IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,639

LLOYD CHASE ALLEN,

Appellant/Cross-Appellee,

-vs-

THE STATE OF FLORIDA

Appellee/Cross-Appellant.

AN APPEAL FROM THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE/CROSS-APPELLANT

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

RANDALL SUTTON
Assistant Attorney General
Florida Bar No. 0766070
Office of Attorney General
Department of Legal Affairs
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

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INTRODUCTION

The Appellant/Cross-Appellee, **LLOYD CHASE ALLEN,** was the Defendant in the trial court below. The Appellee/Cross-Appellant, the **STATE OF FLORIDA,** was the prosecution in the trial court below. All parties will be referred to as they stood below. The symbol "R." will be used to designate the record on appeal. The symbol "S.R." will be used to designate the supplemental r47cord on appeal. The symbol "T." will be used to designate the transcript of the lower court proceedings. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On March 2, 1992, an indictment was filed in the Sixteenth Judicial Circuit Court in and for Monroe County, Florida, case number 92-30056-CF, charging Defendant Lloyd Chase Allen with the first-degree premeditated murder of Dortha Cribbs on or about November 13, 1991. (R. 4-5). On March 10, 1992, an information was filed under the same case number, charging Defendant with: (1) the armed robbery with a deadly weapon of U.S. currency from Dortha Cribbs; (2) the grand theft of a diamond ring from Dortha Cribbs; (3) the grand theft of a 1988 Ford Taurus from Dortha Cribbs; (4) the kidnapping of Dortha Cribbs with the intent to commit or facilitate the robbery or murder of her; all offenses occurring on or about November 13, 1991. (R. 6-8). Trial commenced on February 8, 1993. (T. 3).

The body of 59-year-old Dortha Cribbs was found lying face down in a pool of blood in the master bedroom of a home she owned on Summerland Key between 12:30 and 1:00 p.m. on November 13, 1991, by Charles Vowels III. (T. 240).

Vowels was a real estate broker on Summerland Key. He was the property manager of Dortha's house on Summerland. He had known Dortha for many years. (T. 236).

Around 10:20 a.m. on the morning of November 13, 1991, Vowells drove by Dortha's house, on his way to another property. He noticed that the lights were on, and the blinds and sliding glass doors were open. There was a car which looked like Dortha's parked under the house. (T. 237).

He had not expected that anyone would be there; people usually let him know when they were coming. When he got back to the office he determined that his wife, the property manager, was unaware that anyone was there. They called Ohio to try to find out if someone was using the property. The phone at the Summerland Key house was disconnected so he got the keys and returned around 12:30 or 1:00 p.m. (T. 238).

When he returned to the house, the curtains had been drawn, and the car was gone. He went up and knocked on the door. He heard some sounds in the house, but no one answered. He used his key and entered the house and yelled "Hello". (T. 239).

The TV was on with the volume turned way up. (T. 239). There was no cable or antenna hooked up to the set. There was just snow and static. The coffee pot was on and half full. He went to turn the TV down, and noticed a large object on the floor in the master bedroom. At first he thought it was a large teddy bear or stuffed animal. As he got closer to the bedroom, he saw a large puddle of blood. There was someone lying there with hair

all over. When he saw the blood, he decided he needed to get some help. (T. 240).

Monroe County Deputy Sheriff Albert Albury arrived at the same time as the paramedics and encountered Vowels outside. The paramedics examined the body and verified that it was dead, and then left the area. No one else entered the scene at that time. Albury secured the scene and waited for the other officers to arrive. (T. 246). When he found the victim she was lying face down with a pillow under her head. (T. 250).

Robert Petrick, a crime scene investigator with the Monroe County Sheriff's Office, arrived at 1:45 p.m. (T. 281). He checked all the entrances and windows for forcible entry. There were no such signs. The coffee pot, dryer, and curling iron were on. The windows were all shut, and the window coverings were closed. There was blood under the victim's head, under the bolster pillow from the living room couch that was found in the bedroom, and a spot on a pair of jeans found at the foot of the bed. (T. 306). There was no other blood or drippings in the house. He found a couple of latent prints in the master bedroom, but none in the rest of the house. Some cups and glasses were sent to the Key West lab for processing. (T. 307).

They used a luma-light which detected semen on a towel which was impounded. They also impounded a pair of jeans.

(T. 308). They also impounded a knife and sheath, a towel and a small piece of rag. (T. 309). They impounded a camera which was found inside the brown suitcase. (T. 310). Petrick found no $100 bills at the scene. There were no $100 bills in her purse. She did not have a horseshoe diamond ring on her finger. (T. 311). They impounded a piece of blind cord which was found under Dortha's arm. (T. 312). They found the suitcase on the bed. They found a blue shirt in the suitcase. (T. 313). The items were found within a couple of feet of the body. (T. 314). The victim had ligature marks on her wrists and ankles. (T. 315). The entire house appeared to have been wiped down with a damp rag for fingerprints. (T. 332).

Detective Phil Harrold was a detective with the Monroe County Sheriff's office, specializing in homicide investigation. (T. 342). He was the lead investigator on the case. Upon arrival he examined the exterior of the home. There were no signs of forced entry. (T. 345).

Numerous items were recovered from the scene: a pair of boots, some cups, one full and one empty Budweiser, cigarette packs, a package of coffee, a coffee urn. (T. 346). No fingerprints were obtained from any of the items recovered from the scene. They appeared to have been wiped clean. (T. 461). A composite was drawn to the description of a man who had been working on the house across the street. (T. 347-349). The

composite compared favorably with the pictures from the camera. (T. 350).

They had Defendant try on the boots and clothes that they found at the scene. They fit him. (T. 363). There was blood on the jeans, under Dortha, and in the sink. The blood in the sink was attributable to washing the knife. (T. 374).

Dr. Robert Nelms, medical examiner for the Florida Keys, arrived at Dortha's house on Summerland Key on the afternoon of November 13, 1991. (T. 411). When he arrived Dortha's body was lying face down in the bedroom. The clothing was still on. There was a pool of blood under the neck on the left side. The face was on a pillow. (T. 411).

There were ligature marks on her ankles and her wrist. (T. 415). The subcutaneous bleeding under the marks indicated that she was alive when she was tied up. There were two wounds on her right face about the level of the lower ear which appeared to be stab wounds. Each was about 1/2 inch in length, and 1/2 inch deep. (T. 416). In Nelms's opinion she was alive when the cuts were made because there was blood present on the surface of the cuts. (T. 417).

There was also a long cut to the neck, part of a stab wound entering the left neck one inch below the ear. The cut was a

little over one inch long. It was a bit irregular with jagged edges. The wound extended through the neck and into the mouth behind the molars. The blade would have been at least 4 or 5 inches long. The blade found at the scene could have caused the wound. (T. 417). The critical damage caused by the wound was the severing of the internal carotid artery, which would typically result in bleeding to death if there were no medical intervention. (T. 419). The wound was consistent with someone kneeling over someone who was laying face down. (T. 420).

In Nelms's opinion, Dortha bled to death due to the severing of the left carotid artery. It would have taken her 15 to 30 minutes to die. Due to the right and vertebral arteries continuing to carry blood to the brain she would have continued to be conscious and mentally aware and awake. It would probably have taken her 15 minutes to lose consciousness from either shock or the loss of blood. (T. 422).

Nelms would have expected to see defensive wounds if Dortha's legs and hands had not been tied at the time of the stabbing. He therefore was of the opinion that she was tied at the time she was stabbed. The lack of blood elsewhere in the house supported this conclusion also. (T. 423). Nelms estimated the time of death at 10:00 a.m. (T. 441).

Dr. Donald Pope, a forensic serologist with the Monroe County Sheriff's Office testified that Defendant tested type O and Dortha tested type B. (T. 480). Testing on the jeans revealed that the stain on them was human blood. The stain was type B with a minuscule amount of type O. Pope would conclude that the blood came from a type B person such as Dortha. (T. 483).

Daniel Nippes, Chief Criminologist at the Ft. Pierce Regional Crime Laboratory, testified that he examined a white hand towel and some jeans fabric. He was able to separate out a female fraction from the semen stain on the towel. (T. 508). The blood stains on the jeans were a DNA match for Dortha, as was the female fraction from the towel. The sperm on the towel matched Defendant's DNA. (T. 511).

Nippes concluded that the semen could have come from Defendant. The blood could have come from Dortha. The blood stains on the jeans conclusively did not come from Defendant.

Ogier John, the victim's son, testified that Dortha resided in Bucyrus, Ohio, and travelled to Florida often. (T. 146). She liked to travel and had a home in Summerland Key. (T. 147). Dortha took a trip to Florida during the first week in November, 1991. She intended to stop at her stepson's house and visit some friends in Jacksonville. (T. 147).

Dortha stopped by to see John the day before she left. She told him she was going. She left in her 1988 brownish-gold Ford Taurus with Ohio tags. (T. 149). Dortha was wearing a diamond horseshoe ring when she left Ohio. It had eleven diamonds and was horseshoe-shaped. (T. 152). It was worth about $8,000. (T. 153).

Dortha called John twice on November 11, 1991, from Bunnell, Florida. John talked to a man introduced as Lee Brock on the phone. Brock was interested in buying a Lincoln John's boss had for sale. Brock said he wanted to buy the car, and would pick it up anywhere. He said it did not matter where because he was a truck driver. (T. 150-151).

She did not tell John what her itinerary would be. He only knew that she was supposed to be back in Ohio by November 18, 1991. However, she said she was going somewhere with Lee Brock, and that she would not be back by then, but would return to Ohio shortly afterwards. (T. 152).

John testified that Dortha and his father always wanted to be truckers. They always talked to them on the CB when they travelled. The success of a motel they owned on Ramrod Key was due to this. Truckers always stayed there. She trusted truckers. After John's father died, Cribbs went to school and got her truck driver's license in Florida. (T. 148).

William Ronald Cribbs, Dortha's stepson, testified next. (T. 162). They spoke on the phone on Sunday, November 6. Dortha was coming down to finish a property transaction. He called to remind her that they were going to be out of town that weekend, but she would be free to use the house. (T. 163). She called again on Wednesday. That was the last time he spoke with her. (T. 164). Dortha left a note on the kitchen counter in Cribbs's house saying that she would see him on Monday. (T. 168).

Dortha came to Florida often, three or four times a year, sometimes more. She usually stopped to visit. Generally, she would always follow the same route when they travelled. (T. 164). She generally had a good relationship with truckers. Dortha usually only ate at truck stops recommended by truckers on the CB she travelled. She had a lot of trust for truckers. They were responsible for some of the success of the motel she owned in the Keys. (T. 165).

William G. Hudson lived in Jacksonville Beach, and had known Dortha for eight or ten years. She stopped and visited whenever she came south. (T. 172).

Dortha arrived at Hudson's house around 6 p.m. on November 8, 1991. She was with a friend whom she introduced as Lee Brock. (T. 172). Brock and Dortha arrived on Friday night and stayed through Sunday morning. (T. 174).

Brock said he was from Texas where he had a ranch. (T. 173). Brock also told Hudson he was a trucker. He said his truck had blown an engine in Atlanta and he was waiting for it to be repaired in a day or two. (T. 173). Hudson identified their luggage. Brock was dressed in jeans and snakeskin boots. (T. 175). Hudson identified Brock's boots. (T. 176). Hudson identified Defendant as Brock. (T. 178).

Dortha and Brock left around noon on Sunday to go down to a trailer she had in a small town outside of Jacksonville. (T. 178). She was going to pick up the money from the sale of the trailer and then they were going from there to the Keys. Brock was driving Dortha's tan Taurus when they left. (T. 179).

Janet Hudson grew up with Dortha. Since 1988, Dortha had visited three or four times a year. She had a key to the house and could come any time she wanted to. (T. 184). Dortha had brought female friends and relatives with her before, but never a man. She arrived around six or seven o'clock on November 8, 1991 with a man she introduced as Lee Brock. (T. 185). Dortha was driving her tan Taurus. Brock was wearing jeans, a western shirt, and a pair of snakeskin boots with gold eelskin around the toes. (T. 186).

Dortha stayed until around 1:15 p.m. on Sunday. Saturday night Dortha, Brock and Mrs. Hudson went to the Fleet Reserve Club and listened to country music. They stayed until around 1:30 a.m. and then went to a restaurant and then went back to the Hudsons' house. (T. 187). Mrs. Hudson identified Defendant as Lee Brock.

Brock talked about his semi-trucks. Dortha was supposed to go back with him and drive the truck with him. She had recently gone through truck driving school in Tampa. (T. 188). Dortha appeared really happy when they were at the house. Mrs. Hudson took two pictures of Dortha and Brock sitting at the table. (T. 189).

Dortha usually carried large bills with her when she travelled. She had a large diamond horseshoe ring. She had worn it for a long time. Once when she came down she did not wear it because she said it needed to be fixed. But in September and again in November she was wearing it again. (T. 191).

On cross-examination, Mrs. Hudson testified that she did not notice any inkling of trouble between Dortha and Brock. She seemed very happy. (T. 192). She spoke to her in private and she seemed happy. She said that Lee treated her well. The only thing she talked about was going to the Keys. She was going to Bunnell to sell the trailer and then on to the Keys. (T. 193).

Bonnie Chester was the daughter of the Hudsons. She had known Dortha since she (Bonnie Chester) was a baby. (T. 196). Dortha arrived at Chester's parents house on November 8, 1991. She was accompanied by a man she introduced as Lee Brock. (T. 198). He was wearing jeans, a western shirt and snake boots. She identified the boots Brock was wearing that night. (T. 199). She identified Defendant as Lee Brock. (T. 200).

Everett Smith testified next for the State. During November, 1991, Smith arranged to purchase a trailer in Bunnell from Dortha. He made arrangements to purchase it through Richard Hoops. He met Dortha on a Sunday and then on the following Tuesday, November 12, when the transaction was completed. (T. 206).

When Dortha arrived, she was in a Ford Taurus, accompanied by a man introduced as Lee Brock. He identified Defendant as Brock. (T. 207). Brock told him that he had a ranch in Texas and an 18-wheeler in Atlanta that was being fixed. They said they were going to the Keys to sell their home down there. (T. 208). Brock also told him that Dortha was thinking about selling the house in Ohio also, and travelling with him, using the ranch in Texas as a base. (T. 209).

Joyce McFarland was Dortha's sister-in-law. She had known her for thirty years. She saw her on Sunday, November 10, 1991, in Bunnell. (T. 212). She seemed happy. She introduced her to a friend named Lee Brock. McFarland identified Brock as Defendant. (T. 213).

McFarland testified that Defendant was wearing jeans, a blue knit shirt and snakeskin cowboy boots when she met him. (T. 216). Dortha had two rings: the diamond horseshoe, and one with a large "green set" in it. She always wore the horseshoe ring. (T. 217). It was also Dortha's habit of many years to carry large sums of cash with her. (T. 218).

Richard Hoops knew Dortha because she owned a trailer outside of Bunnell which he wanted to buy for a friend of his. (T. 265). He met her in September, 1991. He heard from the neighbors that she was interested in selling her trailer, and he went and spoke with her on September 25, 1991. He gave her a $100 deposit and returned the next day with an additional $1000 deposit. She said she would have to get the title from Ohio. Over the next month he spoke with her twice regarding the sale. (T. 266). She arrived on Monday, November 10, 1991. They were supposed to complete the transaction that day, but she wanted cash, so they had to wait until Tuesday when the bank opened after the holiday weekend. (T. 267).

Dortha explained that she was late arriving because she had stopped in Atlanta and met a guy in a truck stop there and she was "madly in love". She introduced him as Lee. (T. 267). Hoops identified Defendant as the man he was introduced to as Lee. (T. 268). Dortha indicated to him that she had met Lee in Atlanta two nights earlier. His truck was broken down and he was having a new engine put in it for $5000. Hoops knew this was not true because engines cost more than that, but he did not say anything. (T. 269).

On Tuesday the three of them went to the Savings & Loan and Hoops withdrew $4100. (T. 270-3). The teller counted it out directly to Dortha in $100 bills. She put it in her purse. (T. 271). Dortha said they were going to the Keys next. She said she was in love and they were going to travel all over together. Key West is 472 miles from Bunnell. (T. 271). The drive took 9 1/2 hours. (T. 272).

Detective Jay Glover, of the Monroe County Sheriff's Department, testified that he received a 110 camera which had been found at the scene. He took the film to be developed. (T. 225-226). He subsequently showed the pictures to McFarland, Chester, Smith, and the Hudsons. Before showing them the pictures, they described the person they knew as Lee Brock. The descriptions matched the photographs. (T. 227).

Larry Woods was a contractor on Summerland Key. On November 13, 1991 he was siding a house across the street from Dortha's house. He had met Dortha once and seen her a few times. (T. 383). On the day of the murder, Woods arrived at the job site at 8:00 a.m. There was a car parked under Dortha's house that was not usually there. He saw Dortha early that morning. She was moving around downstairs, then she went back upstairs into the house. (T. 384).

At a little after 11:00 a.m., Woods also saw Defendant at the house. Defendant came down the stairs, walked toward the road, then turned around and started to walk back to the house. (T. 385, 389).

Woods left about 11:45. The car was still there when he left. No one had left the house. (T. 385). He would have been able to see if someone had left. (T. 386). Woods came back from lunch after 1:00 p.m. The car was gone. Woods was still there when the real estate man came to check on the house. (T. 387).

Dortha's car was located at the Buccaneer Lodge in Marathon on December 21, 1991. (T. 355). The car was parked about 400 feet from the Tiki Lounge. There were many parking spots between the car and the lounge. The car was not visible from US 1. (T. 447). Nor could it be seen from the main lodge or the Tiki Lounge. It was at the end of a dead-end road which would not

normally have traffic on it. (T. 448). The car did not appear to have been moved for some time when it was found. There was debris on it. (T. 451).

On the day of the murder, Richard Hare was employed as a taxi driver in Marathon. (T. 402). Shortly after noon, he received a call to pick up a fare at the Buccaneer Resort. (T. 403). He picked up a man a the Tiki Bar, which is located at the rear of the resort, near the water between 12:30 and 12:45. (T. 404). Hare identified Defendant as the man he picked up. (T. 405).

Defendant asked him to take him to Key Largo. Hare told him it would be $80. Defendant paid him with a $100 bill. Defendant said he was going to Key Largo to visit a girlfriend. Defendant asked Hare to drop him someplace in Key Largo where he could call her. Hare dropped him at the Caribbean Club Lounge. (T. 406).

The court granted a motion for judgment of acquittal as to Count I of the information, armed robbery; and as to Count II, theft of the ring. As to all other counts, the motion was denied. (T. 533).

Defendant then indicated that if a penalty phase were conducted, he would be handling his own defense. Defense counsel

would be filing a motion to act as co-counsel because he could not ethically present the case how Defendant wanted it to be presented. The prosecutor questioned whether there was any provision for bifurcated representation. Defense counsel replied that that was a matter of semantics and Defendant knew he would be acting pro se. The court stated that there would be an inquiry when the issue arose. It would probably appoint defense counsel as stand-by counsel. (T. 541).

As to Count I of the indictment, Defendant was found guilty as charged of First Degree Murder. As to the information, Defendant was also found guilty of Count I, grand theft auto, as charged. As to Count II, kidnapping, Defendant was found not guilty. (R. 172-174, T. 656).

Defendant moved after the verdict to proceed pro se, either alone or with counsel as standby. Counsel had discussed it with Defendant and it was Defendant's intention not to present any evidence in mitigation, and to possibly affirmatively request the death penalty. Counsel stated he would be uncomfortable, from an ethical standpoint, standing mute when he felt he should argue mitigating factors. He discussed the issue with Defendant at length, and brought in another attorney to discuss it with Defendant. Defense counsel felt that Defendant was in all respects intelligent, coherent and rational. He did not have a death wish, but did not wish to spend the rest of his life in jail. (T. 661).

A Faretta inquiry was conducted. Defendant asserted that he understood the consequences of what he was doing. Defendant asserted that he was "above competent" to represent himself. (T. 663). Defendant knew he was entitled to a lawyer. He felt his attorney had put on an excellent defense. He stated that his attorney worked tirelessly despite the fact that "[a]t times I handcuffed him." He was aware that he could have an attorney appointed at no cost. No one promised or pressured him to give up his attorney. (T. 663). Defendant understood that he was subject to life imprisonment or death, "very well". Defendant was 47 years old. He quit school in 8th grade. He joined the military at age 17 and obtained his GED. He took a number of college courses at various penitentiaries in America. He worked in six law libraries in six penitentiaries. He was head librarian in three of them. He clerked for Leon Jaworski of Watergate fame at $80 an hour. He believed that he had a greater knowledge of the law than a layman. Although he did not claim to have the knowledge that a lawyer would, he believed that he was well qualified. (T. 664).

Defendant was a law librarian at a McAllister state penitentiary for 8 months. The second time, he was head law librarian for the State of Nebraska. He represented inmates, he filed transcripts, he prepared appeals, with some success. He did that for approximately three years. (T. 665).

He did the same in Arizona. He was head librarian. He had four people under him. He had final say as to whether suits were frivolous or not. Defendant asserted that there was no way anyone could determine that he was not qualified to represent himself. (T. 666).

The court inquired, in an effort to determine his familiarity with criminal procedure, how many times Defendant had been to trial. Defendant responded that he was aware that the man who represents himself has a fool for a client. Defendant understood about the "penalty-phase," which involved the "extenuating and mitigating and aggravating factors." Defendant asserted that he would not be disrespectful or disrupt the prosecutor or the court. (T. 668). Defendant asserted that he was prepared for both a guilty and not guilty verdict and was prepared for the penalty phase.

Defendant stated that he believed the State would go first. Then he would need about twenty minutes to present what he wanted. (T. 669).

The court inquired if Defendant had ever been in a mental health facility or treated for any mental disability. Defendant asserted that he had not and that on IQ tests, he fluctuated between 135 and 138. (T. 671).

Defendant stated he had gone to the library and researched what he could or could not say during the penalty phase. (T. 672). Defendant asked for a ruling, and interrupted himself to note that the court had to determine if he was competent to do that first. (T. 672).

The court noted Defendant's demeanor and responses and concluded that Defendant was aware he had the right to counsel, that he was knowledgeably and voluntarily waiving that right, that he appeared mentally competent to represent himself. The court, pursuant to Faretta, allowed Defendant to represent himself. (T. 672). The court further appointed defense counsel as standby counsel. (T. 673).

Defendant then opposed the State's request for some time to prepare for the penalty phase. (T. 673-674). The court, "in an abundance of caution" decided to allow the State's request, and sua sponte ordered Defendant to be examined pursuant to R. 3.210 to determine his competency to proceed. (T. 674). Defendant argued that he did not think that the court had any doubt about his mental capacity. (T. 675). The court conceded it had no doubts about Defendant's competency, but stated that it was not a mental health expert and given the gravity of the circumstances, desired professional opinions.

Defendant requested that he be given a copy of sentence-phase procedures. Defense counsel stated he would supply a "Life Over Death" conference packet to him. (T. 676).

A competency report was prepared on February 15, 1993, by Marshall Wolfe, Ed. D., in which it was concluded that Defendant was competent to proceed. (R. 916-919) James W. Holbrook, Ed. D., also prepared a report on the same date, finding Defendant competent to proceed, and finding Defendant to be without mental illness or organic dysfunction, but finding Defendant to be antisocial or sociopathic. (R. 920-923).

On February 16, 1993, the competency hearing was held. Defendant was advised of his right to be represented by counsel. Defendant stated he wished to continue to represent himself. (T. 685).

Marshall Wolfe, a psychologist and Assistant Director for the Care Center for Mental Health in Key West, testified first. (T. 685). Dr. Wolfe met with Defendant at 9:30 a.m. on February 15, 1993. He examined Defendant for the six items of competency established under Rule 3.210. (T. 686). The first area was Defendant's appreciation of the charges against him. Defendant told Dr. Wolfe that he had recently been convicted of first degree murder. The second area was an appreciation of the range of possible penalties. Defendant said he would receive 25 years

to life mandatory and possibly the death penalty. The third area was his understanding of the adversary nature of the legal process. Defendant was able to describe the functions of the ASA and his PD, the jury's role and the judge's role. The fourth area was Defendant's capacity to disclose to his attorney pertinent facts surrounding the alleged offense. Defendant stated he had a rapport with his attorney, and that the attorney went along with his wishes. Dr. Wolfe found Defendant to be articulate and as such had no problem in disclosing the facts. The fifth area was Defendant's ability to manifest appropriate courtroom behavior. (T. 687). Defendant told Dr. Wolfe that he had demonstrated this capacity in court many, many times over many years. Defendant felt he was sophisticated enough to get a sidebar conference and knew what his range of freedom in court was. The last criterion was Defendant's capacity to testify relevantly. Defendant stated that he did not testify at trial but knew his right and felt he was competent to testify relevantly.

Dr. Wolfe testified that Defendant was well oriented to time, place and person. He was of the opinion that Defendant was competent to proceed. (T. 688). Defendant understood the nature of the proceeding and had an appreciation of the consequences of the proceedings. (T. 690).

Dr. James Holbrook, a psychologist and Clinical Director at the Care Center for Mental Health, also testified. (T. 690). Dr. Holbrook examined Defendant on February 15, 1992. Defendant was oriented to time, place and person. (T. 691).

Defendant knew he had been charged with first degree murder, robbery, kidnapping, and grand larceny. He knew that first degree murder was a capital felony. Dr. Holbrook felt that he clearly met the criteria for the first competency item. As to the second, Defendant was able to describe in a coherent and sophisticated manner the range and nature of the penalty in this case. He indicated he could receive 25 years mandatory to life or the death penalty. (T. 692). He indicated that these were the only two sentences available to him. Defendant portrayed an accurate understanding of the adversary nature of the process. He was able, in a sophisticated manner, to describe the function of the judge and jury and the duties of the prosecutor and the defense attorney. Defendant evidenced appropriate memory and sufficient clarity of thought and vocabulary command and emotional control to relate facts pertinent to counsel. As to the fifth item, Defendant was able to accurately describe appropriate courtroom behavior and decorum. He knew the penalties for failure to properly comport himself. He stated that he would act accordingly. With regard to the final item, Defendant evidenced sufficient mental clarity, intellectual and vocabulary command to testify. (T. 693).

Dr. Holbrook found Defendant competent with regard to all six criteria. He saw nothing to indicate that he would not be fully capable of performing as his own attorney. He saw no indication of emotional or other major mental disturbance or psychopathology. Defendant impressed Dr. Holbrook as very knowledgeable and well informed relative to the penalty phase. (T. 694). He was of the opinion that Defendant was competent to make the decision not to present mitigating factors. (T. 695).

Based upon the expert testimony, the court found Defendant competent to proceed. (T. 695). The court again advised Defendant of his right to counsel. Defendant indicated that he had not altered his position. He noted that any time he felt uncomfortable about a point of law he could consult with standby counsel. He wished to continue to represent himself. (T. 697).

The penalty phase hearing was also held on February 16, 1993. (R. 156). Defendant indicated he was aware that he was not limited to the statutory mitigating factors. However, it was his intent not to present anything in mitigation. (T. 706).

After the jury was given the preliminary instructions, Defendant was again advised of his right to counsel. (T. 713). The State expressed concern to the court that Defendant might go into facts concerning crimes not in evidence in his argument. (T. 714).

The State presented copies of documents showing that Defendant was on work release from a sentence of one to ten years for forgery and fraud in Kansas and escaped thirteen months before he committed the murder. (T. 719). The State presented no witnesses and rested.

Defendant called Detective Phil Harrold to the stand. He testified that before trial, Harrold discussed Defendant's case with a Stephen Wise, who was charged with first degree murder. They did not make a deal. (T. 723). Harrold asked him if he had any information about Defendant's case. (T. 724). The defense then rested. (T. 724).

The State argued that the aggravating circumstances of under sentence of imprisonment, pecuniary gain and heinous, atrocious and cruel applied. (T. 727-732).

Defendant presented his closing. (T. 733-762). He asked for the death penalty. (T. 733). Defendant began to tell the jury that he had been in six maximum security penitentiaries; the court interrupted with a sidebar, pointing out to Defendant that these facts were not in evidence. Defense counsel pointed out that there was no objection by the State. The court maintained that it had a due process obligation to ensure that the jury's decision was not based upon facts not in evidence.

(T. 725) Defendant was advised that he could reopen the evidence and testify if he so chose. (T. 736).

The court gave a curative to disregard the comment about the penitentiaries. (T. 737). Defendant then offered his "opinion" of Lloyd Chase Allen: for 30 years it was his "job" to steal, because he was an "outlaw". He never cooperated with law enforcement; he never testified against another human being; he tried to be good at what he did. (T. 738).

He rejected any religious feeling as a mitigator. All he believed in was himself. (T. 739). He asserted that his childhood was not a factor. He "was raised right". He was taught proper values, which he no longer had. He cannot say that he had a bad home. Nor did he have a drug or alcohol problem. He had no excuses. He asserted that he would not testify against anyone and that he would escape if he had a chance because it "was his job." (T. 740).

The jury was instructed on the aggravating factors urged by the State, and was given the full standard instruction on mitigation. The jurors were further instructed that the fact that Defendant did not present any evidence in mitigation should not preclude them from considering any mitigating factors which they might find to exist. (T. 763-769).

The jury recommended a sentence of death by a vote of 11-1. (T. 772).

The court ordered a PSI and set sentencing for March 5, 1993. (T. 775). On March 3, 1994, a PSI was filed, indicating a lengthy criminal history, an undesirable discharge from the USMC and an unwillingness to discuss his family history. (R. 908-909).

At the sentencing hearing on March 3, 1993, the State presented the same arguments in favor of death which it did to the jury. (T. 782). The State also introduced into evidence a statement Defendant made on the radio in the presence of his attorney.[1] The statement was made after the jury gave its recommendation. The defense interposed no objection. (T. 783). The prosecutor asserted that he had the police follow up on the statements made in the radio interview. (T. 784). The State called Detectives Harrold and Glover, and Charles Vowels (T. 785-795), to rebut the radio statements, which primarily addressed the question of his guilt or innocence. (T. 894-907).

The court stated that it was only considering those portions of the State's argument which related to the statutory aggravators. (T. 800).

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[1] Defendant had requested that his attorney resume representation of him after the jury retired to consider its penalty-phase verdict. (T. 770).

Defense counsel stated that he was unable to argue for the death penalty. He stated that he had no argument in mitigation to present because Defendant refused to give him any mitigating factors. Defendant also repeatedly requested that counsel not plead for his life. (T. 801). Defense counsel again indicated that he was "biting his lip" because he was not allowed to say everything he wished to. (T. 802).

On inquiry from the court, counsel stated Defendant was aware of the statutory mitigating factors available to him. He had another attorney come and consult with Defendant on the issue. He also had a document signed by Defendant which he presented to the court. (T. 803).

The document reflected that on October 18, 1992, Defendant signed a sworn instruction that his counsel not present any penalty phase defense, indicating his preference for death over life imprisonment. (R. 188-189)

Defendant made it clear to counsel over and over again that he did not want any mitigating evidence presented. (T. 803). Defendant also was aware of the fact that nonstatutory mitigation could be presented. Counsel discussed it all with him. He gave him a copy of the packet from the Public Defender's annual death penalty seminar. Counsel stated that Defendant was probably one of the most intelligent clients he ever had. (T. 804).

Defendant also refused to give counsel any information which would enable him to develop non-statutory mitigators for the court. He did not feel Defendant was being uncooperative, just very clear in his reasons. (T. 804).

Defendant then addressed the court. He requested that he be put to death and his organs donated to the needy. (T. 804-810).

The court recessed for approximately two hours to consider the sentence. (T. 810). Defendant was sentenced to five years for the theft offense. (T. 811). Defendant was adjudicated guilty and sentenced to death for the murder of Dortha Cribbs. (T. 812). The written sentencing order read as follows:

SENTENCING ORDER

> THIS CAUSE having come before this Court for sentencing, the Court having reviewed the presentence investigation submitted by the Department of Corrections, the forensic evaluations submitted by Dr. Marshall Wolfe and Dr. James Holbrook, having considered and reviewed the testimony of the entire trial, the penalty phase, the sentencing phase, the argument of counsel for both sides, as well as that of the Defendant, pro se, and before the Court for sentencing, the Court finds the following aggravating circumstances to exist:
>
> 1. That the capital felony was committed by a person who had escaped from a sentence of imprisonment and the State has supplied in this record proof that the Defendant escaped from a work-release program

from the State of Kansas and, indeed, this aggravating factor is acceded to by the Defendant himself.

2. The Court finds that the capital felony was committed for pecuniary gain. Although the Court granted a judgment of acquittal for the specific elements of the offense of robbery, the Court finds more than ample evidence in the record given the statements of the Defendant, the contents of the victim's purse strewn across the bed, and the subsequent discovery of the victim's car to support this aggravating factor.

3. Further, the Court finds the aggravating circumstance that the capital felony was especially heinous atrocious and cruel in that the Court finds it extremely wicked, shocking, evil, vile and with a high degree of indifference to suffering that the victim was mortally wounded and thereafter it took from fifteen to thirty minutes for death to occur. There being unrefuted testimony in the record that the victim would have been conscious and aware of her circumstances for upwards of fifteen minutes prior to losing consciousness.

The Court did not allow any other aggravating factors to be argued to the jury and the Court finds that those aggravating factors do not exist or there was insufficient evidence in the record to support them.

The Court has considered all statutory mitigating circumstances. The Court finds that the mitigating factor of the Defendant's record of significant history of prior criminal activity inapplicable. That there was no evidence whatsoever to establish that the capital felony was committed while Defendant was under the influence of extreme mental or emotional disturbances. Indeed, his evaluations indicate no mental illness or organic disfunction and that antisocial or sociopathic tendencies are insufficient for this mitigating circumstance to be considered. The Court further finds that there is no evidence in this record to indicate that the Defendant was an accomplice

in the capital felony committed by another person and that Defendant's participation was relatively minor, nor is there any evidence to indicate the Defendant's lack of capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Nor does the Court find the age of the Defendant at the time of the crime to be a mitigating factor.

In addition the Court has considered the possibility of non-statutory mitigating circumstances. The Court finds that the Defendant's family background does act as a mitigating circumstance. The Defendant's parents were divorced when he was approximately fourteen years of age and that the Defendant has essentially been on his own since that time. Further, the Court has reviewed the military service record of the Defendant and notes that his service in Viet Nam may be considered as a mitigating circumstance. The Court finds no other non-statutory mitigating circumstances to exist and notes that the two mitigating circumstances considered by the court were not argued, but are contained within the record.

The Court finds it appropriate to note that a portion of the evidence presented by the State at the sentencing phase to the court may be considered in contradiction of the Defendant's "lingering doubt" argument made to the jury without objection in spite of King v. State 514 So2d 354 (Fla 1987) and Franklin v. Lynaugh 108 Sup. Ct. 2320 (1988). The Court has considered that evidence only as to the State's argument as to a lack of mitigating circumstances. The Court further disregards the "conscience of the community" argument made by the State in their final argument to the Court. Bertolotti v. State 476 So2d 130 (Fla 1985).

The Court further finds it improper to consider the Defendant's request for the death sentence in imposing such a sentence, nor in the imposition of the death sentence may the Court consider what the Defendant considered to be "best for him" in his request of a death sentence.

> The Court has considered and given great weight to the recommendation of the jury, although that recommendation is not determinative of the Court's sentence. The Court has carefully weighed the aggravating factors and searched the record and material available for any statutory and non-statutory mitigating factors and has considered those enumerated above, considering and weighing each factor, it is the Judgment of this Court that under the law of the State of Florida the appropriate penalty in this case is death.
>
> DONE AND ORDERED at Key West, Monroe County, Florida this 3 day of March 1993.
>
> RICHARD J. FOWLER, CIRCUIT JUDGE

(R. 239-241).

This appeal followed. The State filed a notice of cross-appeal.[2]

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[2] See the State's Motion to Supplement the Record filed contemporaneously with this brief.

POINTS ON APPEAL

I.

THE TRIAL COURT DID NOT ERR IN ADMITTING, DURING THE GUILT PHASE, THE ONLY AVAILABLE PHOTOGRAPH OF THE VICTIM'S RING. (RESTATED).

II.

THE TRIAL COURT PROPERLY ALLOWED DEFENDANT TO WAIVE THE PRESENTATION OF EVIDENCE IN MITIGATION DURING THE GUILT PHASE. (RESTATED).

III.

NO ERROR OCCURRED WHERE, AFTER REPEATED ADMONITION, DEFENDANT REFERRED TO MATTERS NOT IN EVIDENCE DURING HIS PENALTY-PHASE CLOSING ARGUMENT. (RESTATED).

IV.

THE TRIAL COURT PROPERLY FOUND AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN. (RESTATED).

V.

THE TRIAL COURT PROPERLY APPLIED THE "HEINOUS ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE, WHICH WAS SUPPORTED BY THE EVIDENCE. (RESTATED).

VI.

THE STATE'S CLOSING ARGUMENT TO THE JURY DURING THE PENALTY PHASE DID NOT SUGGEST ANY NON-STATUTORY AGGRAVATING CIRCUMSTANCES. (RESTATED).

CROSS-APPEAL

THE TRIAL COURT ERRED IN FINDING MITIGATING CIRCUMSTANCES, WHERE THE FINDINGS WERE NOT SUPPORTED BY COMPETENT EVIDENCE AND/OR WERE POSITIVELY REFUTED BY THE EVIDENCE.

SUMMARY OF ARGUMENT

1. Defendant contends that the trial court erred in admitting a single photograph of the ring which was the subject of the grand theft charge in Count II of the information.

The photograph was the only one in existence of the ring and was clearly relevant as to the ring's existence and value, both elements of grand theft. As such it was properly admitted.

Contrary to Defendant's contentions, the presence of a small unidentified child in the photograph did not cause it to become more prejudicial than probative. The child was not identified and its presence was not emphasized.

Moreover, the evidence placed Defendant at the scene of the crime within an hour of her body being discovered. Defendant was picked up by a taxi many miles away about the same time as the body was being discovered, and the victim's car was subsequently discovered at the very hotel where the taxi picked defendant up. Additionally there was abundant evidence, that Defendant and the victim were travel companions and lovers over a six day period preceding the murder. As such, an error was harmless beyond a reasonable doubt.

Nor, as Defendant suggests, did the admission of alleged victim impact evidence and argument serve to render the admission of this otherwise relevant photograph harmful. The victim impact claims were not preserved below by timely and specific objection, and as such may not be raised now. Further, even had the claims been properly preserved, they are without merit. The testimony was proper background information. The argument complained of was brief, and in any event similar in nature to an argument which was the focus of the defense's closing.

The photograph was properly admitted and Defendant's conviction should be affirmed.

2. In its first penalty-phase argument, the defense claims that the trial court erred in allowing Defendant to waive the presentation of mitigation evidence in violation of Koon v. Dugger. This contention is without merit. Koon was an ineffective assistance of counsel case, wherein it was held that counsel may be ineffective in failing to prepare for and pursue the presentation of mitigation evidence during the penalty phase of a capital trial.

Here, on the other hand, Defendant proceeded pro se. Under such circumstances, the only inquiry on appeal is whether the Defendant made a knowing and voluntary waiver of counsel. The

record here reflects that Defendant was of at the very least of average intelligence, well-versed in the legal system and entirely competent. His waiver of counsel was valid.

Further, even if the Koon analysis were applicable here, its holding, which specifically states that it will be prospective in operation only, does not apply here. Finally, even if Koon itself applies, it must be recalled that Koon is an ineffective assistance of counsel case. The defense has shown neither deficient performance by defense counsel below, nor any resultant prejudice, and as such the claim must fail.

3. The defense next argues that the trial court erred in allowing Defendant to deny the applicability of certain mitigating factors during his closing argument to the jury. This contention is without merit. First, the argument amounted to no more than a comment on what the evidence failed to show, which is proper.

Second, Defendant was not only admonished several times by the court to confine himself to the facts in evidence, the defense is now in the anomalous posture of arguing that because Defendant allegedly lied to the court below, he is entitled to seek reversal here. Such a position is untenable.

Finally, since no evidence in mitigation was introduced to the jury during the penalty phase, Defendant's denial that such evidence existed was most assuredly harmless beyond a reasonable doubt.

4. The defense next contends that the trial court erred in finding that the murder was committed for pecuniary gain based upon Defendant's taking of the $4100 cash, the Defendant's statements and the theft of Dortha's car. The record supports the all three bases of the finding.

Contrary to Defendant's contentions, the granting of a JOA as to the armed robbery count during the guilt phase did not collaterally estop the court from finding that the murder was committed for pecuniary gain. To find that the murder was committed for pecuniary gain does not require the court to find that the State had proven all the elements of robbery. As such the court's conclusion that robbery had not been proved did not prevent it from finding the pecuniary gain aggravator, which focuses primarily on the defendant's motivation applied. The evidence strongly supports the trial court's conclusion, which should not be disturbed.

Moreover, the Defendant's statements, and his conduct prior to the murder, also support the aggravator. The evidence showed

that Defendant was a con-man, and romanced Dortha for the sole purpose of taking her money and possessions. Finally, the evidence also showed that one of those possessions which Defendant intended to take and did in fact take was her car. The evidence clearly shows that the sole motivation for this murder was pecuniary gain and the trial court's findings as to this aggravator should be upheld.

5. The defense next contends that the trial court erred in finding that the murder was heinous, atrocious, and cruel. This point is without merit. The evidence showed that the victim was tied up in her bedroom with loud background noise. She was then stabbed twice in the face, and fatally in the neck. She bled to death through her mouth with her face in a pillow. The medical examiner summarized his testimony that she was probably conscious for 10 to 15 minutes before she died. This evidence is more than sufficient to support the HAC aggravator. The defendant's contentions with regard to the sufficiency of the medical examiner's testimony are also unfounded. The fact that he "guessed" how long it took her to die was later put in terms of a probability. Furthermore, even if he had "guessed," such circumstance would go only to the weight, not the admissibility of the opinion evidence, contrary to the defense's suggestions. Finally, it must be noted that the doctor's opinion was neither challenged or contradicted by any other evidence. The court's finding should be upheld.

6. The defense's final contention is that the prosecutor improperly argued future dangerousness as a non-statutory aggravating circumstance. This contention is without merit. A review of the prosecutor's (brief) comment reveals that he simply observed that if Defendant had served out his previous time in Kansas, this crime might not have happened. The prosecutor did not suggest that Defendant would kill again if not put to death. Such argument is proper where the State is arguing the fact that the defendant was under a prior sentence of imprisonment as an aggravating circumstance. Furthermore, even if improper, the unobjected-to comment was not such as to warrant reversal.

Finally, the defense's suggestion that Defendant's waiver of the presentation of mitigation evidence precludes proportionality review is meritless. Not only may the Court conduct such review, a comparison of this case with others indicates that the sentence imposed here is warranted.

Cross Appeal

The State submits that the trial court erred in finding in mitigation that Defendant's parents were divorced when he was 14, at which point he chose not to live with either parent, and that Defendant had served in Viet Nam. Although the trial court is

accorded broad discretion with regard its findings of non-statutory mitigating circumstances, they findings will not be upheld where they are without evidentiary support.

Here the record reflects no more mitigating circumstance than the bare facts stated above. As there was no evidence which related the above circumstances to Defendant's character, record, or the circumstances of the crime, the evidence was insufficient to support the court's findings. Furthermore, given that the divorce occurred more than 30 years prior to the crime, and given that Defendant's military service culminated in a conviction for desertion and an undesirable discharge, the State would submit that these factoids would not constitute mitigating circumstances even if they were properly tied in to Defendant's character or the crime.

The findings of mitigation should be rejected.

Based on the foregoing, Defendant's convictions and sentence should be affirmed.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN ADMITTING, DURING THE GUILT PHASE, THE ONLY AVAILABLE PHOTOGRAPH OF THE VICTIM'S RING. (RESTATED).

Defendant asserts that the trial court committed reversible error in admitting the only available photograph of the ring which was the subject of the theft charged in Count II of the information. His argument is based primarily upon the presence of an unidentified child along with the victim in the photograph. He contends that the photo's probative value was outweighed by its prejudicial effect; that the photo combined with certain testimony and argument constituted victim impact evidence; and that the foregoing constituted harmful error.

The State submits that the photo was relevant and properly admitted; that Defendant's victim impact argument is without merit and unpreserved; and that the error, if any, was harmless beyond a reasonable doubt.

The photograph was relevant and was properly admitted. Nevertheless, Defendant posits that "there was no necessity for the introduction of the photograph," and that it "was at best cumulative," and as such, it was error to admit it.[3] However, the test for the admissibility of photographs is not necessity,

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[3] B. 22.

but relevancy. This court explained the standard in Straight v. State:[4]

> The basic test of admissibility of photographs, however, is not necessity, but relevance. Photographs can be relevant to a material issue either independently or by corroborating other evidence.

Id., at 906-907. In Straight, the defendant asserted that the photographs were irrelevant because he agreed to stipulate to the factual matters which he alleged the photo would prove. This court rejected that argument, finding that the photographs were relevant to corroborate "other evidence, specifically the testimony of witnesses." Id., at 907 (emphasis supplied). See also, Mills v. State, 462 So. 2d 1075, 1080 (Fla. 1985)(even gruesome or inflammatory photographs may be admitted if relevant, regardless of the defendant's willingness to stipulate to the matter of which the photo is probative); U.S. v. Nixon, 918 F. 2d 895, (11th Cir. 1990)(photo of defendant draped with garish jewelry and bundles of cash, looking like a "flashy drug dealer", admissible because probative of "substantial income or resources" element of CCE charge). Likewise, the photo here was relevant to corroborate the witnesses' testimony regarding the existence and value of the ring, both of which were elements of the charge of grand theft, and thus very much in issue.

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[4] 397 So. 2d 903 (Fla. 1981).

The case at bar is not comparable to Czubak v. State,[5] upon which Defendant relies. There, eight photographs of a body which had been decomposing for two weeks and ravaged by dogs were admitted. The court found that none of the photos assisted in explaining the cause of death, in identifying the victim, or in clarifying any other issue at trial. The photos were thus erroneously admitted, not because they were inflammatory, but because they were irrelevant. As discussed above, the single photo here did have relevance to the charges against Defendant.

Further, the trial court did not abuse its discretion in determining that any alleged prejudice did not outweigh the probative value of the photograph. It was determined below that the photograph was the only one available which depicted the ring.[6] (T. 154). At the time of its publication the jury's attention was called solely to the attention of the ring, not to the child. The following testimony was adduced prior to the introduction of the photograph:

> **Q.** I am going to show you what is marked as State's Exhibit 2 for identification. Look at it and see if you recognize the ring we just talked about?
>
> **A.** Yes.
>
> **Q.** Is that the ring?

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[5] 570 So. 2d 925 (Fla. 1990). The defense also relies upon Smith v. State, 556 So. 2d 1096 (Fla. 1990). However, the issue of the admission of photographs is discussed nowhere in that one-column opinion

[6] Defendant does not challenge this fact.

A. Yes.

Q. Is that your mother's horseshoe diamond ring?

A. Yes.

MR. McLAUGHLIN: I would admit this as State's Exhibit 2.

(T. 153). The child's presence was not emphasized, and neither the photograph, nor the child, was made a feature of the State's case. As such, it cannot be said that the probative value of this clearly relevant photograph outweighed its prejudicial impact. Certainly if bloody and gruesome, but relevant, photographs are not too prejudicial, the mere presence of a small, unidentified, child cannot be considered as such. See Jackson v. State, 545 So. 2d 260 (Fla. 1989)(victim's charred remains). Bush v. State, 461 So. 2d 936 (Fla. 1984)(bloody gunshot wound to face); Straight (decomposed body).

Another factor which the courts consider in weighing prejudicial impact is whether an excessive number of photographs was admitted. See, Straight, at 907 (probative value of photos of a gruesome nature not outweighed by prejudicial impact where photographs few in number); cf., Young v. State, 234 So. 2d 341, 347-348 (Fla. 1970)(unnecesarily large number of inflammatory photos outweighed their probative value). Here, only one photo was introduced. Indeed, the trial court sustained a defense objection to introduce a similar second photo, finding that the first photo was better suited to the purpose of identifying the ring. (T. 156).

The photo here was clearly relevant, and not so inflammatory as to be more prejudicial than probative. It was properly admitted. Furthermore, in light of the evidence adduced at trial, this one photograph could not reasonably have affected the verdict. Defendant was the victim's constant companion for six days. He was seen at the scene of the murder, along with the victim's car, at 11:00 a.m. the day of the murder. He did not leave the scene until after 11:45 a.m. (T. 385) Dortha's body was discovered between 12:30 and 1:00 p.m. (T. 238). Her car was gone. (T. 386). The car was found at the Buccaneer lodge in Marathon, miles away. (T. 355). Defendant was picked up by a taxi at the Buccaneer Lodge between 12:30 and 12:45 p.m. the day of the murder. There was no evidence that anyone else was ever at the scene. As such it is plain that any influence the photograph may have had, if indeed it was erroneously admitted, was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Defendant next contends that the photograph, combined with certain prosecutorial comments comprised "victim impact evidence and argument."[7] This contention is neither preserved for review, nor meritorious, and in any event, if error, harmless.

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[7] B. 22-25.

To preserve an allegedly improper prosecutorial comment for review, Defendant must object to the comment and move for a mistrial. Pope v. Wainwright, 496 So. 2d 798 (Fla. 1986); State v. Cumbie, 380 So. 2d 1031 (Fla. 1980). None of the alleged victim impact argument was objected to at trial.[8] Thus any error has been waived.

Defendant has also waived his claim with regard to the witness testimony. To preserve an objection to witness testimony, the objecting party must make an objection which is both timely and specific. Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982); Castor v. State, 365 So. 2d 701 (Fla. 1978); see also, Barclay v. State, 470 So. 2d 691, 693 (Fla. 1985)(failure to make specific objection waived claim that trial court improperly allowed family member to identify murder victim); Johnston v. State, 497 So. 2d 863, 868-869 (Fla. 1986)(general objection not preserve claim that testimony improperly referred to defendant's prior incarceration). Although Defendant objected to two of the three statements he alleges were victim impact testimony, he did not object on the grounds now asserted.[9] As such, he has waived the claim.

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[8] Indeed the defense raised no objections at all during the State's closing arguments at either the guilt or penalty phase.

[9] At T. 152, (B. 20), no objection was raised. At T. 146, (B. 20), the defense's sole objection was "to relevancy." At T. 163 (B. 21), the defense's sole assertion was "Objection, Your Honor."

Even were the claims preserved, they are without merit. The testimony and comments which Defendant cites are plainly not impermissible victim impact testimony or argument. The mere reference to a victim or her family where the evidence is relevant to the circumstances of the crime is not prohibited. Mills v. Dugger, 574 So. 2d 63 (Fla. 1990); Megill v. State, 231 So. 2d 539 (Fla. 3d DCA 1970); Scott v. State, 256 So. 2d 19, 21 (Fla. 4th DCA 1971)(relationship between murder victim and his mother relevant background information for her testimony); Lewis v. State, 377 So. 2d 640 (Fla. 1980)(appropriate for witnesses to establish family relationship with murder victim to explain source of witnesses' knowledge); Justus v. State, 438 So. 2d 358, 366 (Fla. 1983)(familial relationship between murder victim and her granddaughter properly brought before jury to establish witness's knowledge of murder victim's travel plans and intended time of return).

Here, the State brought in evidence which traced Dortha's movements and activities during her final trip to Florida from Ohio, her habits regarding the carrying of money and the ring, and her usual travel habits.[10] Part of this evidence was presented through Ogier John, Dortha's son, and William Cribbs, her stepson.

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[10] The defense has not challenged the admission of the general evidence regarding Dortha's itinerary, travel habits or plans either at trial or on appeal.

John testified (without objection) that Dortha had said she was supposed to be back for his daughter's birthday on November 18, but changed her plans so she could go somewhere with Defendant. The birthday reference explained why John would recall, 2 1/2 years later, when she was due back. Neither the birthday nor the existence of the granddaughter were again mentioned, and served only to establish the date Dortha was expected to return. As such even had the testimony been objected to, it would properly have been admitted.

The remaining two comments of which Defendant now complains were made by John and Cribbs and established the nature of the relationship between the two men and the victim. They testified concerning her itinerary and her habits. The relationship was the basis of their knowledge of these intimate details of the victim's life. The mere fact that their knowledge arose from the victim's status as their mother did not render the evidence victim impact testimony.[11]

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[11] Tellingly, it has not been suggested that similar testimony, regarding the nature and duration of the friendship between Dortha and the Hudsons, which established the basis of their knowledge about Dortha's habits, is victim impact testimony. That testimony was not victim impact evidence and neither was that of Ogier and John. Relevant background information does not become victim impact testimony simply because it is uttered by a relative of the deceased.

Nor were the comments made in closing argument impermissible victim impact argument. The State would first point out that the comments which Defendant claims were improperly made by the prosecutor were very similar to comments previously made by the defense. Defense counsel's primary theory was that the investigators and examiners were incompetent and lazy and accused Defendant because that was easier than working hard and finding the "real" killer. Part of the theory was that because the victim was a sweet old woman, they had to arrest someone:

> If you hang Lloyd then you close the case out. We got a dead body, *a lady who has a large family* that cares about her. [T. 558.]
>
> * * *
>
> No one likes to think about *a lonely widow* that is taken in by a drifter and one who is travelling under an assumed name. [T. 567.]
>
> * * *
>
> They have a dead body and *a nice, old grandmother*. They have a defendant who is a drifter, who, whatever his past and whatever it is in the present, he does not want to cooperate with the police. What did you want? We have *a nice old lady* and we have a drifter. Let's go guys, send him off. You can work as long as you don't do your job, as long as you don't do your job. [T. 572.]

Although the prosecutor briefly noted that Dortha was nice and a grandmother,[12] he spent far less time on the subject than did the defense, which again raised it in rebuttal:

> I trust when you look at the evidence and see the type of investigation that was done, you are not going to buy into this easy way out. We have *a dead grandmother* and we have a drifter and let's close the case, bam, that's enough. That is not enough. The proper result is that the police find out who killed Dortha Cribbs and it is not this gentleman sitting here.

(T. 611.) Thus it is apparent that if any party emphasized any purported victim impact aspect of the case, it was the defense. Its strategy was to argue that this was a victim with relatives who were not going to go away, so the police took the easy way out and pinned the crime on Defendant. Under the circumstances the State cannot be charged with having injected the issue of sympathy into the case. See, Brown v. State, 367 So. 2d 616, 625 (Fla. 1979)(defense may not raise issue as trial tactic, and then claim reversible error where State also addresses issue); Clark v. State, 363 So. 2d 331, 334-335 (Fla. 1978)("A defendant may not make or invite an improper comment and later seek reversal based on that comment.").

The second comment, which was made during the penalty-phase closing, was plainly not victim impact argument. The reference to the child in the photograph[13] was solely a means to identify the photo of the ring. No further mention was made of the child.

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12 (T. 581).

13 (T. 730).

Plainly the entire emphasis of the paragraph (which is set forth in Defendant's brief at B. 23) was the ring.

Finally, the State would submit the even if improper, the testimony and argument were harmless beyond a reasonable doubt. Twenty-two witnesses testified during the guilt phase over a period of three days. During that extensive testimony, only three references were made regarding the victim's family members. During the guilt-phase closing argument, the prosecutor made only one reference to the victim's character and status as a grandmother during a closing argument which consumed thirty-three pages of transcript. The remainder of the closing argument focused on the evidence and the inferences to be drawn from it. In light of the other evidence adduced against Defendant, as discussed above, this minimal reference to Dortha's family cannot reasonably be said to have affected the verdict. DiGuilio.

In view of the forgoing, the alleged victim impact claims cannot be used to bolster his argument that the admission of the photograph was more prejudicial than it was probative.

Defendant's conviction should be affirmed.

II.

THE TRIAL COURT PROPERLY ALLOWED DEFENDANT TO WAIVE THE PRESENTATION OF EVIDENCE IN MITIGATION DURING THE GUILT PHASE. (RESTATED).

In its first penalty-phase issue, the defense contends that the trial court erred in allowing Defendant to waive the presentation of mitigation evidence. However, this contention is based upon Koon v. Dugger[14] and its progeny, which are factually inapplicable to the case at bar.

A "competent" defendant has the constitutional right to waive assistance of counsel at the penalty phase of a capital trial, even if this waiver is for the purpose of not presenting mitigating evidence. Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988); Pettit v. State, 591 So. 2d 618, 620 (Fla. 1992); Godinez v. Moran, 509 U.S. ___, 113 S.Ct. ___, 125 L.Ed.2d 321, 327 (1993).

Defendant's reliance upon Koon, Deaton v. Dugger,[15] and Blanco v. Singletary[16] is misplaced. All of these cases involve claims of ineffective assistance of counsel, where the defendants expressed unwillingness to present any mitigating evidence at the penalty phase, but nonetheless chose to be represented by

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14 619 So. 2d 246 (Fla. 1993).

15 19 Fla. L. Weekly S97 (Fla. October 7, 1993).

16 943 F. 2d 1477 (11th Cir. 1991).

counsel. In all of these cases, collateral evidentiary hearings were conducted to assess both deficient conduct and prejudice. Counsel in Deaton and Blanco were found to not even have attempted to prepare for the penalty phase until after the guilty verdict. Blanco, at 1502; Deaton, at S531. As a result, there was insufficient time to prepare or present any mitigating evidence. Blanco, at 1501-1502; Deaton, at S531. Moreover, counsel had "blindly follow[ed]" the defendant's expressions of unwillingness to present mitigating evidence, without even explaining the potential avenues of mitigation. Blanco, at 1502; Deaton, at S531. In Koon, this court found that counsel had investigated mitigation prior to trial and had talked to Koon about presenting witnesses. Koon, at 250. This Court found no error in counsel "following Koon's instruction not to present evidence in the penalty phase." Id.

Clearly, the critical element in these cases is that when a defendant chooses to be represented by counsel at the penalty phase before the jury, but expresses unwillingness to permit presentation of mitigating evidence, counsel has the duty to advise the defendant of potential mitigating evidence, based upon a reasonable investigation, in light of input from the defendant. Koon, at 250; Blanco, at 1501-1502; Deaton, at S531.

In the instant case, however, Defendant chose not to be represented by counsel at the sentencing hearing before the jury.

He expressly and repeatedly stated his desire to proceed pro se and represent himself at the penalty phase.

Prior to the conclusion of the guilt phase, in response to the court's inquiry as to time schedules should the case proceed to penalty phase, Defendant stated:

> I will be handling my case if it gets to that point [penalty phase]. My attorney will make a[17] motion to have me appointed co-counsel simply because ethically, the way I want the case presented, he can't do it. I will argue extenuating and mitigating factors myself, if it goes to the penalty phase.

(T. 541). Indeed, the record reflects that months prior to the commencement of trial herein, defense counsel explained the function of the penalty phase and potential avenues of mitigation, including both statutory and nonstatutory mitigating evidence, to Defendant. (R. 188-89, T. 803-804).[18] Months before trial, Defendant determined he would proceed pro se, with "full understanding" of the penalty phase issues, and in light of having been informed that counsel would have to argue mitigation

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[17] The record reflects that there was an immediate clarification that the defendant would proceed pro se, with stand-by counsel. (T. 541).

[18] The affidavit of Defendant, dated months prior to the trial, was entered into the record at the final sentencing hearing before the trial judge. (R. 188-9, T. 803). The defendant's understanding and desire to proceed pro se were also reaffirmed during the guilt phase of trial, at the conclusion of the guilt phase, during the Faretta and competency hearings prior to the penalty phase, at the penalty phase before the jury, and at sentencing before the trial judge.

because of ethical considerations. (R. 188-89). In his affidavit, Defendant added:

> . . . I none-the-less [sic] refuse to provide any information or assistance relative to mitigation of the death sentence.
>
> . . . It is therefore my instructions to counsel that:
>
> * * *
>
> b. If I am found guilty of First Degree Murder, that he [counsel] advise the court that I wish to proceed pro se (to represent myself) in the penalty phase so that I may offer no mitigation.
>
> I understand that if I represent myself in the penalty phase I will be precluded from any appeal based upon ineffective assistance of counsel as to that phase.

(R. 188-89). Defendant, at the time he executed the affidavit, prior to trial, was advised against such a decision. (R. 188-89). In an abundance of caution, defense counsel at that time insisted that Defendant consult with an independent attorney, with respect to both his decision to proceed pro se and potential avenues of mitigation. Defendant complied. (R. 189; T. 803). Defendant persisted in proceeding pro se. (R. 189; T. 803). Apart from pretrial consultations with defense counsel and independent counsel, Defendant was also given a copy of the Public Defender's annual seminar on the penalty phase, and aggravating and mitigating factors. (T. 803-804).

In accordance with Defendant's continued requests for self representation, after the guilty verdict and prior to the penalty phase, the trial court conducted a Faretta[19] inquiry. (T. 661-672). The adequacy of the Faretta inquiry has in no way been questioned by the defense.[20]

The inquiry established that Defendant was aware of the penalties involved, his right to counsel and the consequences of his actions, but desired to represent himself in order to avoid spending the rest of his life in jail. (T. 661-664, 668). Defendant acknowledged that he was not as skilled as a licensed attorney, and that a "man who represents himself has a fool for a client." (T. 662, 668, 671). The inquiry further reflected that Defendant was 47 years old, had obtained his GED, had taken a number of college courses, and worked in six law libraries in six penitentiaries. (T. 664). He was the head law librarian at three penitentiaries, and had been offered $80 an hour to do legal research for a Texas law firm. (T. 664). As head law librarian, he had prepared appeals for inmates and was successful in obtaining the release of some of these inmates. (T. 665).

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19 Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975).

20 Defense counsel only argues that because Defendant allegedly did not know what factors in mitigation he was giving up, he did not make a valid and knowing waiver. (B. 33-34). This argument of course ignores the fact that Defendant chose to represent himself, not because he was ignorant of available mitigation, but because he desired to present no mitigation evidence of any kind, a choice he is free to make. Hamblen; Godinez.

Defendant's own criminal record started when he was in the military at age 17 and continued consistently for the next 30 years, thereby giving him extensive experience with the criminal justice system. (T. 667-668). Defendant denied any previous treatment for any mental disability, and stated that his IQ fluctuates from 135 to 138, depending on the test administered. (T. 670-671).

The trial court, in "an abundance of caution" and even though it was satisfied that Defendant was competent to proceed, appointed mental health experts to examine Defendant and submit mental health evaluations. (T. 674, 684-695). The trial court then conducted a competency hearing. (T. 684-695). The written reports of the doctors were also entered into the record. (S.R. 916-923). The defense has not in any way questioned the adequacy of this hearing either.

At the competency hearing, Dr. Wolfe testified that he obtained a clinical history, conducted a mental status evaluation and examined Defendant for six items of competency, pursuant to Fla. R. Crim. P. 3.210. (T. 686, S.R. 916-919). He detailed Defendant's competency as to each component of Fla. R. Crim. P. 3.210, and added that Defendant understood the nature of the penalty phase proceedings and the consequences thereof. (T. 687-690). Dr. Holbrook likewise testified that Defendant was competent as to each criteria set forth in Fla. R. Crim. P.

3.210. (T. 690-694). He added that Defendant was "very knowledgeable and well informed" relative to the penalty phase of trial. (T. 694). This witness stated that Defendant had no "emotional disturbance or any major mental disturbance or psychopathology" that would prohibit him from functioning as his own attorney. (T. 694). He added that Defendant had "the mental and emotional capacity" to make a decision not to present mitigating factors if he so chose. (T. 695). The trial court thus found Defendant competent to represent himself and allowed him to do so. (T. 695).

The Court then offered Defendant another opportunity to be represented by counsel, which Defendant declined. (T. 697, 713). At the subsequent jury instruction conference, the trial court again ascertained that Defendant was familiar with statutory mitigating factors and that he was not limited to said factors. (T. 706). At the conclusion of the charge conference, the court yet again offered Defendant representation by counsel, and stated, "You further understand there may be mitigating circumstances which Mr. Hooper [stand-by counsel] could present in your behalf and, in fact, I believe he is prepared to do so if you allow him to do that?" (T. 713). Defendant again refused and thus proceeded pro se in the penalty phase before the jury.

At the penalty phase, Defendant in opening argument to the jury explained the function of the penalty phase, his right to

argue for the death penalty and the reasons for representing himself. (T. 716-719). He then presented a witness. (T. 721-724).

At closing argument, Defendant stated that he was going to, "give you [the jurors] an opinion of Lloyd Chase Allen, based on what I know about him . . . [S]o you'll know what kind of an individual you have standing before you." (T. 737). Defendant stated that for the past thirty years his job was to steal money and get away. (T. 738). He explained that he was a "dying breed," a "dinosaur," because in the course of stealing, whenever he had been caught, he had never cooperated or accepted any "deals" with law enforcement officials. (T. 738, 759). He had never testified against another human being. (T. 738). Defendant also explained the circumstances of his prior offense,[21] which reflected that it was nonviolent and consistent with his job as a thief. (T. 741). Defendant then argued residual doubt, based upon the inadequacy of the police investigation, untruthfulness of some witnesses, and possibility of a third party having committed the murder. (T. 743-758).

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[21] The offense, fraud and forgery, resulted in a sentence of imprisonment from which the defendant had escaped and subsequently murdered Dortha Cribbs. The State had argued this as a aggravating circumstance. (T. 728).

Defendant also eloquently addressed three "mitigating factors" now proffered by appellate counsel:[22] a) abused childhood and troubled background, b) alcoholism, and c) drug use. He expressly rejected reliance upon these, and stated that he did not have a bad childhood, or an alcohol problem, or a drug problem. (T. 739-740).

The record thus reflects that Defendant was competent,[23] and that he knowingly, intelligently and voluntarily waived his right to counsel in the penalty phase before the jury. The instant case is squarely within the parameters set forth in Hamblen. As noted by this court in Hamblen, at 804:

> Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of Faretta. In the field of criminal law, there is no doubt that "death is different," but, in the final analysis, all competent defendants have a right to control their own destinies.
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> * * *
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> Of course, the common practice in death cases is to introduce evidence of nonstatutory mitigating factors such as the defendant's family background, his work

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22 The defense has proffered these factors by way of reference to its previous Motion to Relinquish Jurisdiction, which was denied by this court. (B. 33).

23 The standard of competency in the penalty phase is no higher or different than that for competency to proceed to trial. Godinez.

> history and the absence of criminal history. Much of this material with respect to Hamblen was contained in the psychological reports. There may have been other factors that Hamblen did not disclose to his doctors, but even if the judge had appointed counsel to argue for mitigation, there is no power that could have compelled Hamblen to cooperate and divulge such information.
>
> We hold that there was no error in not appointing counsel against Hamblen's wishes to seek out and to present mitigating evidence and to argue against the death sentence.

See also, Pettit, at 620 ("We are not unaware of the problems arising out of the imposition of the death penalty when mitigating evidence is not actively pursued by the defendant or someone on his behalf, but we adhere to our rule in Hamblen that a competent defendant can waive its presentation); Godinez (competent defendant has the right to waive assistance of counsel in order not to present mitigating evidence at the penalty phase of a capital trial).

The State would also submit that, in accordance with Hamblen, the trial court fulfilled its obligation to carefully analyze possible statutory and nonstatutory mitigating factors against the aggravators to assure that death was appropriate, regardless of the defendant's request for the death penalty. The trial court, after the recommendation of death, postponed final sentencing and ordered a presentence investigation report. (T. 775, 777, S.R. 910-915).

The presentence investigation report and the mental health evaluation reports, inter alia, reflect Defendant's service in the military, specifically in Vietnam, and his family background Defendant's responses during the course of his Faretta inquiry also contain evidence as to these matters. (T. 664, 666-667). These are two of the nonstatutory mitigating factors referred to by the appellate counsel. Yet, the record reflects that the trial judge did consider and find these factors in mitigation, despite the fact[24] that Defendant was, a) 47 years old at the time of the crime, b) had not been in touch with his family for over 20 years, (S.R. 916), and c) had received a dishonorable discharge from military service. (S.R. 916, T. 666). The sentencing order, inter alia, reflects:

> In addition, the Court has considered the possibility of nonstatutory mitigating circumstances. The court finds that the Defendant's family background does act as a mitigating circumstance. The Defendant's parents were divorced when he was approximately fourteen years of age and that the Defendant has been essentially on his own since that time. Further, the Court has reviewed the military service of the Defendant and notes that his service in Viet Nam may be considered as a mitigating circumstance. The Court finds no other non-statutory mitigating circumstances to exist and notes that the two mitigating circumstances considered by the Court were

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[24] See the State's cross-appeal of these findings, infra, at pp. 92-95.

> not argued but are contained within the record.
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> * * *
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> The Court further finds it improper to consider the Defendant's request for the death sentence in imposing such a sentence, nor in the imposition of the death sentence may the Court consider what the defendant considered to be "best for him" in his request of a death sentence.

(R. 240).

Defendant competently, knowingly, intelligently, and voluntarily waived assistance of counsel, and exercised his right to self-representation. He waived reliance upon any mitigation and requested the death penalty. The trial judge nevertheless fulfilled his constitutional obligation, and after a careful analysis of the facts and the law, properly sentenced Defendant to death, pursuant to the parameters set forth by this Court in Hamblen, and the United States Supreme Court in Godinez.

As discussed above, Koon does not apply here, where Defendant waived representation of counsel. Even if effective assistance of counsel were at issue, the rule set forth in Koon, at 250, is prospective only and does not apply to this case.

In Koon, this court announced the "prospective" rule that, when a counsel-represented defendant refuses to permit presentation of mitigating evidence at the penalty phase, counsel must inform the court "on the record" of the defendant's

decision. This court added that counsel must outline, based upon his investigation, any mitigation he reasonably believes to exist, and confirm on the record that he has discussed it with the defendant. Id. at 250. In Koon, the Court did not apply this rule to Koon himself. As noted by Defendant, Koon was decided after the imposition of the sentence herein and while this case was pending on appeal. Defendant nonetheless argues that Koon's "prospective" language should be ignored pursuant to Smith v. State.[25] (B. 34-37). Defendant has construed Smith to mean that any decision of this court announcing a new rule of law must apply to every pipeline case on direct appeal. Defendant's construction of Smith is erroneous and was recently rejected by this court. Taylor v. State, 18 Fla. L. Weekly S643, S645 (Fla. December 24, 1993). In Taylor, this court expressly construed the term "prospectively," and held that the rule in Fenelon v. State,[26] would apply only to cases "tried after our decision in Fenelon was issued." The defendant in Fenelon, like the defendant in Koon, had not received the benefit of the rule announced in his case. In Fenelon, the Court announced a rule prohibiting jury instructions on flight in "future cases." Fenelon, at 295. Likewise, in State v. Johans,[27] another post-Smith case, which changed the procedures to be followed regarding

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25 598 So. 2d 1063 (Fla. 1992).

26 594 So. 2d 292 (Fla. 1992).

27 18 Fla. L. Weekly S124, S125 (Fla. February 18, 1993).

Neil[28] inquiries, this court held that "Because our holding is prospective only in application, we must analyze the instant case under the Neil standard." The State would also note that in Deaton, a post-Koon case, this court held that penalty phase counsel was ineffective for failing to investigate and advise the defendant as to available mitigating evidence, yet did not mention Koon or rely upon the "on the record" confirmation rule established in Koon.

The basis for Smith is that all similarly situated defendants should be treated equally. Smith, at 1066. To give pipeline appellants the benefit of a new rule of law, when the defendant whose case generated that new rule did not get the benefit of it, would create a dichotomy of unequal treatment which this court has consistently tried to avoid.

Finally, assuming, arguendo, that any claim of ineffective assistance of counsel is applicable in the instant case, Defendant has not established any deficient conduct, nor demonstrated any prejudice. First, contrary to the representations in the defense brief, defense counsel never stated that he had not "investigated" mitigating evidence. Although he stated that he did not have mitigating factors to present, counsel also added: "I am biting my lip here because I am not allowed to open up and say everything that I would like to

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28 State v. Neil, 457 So. 2d 481 (Fla. 1984).

say and argue everything that I want to argue. I am respecting my client in this matter." (T. 801-802). The record, as previously detailed herein, reflects that the defendant was well aware of the nature of mitigating evidence available to him. The record thus does not reflect deficient conduct.

Second, again as previously noted, two of the nonstatutory mitigating factors proffered by appellate counsel, troubled family background and service in Vietnam, were specifically found by the trial court in mitigation. (B. 33, R. 240). The evidence was in conflict, and negated by the extreme violent acts of Defendant in the instant murder, where the victim bled to death as a result of stab wounds. With respect to the remaining two proffers of mitigation by appellate counsel, drug and alcohol abuse, the State would note that Defendant expressly denied any such abuse. (T. 740). See also S.R. 915. ("The defendant further states if he drank six mixed drinks a week, then that was a lot. He admits to trying marijuana in 1964 but denies using any other illegal substances"). The mental health experts who did examine Defendant, in contrast to appellate counsel's proffered expert who has yet to examine Defendant, stated that Defendant evidenced no "impairment in reasoning and judgment," no symptoms "suggestive of mental illness, or organic dysfunction," and that his "responses to Bender-Gestalt test revealed no errors suggestive of organic impairment or neurologic dysfunction." (S.R. 921-923). The record thus reflects that appellate

counsel's proffer of mitigating evidence is contradicted by the record.

More importantly, however, the State would note that there is no representation by appellate counsel that Defendant has now been advised of the proffered mitigation, has now changed his previous position and has expressed a desire to submit mitigating to a new sentencing jury. Defendant has thus failed to demonstrate any prejudice. Defendant's sentence should be affirmed.

III.

NO ERROR OCCURRED WHERE, AFTER REPEATED ADMONITION, DEFENDANT REFERRED TO MATTERS NOT IN EVIDENCE DURING HIS PENALTY-PHASE CLOSING ARGUMENT. (RESTATED).

The defense contends that the trial court erred in allowing Defendant to deny the applicability of certain mitigating factors during his argument to the jury. The defense's contention is wholly unsupported in fact or law.

The defense's argument is that the trial court erred when Defendant was permitted to argue matters not in evidence. In support of its theory, the defense cites cases where it was held to be improper for the State to argue the existence of facts which had not been established.[29] Here, however, the defense is claiming error because Defendant argued the non-existence of facts in the record. While it is undoubtedly improper to argue facts not in evidence, it is entirely proper to argue that the evidence failed to establish a fact. Valle v. State, 581 So. 2d 40 (Fla. 1991)(state may properly argue that defendant has failed to establish a mitigating factor).

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[29] Bertolotti v. State, 476 So. 2d 130 (Fla. 1985); Oropresa v. State, 555 So. 2d 389 (Fla. 3d DCA 1989); Kirk v. State, 227 So. 2d 40 (Fla. 4th DCA 1969). (B. 42). Interestingly, this court held in Bertolotti that where the comments were not objected to, as here, the appropriate remedy was not reversal, but the sanctioning of the offending attorney. Id., at 133-134.

Defendant stated in his closing that he was not abused as a child, and that he did not have an alcohol or drug problem. Nowhere in this record is there any evidence to the contrary. On this record, had the State made such an argument in rebuttal to a defense assertion of such mitigation, there is no doubt that the argument would have been entirely proper. Valle.

Further, even were the argument of Defendant improper or untrue, the State would submit that the defense is now estopped from claiming error. Defendant was admonished on more than one occasion to confine his comments to the evidence.[30] Yet the defense would have this court adopt a policy which would allow a defendant to stand before the court and lie,[31] and then claim such as error on appeal. The absurdity of such a position is manifest. Surely if a defendant may not claim error when an otherwise impermissible comment is permitted because he or his counsel inadvertently "opened the door," a defendant who has deliberately misled the court may not do so. See, Ferguson;

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30 The state expressed concern prior to opening argument at the penalty phase that Defendant would go into facts not in evidence. Defendant stated he would not. (T. 714).

Prior to closing argument, Defendant was again advised by the court not to present facts not in evidence, and was offered an opportunity to testify if he desired. (T. 725).

During closing, the court again admonished Defendant and again offered to let him testify. (T. 735, 736). The jury was instructed to disregard the argument which was not based on facts in evidence. (T. 737).

31 Assuming arguendo that the defense's unsupported claims that Defendant was lying are accepted.

Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); Dufour v. State, 495 So. 2d 154 (Fla. 1986).

Further, the State would note that although Defendant assumed the role of counsel by proceeding pro se, as a party, his statements are fundamentally different from that of counsel. A statement of a defendant, if relevant, is admissible, regardless of whether the defendant was sworn prior to making the statement. §90.803 (18)(a), Fla. Stat. As such the dangers attendant to counsel arguing facts not in evidence do not exist here, particularly where the statements Defendant made pertained to himself.

Finally, any error is harmless beyond a reasonable doubt. The State would first note that to the extent the defense bases its argument upon the alleged Koon violation, its premise is flawed. As discussed at length, above,[32] Koon is inapplicable to the case at hand. Under Hamblen, a defendant is entitled to waive the presentation of mitigating evidence, which, as also discussed above, Defendant did here. As there was no evidence presented in mitigation,[33] it follows that any improper comment suggesting the lack of mitigation must have been harmless beyond

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32 Pages 54-69, 70-73.

33 See cross-appeal, infra, at pp. 92-95, in which the State argues that the finding of any mitigation was error due to a lack of sufficient record evidence supporting the findings.

a reasonable doubt. DiGuilio. Defendant's sentence should be affirmed.

IV.

THE TRIAL COURT PROPERLY FOUND AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN. (RESTATED).

Defendant's next contention is that the trial court erred in finding pecuniary gain as an aggravating factor. The claim is based on three theories: that the judgment of acquittal on the armed robbery precludes consideration of the theft of the $4100 cash in support of the factor; that contrary to the court's findings, Defendant's statements did not support the existence of the aggravator; and that the taking of the car was merely an afterthought, and thus does not support the circumstance either. All of these contentions are without merit.

Defendant's first theory is that the judgment of acquittal[34] "estopped, under principles of double jeopardy," the trial court from finding that the murder was committed for pecuniary gain.[35] Such an estoppel, however, is unsustainable here.

Defendant relies upon case law[36] which holds that where a defendant is acquitted of robbery, the aggravating factor of

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[34] Although it is precluded from appealing the issue, see, State v. Creighton, 469 So. 2d 735 (Fla. 1985), § 924.07, Fla. Stat., the State would submit that under the evidence adduced at trial, the judgment of acquittal was improvidently granted.

[35] B. 43.

[36] Atkins v. State, 452 So. 2d 529 (Fla. 1984); Delap v. Dugger, 890 F. 2d 285 (11th Cir. 1989); People v. McDonald, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

"committed during a robbery" may not be applied. The commission of the murder during a robbery, however, is a wholly separate aggravating circumstance from commission of murder for pecuniary gain. Thus, the court's finding that the elements of armed robbery were not satisfied by the evidence does not mean that the evidence was insufficient to support the pecuniary gain aggravator.

Indeed, the court in Delap specifically refrained from holding that any particular facts underlying the guilt-phase prosecution would not be admissible in the penalty phase. It held only that the acquittal of felony murder precluded the use of the underlying facts to establish felony murder as an aggravating circumstance. Delap, at 316-317, n. 42. To successfully invoke collateral estoppel, the defense must demonstrate:

> (1) that the issue in question was actually raised and litigated in the prior proceeding;
>
> (2) that the determination was a critical and necessary part of the final judgment in the earlier litigation; and
>
> (3) that the issue in the later proceeding is the same as that involved in the prior action.

Delap, at 314. The State would submit that none of these elements is satisfied here.

The "issue in question" here is whether Defendant had pecuniary gain as a motive for the murder. The State would submit that whether Defendant committed this murder for pecuniary gain was not the question presented in Defendant's motion for judgment of acquittal on the robbery charge, and as such it follows that that issue was neither litigated nor resolved by the court's granting of the judgment of acquittal.

Although the court in Delap rejected the State's argument that it was not collaterally estopped from using felony murder as an aggravating factor because the defendant's motive was to commit a felony, the basis of the court's rejection of that argument was that the aggravating factor sought to be imposed there was the actual commission of a felony, not merely the motive to do so. Delap, at 316, n. 41. However, the entire gravamen of the pecuniary gain aggravating circumstance is the defendant's motive.[37] To prove that the murder was committed for pecuniary gain, the state need not prove that the Defendant actually committed a robbery or theft. See, Zeigler v. State, 580 So. 2d 127, 129 (Fla. 1991)(pecuniary gain factor properly found where "major", but "not the only reason" for murder was to collect insurance benefits); Antone v. State, 382 So. 2d 1205 (Fla. 1980)(pecuniary gain factor proper where Defendant received

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[37] Section 921.141(5)(f), Fla. Stat., provides that it is an aggravating circumstance if:

> (f) The capital felony was committed for pecuniary gain.

at least $750 for share in contract killing). This contrasts with the separate aggravating factor, not pursued here, of committed during a robbery, which would require proof of robbery or attempted robbery.[38] As such, the State would submit that the defense has not satisfied the elements of collateral estoppel.

The defense nevertheless cites cases[39] which it contends hold that an acquittal of robbery charges bars a finding that the murder was committed for pecuniary gain. However, no such black-letter rule can be derived from the cited cases. Rather the rulings in both McCray and James appear to be based upon the fact that pecuniary gain was at best a secondary motive for the killings.

The Arizona Supreme Court's holding in James illustrates the fallacy of Defendant's contention:

> Although we see merit in the analysis of the trial judge in determining that the murder was committed for pecuniary gain, we are reluctant in a case of this nature to adopt an argument . . . which refute[s] the finding of the jury.

James, 685 P.2d, at 1298. The facts in James were set forth in State v. Libberton, 141 Ariz. 132, 685 P.2d 1284 (1984). James, 685 P.2d, at 1296. The evidence showed that the victim, Maya, allegedly made a homosexual advance toward Norton, a friend of

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38 See § 921.141(5)(d), Fla. Stat. This was the factor which was at issue in Delap.

39 McCray v. State, 416 So. 2d 804 (Fla. 1982); State v. James, 141 Ariz. 141, 685 P.2d 1293 (1984).

defendants Libberton and James. Norton declined and told him there was someone in the trailer occupied the defendants who would be interested. Maya entered the trailer. Norton told James that Maya was gay and to get rid of him. James kicked Maya in the crotch and Maya attempted to flee. James went after him and brought him back to the trailer with his nose and mouth bleeding. Norton, James, and Libberton then took turns hitting Maya in the face. Maya pleaded with them to take his credit cards and car and stop hitting him. James, who was armed, did so. Then they drove him two hours to some rural property which James's parents owned. They ordered Maya to the edge of an abandoned mine shaft and attempted to shoot him. The gun failed to fire, and a scuffle ensued. They proceeded to beat Maya with rocks. Ultimately, he was thrown down the shaft while unconscious. Libberton, 685 P.2d, at 1287-1288. The court affirmed the trial court's conclusion that the primary motivation for James's involvement in the killing was the defendants' "arrogation to themselves of the role of executioners to those whose sexual preferences they purport to decry." James, 685 P.2d, at 1299.

Likewise in McCray, the defendant burglarized the victim's unoccupied vehicle, asported the loot, and hid it in the woods. He then returned to the vehicle, in which the victim was now

sitting, and in an act which appears to have been motivated by pure spite[40] killed him.

These cases differ markedly from the case at bar. Here the only possible motive which can be inferred from the evidence is that of pecuniary gain. Every movable item of any significant value known to be in Dortha's possession, i.e., the $4100 in $100 bills, the diamond horseshoe ring, and the car, was taken from the scene. There were no signs that an altercation had taken place. There was no suggestion by anyone, including Defendant, that there was any animosity between Defendant and Dortha. There is nothing in the record from which it could be concluded that Defendant killed her out of spite or purposeless evilness. In short, it would be patently unreasonable to conclude that this killing was committed for any reason other than pecuniary gain.

The trial court also based its finding of the pecuniary gain factor upon Defendant's statements. The defense asserts that the trial court was without basis for this conclusion. The defense's assertion is without merit.

The evidence, including Defendant's own statements, showed that Defendant was a professional "con man". He picked the victim up in a truck stop, and induced her trust. He gave her a

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40 The defendant yelled "This one's for you, mother fucker," as he shot the victim three times in the stomach. McCray, at 805.

false name. He told witnesses that he wanted her to sell her house in Ohio, so they could travel, using his non-existent ranch in Texas as a base. Defendant himself concedes that his purpose in romancing Dortha Cribbs was to fleece her. Although he claimed he himself did not commit the murder,[41] he was quite candid about his intentions:

> So by her being murdered, it cost me more money than anybody because she did not get a chance to get -- to sell the house; therefore, I did not get a chance to steal the money.
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> * * *
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> My theory is to make myself look good to convince her and show my credentials that I was a trucking owner; that I was a rancher from Texas . . .
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> * * *
>
> My contention is, that I made a stupid mistake,[42] and I told this individual she had over $4,000 cash money in her purse. I explained to this individual that the scam was we were going to sell the house, and he might have five or 10,000 in his pocket . . .
>
> * * *
>
> . . . I was calling Peterbilt Truck Company to find out what the price of a brand new truck was because if I did sell this house, I was going to have to

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41 As discussed amply throughout this brief, see particularly Issue I, the evidence of Defendant's guilt was quite strong.

42 The "individual" was the phantom third party who supposedly actually murdered Dortha. However, there was absolutely no evidence that anyone other than Defendant and Dortha was ever in the house. Defendant, of course, believing in honor among theives, has not identified his phantom.

> have a reason to borrow all this money from her.

(T. 899-901). Plainly, these statements support the trial court's conclusion that the murder was committed for pecuniary gain. Antone; Zeigler. Indeed they make it quite clear that Defendant's entire association with Dortha, from start to ugly finish, was motived by nothing but cold, calculated, monetary gain.

The defense's final point concerning this aggravating factor is that it is not supported by Defendant's taking of Dortha's car. This claim is without merit. The taking of the victim's car after the murder will support the aggravator of pecuniary gain. Lambrix v. State, 494 So. 2d 1143 (Fla. 1986). As discussed above, it is quite clear that Defendant's intent, and deed, was to take everything of value from Dortha that he could get his hands on. That included her ring, her $4100 in cash, and her car.

For the foregoing reasons the evidence here amply supports the trial court's finding that the murder was committed for pecuniary gain. It should be upheld and Defendant's sentence should be affirmed.

V.

THE TRIAL COURT PROPERLY APPLIED THE "HEINOUS ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE, WHICH WAS SUPPORTED BY THE EVIDENCE. (RESTATED).

The defense contends that the trial court erred in finding that this murder was heinous, atrocious, and cruel because the medical examiner's testimony as to Dortha's suffering was speculative. A review of the record shows that this contention is without merit.

The evidence reflects that Dortha Cribbs was assaulted in the bedroom of her own home, bound hand and foot, and held face down in a pillow by a man she loved and trusted. Defendant stabbed her twice in the face to the bone, and finally stabbed her through the neck into the back of her mouth, which caused her to bleed to death. A radio and television were playing at full volume so that her screams could not be heard. The medical examiner's testimony was summarized as follows:

> **Q.** Just to recapitulate your testimony so we all have it straight. Is it your testimony that Dortha Cribbs was *probably* bound by her hands and feet when she was stabbed in her left neck causing her to bleed to death between 15 and 30 minutes and for approximately 10 to 15 minutes of that time she was conscious?
>
> **A.** Yes.

(T. 423-424). This evidence amply supports the trial court's finding that this murder was heinous, atrocious and cruel. See, Davis v. State, 604 So. 2d 794, 797 (Fla. 1992)(HAC upheld based upon testimony of medical examiner that it was "unlikely" that victim was rendered immediately unconscious, and that the victim "could have been" conscious for thirty or sixty minutes); Lusk v. State, 446 So. 2d 1038 (Fla. 1984)(evidence that victim died after being stabbed three times in back and bled to death supported HAC); Breedlove v. State, 413 So. 2d 1 (Fla. 1982)(single stab wound sufficient to support HAC where victim not die immediately and was attacked in his own bedroom) Johnston v. State, 497 So. 2d 863 (Fla. 1986)(evidence that elderly woman was stabbed three times in neck in her bed and took three to five minutes to die after knife severed jugular found to support HAC aggravator).

Defendant's contention that the medical examiner's testimony was speculative is refuted by the above-quoted passage. Further, the cases cited by the defense are plainly distinguishable from the situation presented here. They deal with situations where the expert testified outside of his area of expertise,[43] or where the expert's opinion was equivocal or based upon a mere possibility. See, Mills v. Redwing Carriers, 127 So. 2d 453 (Fla. 2d DCA 1961)(witness not have qualifications to offer

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[43] Dr. Nelms was accepted as an expert in pathology without defense objection. (T. 410). No challenge is now made to his qualifications or authority to offer an opinion regarding how long it took Dortha to die.

expert opinion); Husky Industries v. Black, 343 So. 2d 988 (Fla. 4th DCA 1983)(witness not qualified to give opinion; opinion based upon insufficient data; opinion internally inconsistent); Crosby v. Fleming & Sons, 447 So. 2d 347 (Fla. 1st DCA 1984)(upon defense objection, doctor told to confine testimony to test results; doctor nevertheless speculated as to results of tests not conducted); Southern Utilities Co. v. Murdock, 99 Fla. 1086, 128 So. 430 (1930)(no factual basis in hypothetical question for conclusion sought from expert).

Further, medical testimony relating to the death in a homicide case does not have to be couched in terms of reasonable medical certainty. The testimony is competent if the expert bases his opinion on what "could," or "might have" or "probably" happened. The weight to be given the opinion is then a matter for the trier of fact. Delap v. State, 440 So. 2d 1242 (Fla. 1983). Thus, combined with the later testimony quoted above, it is clear that Dr. Nelms's use of the term "guess" at trial was not wild speculation, but his expert opinion as to what occurred. The court, as trier of fact could properly conclude that Dortha suffered for fifteen minutes.[44] See also, Davis (finding of HAC supported by similar expert testimony). Defendant's sentence should be affirmed.

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[44] The State would note that not only was the evidence regarding the length of Dortha's suffering unrefuted, it was not even addressed on cross-examination.

VI.

THE STATE'S CLOSING ARGUMENT TO THE JURY DURING THE PENALTY PHASE DID NOT SUGGEST ANY NON-STATUTORY AGGRAVATING CIRCUMSTANCES. (RESTATED).

The defense contends that the prosecutor erred in purportedly arguing Defendant's "future dangerousness" as a non-statutory aggravating factor. This contention is barred by the defense's failure to object to the comment at the time it was made. Even if the alleged error had been preserved, it is substantively without merit, and in any event, harmless beyond a reasonable doubt. Finally, the defense's suggestion, contained within its sixth argument,[45] that proportionality review cannot be performed in this case, is without merit. This case may be reviewed for proportionality, and the death sentence herein is in fact proportional.

To preserve an allegedly improper prosecutorial comment for review, Defendant must object to the comment and move for a mistrial. Pope v. Wainwright, 496 So. 2d 798 (Fla. 1986); State v. Cumbie, 380 So. 2d 1031 (Fla. 1980); Parker v. State, 456 So. 2d 436 (Fla. 1984); Freeman v. State, 563 So. 2d 73 (Fla. 1990). As noted above, the defense raised no objections during the State's argument in either phase of the trial. As such this claim is waived.

Moreover, even had the issue been preserved, the prosecutor's comments were entirely proper. Where the State is arguing that the aggravating circumstance of under sentence of imprisonment applies, comments such as those complained of here are appropriate. Parker, at 443 (prosecutor's conclusion that "if life meant life" victim would be alive today was "manifestly obvious" and not improper where prosecutor did not argue that defendant would kill again if sentenced to life); Kennedy v. State, 455 So. 2d 351, 354 (Fla. 1984)(comment that prior life sentence had not deterred defendant was relevant to aggravating circumstance of under sentence of imprisonment).

The prosecutor here stayed within the bounds set forth in the above cases. He was discussing the aggravating factor of under sentence of imprisonment and observed that "no form of control . . . was adequate to take care of this defendant. Had he served out his term of years in Kansas at the time, this crime might not have been committed." (T. 729). This comment is nearly identical to the one this court held proper in Parker. There was no implication that Defendant would murder again. As such the comment was not error.

Even could such an implication be derived from the comment, any impropriety was harmless beyond a reasonable doubt. In Freeman, the prosecutor compared the murder at bar there with a

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[45] B. 63, n. 61.

prior murder conviction and asked, "How many times is this going to happen to this defendant?" The Court held that while the comment improperly implied that the defendant would kill again if not put to death, where there was no objection to the comment, the "potential for prejudice [fell] far short of the circumstances which required this Court to reverse for a new sentencing proceeding in Teffeteller v. State, 439 So. 2d 840 (Fla. 1983)."[46] Freeman, at 76. The unobjected-to comment here, if improper at all, was less suggestive than the comment in Freeman and far less problematical than that in Teffeteller. As such, Defendant is not entitled to a new sentencing proceeding.

The defense also complains of a comment which the State made to the judge after the jury recommended imposition of the death sentence. (B. 62, T. 600). However, even if that comment were

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46 In Teffeteller, the prosecutor argued:

> [T]his Defendant will kill again if he is given a chance. I don't see how you can find otherwise.
>
> Don't give him that chance. Don't have to realize after he is paroled and after he kills someone else, perhaps Donald Poteet, perhaps Rick Kuykendall or who knows who he will go after.
>
> * * *
>
> Know that your determination will have a deterring effect on this Defendant and know that it will keep him from being able to kill again. Don't let it happen. Don't let it happen. Don't let Robert Teffeteller kill again.

Id., at 845.

improper, it was not objected to, and was based upon Defendant's own statements that his job was to escape.

Further, the comment was made after the jury's sentencing verdict, and the court specifically stated that its decision was based solely upon the permissible statutory aggravating factors. (R. 240). As such, the comment to the court does no provide a basis for reversal. Finally, under the standard set forth in Freeman, the comment was not such as to require a new sentencing proceeding.

Finally, in a footnote to Point VI of its brief, the defense argues that the alleged invalidity of Defendant's waiver of mitigation evidence, as discussed in Points II and III, precludes the Court from conducting proportionality review. (B. 63, n. 61). Defendant cites no authority whatsoever for this proposition. It is plainly without merit.

As discussed above,[47] Defendant's waiver of the presentation of mitigation evidence was valid. Although not specifically mentioned in the opinions,[48] this court presumably found the death sentences in Hamblen and Pettit proportional, or they would not have been affirmed. See also, Anderson v. State, 574 So. 2d

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47 Pages 54-69, 70-73.

48 Whether discussed in the opinion or not, this court conducts proportionality review of every death sentence. Messer v. State, 439 So. 2d 875 (Fla. 1983); Booker v. State, 441 So. 2d 148 (Fla. 1983).

87 (Fla. 1991)(defendant refused to allow the presentation of mitigation evidence, sentence of death affirmed); Durocher v. State, 604 So. 2d 810 (Fla. 1992)(same). It follows therefore, that the mere fact that Defendant declined to present mitigating evidence does not preclude this court from properly determining the proportionality of the sentence.

The State has located only one case in which this court has previously determined that it was unable to conduct proportionality review: Tillman v. State, 591 So. 2d 167 (Fla. 1991). In Tillman, this court concluded that it was unable to conduct a meaningful proportionality review where the defendant pleaded guilty to first degree murder. As a result of the plea, the only record facts concerning the crime were that the victim was stabbed several times and subsequently bled to death in a hospital. The court concluded that it was unable to conduct a proportionality review of the case with so little evidence concerning the crime.

The State would submit, however, that Tillman is qualitatively different from this case and other mitigation waiver cases. In Tillman, the court's concern was the lack of evidence regarding the crime itself. Here, the nature of the crime and its surrounding circumstances, the information cited as lacking in Tillman, were extensively developed during the guilt phase. In contrast to Tillman, this court has consistently

conducted proportionality review in cases where mitigating evidence was waived or not presented. Hamblen; Pettit; Anderson; Durocher; Hodges v. State, 595 So. 2d (Fla. 1992)(this court rejected claim that sentence was disproportionate because trial court did not consider non-statutory mitigation alleged for the first time on appeal: "we will not fault the trial court for not guessing which mitigators Hodges would argue on appeal"). Here Defendant validly waived the presentation of mitigation evidence and affirmatively asserted the non-existence of mitigation; there is no impediment to conducting a proportionality review.

Moreover, comparison of this crime and its circumstances to other cases reveals that the sentence of death is warranted here. See, e.g., Straight v. State, 397 So. 2d 903 (Fla. 1981)(under sentence of imprisonment; pecuniary gain; heinous, atrocious, cruel; no mitigation); Carter v. State, 576 So. 2d 1291 (Fla. 1989)(under sentence of imprisonment; prior conviction of violent felony; committed during robbery; non-statutory mitigation of a deprived childhood); Hodges v. State, 595 So. 2d 929 (Fla. 1992)(disruption or hindrance of law enforcement; cold, calculated, premeditated; non-statutory mitigation of love, affection, and support for wife and step-son); Rogers v. State, 511 So. 2d 526 (Fla. 1987)(committed during a robbery; prior violent felony conviction; non-statutory mitigation that defendant was good husband, father and provider); Clark v.

State, 613 So. 2d 412 (Fla. 1993)(prior violent felony conviction; pecuniary gain; no mitigation); Johnston v. State, 497 So. 2d 863 (Fla. 1986)(prior violent felony; committed during burglary; heinous, atrocious, cruel; no mitigation); Burr v. State, 466 So. 2d 1051 (Fla. 1985)(robbery; to avoid arrest; cold calculated premeditated; no mitigation); Eutzy v. State, 458 So. 2d 755 (Fla. 1984)(prior violent felony; cold, calculated, premeditated; no mitigation).

Finally, even assuming that the court were to find the defendant's contentions with regard to the pecuniary gain and/or HAC aggravators meritorious, the State would submit that given the extreme paucity of mitigating evidence[49] that there is no likelihood that the trial court would not impose the death penalty on remand, and as such any error with regard to the findings in aggravation is harmless beyond a reasonable doubt. Rogers; Clark; Antone. Defendant's sentence should be affirmed.

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[49] Even if the mitigation found by the trial court is not rejected as urged by the State in its cross-appeal, (see pp. 92-95, infra), the State would submit that the mitigation evidence found by the trial court is so slight (as pointed out in the cross-appeal) as to be virtually non-existent.

CROSS-APPEAL

THE TRIAL COURT ERRED IN FINDING MITIGATING CIRCUMSTANCES, WHERE THE FINDINGS WERE NOT SUPPORTED BY COMPETENT EVIDENCE AND/OR WERE POSITIVELY REFUTED BY THE EVIDENCE.

The trial court found in mitigation that Defendant's parents were divorced when he was fourteen, and that Defendant served in Viet Nam. (R. 240). The State submits that these findings are not supported by the record, and must be rejected.

Although a mitigating circumstance need not be proved beyond a reasonable doubt, it must be reasonably established by the greater weight of the evidence. Duncan v. State, 619 So. 2d 279 (Fla. 1993); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Campbell v. State, 571 So. 2d 415 (Fla. 1990). The trial court's findings will not be disturbed if they are supported by sufficient competent evidence in the record. Duncan; Nibert; Campbell. However, where the conclusions are not supported by sufficient evidence, the will be rejected. Duncan.

Here, the finding that Defendant's parents' divorce was a mitigating circumstance is not supported by the record. The evidence concerning the divorce is found in the PSI, and shows only that it occurred, and that Defendant thereafter chose to live with neither parent. (S.R. 915). However, there is absolutely no evidence that this event, which occurred in 1959, some thirty years prior to the killing of Dortha Cribbs, was in

any way related to the circumstances of that murder. As such, the divorce cannot properly be considered a mitigating factor.

As this court observed in Rogers v. State,[50] the effects produced by childhood traumas have mitigating weight only if they are relevant to the defendant's character, record, or the circumstances of the offense. Id., at 535. In Rogers it was held that the mere notation in a PSI of a childhood event which might be viewed as traumatic is insufficient to establish a mitigating circumstance without evidence tying the fact to the murder or the defendant's conduct. As in Rogers, there was no such evidence here. Further, the divorce here was temporally far removed from the murder of Dortha Cribbs. See, Francis v. State, 529 So. 2d 670, 673 (Fla. 1988)(childhood traumas become less significant as defendant ages); and Francis v. Dugger, 908 F. 2d 696, 703 (11th Cir. 1990)(given "the fact that Francis was thirty one years old when he murdered Titus Waters, evidence of a deprived and abusive childhood is entitled to little, if any mitigating weight"). Contrary to the import of the sentencing order, Defendant characterized his upbringing as normal and appropriate. (T. 739-740). As such, the record shows no relevant relationship between the divorce and the circumstances of the crime or defendant's character. The trial court should

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[50] 511 So. 2d 526 (Fla. 1987).

not have found the divorce to be a mitigating circumstance. Duncan; Rogers.

The record is also devoid of support for the finding of Defendant's military service as a mitigating circumstance. On the contrary, the record shows that Defendant went AWOL numerous times and was ultimately convicted of desertion and given an undesirable discharge. (S.R. 915, 916, 920). There is absolutely no evidence that Defendant in any way distinguished himself or suffered any trauma during his military tenure. See, Rutherford v. State, 545 So. 2d 853, 856 (Fla. 1989)(trial court properly rejected service in Viet Nam as mitigating circumstance where no claim of posttraumatic stress disorder); cf., Masterson v. State, 516 So. 2d 256, 258 (Fla. 1987)(mitigating circumstance supported by record where defendant was wounded in Viet Nam and honorably discharged, suffered from posttraumatic stress disorder, and began taking drugs in Viet Nam where drug problems related to offense). The State would submit that mere service in the Marines, even in Viet Nam, does not constitute a mitigating circumstance in light of Defendant's dismal service record. Nor was there any evidence that his military service resulted in any condition which could be regarded as mitigating. Further, even if a traumatic reaction to his military service twenty-five years before the murder could be speculated to,[51] there was absolutely

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51 The doctors who examined Defendant found him to be devoid of any mental problems other than anti-social tendencies. (S.R. 916, 923).

no evidence that such a reaction was in any way related to defendant's condition or the circumstances of the crime. As such the trial court erred in finding the Defendant's military service to be a mitigating factor. Duncan; Rutherford.

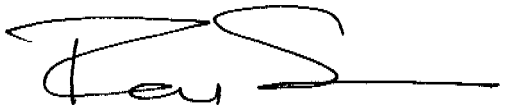
For the foregoing reasons, the trial court's findings of mitigation should be rejected.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

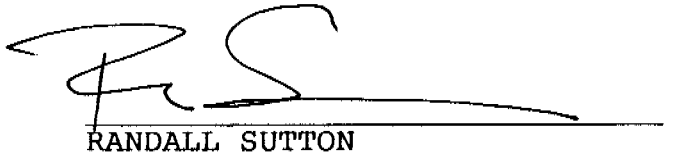
ROBERT A. BUTTERWORTH
Attorney General



RANDALL SUTTON
Assistant Attorney General
Florida Bar No. 0766070
Office of the Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite N921
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was served via U.S. Mail upon **VALERIE JONAS,** Assistant Public Defender, 1320 Northwest 14th Street, Miami, Florida 33125, this 5th day of July, 1994.



RANDALL SUTTON
Assistant Attorney General