IN THE SUPREME COURT OF FLORIDA

MICHAEL GENE ABSHIRE,

Appellant,

v. CASE NO. 81,326

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The appellant, Michael Gene Abshire, and his co-defendant, John Christopher Marquard, were indicted by a St. Johns County grand jury for the June 1991 murder of Stacey Ann Willetts. The indictment, in pertinent part, reads as follows:

> Charge: First degree premeditated murder or first degree felony murder, in violation of F.S. 782.04(1)(a)(1) one or 782.04(1)(a)(2), a capital felony.
>
> Specifications of charge: In that John Christopher Marquard and Michael Abshire, on or between the 20th day of June, 1991 and the 30th day of June, 1991, within rural St. Johns County, Florida, did then and there unlawfully, from a premeditated design to effect the death of one Stacy [sic] Willets [sic], a human being, or while engaged in the perpetration of or attempt to perpetrate a robbery against the person and property of Stacy Ann Willets [sic], did kill and murder Stacey Ann Willets [sic] by stabbing, cutting or chopping her neck and body with a knife or knives or by drowning her. ...

(R. 30). Abshire entered a plea of not guilty to the charge set out in the indictment, and, following a jury trial, was found guilty of the first degree murder of Stacey Ann Willetts on October 2, 1992. On October 3, 1992, the jury recommended a sentence of death by a vote of 11-1. Following a sentencing hearing before the court on February 5, 1993, the trial court sentenced Abshire to death. Timely notice of appeal was given.[1]

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[1] Count II of the indictment charged Abshire with armed robbery with a deadly weapon. He was also found guilty of that offense, but no issues concerning that conviction are raised in this appeal.

The facts set out in Abshire's brief are substantially correct. However, the following additional facts are necessary to a fair presentation of the issues contained before this court.

GUILT PHASE PROCEEDINGS

Voir Dire.

The voir dire proceedings in this case consumed approximately three-hundred transcript pages. (R. 642-940). The jury that ultimately heard this case consisted of eight women and four men, plus an alternate juror who was also a woman. (R. 1771). During the course of jury selection, the state exercised four peremptory challenges against women and five against men. The defendant struck one woman and nine men. (R. 788-820).

The State's Case-in-Chief.

After he was taken into custody, Abshire confessed to his involvement the murder of Stacey Willetts on November 16, 1991. (R. 1109; 1259). In that confession, after being advised of his Miranda rights, Abshire stated that he left North Carolina in June of 1991 accompanied by the co-defendant and the victim, heading for Florida. They stopped at a convenience store in South Carolina where Marquard stated that he was going to kill Stacey. Abshire told him that he wanted no part of it. However, Marquard told him to find a side road to pull down so that he could kill Stacey. However, Abshire was driving and did not comply. (R. 1111). After arriving in St. Augustine, the two defendants and the victim spent their first night at the American Motel, and their second and third nights in St. Augustine at the Seabreeze Motel. Id. In his initial statement, Abshire stated

that the victim left with an unknown individual after selling the defendants her vehicle and stereo for two hundred dollars (one hundred dollars each). Abshire further stated that the victim was alive and well when he last saw her. (R. 1112).

Shortly thereafter, the investigating officer explained to Abshire that Marquard was also being interviewed in regard to Stacey's murder. At this time, Abshire stated that Marquard had talked about killing Stacey and had paid one-hundred dollars for a room at a boarding house for only two people. (R. 1113). Abshire further stated that he knew Marquard was going to kill Stacey at this time because they had only rented a room for two people. Id. Abshire and Marquard discussed telling Stacey of a party on the river and subsequently drove seventeen miles out State Road 16 to Trout Creek Bridge with Marquard driving Stacey's car. (R. 1114). They drove down a dirt road and parked the vehicle. Abshire and Marquard were looking for a body of water with alligators in it so that they could dispose of Stacey's body and be sure that no evidence of her was left. (R. 1158).

After stopping on a dirt road, Abshire and Marquard donned their "survival gear" which consisted of camouflage attire, a poncho, and military-style equipment for the purpose of holding knives and flashlights. Abshire led the way into the woods with Stacey in the middle and Marquard following. (R. 1157). The three had walked approximately three-hundred and sixty yards into the woods when, according to Abshire, Stacey saw a snake and screamed. Abshire stated that he was tired of the rain and the

briars and began to head back. At this time, Abshire heard a "muffled scream" as the three approached a clearing. He saw Marquard lift Stacey Willetts off her feet and stab her somewhere in the front of her body. Marquard threw her to the ground, straddled her, and put her head under water. Bubbles were coming out of Stacey's mouth and Marquard again put her face in the water. Marquard then gave the knife to Abshire and told him to stab her. At this time, Abshire thought he saw Stacey's body jump. (R. 1158). Abshire then stabbed Stacey in the side. He saw that Stacey's throat had been cut. (R. 1159). Marquard then took what is described as a kurki knife and chopped at the back of Stacey's head. Abshire then took his knife and did the same thing after being told by Marquard "your knife has not been bloodied. You need to do it." (R. 1159).

Marquard went through Stacey's pockets looking for the car keys. They then attempted to dig a hole to dispose of the body, but, because there were too many roots in the ground, they cut tree branches and covered the body with them. The defendant then returned to Stacey's car, took off their ponchos and suspenders, and drove back to their motel room. (R. 1159). They took showers and went through Stacey's bags and personal items. Then, they drove around to dispose of the trash bags which were filled with Stacey's clothing. (R. 1160). Abshire and Marquard stayed up all night talking, had breakfast at the Waffle House, and then drove to Orlando. (R. 1160).

On November 11, 1991, hunters found what was left of Stacey's body. (R. 976). The scene was secured (R. 982-983) and

was processed by evidence technicians and Florida Department of Law Enforcement personnel. (R. 984-1012; 1042-1046).

A forensic pathologist and a forensic anthropologist examined the remains. (R. 1013; 1358). The pathologist, Dr. Terrence Steiner, testified that, from the skeletal remains, he was able to identify three injuries. The first was an injury to the fifth cervical vertebrae which would be a fatal injury. (R. 1025). Another injury was identified on the left fifth and sixth ribs. (R. 1372). That injury could have resulted in a stab wound to the heart. (R. 1375; R. 1026). Dr. Stiner testified that he could not rule out drowning as a cause of death. (R. 1038). Further, as Dr. William Maples, a forensic anthropologist, testified, it is difficult to know the precise nature of the injury to Stacey's neck, because the first, second, third and fourth cervical vertebrae were never located. For that reason, it is impossible to tell how deep the cut to her neck was. (R. 1367-1369).

Information was developed that indicated the possibility that the remains were those of Stacey Willetts and, following comparisons of dental records, it was determined that the remains were in fact hers. (R. 1027-1028).

The foregoing statement of the facts of the case is in supplementation of those set out in Abshire's briefs. Specific facts relevant to issues contained in Abshire's brief are set out in the argument portion of the state's answer brief in connection with the appropriate appellate issue.

SUMMARY OF ARGUMENTS

POINT 1: The state did not improperly or discriminatorily exclude women from jury service based upon the actual composition of the jury that tried the case and based upon the law as it has developed in the area of jury selection.

POINT 2: The prosecution's use of peremptory strikes did not violate the Fair-Cross Section of the requirement of the Sixth Amendment, nor did it violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. The law is settled that the Fair-Cross Section requirement of the Sixth Amendment does not provide a basis for relief because the Sixth Amendment does not apply to the use of peremptory challenges. Likewise, Abshire is not entitled to relief based upon the Fourteenth Amendment component of his claim because he has not demonstrated even a prima facie case of gender-based discrimination.

POINT 3: The prosecution did not comment on improper and irrelevant matters, but, instead, the statement about which Abshire complains is clearly a factual reference to an item of evidence anticipated by the state. That statement was not an attack on the integrity of the defendant's attorney, and was not improper. Even if that single comment was improper, any error was harmless beyond a reasonable doubt.

POINT 4: The facts do not support Abshire's claim that the prosecution improperly commented on Abshire's failure to testify. No reasonable reading of the statement at issue allows it to be interpreted as an improper comment.

POINT 5: The state's questioning of the medical examiner was not improper and is not a basis for relief because Abshire's objection to the state's question was sustained, and the jury was instructed to disregard the question. Abshire did not move for a mistrial, and has no adverse ruling from which to appeal.

POINT 6: The state did not impermissibly inquire into the defendant's lack of remorse. The state never argued that Abshire had shown no remorse, but rather merely asked the investigating officer whether Abshire had shown any emotion whatsoever. That question came in response to a cross examination question asked by the defendant in which the witness was asked if Abshire had expressed any malice toward the victim. Abshire opened the door through his cross examination, and there is no error.

POINT 7: Abshire's right to cross examination was not improperly restricted when the state's objection to Abshire's questions of a witness concerning the results of the investigation into the co-defendant was sustained as being outside the scope of direct examination. Abshire's questions did not relate to the credibility of the witness, were outside the scope direct examination, and the objection to that line of questioning was properly sustained.

POINT 8: The three instances of prosecutorial misconduct argued by Abshire in his brief are either not supported by the evidence, or were corrected by the trial court's instructions to the jury. Juries are presumed to follow their instructions, and Abshire received exactly what he requested. The jury was properly instructed on the law of accomplice liability, and the trial

court correctly refused to give Abshire's proposed jury charge. The instruction given in this case covered the concepts contained in Abshire's requested instruction, and, moreover, the evidence comported with the standard jury instruction and there was no basis for giving any additional instructions.

POINT 10: Of the individual specifications of "prosecutorial misconduct" contained in Point 10 of Abshire's brief, all but one of those instances has previously been addressed in the state's brief. To the extent that Abshire claims that "the prosecutor denigrated women at least three times during voir dire", two of those instances occurred outside the presence of the jury, and the third instance was so benign that it would not have made any difference.

POINT 11: Section 921.141 of the Florida Statutes is constitutional. Such challenges to the statute have been repeatedly rejected, and, to the extent that Abshire argues different challenges to the constitutionality of the Florida death penalty act, those claims are foreclosed by binding precedence.

POINT 12: The jury was properly instructed that parole status at the time of the offense is sufficient to establish the "under sentence of imprisonment" aggravating circumstance. This issue was not preserved by timely objection, and, even if it had been, it would not entitle Abshire to relief.

POINT 13: The trial court properly allowed the state to inquire into the specifics of Abshire's prior violent felony under binding precedent.

POINT 14: The trial court properly found the during the course of a robbery or for pecuniary gain aggravating circumstance, and did not improperly "double" those aggravators. The trial court was aware that "double counting" was improper, and the sentencing order is clear that no impermissible doubling of aggravating circumstances occurred.

POINT 15: The trial court properly found the heinous, atrocious or cruel aggravating circumstance, and Abshire has not been held vicariously liable for the actions of his co-defendant in establishing this aggravating circumstance. The facts of this case establish the heinous, atrocious or cruel aggravator under the precedents of this court.

POINT 16: The trial court properly found the cold, calculated and premeditating aggravating circumstance because the facts of this case clearly establish a "careful plan or prearranged design" effect the murder of the victim. This aggravating circumstance was applied in accordance with the prior decisions of this court.

POINT 17: The death penalty is proportionate to Abshire's culpability under the facts of the offense.

ARGUMENT

POINT 1

THE STATE DID NOT DISCRIMINATORILY EXCLUDE WOMEN FROM JURY SERVICE IN VIOLATION OF ABSHIRE'S RIGHTS UNDER THE FLORIDA CONSTITUTION.

Abshire argues that the rationale of State v. Neil, 457 So. 2d 481 (1984) and its progeny should be extended to include the prosecution's use of peremptory challenges in what is claimed to be a gender-based fashion. Specifically, Abshire argues that the state used its peremptory challenges to exclude women from the jury that tried his capital case. This claim is without merit for four independently adequate reasons.

First, the jury that ultimately decided this case consisted of eight women and four men (R. 1771). While the focus is on the excluded jurors rather than on the jurors who actually served, the fact that two-thirds of the jury that heard this case consisted of women is certainly evidence of a lack of discriminatory intent on the part of the prosecution.[2] Moreover, while it is difficult to discern from the record, the jurors who were peremptorily challenged responded to voir dire questioning in a manner that led the prosecutor to believe that other prospective jurors were more desirable. Of course, that is the heart of the peremptory challenge--a challenge that can be exercised merely because another prospective juror is more desirable as a member of the particular jury being selected. To claim, as Abshire does, that the prosecution systematically

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[2] The alternate juror was also a woman.

excluded women from the jury strains credibility when the ultimate make-up of the jury is considered. While the prosecution did strike four women, it is apparent that the female jurors who were challenged were the subject of a peremptory challenge so that other jurors, who were also women, would serve on the jury. This case demonstrates jury selection strategy, not gender-based discrimination.

The second reason that this claim is without merit is because the Neil-Slappy rationale does not apply to purported gender-based discrimination. Moreover, the multi-part analysis set out in Slappy does not function in the gender context. See, e.g., State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988).

The Slappy court identified five factors which could demonstrate an impermissible motive for striking a prospective juror. Those factors were:

> (1) Alleged group bias not shown to be shared by the juror in question; (2) failure to examine the juror or perfunctorily examination, assuming neither the trial court nor opposing counsel had questioned the jurors; (3) singling the juror out for special questions designed to evoke a certain response; (4) the prosecutor's reason is unrelated to the facts of the case; and (5) a challenge based on reasons equally applicable to juror[s] who were not challenged [citation omitted].

State v. Slappy, 522 So. 2d at 22. Applying those factors to Abshire's claim demonstrates why the Slappy factors do not work in this context.

The starting point in the Slappy analysis was that the defendant was the same race as the challenged juror. Id., at 19.

Obviously, Abshire is not a woman, and does not satisfy that component of Slappy. However, given the decision in Powers v. Ohio, 111 S. Ct. 1364 (1991), the Supreme Court seems to no longer focus on racial identity between the prospective juror and the defendant, choosing instead to focus on the right of the juror to serve.[3] However, that factor does not matter because Abshire has not and cannot demonstrate that women have ever been denied the chance to serve on juries in St. Johns County or anywhere else in the State of Florida. Any claim to the contrary is squarely rebutted by the gender make-up of the jury that actually heard this case. A long-standing history of race discrimination underlies the Slappy line of cases; there is no such history of discrimination against women in jury selection.

Insofar as the five Slappy factors are concerned, none of them apply to this case, and at least one of them can never apply to a claim of gender discrimination. Specifically, the first factor (alleged group bias) can never apply to peremptory challenges based on gender because women are not a "group" in the sense that they have "an internal cohesiveness of attitudes, ideas or experiences that may not be adequately represented by other segments of society". State v. Allen, 616 So. 2d 452, 454 (Fla. 1993). Women simply do not meet that criteria. Instead, as a "group", women are more closely akin to city residents, young adults and college students, which have specifically been

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[3] This shift in focus seems to be a partial return to the rationale of Swain v. Alabama, which looked to, and was based upon, the right of the individual to serve on a trial jury.

found not to constitute cognizable "groups" for jury selection purposes. Id., at n. 3.[4]

The second, third, and fourth Slappy factors do not apply to this case. The state did not fail to voir dire the jurors who were struck and did not single out jurors for special questioning. Further, the reasons given by the prosecutor, to the extent that any reasons were given, were directly related to the case itself.

The fifth Slappy factor is, at best, difficult to graft onto a claim of gender discrimination. That factor is intended to address a situation in which black jurors, who otherwise have the same characteristics as white jurors, are struck.[5] This factor is not workable when the class is as broad as gender.

Finally, policy reasons do not support the sweeping expansion of the law that Abshire advocates. Discrimination in the selection of juries has long been condemned and, since Strauder v. West Virginia, 100 U.S. 303 (1879) has not been allowed. Abshire's argument, on its face, is an extension of this court's opinions in the Neil-Slappy line of cases. However, that argument is far more sweeping than any decision which has gone before because, if this court adopts Abshire's argument as the law of this state, the present system of jury selection will be rendered invalid. If the law is as Abshire wants it to be, no

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[4] The underlying requirement for classification as a "group" for jury selection purposes is that the group be a substantial minority within the community. Id. That cannot be said about women, since they represent a majority of the population.

[5] An example of this would be when the state struck all black teachers but left all white teachers on the jury.

juror will be subject to a peremptory challenge. Because women constitute a majority of the population, this court will ultimately be forced to confront the issue of whether or not white men can be the subject of a peremptory challenge. Under precedent, that holding would be mandated. When that happens, there will be no system in place for the selection of juries, and the entire system will stop until a new method is formulated. At best, the result would be massive confusion.[6] The potential for mischief that this issue carries with it is apparent from the facts of this case, in which Abshire exercised all but one of his peremptory strikes against male jurors, with the result that four men served on the jury. While Abshire attempts to limit the issue to only women, he cannot have it both ways. If it is improper for the state to strike women based on gender, it is equally improper for the defendant to discriminate. There is no question that the defendant has no right to exercise his peremptory strikes based on race, Georgia v. McCullum, 112 S. Ct. 2348 (1992) and it would be wholly inconsistent to suggest that gender-based striking is any different. While Abshire may argue that he objected and the state did not, that argument misses the point. The result must be, if the law is to be as Abshire wants, that neither party can strike any juror based on gender. The result of that holding will be that peremptory challenges are

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[6] At that point in time, Neil-Slappy will become obsolete because the broad gender classification will have swallowed the racial category insofar as the use of peremptory challenges is concerned.

effectively eliminated because no challenge will withstand Constitutional scrutiny.[7]

The state should not be understood as suggesting that discrimination of any sort should be allowed to take place in the jury selection process. However, when the proposed "class" of affected juror is based on gender, which is the broadest definition possible, there must be some sort of reasonable rule. In this case, Abshire cannot claim that he was prejudiced because eight women sat on the jury and recommended a death sentence. It makes little sense to complain about the state's excusal of women in the face of that result. Likewise, the ultimate composition of the jury lends credence to the assistant state attorney's statement that he struck certain jurors because there were other jurors that he wanted to be on the jury (R. 926). In other words, the state had to strike some women to place other jurors, who were also women, on the jury. That does not amount to gender-based discrimination, and it certainly does not entitle Abshire to any relief. This claim is without merit.

As stated above, the actual use of the state's peremptory challenges rebuts Abshire's claim. The state only used four peremptory challenges against women, and exercised five peremptory challenges against men. At the time of the much-discussed comment about women and former police officers, a second panel of prospective jurors had been called that consisted

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[7] If this court rules in accord with Abshire's position, there will never be any need to address whether, for example, age can be a basis for the use of peremptory strikes because the gender-based prohibition against peremptory strikes will swallow every other possible basis.

of nine women and one former police officer. See, e.g., R. 788-20. The defendant struck first, and, predictably, struck the former police officer. The state then exercised its peremptories against a male on the first panel, a female on the first panel who had subsequently expressed reservations about the death penalty, and two women on the second panel. At this time, the second panel was entirely female because of the defendant's strike against the only male on that panel.

Apparently, the trial court's comment concerning the state's supposed systematic exclusion of women was based upon an inaccurate perception of the number of peremptories the state had exercised against women. However, the inescapable fact is that the use of four peremptory strikes against women does not amount to systematic exclusion based on gender. The only gender-based systematic exclusion of jurors that occurred in this case was done by the defendant when he used nine peremptory strikes to remove men from the jury. Abshire is entitled to no relief on this claim.

The state is aware of the certified question from the Fourth District Court of Appeals which is before this Court in Laidler v. State, Case Number 92-1482 (December 8, 1993). This Court's resolution of the certified question should have no effect on the disposition of this case because Abshire cannot demonstrate a prima facie case of gender-based discrimination under the facts of his particular case. However, the facts of the Abshire case do demonstrate that Abshire used his peremptory challenges to systematically exclude men from the jury. While

the assistant state's attorney did not object to Abshire's action, it is apparent that systematic exclusion of male jurors was Abshire's intent. In fact, the Ninth Circuit case upon which Abshire and the Fouth District Court of Appeals rely stands for the proposition that a defendant cannot use his peremptory strikes to systematically remove male jurors. See, United States v. DeGross, 913 F. 2d 1417 (9th Cir. 1990). The DeGross decision is consistent with the law that has developed in the area of peremptory strikes based on race. See, Powers v. Ohio, supra; Georgia v. McCullum, supra. This Court cannot hold that only women are protected from gender-based peremptory striking and be consistent with federal constitutional law.

As discussed above, the focus of the earlier jury selection cases is on the right of the juror to serve. Contained within that rationale is the basic premise that jurors are constitutionally indistinguishable. Because jurors are constitutionally indistinguishable, Abshire cannot have suffered any prejudice even assuming that the state engaged in gender-based discrimination. Likewise, the state cannot have been prejudiced by Abshire's obvious discrimination against men. On the other hand, if this Court grants Abshire a new trial, this Court will implicitly endorse the notion that jurors are not indistinguishable for constitutional purposes. In other words, this Court cannot reverse Abshire's conviction without implicitly adopting the same stereotype it condemns the state for using.

Because jurors are constitutionally indistinguishable, Abshire cannot have suffered any prejudice, and he is entitled to

no relief. Consequently, if this Court does announce a rule extending Neil and Batson to include gender, that rule should be applied prospectively only.

POINT 2

THE PROSECUTION'S USE OF PEREMPTORY STRIKES DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OR THE FAIR-CROSS SECTION REQUIREMENT OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In addition to basing his gender discrimination claim on Florida Constitutional grounds, Abshire also raises that claim based on federal Constitutional grounds. Specifically, Abshire bases this claim on the equal protection clause of the Fourteenth Amendment and the Fair-Cross Section requirement of the Sixth Amendment. Those claims are without merit for the reasons set out at pp. 11-19, above, and for the following additional reasons.

A. The Sixth Amendment Issue.

Abshire seems to argue that the Fair-Cross Section requirement of the Sixth Amendment provides a federal Constitutional basis for relief. That claim has no basis in law because the Sixth Amendment does not apply to the use of peremptory challenges. Instead, the Sixth Amendment applies only to the venire as a whole. In disposing of the Sixth Amendment issue, the United States Supreme Court stated:

> A prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment, is without support in our prior decisions, and would undermine rather than further the Constitutional guarantee of an impartial jury.

Holland v. Illinois, 110 S. Ct. 803, 806 (1990). The Sixth Amendment component of Abshire's claim is without merit.

B. The Fourteenth Amendment Claim.

Abshire also bases his federal Constitutional claim on the equal protection clause of the Fourteenth Amendment. This claim is also without merit.

Abshire relies upon United States v. DeGross, 960 F. 2d 1433 (9th Cir. 1992), to support his claim that the equal protection clause forbids the exercise of peremptory strikes based on gender. That is what DeGross holds, but that decision is not binding on this court. Moreover, the Fourth Circuit has decided the same issue but reached the opposite result. United States v. Hamilton, 850 F. 2d 1038 (4th Cir. 1988). There is a clear conflict between federal circuits and the Supreme Court has granted certiorari on this issue. J.E.B v. T.B., 606 So. 2d 156 (Ala. 1992), cert. granted, 113 S. Ct. 2330 (1993).[8]

However, regardless of the ultimate decision of the United States Supreme Court, it should have no effect on this case because Abshire has not even demonstrated a prima facie case of gender-based discrimination. See, pp. 11-19, above. Consequently, this court need not even reach the discrimination issue. However, if the court does reach that issue, Abshire is not entitled to relief.[9]

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[8] Of course, the granting of certiorari has utterly no precedential value.

[9] The DeGross case, upon which Abshire principally relies, held that a defendant could not Constitutionally exercise his peremptory strikes to exclude men based upon their gender. Abshire did precisely that during the jury selection phase of his capital trial.

POINT 3

THE PROSECUTION DID NOT COMMENT ON IMPROPER AND IRRELEVANT MATTERS.

Abshire argues that the prosecution urged the jury to consider facts outside the scope of its deliberations by referring, during opening argument, to a request to speak to a law enforcement officer sent by the defendant which stated "I don't want my lawyer in here". Abshire claims that that reference to that statement was error which entitles him to a new trial. That claim is without merit.

Abshire argues that the complained-of comment was a personal attack on opposing counsel. See, Appellant's brief at 39. However, it is difficult to determine how that comment, which was not repeated, amounts to an attack on Abshire's lawyer. The statement is nothing more than a factual reference to an anticipated item of evidence. This is certainly not an attack on the integrity of the defendant's attorney, and is not by any means an improper exhortation to the jury. See, e.g., United States v. Young, 470 U.S. 1, 18 (1985); Briggs v. State, 455 So. 2d 519, 521 (Fla. 1st DCA 1989). The argument about which Abshire complains simply was not improper and is not a basis for reversal.

Even if the lone comment at issue was improper, no other similar reference was made, and the issue never re-surfaced. In light of the overwhelming evidence against Abshire, the comment at issue, if it was error, was harmless beyond a reasonable doubt. Abshire would have been convicted whether or not the

comment at issue had been made. See, Redish v. State, 535 So. 2d 921, 931 (Fla. App. 1 District 1988). Abshire is not entitled to any relief.

POINT 4

THE PROSECUTION DID NOT IMPROPERLY COMMENT ON ABSHIRE'S FAILURE TO TESTIFY.

Abshire argues that the state improperly commented on his failure to testify based upon an objection made by the state during cross-examination of a state witness. This claim is without merit.

The entire statement about which Abshire complains reads as follows:

> Mr. Whitson: Judge, objection, outside the scope of direct. If he wants to try his case, I don't have any objection to anything he wants to do with his case in chief.

(R. 1349). The second sentence set out above is the statement that Abshire claims to be a comment on his failure to testify. While that statement was perhaps unnecessary, it is not objectionable, is not fairly susceptible to interpretation by the jury as a comment on the defendant's failure to testify, and it certainly is not a basis for reversal. When the statement by the assistant state's attorney is read fairly instead of with the desire to slant its meaning, it is readily apparent that no improper comment was made. No reasonable reading of the statement at issue lends itself to the strained reading attributed by the defendant. The objection came during the state's case-in-chief before the jury knew whether or not Abshire would testify. There is no mention of the defendant not testifying and there is simply no reasonable way to find such meaning in the complained-of objection. This claim is wholly devoid of merit.

POINT 5

THE STATE DID NOT IMPROPERLY QUESTION THE MEDICAL EXAMINER.

During the state's examination of the medical examiner, the following occurred:

> Q: Okay. Thank you doc. You cannot rule out that this lady was virtually scared to death before she was cut?
>
> Mr. McCloud: Objection. Move to strike.
>
> The Court: The objection is sustained, the jury will disregard the question. The doctor is not qualified to testify as to that. He was not there.

(R. 1041). In his brief, Abshire seems to argue that even though his trial objection was sustained and the jury was instructed to disregard the question, he should still receive some sort of relief. That claim has no merit.

The fundamental flaw with Abshire's one-page argument is that it overlooks the fact that he received exactly what he asked for at trial. Of course, it is settled law that juries are presumed to follow their instructions, and this jury was instructed as Abshire requested. Abshire did not move for a mistrial, and consequently has no adverse ruling from which to appeal. This claim is wholly without merit.

POINT 6

THE STATE DID NOT IMPERMISSIBLY INQUIRE INTO THE DEFENDANT'S LACK OF REMORSE.

In his brief, Abshire argues that the state improperly inquired into whether the defendant had shown any remorse for the murder of Stacey Willetts. This claim is without merit because such an inquiry did not occur.

The question Abshire claims was error, which he has omitted from his brief, was as follows: "Q: Did Mr. Abshire express any emotion whatsoever concerning Stacey Willetts during your contact with him on the sixteenth of November, 1991"? (R. 1311). That question came during re-direct examination of a state's witness who had been asked, on cross-examination, if Abshire had ever expressed any malice towards the victim (R. 1309). The state did not argue that Abshire had shown no remorse for his crime, but rather asked the investigating officer whether the defendant had shown any emotion at all. Of course, the state's question came in response to a cross-examination question put by the defendant in which he asked the witness if Abshire expressed any malice towards the victim. Obviously, Abshire asked a question concerning a specific emotion and, by doing so, opened the door for the state to inquire as to whether Abshire displayed any other emotions during that interview session. There was no improper questioning about any lack of remorse on Abshire's part, and this claim does not entitle him to relief.

POINT 7

THE COURT DID NOT IMPROPERLY RESTRICT THE DEFENDANT'S RIGHT TO CROSS EXAMINATION.

Abshire argues that the court improperly sustained an objection by the state to a question put to a state witness which was outside the scope of direct examination. This claim is without merit.

The question put by Abshire's attorney was clearly beyond the scope of the state's direct examination of the witness in question. Florida law is well-settled that "cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness." Section 90.612(2), Fla. Stat. (1993). The direct testimony of the witness at issue consumed four transcript pages and was limited to the identification of certain items of evidence (R. 1322-1325). In other words, this witness was called merely to establish a part of the chain of custody of some of the evidence in this case. Nevertheless, Abshire's attorney attempted to inquire as to the results of the investigation as they related to Abshire's co-defendant, John Marquard (R. 1326). No such line of questioning was followed during direct examination, and the question put by Abshire's attorney was clearly outside the scope of direct examination and did not relate to the credibility of the witness. Consequently, the state's objection was properly sustained.

None of the cases relied upon by Abshire compel a different result. Johnson v. State, 595 So. 2d 132 (Fla. 1st DCA 1992),

does not stand for the proposition that defense cross-examination is unlimited in scope. Instead, Johnson merely restates the well-established rule that a defendant has a Constitutional right to cross-examination of state witnesses as to the matters brought out on direct examination. Id., at 135.

Johnson is also distinguishable on its facts from the case before this court. In Johnson, the court sustained the state's objection to a question concerning the location of an undercover police officer when that officer observed a drug transaction. Id., at 133. Obviously, that question dealt with matters directly related to the direct testimony of the witness, and also dealt with issues of credibility. That is not the situation in the Abshire case.

The question put by Abshire's lawyer did not even arguably concern the credibility of the witness, and was certainly not designed to elicit information that modified, supplemented, contradicted, rebutted or clarified the witness's direct testimony. See, e.g., Johnson v. State, 595 So. 2d at 135. Consequently, there was no error and Abshire is not entitled to relief.[10]

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[10] Abshire could have called this witness during his guilt phase case-in-chief, but did not. It strains credibility to suggest that the defendant is somehow entitled to relief when the very evidence he claims was excluded was available to him. In fact, Abshire called this very witness at the penalty phase and elicited the same evidence he now claims was improperly excluded. (R. 1659-1662).

POINT 8

THE PROSECUTOR DID NOT ENGAGE IN IMPROPER CONDUCT DURING CLOSING ARGUMENT.

Abshire points to three purported incidences of prosecutorial misconduct during closing argument at the guilt phase of his capital trial. Each of those claims is without merit.

A. The "Dragonmaster" Argument.

Abshire argues that the prosecution's reference to him as the "Dragonmaster" constitutes reversible error. However, that claim does not entitle him to relief.

The law was settled that the prosecutor is entitled to argue inferences and conclusions that can be drawn from the evidence. See, e.g., Craig v. State, 510 So. 2d 857, 865 (Fla. 1987). The record supports the inference that the defendant participated in the game known as Dungeons and Dragons, and the reference to the defendant as "the Dragonmaster" is a reasonable inference from that evidence. As such, that inference is the proper subject of closing argument. Id. This claim does not entitle Abshire to relief.

B. The Argument that if Abshire is Not Convicted No One Will Be Punished for the Murder.

Abshire also argues that the following argument by the prosecution entitles him to relief:

> [Mr. Whitson]: Ladies and gentlemen, if John Marquard gets up in here and tells the kind of story that this man wants you to believe, is sufficient to find this man not guilty of killing Stacey

> Willetts and taking her property incident to that murder, nobody is going to get convicted for the loss of Stacey.

(R. 1514).

However, Abshire has omitted the instruction given to the jury after Abshire objected to that argument. The trial court instructed the jury as follows:

> Members of the jury, there was a statement made to you a moment ago that if the defendant is not convicted then no one will be convicted for the death of Stacey Willets. That is not for your consideration. Your sole consideration in this case is whether or not the defendant is guilty or not guilty in accord with the evidence.

(R 1515-1516).

Obviously, Abshire received exactly what he requested; the jury was plainly instructed to disregard the prosecution's argument. Juries are presumed to follow their instructions, and because the jury was instructed to disregard the argument set out above, it must be presumed that they did. Abshire did not request any further curative instructions, and should not now be heard to complain.

C. The Reference to the Indictment.

In his third specification of prosecutorial misconduct, Abshire asserts that the prosecution improperly attempted to use the grand jury indictment as evidence of guilt. However, a fair reading of the prosecutor's argument establishes that the reference to the indictment was no more than a reference to the mechanism by which the case was brought to trial. Of course, that is precisely the function of an indictment, and the jury was

instructed to consider only the evidence introduced at trial. (R. 1548). Likewise, the jury was specifically instructed that the indictment is not evidence of guilt. (R. 643). Of course, juries are presumed to follow their instructions, and there is no basis for reversal predicated upon this claim.

POINT 9

THE JURY WAS CORRECTLY INSTRUCTED ON THE PRINCIPAL THEORY.

Abshire argues that the trial court erred by not giving a modified jury instruction on the principal theory. This claim is without merit for two reasons.

First, Florida Standard Jury Instructions in Criminal Cases 3.01 was given in this case. (R. 1546-1547). That instruction correctly states the law of accomplice liability. Moreover, the standard jury instruction includes the concepts contained within Abshire's requested jury instruction. Because the requested instruction was covered in the standard jury charge, the requested instruction was properly refused.

Second, despite Abshire's claim to the contrary, the evidence did not compel the giving of his requested jury charge. The evidence established that Abshire developed the scenario through which Stacey Willetts was taken into the woods in rural St. Johns County; actively participated in perpetrating that scenario to her; armed himself with a knife and actively participated, and in fact, led, Stacey into the woods; took an active part in stabbing her to death; searched her corpse and participated in concealing it; and took various items of Stacey's property. (R. 1113-1114; 1157-1160). The evidence comported with the standard jury instruction, and no evidence exists which would require any additional instructions. Abshire was not entitled to any additional instructions, and this claim is without merit.

POINT 10

THE "CUMULATIVE" EFFECT OF THE CLAIMED INSTANCES OF PROSECUTORIAL MISCONDUCT DOES NOT ENTITLE ABSHIRE TO A NEW TRIAL.

Abshire contends that the cumulative effect of what he categorizes as "one [prosecutorial] impropriety after another" entitles him to a new trial. That claim is without merit.

In what seems to be an issue that combines a number of issues previously discussed, Abshire identifies eight purported instances of prosecutorial misconduct. Of those eight identified claims, all but one has been previously addressed in this brief. See, pp. 22-26, 29-31, above. Those arguments will not be repeated, other than to emphasize that Abshire's objections to some arguments were sustained and the jury instructed to disregard them.

Abshire's claim that the "prosecutor denigrated women at least three times during voir dire" is somewhat confusing. Two of those alleged instances occurred outside the presence of the jury (R. 875; R. 923-927), and the third "instance" was so benign that it hardly deserves mention. (R. 886). Further, it would appear that any "denigration of women" by the prosecution, if heard by the jury, would have operated to the advantage of the defendant given that eight women sat on the trial jury. See, p. 11, above. However, it is inconceivable that any derogatory remarks made by the prosecutor, if they were derogatory at all, would have helped the state's case. This claim is without merit.

PENALTY PHASE CLAIMS

POINT 11

SECTION 921.141 OF THE FLORIDA STATUTES IS NOT UNCONSTITUTIONAL.

Abshire argues that Section 921.141 is unconstitutional because it does not provide adequate guidance in the finding of aggravating and mitigating circumstances. That claim, and each of its subparts, is without merit.

A. The Effect of Proffitt and Hitchcock.

In Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court upheld the constitutionality of the Florida Death Penalty Act. The Proffitt court rejected an across-the-board challenge to the constitutionality of that statute and found that the statute did not result in the arbitrary and capricious imposition of the death penalty. Id. at 259, 260. The Proffitt court further rejected a claim that "the statute gives no guidance as to how the mitigating and aggravating circumstances should be weighed in any specific case." Id. at 254, 257-260.

In Hitchcock v. Dugger, 481 U.S. 393 (1987), the Supreme Court held that the construction applied to Section 921.141 at the time of Hitchcock's trial improperly precluded the advisory jury and the sentencing judge from considering non-statutory mitigating evidence. Hitchcock was decided on that limited basis only; it does not stand for the broad proposition of law advanced by Abshire.

B. The Jury's Finding of Mitigation.

Abshire argues that Section 921.141 is unconstitutional because it does not specify "[h]ow many votes are necessary to find mitigation." What Abshire attempts to cast as a new issue never before decided by this court, is, in reality, nothing more than an attempt to convince this court to decide this case in a matter inconsistent with Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 110 S. Ct. 1227 (1990).

The law in the capital sentencing area is settled that the sentencer cannot be precluded from full consideration of mitigating circumstances advanced by the defendant. Mills, supra; McKoy, supra. The Florida statute complies fully with the federal constitutional requirements and, to decide this case as Abshire suggests would run afoul of the Mills-McKoy line of cases.

Abshire argues that this court has not decided whether mitigating circumstances must be found unanimously, by a majority, or individually by the jury. While Abshire is correct in his claim that this court has not spoken directly to this point, the reason that such an opinion has not been released is because the federal constitution requires that the jurors be able to individually assess the existence of mitigation. See, e.g., Mills, supra; McKoy, supra. Any other result would not be constitutional under binding precedent. In fact, Abshire's argument asks this court to declare Section 921.141 unconstitutional because it does not contain the offensive provision which led the Mills Court to find the Maryland statute invalid.

Under Florida's sentencing scheme, the members of the jury are free to give full consideration and effect to mitigation evidence advanced by the defendant. Likewise, the jury instructions in this case cannot reasonably be interpreted as requiring each juror to agree on a mitigating circumstance before it can be found to exist. There is no constitutional defect in Section 921.141, and this claim has no merit.

C. The Standard of Proof of Mitigation.

Abshire also argues that Section 921.141 does not provide the standard for the proof of mitigating evidence. Abshire further argues that the burden of proof of mitigating circumstances must be established by the legislature and, because it has not been, Section 921.141 is unconstitutional. This claim is without merit.

In Campbell v. State, 571 So. 2d 415, 419-420 (Fla. 1990), this court addressed the question of the burden of proof necessary to establish the existence of a mitigating circumstance. This court cited the standard jury instruction with approval. Id., at 419-420. The standard jury instruction clearly comports with state and federal constitutional requirements and does not violate the separation of powers division of the Florida Constitution.[11] This claim is without merit.

D. The Finding of Aggravating Circumstances.

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[11] It appears that the legislature has not enacted any criminal statute which specifies the burden of proof.

On pp. 66-69 of this brief, Abshire argues that defects similar to the ones claimed to exist with regard to mitigating circumstances also exist as to the statutory aggravating circumstances. To the extent that Abshire claims that Florida's capital sentencing scheme is unconstitutional because it allows for a jury recommendation of death based on a majority vote, that claim was decided against him in Alvord v. State, 322 So. 2d 533 (Fla. 1979). See also, James v. State, 453 So. 2d 786 (Fla. 1984); Fleming v. State, 374 So. 2d 954 (Fla. 1979). While the defendant is correct in his statement that this court did not specifically address in Alvord whether a majority vote of the jury was sufficient to sustain a recommendation of death, in deciding that the sentencing recommendation did not have to be unanimous, this court necessarily approved the sentencing scheme as written. This claim is without merit and does not entitle Abshire to relief.

E. General Principles Applicable to Both Aggravation and Mitigation.

Abshire can point to no decision of any court holding that the jury must specifically identify the aggravators and mitigators which were found to exist. There would be no rational basis for such a rule of law, and such a rule would be contrary to the underlying premise of capital sentencing, which requires an individualized sentencing decision. See, e.g., Gregg v. Georgia, 428 U.S. 153, 199 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.). If the law were as Abshire suggests, it would prevent the reasoned moral response which is the linch-pin of capital sentencing jurisprudence.

More fundamentally, Abshire has not taken into account that the trial judge is the sentencer under Florida's death penalty act. As the United States Supreme Court said in Proffitt, "it would appeal that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases. [Footnote omitted]". Proffitt v. Florida, 428 U.S. at 252. Moreover, the trial court is required to enter specific written fact findings as to aggravation and mitigation. See, e.g., VanRoyal v. State, 497 So. 2d 625 (Fla. 1986). Finally, the trial court is presumed to have followed his own instructions and considered all mitigating evidence when the record does not indicate otherwise. Johnson v. Dugger, 520 So. 2d 525, 526 (Fla. 1988). As the sentencer, the trial court must consider which aggravating and mitigating factors apply, what weight should be accorded each, and how the factors balance. Lopez v. State, 536 So. 2d 226 (Fla. 1988), Grossman v. State, 525 So. 2d 833 (Fla. 1988). For these reasons, Abshire's claim is inapposite to Florida's death penalty scheme, and does not entitle him to relief.

POINT 12

THE JURY WAS PROPERLY INSTRUCTED THAT PAROLE STATUS AT THE TIME OF THE OFFENSE IS SUFFICIENT TO ESTABLISH THE "UNDER SENTENCE OF IMPRISONMENT" AGGRAVATING CIRCUMSTANCE.

Abshire argues that the trial court improperly instructed the jury that parole status is the equivalent of being under sentence of imprisonment for purposes of the first aggravating circumstance. This claim is without merit for two independently adequate reasons.

First, Abshire did not preserve the issue contained in his brief by timely objection at trial. While Abshire did object to "any change in the rendering of the Supreme Court's approved aggravating circumstances as they are set forth in the jury instructions" (R. 1581-1582), that objection is not sufficient to preserve the issue Abshire now presents. See, e.g., Hitchcock v. State, 578 So. 2d 685, 692 (Fla. 1990). Moreover, Abshire did not raise this objection at the conclusion of the court's oral charge to the jury. (R. 1738). This claim is not properly before the court.

Second, even if this claim were properly preserved, it would not entitle Abshire to relief. This court has already addressed this issue and decided it adversely to Abshire's position. Hitchcock v. State, 578 So. 2d 685, 693 (Fla. 1990); Carter v. State, 576 So. 2d 1291, 1293 (Fla. 1989). Likewise, the United States Supreme Court has rejected any challenge to the validity of the aggravating circumstance at issue here. Barclay v. Florida, 463 U.S. 939, 955 (1983); see also, Lindsey v. Smith, 820 F. 2d 1137, 1153 (11th Cir. 1987).

To the extent that Abshire claims that his federal due process rights have been violated because this court has interpreted the first aggravating circumstance to exist when the defendant was on parole at the time of the capital offense, that claim is meritless. See, e.g., Lindsey v. Smith, supra. To the extent that Abshire claims that any right existing under the Florida Constitution has been violated, that claim is equally devoid of merit because, under Abshire's view of the law, this court would be precluded from interpreting any criminal statute. That runs contrary to common sense as well as well-settled principles of statutory construction. This claim does not entitle Abshire to relief.

POINT 13

THE TRIAL COURT PROPERLY ALLOWED THE STATE TO INQUIRE INTO THE SPECIFICS OF ABSHIRE'S PRIOR VIOLENT FELONY.

Abshire argues that it was error for the trial court to allow the state to inquire into the specifics of his prior conviction for a felony involving the use of violence. The precedents of this court are squarely against Abshire, and this issue is without merit. See, e.g., Elledge v. State, 346 So. 2d 998 (Fla. 1977).

POINT 14

THE TRIAL COURT CORRECTLY FOUND THE ROBBERY OR PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE.

Abshire argues that neither robbery nor pecuniary gain could properly be found as aggravating circumstances. At p. 75 of his brief, Abshire argues that the trial court "doubled" the robbery/pecuniary gain aggravator improperly. While Abshire treats these claims as separate issues, they are combined here. Neither issue has merit.

Florida law is settled that the robbery and pecuniary gain aggravators cannot be "double counted". See, e.g., Jones v. State, 612 So. 2d 1370, 1375 (1992). In this case, it is clear that the trial court considered robbery and pecuniary gain as a single aggravating factor, which is the proper procedure. The court was aware that "double counting" was not allowed (R. 1576), and, from the sentencing order, it is clear that the court properly considered robbery and pecuniary gain to be a single aggravator.

Finally, the evidence at trial, which is accurately stated in the sentencing order, establishes the existence of the robbery/pecuniary gain aggravating factor beyond a reasonable doubt. This issue is without merit and does not entitle Abshire to relief.

POINT 15

THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

In his brief, Abshire argues that the trial court improperly found the heinous, atrocious or cruel aggravating circumstance. The premise of his argument is that events occurring after death are irrelevant to this aggravator and that Abshire was held vicariously liable for the actions of his co-defendant. This claim is without merit.

Abshire relies on Archer v. State, 613 So. 2d 446 (1993), for the proposition that he cannot be vicariously liable for the actions of his co-defendant. However, Archer is distinguishable on its facts because, in that case, the defendant did not know that "the victim would be shot four times or that he would die begging for his life." Id. at 448. In contrast, Abshire knew that Stacey Willetts would be stabbed to death. See, e.g., R. 1157. In fact, if Abshire's story about providing a knife to Stacey and instructing her on what to do if attacked from behind is to be believed, the reasonable inference is that Abshire expected the co-defendant to kill her by cutting her throat and/or stabbing her in the chest. Whether or not Abshire's story is true, there is no doubt that Stacey Willetts died slowly and was in pain for an unknown period of time before losing consciousness. (R. 1026). The facts of this case clearly establish the heinous, atrocious or cruel aggravating

circumstance. See, e.g., Lusk v. State, 446 So. 2d 1038 (Fla. 1984); Breedlove v. State, 413 So. 2d 1 (Fla. 1982).[12]

[12] Given that only skeletal remains were discovered, it is not possible to determine if the victim had any stab wounds other than those described on p. 6, above. Likewise, it is not possible to determine to a reasonable degree of medical certainty whether or not the victim drowned.

POINT 16

THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR WAS PROPERLY FOUND.

Abshire argues that the cold, calculated and premeditated aggravating circumstance was improperly applied in this case. In support of his claim, Abshire focuses on the three identifiable motives for this murder. Those possible motives are relevant to the lack of moral or legal justification component of the cold, calculated and premeditated aggravator, but are not the end of the inquiry into the appropriateness of the application of this aggravating circumstance. The facts of this case establish that Abshire helped plan the murder over a period of hours leading up to its commission, helped lure the victim into the woods, and took an active part in the murder. (R. 484). Abshire does not dispute the overwhelming evidence of discussions with his co-defendant about killing the victim which began at least one week prior to the murder. Id. The facts of this case clearly establish a "careful plan or prearranged design" to murder Stacey Willetts. See, Rogers v. State, 511 So. 2d 526 (Fla. 1987); see also, Koon v. State, 513 So. 2d 1253 (Fla. 1987). The cold, calculated and premeditated aggravating circumstance was properly found, and Abshire is not entitled to relief on this claim.

POINT 17

THE DEATH PENALTY IS NOT DISPROPORTIONATE TO THE OFFENSE.

Abshire states that a fundamental requirement of the Eighth Amendment is that a death sentence must be proportional to the defendant's culpability. That is a correct statement of the law, but Abshire cannot find any relief in it.

The facts of this case, as set out in the trial court's sentencing order, do not establish that Abshire was a minor participant in this offense. (R. 484). Instead, Abshire was a major participant in the murder, and in fact developed the scenario which was used to lead the victim to her death. (R. 1156). Abshire's involvement, and his culpability, at least equal that of the co-defendant in this case and unquestionably far exceed the level of culpability found sufficient to support a death sentence in Tison v. Arizona, 481 U.S. 137 (1987). Abshire's level of culpability is more than sufficient to justify a sentence of death. That sentence should not be disturbed.

CONCLUSION

Abshire's conviction and sentence of death should not be disturbed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by U.S. Mail to David S. Morgan, 724 South Beach Street, Suite 3, Daytona Beach, FL 32114, this 16th day of December, 1993.

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