomes necessary and if the State considers it appropriate.

And I'm relying specifically on the Henry decision, the Burns decision, the Long decision that has recently come out that

> specifically dealt with the penalty phase. And I am relying , a case that is still pending in April, that dealt with this same issue in a different-- in a different death penalty proceeding I find that to be persuasive. Obviously, I'm bound by the Supreme Court decision and that's how I interpret those.
>
> I don't see how that would be fair to both sides to allow the Defense an expert to examine their client and not allow the State. Once that -- that expert has been listed as a witness, ostensibly, I presume to testify to the Defendant's mental status, and not allow the State the same opportunity.
>
> Mr. Barlow, I'll grant the State' motion for psychiatric or psychological examination of the Defendant.

(R 4870-4872).

On appeal, appellant argues two different grounds. First, citing to Bradford v. State, 873 S.W.2d 15 (Tex. Cr. App. 1993), cert. denied, Texas v. Bradford, ___ U.S. __, 115 S. Ct. 311, __ L. Ed. 2d __ (1994), he claims that requiring Gore to submit to an evaluation violates the Fifth and Sixth Amendments. He further complains that such an evaluation limits the defendant's introduction of mitigation in violation of Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). Neither of these arguments were presented to the trial court below; consequently, review is precluded. Occhicone v. State, 570 So. 2d 902 (Fla. 1990).

In any event, appellant's claim is without merit. This Court has implicitly, if not explicitly, rejected appellant's claim under Bradford. Just recently this Court promulgated Rule 3.202, Florida

Rule of Criminal Procedure, which authorizes the very ruling under attack here. Furthermore, in Bradford, the state was seeking to offer evidence of non-statutory aggravating evidence. In the instant case the rule is designed to "level the playing field." The prescience of the trial court's ruling in the instant case is now apparent. Dillbeck v. State, 643 So. 2d 1027, 1030 (Fla. 1994) (requiring defendant to submit to mental health examination by state expert once defendant presents mental health evidence in mitigation at penalty phase); Fla. R. Crim. P. 3.202. Although Dillbeck had not issued prior to Gore's resentencing, it obviously supports the trial court's ruling.[31]

Equally without merit is appellant's claim that requiring him to submit to an examination will limit the introduction of mitigation in violation of Lockett. Appellant does not, and cannot, demonstrate that he has in any way been precluded from presenting anything in mitigation. He presented the testimony of two mental health professionals and several family members. (R 2717-2838, 2977-3037, 3123-3193, 2840-2967, 3044-3119). The trial court simply afforded the state equal access to the defendant. The penalty phase proceeding is a means by which the sentencing judge and jury may meet their constitutional duty and render a decision/recommendation that is based on all of the relevant

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[31] Appellant may argue in his reply brief that Dillbeck does not apply because it issued after appellant's resentencing, but, as this Court has recently explained, "new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise." Wuornos v. State, 644 So. 2d 1000, 1007 n.4 (Fla. 1994).

evidence regarding the crime and the defendant. Cf. Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977) (stating that purpose of considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain the appropriate penalty).

## ISSUE XVI

WHETHER APPELLANT WAS DENIED HIS RIGHT TO A SPEEDY RESENTENCING HEARING

Appellant claims that his right to a speedy trial was violated by the state. He first contends that, due to the fact that his original sentencing hearing was vacated, the state was subsequently allowed to rely on an aggravating factor not previously available. Appellant's argument is incorrect. At Gore's original sentencing, the trial court did not find the aggravating factor of prior violent felony. Gore v. State, 475 So. 2d 1205, 1209-1210 (Fla. 1985). However, the aggravating factor, as well as any evidence to support it was available at the time of Gore's original sentencing hearing.At Gore's resentencing, the trial court did find this factor.[32] Consequently, there is no *ex post facto* violation. However even if the "prior violent aggravating factor" did not cone inot existence until after Gore's orignial sentencing, the state would not have been percluded from relying on it at resentencing. See Valle v. State, 581 So. 2d 40, 47 (Fla. 1991); Windom v. State, 656 So. 2d 432 (Fla. 1995).

Resentencing is an entirely new proceeding; thus, neither side is precluded from pursuing any relevant circumstance. See Preston v. State, 607 So. 2d 404 (Fla. 1992) (resentencing court is not bound by original court's findings). To say that the state somehow

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[32] The evidence relied on to establish the aggravating factor of "prior violent felony" also includes appellant's contemporaneous violent felonies against a second victim, Regan Martin. (R 4564-4565). See Issue III, supra.

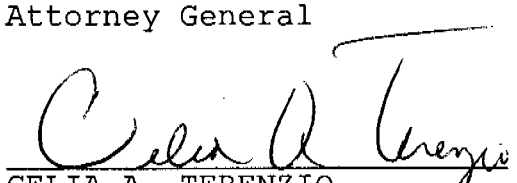
gained an advantage when Gore's origninal death sentence was vacated by a federal court six years after its imposition, borders on the absurd. The state obviously had more than sufficient evidence to obtain a conviction and sentence of death without the additional factor of prior violent felony. Gore v. State, 475 So. 2d 1205 (Fla. 1985). Appellant's argument is completely void of merit. See Hitchcock v. State, 21 Fla. L. Weekly S139 (Fla. March 21, 1996) (rejecting identical argument).

## CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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Assistant Attorney General
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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Gary Caldwell, Assistant Public Defender, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 25th day of June, 1996.

CELIA A. TERENZIO
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| DAVID ALLEN GORE,<br><br>Appellant,<br><br>vs.<br><br>STATE OF FLORIDA,<br><br>Appellee. | ) | Case No. 80,916 |

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR ST. LUCIE COUNTY, FLORIDA

APPENDIX TO

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CELIA A. TERENZIO
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(407) 688-7759

ATTORNEY FOR APPELLEE

# APPENDIX A

THE CIRCUIT COURT OF FLORIDA

NINETEENTH JUDICIAL CIRCUIT

SAINT LUCIE COUNTY

WHEREAS, it has been officially made known to me that it is necessary to the dispatch of business in the Circuit Court in and for St. Lucie County, Florida, that an additional Judge be assigned,

NOW, THEREFORE, I, WILLIAM L. HENDRY, pursuant to authority vested in me as Chief Judge of the Nineteenth Judicial Circuit of Florida, under Section 2 (b) and (d), Article V of the Constitution of Florida and Rule 2.050(b)(3)(4) Rules of Judicial Administration, do hereby assign and designate the Honorable Dan L. Vaughn, a Judge of the County Court in and for St. Lucie County, Florida to the Circuit Court in and for St. Lucie County, Florida, beginning January 1, 1992 through June 30, 1992, to hear, conduct, try and determine in the Juvenile Division any emergency matters presented to him, and to hear, conduct, try and determine in the Familiy Relations Division, all HRS and URESA filings and determine all matters presented to him in the Criminal Division. The said Dan L. Vaughn, under and by virtue of the authority here of, is hereby vested with all and singular the powers and prerogatives conferred by the Constitution and Laws of the State of Florida upon a Judge of the Court to which he is hereby assigned as to the proceedings set forth.

VAUGHN 6/MONTH ORDER

All prior assignment orders concerning Judge Dan L. Vaughn are hereby revoked January 1, 1992.

DONE AND ORDERED at Okeechobee, Okeechobee County, Florida, this 27th day of November, 1991.

William L. Hendry

WILLIAM L. HENDRY, Chief Judge
Nineteenth Judicial Circuit

ATTEST:

DOUGLAS DIXON
Clerk, Nineteenth Judicial Circuit
County of St. Lucie, Florida

BY:_____D.C.

Okay Keep Off File

THE CIRCUIT COURT OF FLORIDA

NINETEENTH JUDICIAL CIRCUIT

ST. LUCIE COUNTY

WHEREAS, it has been officially made known to me that it is necessary to the dispatch of business in the Circuit Court in and for St. Lucie County, Florida, that an additional Judge be assigned,

NOW, THEREFORE, I, WILLIAM L. HENDRY, pursuant to authority vested in me as Chief Judge of the Nineteenth Judicial Circuit of Florida, under Section 2 (b) and (d), Article V of the Constitution of Florida and Rule 2.050(b)(3)(4) Rules of Judicial Administration, do hereby assign and designate the Honorable Dan L. Vaughn, a Judge of the County Court in and for St. Lucie County, Florida, to the Circuit Court, Family Relations Division, in and for St. Lucie County, Florida beginning January 1, 1992 through June 30, 1992 to hear Domestic Violence Ex Parte Injunctions for protection cases arising out of chapter 91-210, Laws of Florida. The said Dan L. Vaughn under and by virtue of the authority hereof, is hereby vested with all and singular the powers and prerogatives conferred by the Constitution and the Laws of the State of Florida upon a Judge of the Court to which he is hereby assigned as to the proceedings set forth.

The purpose of this order is to provide weekend and holiday coverage and additionally to assist during the absence of the judge regularly assigned Domestic Violence cases.

COUNTY JUDGES DOMESTIC VIOLENCE

This order is in addition to the assignment order dated November 20, 1991.

DONE AND ORDERED at Okeechobee, Okeechobee County, Florida this 6TH day of January, 1992 nunc pro tunc January 1, 1992.

William L. Hendry

WILLIAM L. HENDRY, Chief Judge
Nineteenth Judicial Circuit

ATTEST:
DOUGLAS J. DIXON
Clerk, Nineteenth Judicial Circuit
County of St. Lucie, Florida

BY:_____D.C.

# APPENDIX B

IN THE COUNTY COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

WHEREAS, it has been officially known to me that the Honorable JOE WILD, Acting Circuit Judge of the Circuit Court, of INDIAN RIVER COUNTY, Florida, is unable to perform the duties of this office because of disqualification in the case of:

STATE OF FLORIDA VS. DAVID GORE
INDIAN RIVER CASE NO. 83-361-CF

NOW THEREFORE, I, MARC A. CIANCA, pursuant to authority vested in me by Administrative Order No. 91-5, as Administrative Judge of the Criminal Justice Division, Nineteenth Judicial Circuit of Florida, under Section 2(b) and (d), Article V of the Constitution of Florida and Rule 2.050 (b)(3)(4), Rules of Judicial Administration, do hereby assign and designate the Honorable DAN L. VAUGHN, a Judge of the COUNTY Court of ST. LUCIE County, Florida, to proceed to the CIRCUIT Court, ST. LUCIE County, State of Florida. To hear, conduct, try and determine the cause or causes which shall be presented to him as a temporary Judge of said Court, and thereafter to dispose of all matters considered by him on said dates.

The said DAN L. VAUGHN, ACTING CIRCUIT JUDGE under and by virtue of the authority hereof, is vested with all and singular the powers and prerogatives conferred by the Constitution and laws of the State of Florida upon a Judge of the Court to which he is hereby assigned.

DONE AND ORDERED at Stuart, Martin County, Florida, this 13th day of APRIL 1992.

ATTEST:

CLERK, NINETEENTH JUDICIAL CIRCUIT, COUNTY OF ST. LUCIE FLORIDA

BY:_____D.C.

Administrative Judge,
Criminal Justice Division of
all Circuit and County Courts
Nineteenth Judicial Circuit.

MAC/Admin. Criminal Judge

# APPENDIX C

**AMENDED**

THE CIRCUIT COURT OF FLORIDA

NINETEENTH JUDICIAL CIRCUIT

SAINT LUCIE COUNTY

**WHEREAS**, it has been officially made known to me that it is necessary to the dispatch of business in the Circuit Court of the Nineteenth Judicial Circuit an additional Judge be assigned,

**NOW, THEREFORE**, I, WILLIAM L. HENDRY, pursuant to authority vested in me as Chief Judge of the Nineteenth Judicial Circuit of Florida, under Section 2 (b) and (d), Article V of the Constitution of Florida and Rule 2.050(b)(3)(4) Rules of Judicial Administration, do hereby assign and designate the Honorable Dan L. Vaughn, a Judge of the County Court in and for St. Lucie County, Florida to the Circuit Court in and for St. Lucie County, Florida, beginning July 1, 1992 through December 31, 1992, to hear, conduct, try and determine in the Juvenile Division any emergency matters presented to him, and to hear, conduct, try and determine in the Familiy Relations Division, all HRS and URESA filings and determine all matters presented to him in the Criminal Division of the Nineteenth Judicial Circuit. The said Dan L. Vaughn, under and by virtue of the authority here of, is hereby vested with all and singular the powers and prerogatives conferred by the Constitution and Laws of the State of Florida upon a Judge of the Court to which he is hereby assigned as to the proceedings set forth.

VAUGHN 6/MONTH ORDER

All prior assignment orders concerning Judge Dan L. Vaughn are hereby revoked July 1, 1992.

DONE AND ORDERED at Okeechobee, Okeechobee County, Florida, this 19th day of August, 1992. Nunc pro tunc July 1, 1992.

William L. Hendry
WILLIAM L. HENDRY, Chief Judge
Nineteenth Judicial Circuit

ATTEST:

DOUGLAS DIXON
Clerk, Nineteenth Judicial Circuit
County of St. Lucie, Florida

BY:_____D.C.

# APPENDIX D

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER, MARTIN
OKEECHOBEE AND ST. LUCIE COUNTIES

IN RE: Administrative Judges of
Circuit and County Courts.

ADMINISTRATIVE ORDER NO. 91-05

In accordance with the authority vested in me as Chief Judge by Rule 2.050(b)(4)(5), Florida Rules of Judicial Administration, it is ORDERED that, EFFECTIVE JANUARY 1, 1992:

1. Judge John E. Fennelly is appointed Administrative Judge of the appeallate Division of the Nineteenth Judicial Circuit

2. Judge Marc A. Cianca is appointed Administrative Judge of the Criminal Division of all Circuit Courts and of all Criminal and Traffic matters in all County Courts.

3. Judge Paul B. Kanarek is appointed Administrative Judge of the General Civil Division of all Circuit Courts and of all Civil and Small Claims matters in all County Courts.

4. Judge Scott M. Kenney is appointed as Administrative Judge of the Probate, Guardianship and Trust Division and the Juvenile Division of all Circuit Courts.

5. The Administrative Judge may assign any judge to temporary service for which the judge is qualified in any court in the same circuit.

6. Administrative Order 90-06 (Amended) is vacated the effective date of this Order.

DONE and ORDERED in quadruplicate, at Okeechobee, Florida, this 5th day of December, 1991.

William L. Hendry, Chief Judge

Vacated 1992

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Appendix to Answer Brief of Appellee" has been forwarded by courier to Gary Caldwell, Esq., Assistant Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, this 25th day of June, 1996.

Of Counsel

/pas