IN THE SUPREME COURT OF FLORIDA

BRIAN KEITH GIBSON,

Appellant,

v. Case No. 81,769

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant was charged in a three count indictment with first degree premeditated murder, first degree felony murder (in the perpetration of or attempt to perpetrate a burglary) and burglary (R 9 - 10). Trial by jury resulted in guilty verdicts on all three counts (R 155 - 156). Following a penalty phase the jury recommended death by a 7 - 5 vote (R 157). The trial court imposed a sentence of death, finding four aggravators and no mitigators. This appeal follows.

(A) The Guilt Phase --

Jay Odom, an employee of Clewiston Fertilizer was working in the early morning hours of September 30, 1991, with DeWayne Bryant, Matt Street and appellant Brian Gibson (Tr 1085). They started on the fertilizer load at 4:00 a.m., it was weighed full at 4:43 and appellant weighed the truck that day (Tr 1088 - 89). The next phone call order to mix another load of fertilizer occurred at 6:30 and during that hour and a half time period he did not see Gibson (Tr 1090). Gibson could not be located and the load was made without him. Appellant then arrived between 7:15 and 7:30; he had a Band-Aid on his face and a bruise under his eye (Tr 1091 - 93). He had not noticed injuries earlier that morning; Gibson explained he was sleeping in his truck and hit his head on the door handle when he woke up. Appellant complained about his stomach and wanted to go home. Odom gave permission (Tr 1093 - 94). Appellant returned at 9:00. Gibson normally wore a necklace, a gold chain with an Indian head emblem

or charm (Tr 1095 - 96). Appellant did not wear Exhibits 32 or 33 after September 30 (Tr 1096 - 97). It was unusual for Gibson to leave the plant without telling someone (Tr 1103).

DeWayne Bryant similarly testified that he and Gibson were at work at four in the morning (Tr 1107), that he did not see Gibson for the second load (Tr 1115). He saw appellant after Jay got the truck at 6:56 (Tr 1117). Appellant had cowboy rubber boots issued by the plant, with a square or diamond tread on the bottom. (Tr 1118). Appellant looked like he'd been in a fight with scratches on his face which were not present earlier in the morning (Tr 1118 - 19). When appellant returned to work -- after going home in the morning -- he asked Bryant if he had seen a Mexican running from the street behind the house where the girl was murdered. Lupita Luevano on earlier days could be seen from the plant working in her yard (Tr 1123 - 25). Appellant had indicated she looked pretty good (Tr 1125). The next day, Tuesday, Bryant learned of the murder. Appellant told him that a woman was raped and killed (Tr 1126 - 27). This witness also described Gibson's necklace (Tr 1127 - 28). After Bryant talked to deputies Gibson told him his chain was at his home; but he did not wear it after September 30 (Tr 1130). The girl's house was about 150 yards away (Tr 1137).

Matthew Street, another coworker, gave similar testimony about the scratches on Gibson's face and that he seemed upset (Tr 1145). On the next day appellant told him he heard the girl had been raped and shot. Appellant acted normally until deputies came around asking questions (Tr 1148 - 49).

Kimberly Murphy, a dispatcher/bookkeeper at the plant, identified appellant's time card and exhibits 34, 36 and 70 were introduced into evidence (Tr 1159). She saw appellant off the plant property walking about the canal when she arrived between 7:10 and 7:15 (Tr 1159 - 61).

Clifford Watts saw appellant around seven; it looked like he'd been fighting with scratches on his face (Tr 1172 - 73). Alfonso Bynes saw appellant off the plant property walking towards it; he had scratches (Tr 1178 - 79). Albert Young saw appellant between 10:00 and 11:00 a.m. and he had scratches on his face that were fresh (Tr 1188 - 89). Appellant explained that he and his wife had an argument (Tr 1189). Vernon Kirkland noticed scratches on appellant at lunchtime and appellant explained that he had fallen (Tr 1195 - 96).

Randy Perryman, an employee at Super Stop, testified that appellant entered his store about 5:30 a.m. on September 30, and purchased a bottle of Sprite, as depicted in photo Exhibit 11 (Tr 1203 - 050. Lupita Luevano worked at the store (Tr 1207). She did not come to work that day (Tr 1210).

Tracey White, a neighbor to Lupita Luevano and Rick Murrish heard a short blood curdling scream at about 6:30 or 6:45 a.m. (Tr 1215). He did not see anything and attributed it to an eighteen wheeler stopping fast (Tr 1217).

Roxanne Gibson, appellant's wife, now lives in Mississippi (Tr 1225). Appellant returned home from work the morning of September 30. He got into bed complaining of a stomach ache (Tr

1228 - 29). He stayed 30 - 45 minutes and said he was going back to work. He had a scratch on his face (Tr 1230). Appellant told his wife the dog caused the scratch, then the vise grips in the truck caused it (Tr 1231). She knew Lupita Luevano from work; they were acquaintances (Tr 1232 - 33). When she talked to her husband the next day he said he had not been to the victim's house but said, "if they have my fingerprints wouldn't they come and get me" (Tr 1235). Appellant told her he had seen a Spanish man running, holding his stomach, from the victim's house (Tr 1236). She identified the gold chain and Indian head charm (Exhibits 32 & 33) as belonging to her husband (Tr 1236 - 39). She has not seen appellant wear it after September 30. She could not find it at home (Tr 1240 - 41). She and appellant talked about moving to Mississippi previously and he suggested to her that they leave now but she told him they had to wait (Tr 1244 - 45). While married appellant attempted anal intercourse with her (Tr 1245, 1249); she did not let him and he did not force her to engage in this act (Tr 1264). Since appellant's arrest she learned that he was having an affair with a woman named Tracy (Tr 1258). The trial court sustained an objection to the defense asking the witness if she had been told by others that her husband was having an affair with Miss Luevano; it was anticipated the answer would be that appellant told her in-laws a

year after the offense he was having an affair with the victim (Tr 1258 - 1262).[1]

The defense was permitted to elicit that the witness has learned that her husband was having an affair with Tracy and that the witness has, since appellant's arrest started a relationship in Mississippi with someone that has resulted in a two month old child (Tr 1263).

Ramon Iglesias, the manager at a Super Stop, testified that victim Lupita Luevano had been an employee for five or six months, she was scheduled to work the afternoon shift and he tried to contact her to come in early for work (Tr 1266 -1268). The telephone effort was unsuccessful; he drove to her house and noticed her car parked in the driveway. He knocked at the door but no one answered at 8:30. He returned again at 3:30 but there was still no answer (Tr 1268 -72). The next time he went there police had already arrived (Tr 1273).

The victim's boyfriend Richard Murrish was living with the victim (Tr 1277). The witness described the house. The screen on the window in Exhibit 17 had not been cut (Tr 1284, R 83). The towel would not normally be left on the bed (Tr 1285). Weights and barbells were not kept in the master bedroom (Tr 1287).

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[1] The defense sought to inquire into the bias or motive for the witness to testify (Tr 1259).

The ladder and pail near the window depicted in Exhibit 9 had not previously been there (Tr 1294, R 78). There had not been a full Sprite bottle laying underneath the bedroom window (Tr 1294). He and the victim had engaged in sexual intercourse the night before she was murdered, had not used a condom and did not engage in anal intercourse (Tr 1296 - 97). He used a washcloth to clean up and did not use a pair of white shorts to clean up (Tr 1297). He awoke at 5:30 or 6:00 and went to work. Lupita put on a night shirt with "sun your buns" wording on it (Tr 1299). He left for work about 6:15 (Tr 1300). She locked the doors behind him when he left (Tr 1302). He arrived home from work at 6:05, became concerned when he saw her car present (Tr 1304). He entered the house and found her laying on the bed face down. The bedroom was a wreck and there was blood on the walls and floor (Tr 1307 - 08). A barbell was next to her body, normally, it would be kept in the second bedroom (Tr 1310). Murrish left the bedroom and asked a neighbor if anyone had been there. He didn't have a telephone so he went to the Sheriff's Department two blocks away (Tr 1315). He did not know appellant Gibson. Exhibits 32 and 33, the gold chain and Indian head charm were not owned by either him or Lupita (Tr 1316).

Investigator Jeri Nuzzo testified someone came into the office and said Lupita was dead (Tr 1337). Nuzzo know the victim as a casual acquaintance (Tr 1338). There was a commotion in the hallway and Nuzzo saw Murrish (Tr 1340). Nuzzo described entering the house so as not to contaminate the scene (Tr 1343).

There appeared to be a shirt tied from the front of the victim's face to the back and tied from the back. Around the buttocks area the underwear on her were ripped from the crotch up around her waist (Tr 1352). A shotgun was protruding from the right side of the bed (Tr 1353). A bottle of Sprite, unopened, was found underneath the window in the back, Exhibit 11 (Tr 1356, R 80). The screen on the window was pushed in (Tr 1359).

Paramedic Jay Lacey found no electrical activity in the victim's body (Tr 1384). Sergeant Joseph Notarian testified as to his observations at the scene and taped up the area (Tr 1390 - 95).

Investigator Pittman videotaped the crime scene, Exhibit 30 (Tr 1401 - 02). There were smudges along the window that looked like latent fingerprints; the screen had been cut or torn leading into the bedroom. A small step ladder and cement block was below the window. A diamond shape or triangle print was beside the ladder (Tr 1405). Investigator Campbell picked up the charm, Exhibit 33, from the crime scene (Tr 1410). Pittman learned that appellant had furnished information about seeing a Spanish male in the area and that Gibson had disappeared from work for a period of time that day (Tr 1418). The boots furnished by the plant for its workers was similar to the design seen on the ground at the house (Tr 1419). He assisted in the search of the residence of Brian and Roxanne Gibson on October 8 (Tr 1422). Several identifications of the necklace and charm were made by coworkers Odom, Bryant and Murphy (Tr 1424).

William Tucker, crime lab analyst with F.D.L.E. and expert in latent print identification also videotaped the crime scene, Exhibit 31 (Tr 1461, 1467). He described what the crime scene depicted (Tr 1468 - 1475). A towel, Exhibit 75, was introduced into evidence (Tr 1483). He observed what appeared to be seminal fluid both in the anus of the victim as well as her vagina; swabbings of these areas were taken as well as hairs and fibers (Tr 1491). Exhibit 42, a white sleeveless shirt found underneath the victim and Exhibit 43, a shirt found around the wrist were introduced (Tr 1499 - 1501). Tucker located the gold necklace laying on the bed by the victim (Tr 1509 - 10). Exhibit 40, was a shirt tied around the neck of the victim (Tr 1538 - 39). A t-shirt around the chest of the victim Exhibit 39, was introduced (Tr 1541).

Bill Chamness was present when blood and saliva samples were taken from Rich Murrish (Tr 1592).

Tracy Grass began again seeing appellant in 1990 although appellant was married (Tr 1597). They had a sexual relationship (Tr 1599). Appellant wanted to have anal intercourse with her (Tr 1603), but she was not interested (Tr 1611).

Grass testified that she gave appellant the Indian head charm as a gift for St. Valentine's day, Exhibit 33 (Tr 1604 - 05). After September 30, she saw appellant had scratches on his face (Tr 1607), and he subsequently did not have the chain and charm; he said he had lost it (Tr 1608 -09). Appellant told her he heard rigor mortis had set in and they couldn't test the blood after that (Tr 1609).

Larry Burmeister, a medical technologist drew blood on Rick Murrish, Exhibit 53 (Tr 1615). Nurse Manager Oliver Miracle drew blood from appellant Gibson (Tr 1621), Exhibit 51.

Dean Cassels investigated the Luevano homicide at 839 East Trinidad Street in Clewiston (Tr 1633). He described the scene -- the room was in disarray, the victim was lying on the bed, blood spatters were on the wall (Tr 1635). He spoke to Murrish who was crying, scared and upset that he had come home and found his girlfriend murdered (Tr 1637). Details of the crime were not released (Tr 1638). Cassels received information from Ramon Iglesias about his three visits (Tr 1640). An anonymous call to the police related that a Mexican male was running from the scene (Tr 1644), but they were able to find no leads (Tr 1645). Some Mexicans were checked and eliminated as suspects upon furnishing blood and hair samples (Tr 1646). The caller regarding the Mexican male apparently was the father of Matt Street, a coworker of appellant (Tr 1646). The boots at the fertilizer plant seemed to have the same dimple tread as the impression left at the crime scene (Tr 1648). After Miranda warnings appellant gave a taped statement on October 3, 1991 (Tr 1660 - 1702), wherein Gibson contended that he saw an Hispanic guy running and holding his stomach. Gibson claimed that he did not know the girl who was killed but had seen her where she worked and from the fertilizer plant where he worked (Tr 1672). Blood samples were taken from appellant with his consent (Tr 1701, 1706). Cassels noticed scratches under his eye and on his

chin (Tr 1707). Appellant claimed his dog injured him (Tr 1709). The chain and charm found at the crime scene which did not belong to Murrish or the victim were shown to employees at the plant. Gibson was recontacted on October 14 (Tr 1714). He came to the station to talk about rumors of the chain and charm; he said his was at home. Roxanne Gibson was able to identify the chain and charm as appellant's (Tr 1716).

Dr. Wallace Graves performed the autopsy on Lupita Luevano (Tr 1778). The victim had suffered depressed fractures of the frontal portions of the skull; one eye was so distorted the eyeball was displaced. Both cheek bones were fractured, the jaw bone at the bottom was fractured; the roof of the mouth was fractured; the bones were pushed in so badly on her skull that brain tissue was coming out of the fracture sites (Tr 1797). The severity and overlapping of the injuries were so extensive that it was impossible to give an accurate number of blows struck to the face, very possibly more than six. To cause these types of injuries a fairly heavy blunt object would have to be used, such as the barbell depicted in Exhibit 46 (Tr 1799 - 1800). There was much bleeding from the injuries; the victim swallowed about a pint of blood into her stomach (Tr 1803). Considerable force was used to inflict the injuries (Tr 1804). There were a number of bruises on the back of the neck (Tr 1806). There was a tear or laceration in the anus, consistent with insertion by a penis or finger, caused at, or about the time of death (Tr 1808).

The cause of death was blunt injuries to the face and skull; the witness could not exclude strangulation as a possible contributing factor (Tr 1810). The tightly wrapped shirt around the neck was consistent with the role played by strangulation (Tr 1811). After the fatal blow she would have lived anywhere from a few minutes up to perhaps twenty to thirty minutes (Tr 1812). Sperm was present in the vaginal smear; the witness did not locate sperm in the anal area (Tr 1813). None of the injuries would have caused instantaneous death (Tr 1817).

(The prosecutor proffered the testimony of Dean Cassells and investigator Edward Boone regarding appellant's statement on October 16 and the court ruled there were equivocal responses by appellant as to his waiver and sustained the defense objection - Tr 1838 - 1868).

Terry Campbell, an investigator at the scene, observed that a nightgown looked like it had either been wound or tied around her hands. A barbell was close to her left leg (T 1877). The screen on the window was open twelve to sixteen inches (Tr 1882). Appellant had facial scratch marks and what appeared to be a tooth indentation on his hand (Tr 1911). He sent Exhibits 59, 60 and 61 to the F.B.I. (Tr 1901).

Deborah Lightfoot, supervisor of the microanalysis unit at F.D.L.E. and expert in hair and fiber identification (Tr 1946 - 48) testified that a twelve and one-quarter inch hair found on Gibson's pant leg, Exhibit 57, had all of the microscopic characteristics that were found in the known standards from Miss Luevano, Exhibit 44 (Tr 1967).

Diana Weiss, the victim's sister testified that Exhibits 32 and 33 the gold chain and Indian head charm, did not belong to Lupita (Tr 1979).

Billie Shumway, supervisor of serology and microanalysis sections of the F.D.L.E. Tampa Regional Crime Laboratory (Tr 1981), testified that Exhibit 50 (Ms. Luevano's blood sample) was type "O", secretor with a P.G.M. subtype of one (Tr 1993 - 94).

Exhibit 53, a blood sample from Rick Murrish, revealed blood group "O" nonsecretor with a different P.G.M. subtype than the victim. Exhibit 51, the blood sample from appellant Gibson was group "O" secretor and his P.G.M. subtype was also a one plus (like Murrish) (Tr 1994). On Exhibit 63, the bedsheet contained three areas consistent with having originated from a blood group "O" secretor. Gibson was an "O" secretor (Tr 2002). Exhibit 38 -- white shorts found on the bed contained semen and sperm located in a manner consistent with someone cleaning off or ejaculating into the shorts but not merely wearing the shorts (Tr 2004 - 2006). The blood subtyping was consistent with an "O" secretor; both Gibson and Luevano were type "O" secretors. But his sample and not hers would contain semen or sperm (Tr 2006 - 2007). If Murrish did not touch the white shorts the analysis would be consistent with Gibson using the shorts to ejaculate or clean off (Tr 2035).

Shirley Ziegler, crime lab analyst for the F.D.L.E. crime lab in Jacksonville, assigned to the serology and D.N.A. section was recognized by the court as an expert (Tr 2050). Exhibit 64,

a composite of D.N.A. results and Exhibit 48, vaginal swabbings from the victim were introduced into evidence (Tr 2067). A sample from the shorts had bands which cannot be accounted for by either Murrish's or the victim's blood, but fall in the same place as the blood of appellant Gibson (Tr 2085). She got a reading on Gibson on both the shorts and the vaginal swabs (Tr 2089 - 90). The probability of selecting another individual at random from the Caucasian population that would have a matching profile as his was approximately 1 in 350,000 (Tr 2095).

Alfred J. Lowe, formerly of the F.B.I., was accepted by the court as an expert in latent fingerprint and palm print analysis (Tr 2130). Exhibits 62, 81 and 82 were Gibson's fingerprints (Tr 2136). Exhibits 59, 60, and 61 sidings from the victim's residence contained appellant's fingerprints (Tr 2145 - 54).

(B) The penalty phase --

Corrections officer William Glynn identified Exhibit 67, the fingerprint card of appellant's prints he took on October 16, 1991 (p. 6 - 9). F.D.L.E. fingerprint expert William Tucker testified the prints on the prior judgment and sentence form were those of Gibson (p. 14 - 14). Gibson pled guilty to second degree murder on May 14, 1984 and the sentence was seventeen years with credit for gain time of 692 days (p. 15).

Investigator Dean Cassles testified that he responded to the Thompson homicide in 1982. The victim was laying on the floor (p. 22 - 23). The witness identified various photos of the scene

(p. 33, 34, 35, 37, 40). The phone cord had been cut and there were holes in the screen gnashed by some type of instrument. Gibson had been out to sell Thompson a snake (p. 42 - 43). Thompson's Ford pickup truck was missing (p. 43). The vehicle was located at appellant's residence (p. 44). The truck was painted over (p. 46). Gibson originally stated that he purchased the truck and after charged with first degree murder made a comment that he was defending himself from the victim's sexual advances (p. 47 - 50).

Max Luevano, the victim's brother described the loss of his sister and the impact on his life (she wanted to become a law enforcement officer and he decided to take her place) (p. 66). The entire family has been affected, leaving a lot of sleepless nights (p. 68).

Angie Luevano, the victim's older sister, testified that all the sisters were very close (p. 72) and her loss has made it difficult for Angie to trust anyone (p. 73).

Dr. Robert Schultz performed the 1982 autopsy on Lester Thompson and identified various photos (p. 81, 83, 90, 93, 97). The victim Lester Thompson had sustained multiple head trauma. Blood soaked the shirt and there were wounds on the torso (p. 82). The witness described the wounds to the head, consistent with being caused by a cane knife or machete type instrument. He also described other wounds to the body. Mr. Thompson was struck about thirty times with the weapon and death resulted from severe hemorrhage and trauma to the brain, in turn damaging the brain stem causing death (p. 83 - 98).

Guedalupe Rendon, the mother of victim Lupita Luevano, testified that her daughter's murder totally destroyed the family's lives (p. 106). Lupita's sister Diana Weiss described her loss; now she looks over her shoulders to see who is behind her, drives around the house to make sure the windows not broken into, checks the home of family members if they don't answer the phone (p. 110 - 114).

Defense witness Mark Campbell, a correctional officer, stated that appellant was not a disciplinary problem in jail; but he had been in a cell by himself without much interaction with other inmates (p. 119 - 120). Corrections officer Lester Grant provided mental health medication to Gibson (p. 124). Gibson had not caused him problems (p. 125), but he can't leave his cell to cause a disturbance with the general population. He eats by himself (p. 125 - 126). Officer Lavoyea Henry and Mary Coronado gave similar testimony (p. 128 - 139). Coworkers at the fertilizer company Varnon Kirkland, Jay Odom, Dwayne Bryant, Albert Young, Clifford Watts, and Alphonso Bynes (p. 141 - 169) testified they did not have problems with Gibson.

Appellant's stepmother Billie Ruth Gibson met her husband in 1986 when appellant was in prison (p. 173). The natural mother abandoned him when he was eight years old (p. 175). Appellant's grades in school were fairly good but started going downhill; he dropped out of school and married at age sixteen (p. 177 - 178). Appellant had a son. He was not still married when the witness met him in prison (p. 178). Appellant's natural mother and

future wife Roxanne (Rocket) Gibson brought him from prison to Billie Ruth's house where he stayed for six weeks (p. 179). Appellant wasn't real happy about the counseling she set up (p. 181). Appellant moved out and in with Rocket (p. 184). Rocket had a baby (Victor) while married to appellant. Appellant lies (p. 185 - 186). Appellant did not take up a lot of time with his baby son (p. 187). Appellant and his brother "move in different circles entirely" (p. 191). She wasn't aware of things in appellant's past but relied on what others told her (p. 194). She learned appellant was having an affair while married to Rocket (p. 196). Appellant never complained of hallucinations or nightmares; appellant was silent (p. 198). She could feel hostility coming from him occasionally (p. 200). Appellant talks more to his father now, "but he tells it the way he thinks his dad would like to hear it" (p. 203). Appellant's affair was with Tracy Grass (p. 204).

Appellant's father William Gibson complained that appellant's mother drank and moved out (p. 247). She took the oldest son Kevin but left appellant at home (p. 248). Appellant was about eighteen years old when he married (p. 251). When his mother returned from Australia, appellant moved in with her but it didn't work out (p. 253). When he had conversations with appellant, Mr. Gibson "couldn't tell if he was really telling the truth or not" (p. 254). Appellant threatened to kill himself (p. 256), but he calmed down (p. 257). Appellant was in prison for seven years for murder and released at about age twenty-four (p.

259) He stopped going to church and started drinking and running abound (p. 260). Appellant does not confide in him (p. 262). He did not tell the witness of his affair with Tracy Grass (p. 263). At the jail appellant told him he was having an affair with the victim, that she pulled a gun on him during an argument and he didn't remember what happened (p. 264 - 65). Appellant never described having hallucinations (p. 269). He thought his son would lie to make the situation sound better to him (p. 274).

Appellant initially denied knowing the victim Lupita but subsequently told his father of the alleged affair only after the discovery of the DNA results (p. 274 - 275).

Dr. Robert Silver, a clinical psychologist opined that appellant had an intermittent explosive disorder (p. 284). Appellant reported having blackouts to him (p. 286). He had a below average I.Q. (p. 289). Silver also diagnosed a borderline personality (p. 294). On cross-examination the witness stated that his 1982 evaluation lasted approximately three and one-half hours, two and one-half of which was spent on administering tests, that he did not verify what appellant told him in the family history, and had the impression appellant was over reporting (p. 300). Silver could not have made the explosive disorder judgment without the information appellant furnished (p. 301). If appellant had assaulted someone after losing his temper he would have become aware of it as soon as he calmed down. It wouldn't be intermittent explosive disorder if he claimed he didn't remember what happened (p. 302 - 03). The probability of

psychological therapy being helpful is nil (p. 303). Some of the things appellant told him in the 1982 history were different from the 1992 history. Silver did not believe he suffered from hallucinations (p. 304). He admitted that his earlier 1982 explosive personality test "does not really fit Mr. Gibson with regard to the present charges" (p. 306). Since these "explosions" occurred in civilian life when someone commits murder but that he behaved well in jail, Silver conceded that Gibson may have more control over this than what he's letting on (p. 307). Gibson wanted to tell the witness every difficulty in which he thought he would look psychologically unhealthy (p. 313).

Psychiatrist Dr. Robert Wald opined that in 1982 appellant was of dull to normal intelligence, had intermittent explosive personality disorder, depressive reaction and history of alcohol and drug abuse (p. 320). In 1992 he appeared to be in basically the same condition (p. 326). On cross-examination the witness agreed that the 1982 EEG proved to be negative for any type of brain dysfunction, his I.Q. in 1982 was between 80 and 85 (p. 332). There was no evidence of hallucinations and he suffered no psychiatric thought disorders (p. 332). Wald's testing did not confirm appellant's stated history of blackouts and Wald did not verify Gibson's self history (p. 333). It was unusual if the only two blackouts appellant had occurred during his commission of two murders (p. 333).

Wald could not determine whether appellant really had auditory hallucinations; there was no evidence of visual or audio hallucinations. The intermittent personality disorder is not a common disorder and there is no cure for it (p. 334). His depressive reaction is normally found when someone faces difficult circumstances or the loss of freedom such as current incarceration (p. 335) Appellant gave details of what happened on the day of September 30, but he did not relate that he knew the victim Lupita Luevano, he never indicated having an affair with her and that's why he was at her house; he claimed not to recall anything about the murder (p. 337). There is no scientific information to base the analysis on that Gibson did in fact have a blackout. There are no major memory gaps except where appellant claims to have blacked out when he killed someone (p. 338). It is possible Gibson falsified or exaggerated information; Wald did not test for falsification. Appellant was sane and competent at the time of the offense.

The likelihood of someone suffering from three blackouts, remembering cleaning things up -- the likelihood of that happening and not remembering is relatively low (p. 345)

Appellant elected not to testify (p. 348). The jury recommended a sentence of death by a 7 to 5 vote (p. 398 - 401).

SUMMARY OF THE ARGUMENT

I. The failure of the sentencing judge to file a separate written document finding the appropriate aggravating and mitigating circumstances is not reversible error. The trial court's oral articulation contemporaneously recorded by the court reporter satisfies the writing requirement of F.S. 1.01 and makes meaningful appellate review possible. Any language to the contrary in Grossman v. State, 525 So. 2d 833 (Fla. 1988) should be overruled.

II. The departure sentence for the burglary count should be affirmed since a capital felony which cannot be scored as an additional offense at conviction may serve as a clear and convincing reason for departure. Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988).

III. The trial court properly admitted evidence from appellant's wife and appellant's girlfriend that Gibson attempted anal intercourse with them. The testimony was relevant as it helped explain Lupita Luevano's murderer's identity and state of mind. The testimony is not evidence of another crime. See Malloy v. State, 382 So. 2d 1190 (Fla. 1979).

IV. Appellant was not denied the opportunity to cross examine a witness as to bias. The right of cross examination is not unlimited and the trial court merely refused to permit a single question. The witness was otherwise cross examined to determine bias. In any event, the witness provided only cumulative testimony and any error in this regard is harmless beyond a reasonable doubt.

V. Appellant was not denied the right to be present and to assist counsel in jury selection. The claim is both procedurally barred and meritless.

VI. The lower court did not abuse its discretion in permitting the introduction at penalty phase of photos of homicide victim Lester Thompson. They assisted the testimony of Dr. Schultz in explaining the wounds and were relevant to establish a prior felony conviction of force and violence and to show Gibson's modus operandi in his homicides.

VII. The trial court properly admitted victim impact testimony in the penalty phase. F.S. 921.141(7) (1992). Appellant's current argument is procedurally barred and it is meritless.

VIII. The lower court did not err in finding the "CCP" and "HAC" aggravating factors. Appellant planned his attack on Ms. Luevano for some time and selected the moment when she would be home alone early in the morning. Even if the "CCP" factor were to be found inapplicable, any such error is harmless in light of the three remaining valid aggravators and the weak mitigation proffered. The instant killing qualifies as HAC in light of the multiple blows to the victim's head with a barbell, to say nothing of his sexual assault.

IX. The "HAC" instruction was not vague or overbroad; it has been approved by this Court in Taylor v. State, 630 So. 2d 1038 (Fla. 1993) and Hall v. State, 614 So. 2d 473 (Fla. 1993). Appellant is barred from challenging the Constitutional validity

of the CCP factor since he only complained below of its evidentiary insufficiency.

X. The trial court did not err in its consideration of mitigating circumstances; it correctly gave it little weight.

ARGUMENT

ISSUE I

WHETHER THE FAILURE TO FILE SEPARATE WRITTEN FINDINGS OF FACT IN SUPPORT OF THE DEATH PENALTY CONSTITUTES REVERSIBLE ERROR.

On April 13, 1993, the Honorable Jay Rosman, Circuit Judge in the Twentieth Judicial Circuit orally articulated and the court reporter transcribed the following findings:

> "After approximately three weeks of trial, two days of consideration of penalty phase by the jury, having ordered the presentence investigation report, reviewed it, and given great reflection to the sentence in this case, I'm prepared to pronounce sentence in this matter.
>
> In reviewing the aggravating circumstances as has been enumerated, I do find that there are aggravating circumstances; the first being that the defendant has been previously convicted of a felony involving the use of violence to another person. That is an aggravating circumstance as set out by law. That is an aggravating circumstance. I find the State of Florida has proven that aggravating circumstance beyond a reasonable doubt, as you've been previously convicted of second degree murder. And therefore, that's one aggravating circumstance.
>
> I do find a second aggravating circumstance. That is, that this crime was committed while engaged in the commission of a burglary. By law that is considered to be an aggravating circumstance. The jury having returned its verdict of guilt as to the burglary charge, the state has proven a second aggravating circumstance beyond a reasonable doubt.
>
> Third aggravating circumstance the state has presented has been that the crime was heinous, atrocious or cruel. And based upon the facts in this case, the facts that we've heard concerning the manner in which this murder took place, I do find that that third

aggravating circumstance has been proven beyond a reasonable doubt.

With respect to the fourth aggravating circumstance that the state has presented and argued, that the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, again, based upon the facts that the jury considered in this, and this court has considered, this court finds that there was premeditation. The planned watching of the victim in this case, I find it does rise to that level of an aggravating circumstance.

I find four aggravating circumstances have been proven beyond a reasonable doubt in this case in my considerations with respect to the aggravating circumstances as compared with mitigating circumstances. That has been my focus in proceeding with the sentencing today, as I'm sure the jury proceeded with in their deliberations.

With respect to mitigating circumstances, I do not find that the age of Mr. Gibson at the time of the crime is an aggravating circumstance.

As far as the mitigating circumstances, that this crime was committed while you were under the influence of extreme mental or emotional disturbance, I'm not convinced that that was the case based upon the testimony I heard from the psychologist and psychiatrists, that at the time that that was in fact the case.

The capacity of the defendant to appreciate the criminality of his conduct, to conform his conduct to the requirements of law were substantially impaired. I'm also not convinced that that was in fact the case at the time of this crime.

I have taken into consideration your background, what has occurred previously. I have taken that into consideration as far as the sentence here today. I have also taken into consideration, as I'm required by law, the recommendation of the jury. And the jury

did in fact recommend the death penalty. I'm required to give that great weight and I will do so.

As far as the psychologist and psychiatrists being presented on your behalf for mitigating circumstances, I listened intently, as I'm sure the jury did, to their presentation.

Very clearly they indicated that you were in fact sane at the time of the crime, that you are in fact competent to stand trial. As far as their testimony is concerned, they testified that you become extremely violent upon confrontation, upon your attempts to resolve conflict.

They also presented testimony that there was over reporting, and I took that into consideration. That perhaps you were trying to grasp for a defense in presenting to the psychologists or psychiatrists the best possible presentation of a defense in your case.

I considered the fact that years earlier your IQ was higher, yet it fell in front of these individuals. And I considered that in terms of your attempting to manipulate your defense in this case.

The psychologist and psychiatrists present an individual that does evoke extreme violence upon different situations. And I think it's -- I think it's presented to all of us, that we all face conflict and confrontation, and we all become angry at various points of time. It's another question as far as how we redirect that, as far as anger is concerned. As far as you ability to deal with conflict and confrontation, on two occasions you have become extremely violent and caused death.

The crime in this case, after reviewing the photographs in this case, it would be mild to use the term grotesque and violent. I have yet to have seen more grotesque photographs showing what your violence did to an individual.

You broke into Lupita Luevano's home. You raped her. You sodomized her by having anal intercourse with her. You bound her, she was choked. And you beat her about her face.

According to Dr. Graves, you broke her cheekbones, you broke her jaw, you broke the upper plate of her mouth. You displaced an eye. And you crushed her skull to the point that brain matter was showing. She was choking on her own blood.

We can only imagine with fear and terror what she was going through the last minutes of her life. The tremendous fear, tremendous terror and the tremendous pain. You invaded the privacy of her home. You invaded the privacy of her body. The pictures displayed how you destroyed her God given beauty. This young woman was a very beautiful twenty-year-old person.

There was a person that was taken from us, but you took more than just a person. You took a daughter, you took a sister, you took a friend, and you took a future wife. You took a future mother. She was more than just a person. She meant a lot to many, many people.

In consideration and reflection of this case, it simply wasn't a murder that you committed. It was a desecration of life itself in review of those photographs.

You took Lupita Luevano to her grave, and many hearts from this community with her. And it's the goal of this sentence that you not take another.

In the past you've killed an elderly person. And it is a frightening irony that you had done so in a similar fashion, that is, approximately thirty blows the testimony has been, to an elderly individual through the use of a knife, a machete, approximately thirty blows to the head. Very similar to the fashion of the murder in the case here before us, Lupita Luevano.

> I'm not convinced that the safety of the community will be protected with any other sentence that is to be imposed today. I have considered the aggravating circumstances presented in the case, and determined that sufficient aggravating circumstances do exist, that they were proven beyond a reasonable doubt. And that there are insufficient mitigating circumstances to outweigh the aggravating circumstances in this case.
>
> There being no legal cause as to why judgment and sentence should not be pronounced, the court adjudges that you are guilty of the crime of first degree murder. Also with respect to the burglary charge, I'm going to order based upon what has been presented, that you receive a consecutive life sentence.
>
> It is the sentence of this court based upon my findings, that you be taken into custody of the department of corrections, and at their appointed place and time, be put to death. You have an automatic appeal to the supreme court of Florida on the judgment of guilt and the sentence that this court has imposed.
>
> (emphasis supplied)
> (Vol. XVI, pp. 13 - 19)

Appellant contends that the line of cases beginning with Van Royal v. State, 497 So.2d 625 (Fla. 1986) and Grossman v. State, 525 So. 2d 833 (Fla. 1988) requires that the lower court's failure to file a separate written sentencing order requires reduction of the sentence from death to life imprisonment. See also Stewart v. State, 549 So. 2d 171 (Fla. 1989); Christopher v. State, 583 So. 2d 642 (Fla. 1991) Bouie v. State, 559 So. 2d 1113 (Fla. 1990); Hernandez v. State, 621 So. 2d 1353 (Fla. 1993).

Appellee submits, respectfully that the Van Royal progeny are erroneous and the Court should now recede from them.

Initially, the state would note that in fact there has been a writing. Circuit Judge Rosman orally articulated his findings pertaining to aggravating and mitigating circumstances which have been transcribed by the court reporter and are in writing subject to appellate review at Vol. XVI, pp. 13 - 19, as contemplated by the statute. The Florida Statute defines writing as follows:

> "1.01. Definitions -- In construing these statutes and each and every word, phrase or part hereof, where the context will permit:
>
> * * *
>
> (4) The word 'writing' includes handwriting, printing, typewriting and all other methods and means of forming letters and characters upon paper, stone, wood, or other materials."

(emphasis supplied)

If the legislature deems the formulation of letters upon stone or word or other materials sufficient to satisfy a writing, it is incomprehensible that this Court would conclude that a transcript reciting factual findings made a part of the official appellate record is inadequate. See United States v. Copley, 978 F.2d 829, 831 (4th Cir. 1993) (a transcribed oral finding can serve as a "written statement" for due process purposes when the transcript and record complied before the trial judge enable the reviewing court to determine the basis of the trial court's decision); United States v. Barth, 899 F.2d 199, 201 (2nd Cir. 1990) (we can see no reason why transcribed oral findings cannot satisfy the written statement requirement of Morrissey, at least where as here, we possess a record that is sufficiently complete

to allow the parties and us to determine the evidence relied on and the reasons for revoking probation).

We are told with increasing frequency that the jury is a co-sentencer and that their recommendation must be accorded great weight. See Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). Indeed, this Court has ruled that the state constitutional double jeopardy clause precludes resentencing a defendant to death if the jury recommends life imprisonment and this Court finds that the jury recommendation was reasonable and other error requires retrial. Wright v. State, 586 So. 2d 1024 (Fla. 1991). And yet the Van Royal -- Grossman line of cases would render a nullity the considered judgment of both jury and judge which as here have concluded that death is the appropriate sanction, solely because the judge has not performed the repetitive gesture of filing another paper which identically recites that faithfully recorded by the court reporter. Such a result constitutes an arbitrary irrational, and capricious elevation of form over substance and is in the words of Barth, supra, at 202, "unduly formalistic".

Appellee is cognizant that many of the concerns mentioned in this Court's decisions on this point are legitimate and real. In Bouie v. State, supra, for example, the Court correctly reduced the sentence from death to life imprisonment where the sentencing order said virtually nothing about what specific aggravating or mitigating factors had been found by the trial judge:

> "There is no indication of which aggravating circumstances and which mitigating circumstances, if any, were deemed applicable."

(559 So. 2d at 1116)

In Hernandez v. State, 621 So. 2d 1353 (Fla. 1993), the trial court failed to provide either oral or written reasons in support of death sentence until twelve days after oral pronouncement of sentence. This Court reiterated its previously stated concerns:

> "The purpose of this requirement is to ensure that each death sentence handed down in Florida results from a thoughtful, deliberate, and knowledgeable weighing by the trial judge of all aggravating and mitigating circumstances surrounding both the criminal and the crime, as dictated by the United States Supreme Court and our own state constitution."

(621 So. 2d at 1357)

The concerns expressed in Hernandez and in Christopher, supra, have been satisfied in the instant case; the trial court contemporaneously articulated his findings of aggravation and mitigation without resorting to belated rationalization "after the fact" which runs the risk that the "sentence was not the result of a weighing process or the 'reasoned judgment' of the sentencing process that the statute and due process mandate". Christopher, quoting Van Royal v. State, 497 So. 2d 625, at 630 (Fla. 1986) (Ehrlich, J., concurring).[2]

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[2] The instant case is unlike Van Royal where the trial court overrode a jury life recommendation and made no findings in the record at all -- oral or written.

Since the legitimate concerns of contemporaneous recording of facts demonstrating a reasoned judgment without the risk of post-hoc rationalization of forgotten reasoning have been satisfied sub judice the court should recede from the language in Grossman requiring a separate written order filed concurrently with the oral pronouncement of sentence. As Chief Justice Rehnquist observed in Lockhart v. Fretwell, 506 U.S. ___, 122 L.Ed.2d 180, 191 (1993): "Cessante ratione legis, cessat et ipsa lex."

The Court should acknowledge that the contemporary oral articulation of aggravating and mitigating findings memorialized by the court report's transcribing sufficiently satisfies the writing requirement and makes meaningful appellate review possible and that conforms to statutory and constitutional requirements. See also Cave v. State, 445 So. 2d 341 (Fla. 1984).

ISSUE II

WHETHER THE LOWER COURT ERRED BY DEPARTING FROM THE SENTENCING GUIDELINES PERMITTED RANGE FOR THE BURGLARY SENTENCE WITHOUT PROVIDING WRITTEN REASONS FOR THE DEPARTURE.

The record reflects that the trial court imposed a life sentence on the burglary count (T 163; Sr 19) and the sentencing guidelines scoresheet provided a permitted range of 4-1/2 to 9 years (R 159). The court concluded at sentencing that:

> "I'm not convinced that the safety of the community will be protected with any other sentence that is to be imposed today."

(Sr 19)

The sentence imposed that day was death for the murder charge and life imprisonment for the burglary. While the sentencing guidelines scoresheet does not reflect written reasons for departure, it is apparent from the trial court's articulation of sentence that the murder of Lupito Luevano warranted departure. See, e.g., Torres-Arboledo v. State, 524 So. 2d 403, 414 (Fla. 1988) (" . . . we find the fact that a defendant has been convicted of first-degree murder, a capital felony which cannot be scored as an additional offense at conviction may serve as a clear and convincing reason for departure"); Bedford v. State, 589 So. 2d 245, 252 (Fla. 1991).

ISSUE III

WHETHER THE LOWER COURT ERRED IN ADMITTING EVIDENCE OF APPELLANT'S ATTEMPT TO HAVE ANAL INTERCOURSE WITH HIS WIFE AND GIRLFRIEND.

Appellant's wife Roxanne Gibson testified, inter alia, that during her marriage to Gibson he had attempted anal intercourse with her. The defense objected, after the answer was given, that the question was not relevant (R 1245). The prosecutor responded that appellant was charged with murder and burglary and:

> "However, in the course of the burglary he's charged with committing or attempting to commit a crime therein, either a sexual battery or theft, or any number of subcharges. There is an indication from the medical examiner's report that there is some type of damage to the anal area of the victim in this case. And I think it's relevant that we can show that sometime during the course of their marriage that he had attempted to have anal intercourse with her and that she had not allowed him to do it."

(Tr 1246)

The court allowed the question whether appellant had attempted anal intercourse with her (R 1249). On cross-examination by the defense the witness testified that he had not forced her to engage in that act against her will and on redirect examination she stated she would not let him (Tr 1264).

Appellant's girlfriend Tracy Grass also testified that appellant wanted her to have anal intercourse with him (Tr 1603). On cross-examination she testified that appellant tried but that she told him she was not interested and he did not force her to submit to it (Tr 1611).

Crime scene technician William Tucker testified -- without objection -- that he "observed what appeared to be seminal fluid both in the anus of the victim as well as her vagina" (Tr 1491).

The victim's boyfriend Richard Murrish testified that the night before the homicide he had engaged in sexual intercourse with her but the two of them had not, either then or in the past engaged in anal intercourse (Tr 1296 - 97).

Appellant contends inexplicably that evidence of appellant's interest in engaging in anal intercourse was not relevant to any material issue other than his bad character or propensity. Gibson is in error.

First of all, appellee submits that the question of inadmissible Williams-rule does not arise since as stated in Malloy v. State, 382 So. 2d 1190, 1192 (Fla. 1979) "the circumstances . . . do not establish all the elements of a crime." Gibson's request to his wife, and also to girlfriend Tracy, that each participate with him in such conduct is not a crime in the State of Florida. Appellant notes that this Honorable Court held in Franklin v. State, 257 So. 2d 21 (Fla. 1971) that the former statute proscribing the "abominable and detestable crime against nature" was unconstitutionally vague; he urges, however, that F.S. 800.02 making unnatural and lascivious acts punishable as a misdemeanor remains intact. But even if the "homosexual act" charged in Franklin could be deemed covered by F.S. 800.02, it would not govern Gibson since he was neither engaged in homosexual acts with his wife or his girlfriend and,

in addition, the testimony of both witnesses was that no such acts took place.

Appellant argues that even an attempt to violate F.S. 800.021 constitutes a crime pursuant to F.S. 777.04(4)(g); that argument too must fail. An attempt requires an overt act which is a direct movement toward commission of the offense and which is more than mere preparation. State v. Coker, 452 So. 2d 1135 (Fla. 2nd DCA 1984); Smith v. State, 632 So. 2d 644 (Fla. 1st DCA 1994). And in any event since the homicide sub judice occurred on September 30, 1991, and Gibson's request to his wife and girlfriend had occurred prior thereto by the time of the instant trial in March of 1993, the statute of limitations on such an "offense" with Roxanne Gibson and Tracy Grass had already expired. There was no prosecutable crime for his conduct with them. See F.S. 775.15(2)(d).[3]

The evidence adduced through Roxanne Gibson and Tracy Grass was plainly relevant to the offenses charged. F.S. 90.402. In Alford v. State, 307 So. 2d 433 (Fla. 1975) a child was discovered lying atop a trash pile, she had been raped and shot

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[3] Additionally, it cannot be urged that a private consensual act requested of appellant's wife or girlfriend constitutes an "unnatural and lascivious act" under F.S. 800.02. In Schmitt v. State, 590 So. 2d 404, 410 (Fla. 1991), this Honorable Court (while dealing with F.S. 827.071) explained that "lewd" and "lascivious" are synonymous in Florida law and that "Acts are neither 'lewd' nor 'lascivious' unless they substantially intrude upon the rights of others." Here, there can be no others whose rights were intruded upon.

to death. This Court approved the admissibility of testimony that the defendant and another man attempted to engage in anal intercourse prior to the victim's rape and murder. The evidence of the defendant's unsatisfied sexual appetite which led to the abduction and sexual assault on the victim was relevant to his motive and state of mind. So too in this case. Gibson's interest in this form of sexual activity helps establish both his identity as the burglar-murderer in the Luevano residence and his state of mind on September 30, 1991. See also Padilla v. State, 618 So. 2d 165 (Fla. 1993) (evidence of defendant's prior shooting into victim's apartment admissible to establish his mental state in order to prove premeditation); Tumulty v. State, 489 So. 2d 150 (Fla. 4th DCA 1986); Griffin v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 365 (Fla. 1994) [Practitioners have attempted to characterize all prior crimes or bad acts of an accused as Williams Rule evidence. This characterization is erroneous. The Williams Rule, on its face, is limited to "similar fact evidence" §90.404(2)(a)].

ISSUE IV

WHETHER THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO CONFRONT ADVERSE WITNESSES BY FORBIDDING CROSS-EXAMINATION OF HIS WIFE ABOUT A MATTER RELATING TO HER BIAS WHETHER SHE HEARD APPELLANT WAS HAVING AN AFFAIR WITH THE VICTIM.

Prior to trial the state filed a motion in limine to prohibit, without first proffering testimony, the defendant from referring to an "affair" between appellant and victim Lupita Luevano (R 47). The state argued that there was no evidence of any such affair other than what appellant may have told his father; the defense argued this motion was premature and the topic would be batter addressed at trial through proper objection (SR 13 - 15) The court granted the motion, ruling that it would allow the defense to establish they may have met but not use the word affair other than through Mr. Gibson (appellant's father) except through a proffer (SR 16 - 20).

At trial appellant sought to ask of Mrs. Gibson the singular question whether she had been told by others that her husband was having an affair with Miss Luevano (Tr 1261).[4] The defense contended that the purpose of asking the question was not to establish whether or not it was true but to establish the reasons or motive for bias or prejudice by the witness (Tr 1260) The state contended that the defense was asking it only for the effect of it, and there was no evidence to substantiate it.

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[4] "The Court: Is that the only question?

Mr. Rinard: That's the only question, your Honor."

Whether defense counsel's motive was proper or improper, it is clear that the trial court's ruling not to allow that question cannot be other than harmless error, if error at all. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); D. Smith v. State, ___ So. 2d _____, 19 Fla. Law Weekly S 312 (Fla. 1994); Allen v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 139 (Fla. 1994).

In the instant case, the defense was able to cross-examine for bias by inquiring into her knowledge of the affair with Tracy and her own forming another relationship with another man yielding a recent child (Tr 1263).

Additionally, Roxanne Gibson did not provide any uniquely damaging testimony; every thing she provided of an incriminating nature was provided by multiple other witnesses. Coworkers described his going home the day of the murder and scratches on his face. His girlfriend testified that she provided the Indian head charm. Coworkers also identified his necklace and charm. Thus, any error in the failure to allow this single question was harmless.

Appellant was not deprived of the right to cross-examine a witness regarding bias or motive to testify; the trial court merely denied counsel's request to ask a single question. Her motive to testify was otherwise explored. See Brookings v. State, 495 So. 2d 135, 140 (Fla. 1986); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (any error in restricting defense in its attempt to show witness Capo's involvement or interest in the case was surely harmless as these matters were substantially put

before the jury through the direct and cross-examination of Capo as well as the testimony of other witnesses); Marr v. State, 494 So. 2d 1139, 1143 (Fla. 1986) (petitioner was afforded an adequate and fair opportunity to show the bias and motive of the victim and Young without delving into the sexual nature of their relationship).

Unlike the situation in Davis and contrary to appellant's argument Roxanne Gibson was not a crucial witness to the state. Several coworkers and appellant's girlfriend Tracy Grass all identified the neck chain and charm appellant wore.

Appellant's conversation with Roxanne including the comment "if they have my fingerprints wouldn't they come and get me" was apparently in response to something she had heard about the investigation and he immediately followed with a disclaimer that he had not been there (Tr 1235). The comment about moving to Mississippi earlier than January (Tr 1244) adds little since apparently made in the context of repeated visits from the police.[5] More damaging to Gibson were his inconsistent stories as to whether the scratches were caused by hitting his head while sleeping in the truck by a fight with his wife or by the dog (Tr 1093, 1189, 1231).

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[5] Moreover, had the witness chosen to falsely give incriminating statements at trial she could have claimed to see blood on appellant's clothing prior to washing (Tr 1256 -1257).

A defendant's right to cross-examine on the question of bias is not unlimited. Mosley v. State, 616 So. 2d 1129 (Fla. 3d DCA 1993); United States v. Leavitt, 878 F.2d 1329 (11th Cir. 1989) (district court did not violate Sixth Amendment by placing limits on bounds of defendants' cross-examination of government in narcotics prosecution); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (trial court should have permitted cross-examination of witness arrested prior to trail as to his possible motive for testifying against defendant, but court's refusal to do so was harmless in light of overwhelming evidence of guilt of defendant).

Appellant's claim must be rejected.

ISSUE V

WHETHER THE LOWER COURT VIOLATED APPELLANT'S RIGHT TO BE PRESENT AND TO ASSISTANCE OF COUNSEL BY DENYING A DEFENSE REQUEST TO CONSULT WITH APPELLANT BEFORE EXERCISING PEREMPTORY CHALLENGES.

Appellant contends that he was denied the right to be present and to the assistance of counsel by denying defense counsel's request to consult with appellant before exercising peremptory challenges. The claim is both procedurally barred and meritless. Appellant refers to the record at R 488 - 489. The colloquy reveals:

> "The Court: Do you have any other questions? Are your prepared to proceed with jury selection?
>
> Mr. Rinard: Your Honor, if I may have -- if we make [sic] take an afternoon recess so I may have ten minutes or so to speak with Mr. Gibson to advise him of some things and see how he would like for me to proceed.
>
> The Court: Let's proceed with this round. Are there any additional challenges for cause?
>
> Mr. Rinard: Yes, Your Honor.
>
> (Tr 488 - 489)

Then both the state and defense proceeded to exercise challenges for cause (Tr 489 - 498). The defense then acknowledged that prospective jurors Jones through Price were "acceptable at this time" (Tr 498). Then the court took a fifteen minute recess (Tr 498). Appellant was present throughout the proceeding and no complaint was lodged either at that time or thereafter that Gibson was denied the opportunity to assist

counsel in jury selection (Tr 498 - 1067). Thereafter, the defense sought to challenge jurors Spann, Chambers and Peterson for cause (Tr 774 - 777). The challenge to Chambers was granted. The defense peremptorily challenged Peterson, Spann, and Miller and accepted the eleven on the panel (Tr 774 - 780). The court granted a defense challenge for cause to jurors Capling (Tr 983) and Snider and Miller (Tr 984 - 985) and a defense peremptory challenge to Shipwash (Tr 985).

The defense peremptorily excused as an alternate juror Abelt (Tr 988). Since no complaint was uttered below regarding appellant being denied the opportunity to participate in jury selection, the claim has not been preserved for appellate review and is barred. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990). Since the record reflects that appellant was not denied any right and counsel was able to engage in jury selection exercises both peremptory and for cause challenges, the claim is meritless.[6]

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[6] If appellant's complaint now is that he was not allowed to participate in the bench conference at Tr 480 - 488 he may not prevail for several reasons: no such request to participate was made there is no right of a defendant to participate in a bench conference, [Garcia v. State, 492 So. 2d 360 (Fla. 1986), United States v. Provenzano, 620 F.2d 985, 998 (3rd Cir. 1980)] and finally, the defense received everything requested (the prosecutor agreed with challenges for cause to jurors Murrah, Ellington, Watts, Gremli, Fairchild and Vary and the defense was permitted to individually voir dire Barrineau, Barber and Smith, none of whom ended up serving on the jury (Tr 2335 - 36).

ISSUE VI

WHETHER THE LOWER COURT ERRED AT PENALTY PHASE BY ADMITTING PHOTOS OF THE PRIOR MURDER VICTIM.

> "Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." Henderson v. State, 463 So. 2d 196, 200 (Fla. 1985).

The test of admissibility of photographic evidence is relevance. State v. Wright, 265 So. 2d 361 (Fla. 1972); Engle v. State, 438 So. 2d 803 (Fla. 1983); Welty v. State, 402 So. 2d 1159 (Fla. 1981); Booker v. State, 397 So. 2d 910 (Fla. 1981); Straight v. State, 397 So. 2d 903 (Fla. 1981); Jackson v. State, 359 So. 2d 1190 (Fla. 1978). See also Wyatt v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 351 (Fla. 1994) (trial court did not abuse discretion in admitting photographs of victims of prior violent crimes despite defense claim that the evidence was cumulative and prejudicial).

The introduction of photographic evidence is within the trial court's discretion which will not be disturbed on appeal unless there is a showing of clear abuse. Duest v. State, 462 So. 2d 446 (Fla. 1985); Brown v. State, 526 So. 2d 903 (Fla. 1988); Jackson v. State, 545 So. 2d 260 (Fla. 1989); Tompkins v. Dugger, 549 So. 2d 1370 (Fla. 1989).

This Court has routinely allowed the introduction into evidence of photographs used to identify the victim or used by the medical examiner to illustrate wounds. Haliburton v. State, 561 So. 2d 248 (Fla. 1990); Randolph v. State, 562 So. 2d 331 (Fla. 1990).

At penalty phase the defense objected to any testimony as to the nature and character of events that occurred in the 1982 homicide. The state cited case law in support of the admissibility.[7] Based on the case law cited, the defense objection was overruled (p. 19 - 22). When the defense complained about not being furnished discovery of the photos, the court held a hearing and determined there was no violation (p. 25 - 32). The defense was permitted to review the photos (p. 31). Exhibits 90 - 93 were admitted (pp. 33 - 35) and thereafter Dr. Schultz, who performed the autopsy on victim Lester Thompson testified regarding the injuries incurred, utilizing Exhibits 85 -88 (pp. 77 - 99).

Appellant acknowledges that this Honorable Court has ruled that evidence of the details of a prior conviction for felony involving violence is admissible to support aggravating factor F.S. 921.141(5)(b). Waterhouse v. State, 596 So. 2d 1008, 1016 (Fla. 1992); Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989); Tompkins v. State, 502 So. 2d 415, 419 (Fla. 1986). Such testimony "assists the jury in evaluating the character of the

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[7] Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Buenoano v. State, 527 So. 2d 194 (Fla 1988); Stano v. State, 473 So. 2d 1282 (Fla. 1985); Tompkins v. State, 502 So. 2d 415 (Fla 1986). Defense counsel did not offer any contrary authorities to the court. See Lucas v. State, 376 So. 2d 1149, 1152 (Fla. 1979) (This Court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law.)

defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence." Waterhouse, supra, at 1016, quoting from Rhodes, supra. And autopsy photos are admissible in penalty phase. Randolph v. State, 562 So. 2d 331 (Fla. 1990).

Appellant cites Duncan v. State, 619 So. 2d 279 (Fla. 1993), wherein the court found harmless error in the trial court's admission of a gruesome photo depicting the victim in a prior crime. Duncan, appellee submits, conflicts with Waterhouse, Rhodes, and Tompkins and is an aberration. Moreover, the reasoning is suspect. The Court opines that:

> "The photograph did not directly relate to the murder of Deborah Bauer but rather depicted the extensive injuries suffered by the victim of a totally unrelated crime."

(619 So. 2d at 282).

Obviously the photo would not relate to the murder victim who was a subject of the trial if the photo was introduced to show prior conviction of a violent felony. To the extent that the Court was articulating that the photo was gruesome and cumulative to the other evidence presented, appellee cannot quarrel since the opinion furnishes no picture. In the instant case, appellee submits that the photos are not gruesome, that the evidence was relevant to demonstrate appellant's extraordinary violent character and repeated attempts to attack his victims' heads when the opportunity is available and furnishes valuable information to the jury "in evaluating the character of the

defendant."[8] See also Wyatt v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 351, 352 (Fla. 1994).

The state's use of evidence pertaining to the details of the homicide of Lester Thompson of course primarily serves the purpose of proving and explaining a prior felony conviction involving force and violence. F.S. 921.141(5)(b). But such evidence also has relevancy in another regard. That appellant killed Thompson and stole his pickup truck after using a machete or cane knife located in the victim's residence and offered an elaborate story of seeing two men who may have been involved in the Thompson murder and having explained to a corrections officer that he was defending himself against sexual advances (p. 42 - 48) and similarly burglarizes the Luevano residence to kill its occupant with a barbell-weapon already on the premises and also provide a story to investigating officers that a Mexican was near the scene and falsely explaining to his father that he was having an affair with the victim when she pulled a gun on him during an argument tend to establish a pattern of highly premeditated conduct and rebuts proffered mental health defense experts whom the defense relied on to show an impairment.

No abuse of discretion has been established.

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[8] The evidence is also relevant to establish the CCP aggravator in that Gibson had established a protocol of entering victims' homes to destroy their faces and heads with multiple blows.

ISSUE VII

WHETHER THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY ADMITTING ALLEGEDLY IRRELEVANT VICTIM IMPACT EVIDENCE.

Appellee would respectfully submit that to the extent Gibson is now contending that there has been some kind of constitutional error in the trial court's admitting victim impact testimony from Lupita Luevano's relatives, the claim has not been preserved for appellate review. The only objection urged below was not of a constitutional nature but that such testimony was not admissible under the statute:

> "MR. RINARD: Your Honor, I'm going to object to the introduction of any testimony through this witness as it relates to the victim impact. I believe that's improper testimony to be presented to the jury in the penalty phase.
>
> Section 921.141 of the Florida Statutes sets out the procedures to be followed in the penalty phase. The Section says in the proceeding evidence may be presented as to any manner the Court deems relevant to the nature of the crime, and the character of the defendant, and shall include matters relating to any aggravating or mitigating circumstances enumerated in Subsections (5) and (6).
>
> The Court's aware that Subsection (5) sets out the specific aggravating circumstances that a jury can consider in the penalty phase. Victim impact or the family's impact of the victim is not one of the aggravating factors that can be considered by this jury in making its recommendation.
>
> I cite to the Court Jones versus State, which is a Supreme Court decision, 1990, 569 So. 2nd 1234. I provide a copy also to the State. Jones is a recapitulation of a long standing line of Florida cases that

> consistently held that evidence is designed to create sympathy for the deceased in a penalty phase.
>
> It also stands for the proposition that not only in the guilt phase but also in the penalty phase it's inadmissible especially when there's not specific aggravating factors listed to which that evidence could be applied.
>
> I also cite to the Court Grossman versus State, found at 525 So. 2nd 833, a 1988 Supreme Court decision. I also provide a copy of that decision to the State. Grossman stands for a lot of different propositions of law, one of which is admission of evidence concerning the deceased or the circumstances of the Defense is inadmissible under Florida law at the penalty phase and cite as authority for that proposition Florida Statute 921.141."

(p. 61 - 63)

To the extent that Gibson is changing the basis of his objection from that presented below, he may not do so. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So 2d 902 (Fla. '1990). This Court has held that attacks on the evidentiary support for aggravating factors in the trial court do not preserve for appellate review a challenge that the instruction on such aggravator is vague or overbroad. See, e.g., Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993); Lambrix v. Singletary, ___ So. 2d ___, 19 Fla. Law Weekly S 330 (Fla. 1994); Lightbourne v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 331 (Fla. 1994); Ragsdale v. State, 609 So. 2d 10 (Fla. 1992).

To the extent that appellant complained below only that victim impact evidence was inadmissible under the statute, he is mistaken. Florida Statute 921.141(7), recites:

> (7) VICTIM IMPACT EVIDENCE -- Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in sub section (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

But even if appellee is incorrect in urging that Gibson's claim is procedurally barred, his contention is meritless. Defense counsel's reliance below on Grossman v. State, 525 So. 2d 833 (Fla. 1988) and Jones v. State, 569 So. 2d 1234 (Fla. 1990) is unavailing. Both decisions occurred when Booth v. Maryland, 482 U.S. 496, 96 L.Ed.2d 440 (1987) governed Eighth Amendment law in this country and predated Booth's being overturned in Payne v. Tennessee, 501 U.S. ___, 115 L.Ed.2d 720 (1991) and the legislature's amendment, F.S. 921.141(7). This Court has subsequently allowed victim-impact evidence. Hodges v. State, 595 So. 2d 929 (Fla. 1992), vacated on other grounds, ___ U.S. ___, 121 L.Ed.2d 6, affirmed on remand 619 So. 2d 272 (Fla. 1993).

Appellant is in error thinking that only that which is mentioned in F.S. 921.141 may be heard and considered by the

sentencer. Trial judges in their sentencing order frequently announce that they have given great weight to the jury recommendation although the statute does not tell them to do so; instead, this Court has ordained it. See Tedder v. State, 322 So. 2d 908 (Fla. 1975); Stone v. State, 378 So. 2d 765 (Fla. 1979); Penn v. State, 574 So. 2d 1079, 1085 (Fla. 1991) (J. Grimes concurring in part and dissenting in part). The sentence received by a codefendant either contemporaneously with a defendant or years later (see Scott v. Dugger, 604 So. 2d 465 [Fla. 1992]) is not enumerated in the statute, yet this Court presumably regards it as relevant to the circumstances of the offense. So too is evidence of the impact of loss on the victim's family and to society relevant for the judge and jury's consideration, even if it is not part of the weighing process in the life-death determination.

Appellant argues now that he was denied due process of law by presentation of testimony of Max Luevano, Angie Luevano, Guadalupe Rendon, and Diana Weiss -- it is clear that he was afforded the opportunity to cross examine them (p. 69, 75, 109, 114).

Appellant cannot seriously contend that due process of law was violated because the testimony of the loss of Lupita Luevano became a mini-trial. The testimony of Max and Angie Luevano, Guadelupe Rendon and Diana Weiss comprised only twenty pages in the transcript (p. 65 - 69, 70 - 75, 105 - 108, 110 - 114) in comparison to the testimony adduced by and about the defendant

amounting to two hundred and thirty pages (p. 116 - 345). Gibson's complaint that victim-impact evidence is not relevant is belied by the fact that the legislature has determined with the enactment of subsection (7), that it is relevant for the jury to hear. That such evidence may not be used by them or the judge in the weighing process of aggravating versus mitigating circumstance neither renders it improper for them to hear nor violative of the due process rights of the defendant.

Florida's death penalty statute was originally passed in 1972, and was codified in section 921.141. Despite various attacks on the statute, the constitutionality of the statute as a whole has been upheld repeatedly by this Court and the United States Supreme Court. See Proffitt v. Florida, 428 U.S. 242 (1976); Ragsdale v. State, 609 So.2d 10 (Fla. 1992); State v. Dixon, 283 So.2d 1 (Fla. 1973). In section 921.141(1), the legislature set forth the following standard for the admission of evidence in the penalty phase:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of

> the Constitution of the United States or the Constitution of the State of Florida.

(Emphasis supplied).

This section has been interpreted consistently by this Court to allow the sentencer, both the jury and judge, to hear evidence "which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence," Teffeteller v. State, 495 So.2d 744, 745 (Fla. 1986), or which will allow the sentencer "to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977). Thus, for example, in Teffeteller, this Court admitted into evidence a crime scene photograph of the victim, although the photograph was not specifically relevant to any of the aggravating circumstances. This Court observed that it could not "expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum." 495 So.2d at 744.

In 1984, the legislature amended section 921.143 to allow at a sentencing hearing, or prior to the imposition of sentence upon any defendant who has been convicted of a felony, the victim or next of kin to appear before the sentencing court to provide a statement concerning "the

extent of any harm, including social, psychological, or physical harm, financial losses, and loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced." A constitutional amendment in 1988 further strengthened victim's rights by providing that "victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right . . . to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused." **Fla. Const.** art. I. § 16(b).

In Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989), the United States Supreme Court held that the Eighth Amendment prohibited a jury from considering, and a prosecutor from arguing, a victim impact statement or the personal qualities of the victim at the sentencing phase of a capital trial, unless such evidence related directly to the circumstances of the crime. Following the dictates of Booth and Gathers, this Court held that, despite section 921.143(2), the legislature could not permit victim impact evidence "as an aggravating factor in death sentencing." Grossman v. State, 525 So.2d 833, 843 (Fla. 1988) (emphasis supplied).

In 1991, the United States Supreme Court overruled its Booth and Gathers decisions in Payne v. Tennessee, 501 U.S. ___, 115 L. Ed. 2d 720, 736 (1991):

> We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

The Court explained that sentencing a criminal defendant involves factors which relate both to the subjective guilt of the defendant and to the harm caused by his acts:

> 'We have held that a State cannot preclude the sentencer from considering any relevant mitigating evidence that the defendant proffers in support of a sentence less than death.' Thus we have, as the Court observed in Booth, required that the capital defendant be treated as a "uniquely individual human bein[g.]" But it was never held or even suggested in any of our cases preceding Booth that the defendant, entitled as he was to individualized consideration, was to receive that consideration wholly apart from the crime which he had committed. The language quoted from Woodson in the Booth opinion was not intended to describe a class of evidence that could not be received, but a class of evidence which must be received. Any doubt on the matter is dispelled by comparing the language in Woodson with the language from Gregg v. Georgia,

> quoted above, which was handed down the same day as Woodson. This misreading of precedent in Booth has, we think, unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering 'a glimpse of the life' which a defendant 'chose to extinguish,' or demonstrating the loss to the victim's family and to society which have resulted from the defendant's homicide.

Id. at 733 (citations omitted; emphasis supplied).

The Court ruled that evidence of the specific harm caused by a defendant presented in the form of victim impact evidence could be admitted by state courts, subject to evidentiary rulings:

> 'Within the constitutional limitations defined by our cases, the States enjoy their traditional' latitude to prescribe the method by which those who commit murder should be punished.' The States remains free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the Booth Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it

> renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.

Id. at 735 (citations omitted; emphasis supplied).

The Court concluded that juries should hear all relevant evidence before sentencing a defendant for first degree murder:

> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. '[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.' 'By turning the victim into a 'faceless stranger at the penalty phase of a capital trial,' Booth deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

Id. (citations omitted).

In response to Payne, the Florida Legislature amended section 921.141 in 1992 as follows:

> (7) Victim impact evidence - Once the prosecutor has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

Likewise, in Hodges v. State, 595 So.2d 929 (Fla. 1992), this Court recognized the admissibility of victim impact evidence:

> Hodges also argues that allowing testimony about the victim's prosecuting him for indecent exposure and his attempts to dissuade her from doing so, the victim's sister's breaking down in tears while testifying, and the prosecutor's closing argument violated Booth v. Maryland, 482 U.S. 496 . . . (1987), and South Carolina v. Gathers, 490 U.S. 805 . . . (1989). Recently, however, the United States Supreme Court held that:
>
> > if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such

> evidence differently than other relevant evidence is treated.
>
> Payne v. Tennessee . . . 115 L.Ed.2d 720 (1991). In so holding the Court receded from the holdings in Booth and Gathers that 'evidence and argument relating to the victim and the impact of the victim's death on the victim's are inadmissible at a capital sentencing hearing.' Id. at 2611 n.2. The only part of Booth not overruled by Payne is 'that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment.' Id. The comments and testimony Hodges complains about are not the type of victim impact evidence that the Court did not address, i.e., is still Booth error, in Payne. Therefore, we find no merit to Hodges' Booth claim.

Any assertion that victim impact evidence constitutes an aggravating factor is unfounded. The statute clearly shows that the admission of victim impact evidence is contingent upon the prior presentation of evidence concerning an aggravating circumstance. Its relevance is independent of any aggravating circumstance and is an adjunct to the facts of the case as the jury has already heard them. The way in which the legislature amended section 921.141(7) to add subsection (7) establishes that victim impact evidence does not fall under the aggravating circumstances listed in subsection (5) or the mitigating circumstances listed in subsection (6), but instead stands alone as "evidence designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." This

evidence is simply another method of informing the sentencing authority in a capital case as to the specific harm caused by the crime in question. As noted in Payne, a sentencing court and jury have always taken into consideration the harm done by the defendant in imposing sentence, and victim impact evidence is illustrative of the harm caused by the murder. 115 L. Ed. 2d at 736. Thus, the enactment of subsection (7) is consistent with Payne as it places before the sentencing authority all of the relevant evidence needed in order to sentence a defendant for the crime of first degree murder. Id.

See also State v. Maxwell, ___ So. 2d ___, 19 Florida Law Weekly D 1706 (Fla. 4th DCA 1994) (Victim impact evidence is not an aggravating factor. It is neither aggravating nor mitigating evidence. Rather, it is other evidence, which is not required to be weighed against, or offset by, statutory factors).

The fact that victim impact evidence is relevant to a capital sentencing proceeding is evident from Payne itself. A defendant should not be unrestricted in the presentation of mitigation evidence and yet cry foul when the harm caused by his criminal deeds are presented to the jury. Henderson v. State, 463 So.2d 196 (Fla. 1985). Victim impact evidence is relevant because it places the defendant's crime and the victim's death in proper context. It is for this same

reason that the facts underlying a capital conviction are made known to a jury if a capital resentencing hearing is ordered. Chandler v. State, 514 So.2d 354 (Fla. 1987). These facts assist the sentencing jury in becoming familiar with the facts of a conviction. Id. Indeed, this Court in Teffeteller ruled that a photograph of a victim, even though not relevant to prove any aggravating or mitigating factor, was nonetheless admissible at the defendant's capital resentencing proceeding:

> We note that this evidence was not used to relitigate the issue of appellant's guilt, but was used only to familiarize the jury with the underlying facts of the case. Had this jury also been the same panel that originally determined appellant's guilt, it would have been allowed to see more than simply this one photograph. As we recognized in Henderson v. State, 463 So.2d 196, 200 (Fla.), cert. denied, . . . 87 L. Ed. 2d 665 (1985), '[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.' Again, in Henderson, we said relevancy is the test of admissibility. Id. The essence of appellant's claim here is that the photograph was not relevant to prove any aggravating or mitigating factor and should, therefore, not have been admitted. The issue, however, is broader than framed by appellant. Section 921.141(1), Florida Statutes (1985), provides in pertinent part that in capital sentencing proceedings, 'evidence may be presented as to any matter that the court deems relevant to the nature of the crime.' We find that the photograph in question here clearly comes within the purview of the statute. We hold that it is within the sound

> discretion of the trial court during resentencing proceedings to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence. We cannot expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum.

Id. at 745 (emphasis supplied).

This Court has recognized the admissibility of certain evidence at the penalty phase which does not relate to the existence of aggravating or mitigating factors. Such evidence does not constitute an aggravating circumstance but, like victim impact evidence, is relevant because it places the crime and the victim's death in proper context, and is not weighed but merely considered in rendering an appropriate sentence. In fact, Florida law mandates that, in cases of felony murder where the death penalty is sought on the non-triggerman, the jury must make certain findings before it can recommend a sentence of death. Jackson v. State, 502 So.2d 409 (Fla. 1986). Specifically, the jury is instructed that, in order to recommend death, it must find that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed, or that the defendant was a major participant in a felony that resulted in murder and his mental state was one of reckless indifference. This finding must be made not only

in accordance with Florida law, but also in accordance with the Supreme Court's decision in Tison v. Arizona, 481 U.S. 137 (1987). A jury's finding under Jackson and Tison does not amount to an aggravating circumstance, but is something that must be found and considered by a capital jury although not specifically enumerated under section 921.141. Thus, Florida law as interpreted by this Court allows and, in certain circumstances, mandates the consideration of evidence and circumstances not listed as aggravation or mitigation under section 921.141.

Section 921.141(1) provides that, in capital sentencing proceedings, "evidence may be presented as to any matter that the court deems relevant to the nature of the crime." See Teffeteller, 495 So.2d at 745. Victim impact evidence, other than "characterizations and opinions about the crime, the defendant, and the 'appropriate sentence," may be admissible under sections 921.141(1) and 921.141(7). As noted by the Payne Court: "In the majority of cases . . . victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." 115 L. Ed. 2d at 735.

Additionally, because victim impact evidence under section 921.141(7) does not constitute an aggravating

circumstance and is merely considered in reaching a sentencing recommendation, it plays no part in the weighing process. Victim impact evidence, like the facts underlying a conviction which do not relate to aggravating or mitigating circumstances or a non-triggerman's intent, is not weighed during sentencing but merely considered. Therefore, the fact that Florida is a weighing state, or that there is no jury instruction regarding how to "weigh" victim impact evidence, does not render section 921.141(7) unconstitutional.

Furthermore, the admissibility of evidence regarding the existence of an aggravating circumstance is governed by section 921.141(1) and **Fla. R. Crim. P.** 3.780. Once evidence regarding an aggravating circumstance is "provided" by the state, the state may introduce and argue victim impact evidence, and the jury is instructed pursuant to the Florida Standard Jury Instructions. The instruction tells the trial court to "[g]ive only those aggravating circumstances for which evidence has been presented" and instructs the jury that "[e]ach aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision." **Fla. Std. Jury Instr. (Crim.)** Penalty Proceedings -- Capital Cases 78, 81 (1985). Victim impact evidence, however, carries no burden of proof because it is not an aggravating

factor. Thus, the state carries no burden of proof in establishing the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Indeed, the Payne Court rejected the notion that the presentation of victim impact evidence creates a "mini-trial" on the victim's character. 115 L. Ed. 2d at 734.

The Payne Court also specifically rejected the argument that the presentation of victim impact evidence leads to the arbitrary and capricious imposition of the death penalty. 115 L. Ed. 2d at 735. The statute makes clear the type of victim impact evidence that is admissible and when that evidence is admissible. Clearly, the statute does not lead to arbitrary imposition of the death penalty.

The trial judge in sentencing appellant to death, after finding the presence of four aggravating factors and no mitigation, commented:

> There was a person that was taken from us, but you took more than just a person. You took a daughter, you took a sister, you took a friend, and you took a future wife. You took a future mother. She was more than just a person. She meant a lot to many, many people.
>
> (Vol. XVI, p. 18)

Such personalizing comments by the trial judge are similar to those attacked collaterally in Porter v. Dugger, 559 So. 2d 201, 202, n. 3 (Fla. 1990) (It so happens that Raleigh Porter was

tried by a judge that has a lot more sympathy for the feelings of the victims than he does worry about the sensibilities of the murderer), a comment which the Court noted "We do not concede that the complained of sentence violates Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), or South Carolina v. Gathers, ___ U.S. ___, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989)."

The trial court's comment is an innocuous response to the argument advanced by the defense counsel that the tragedy could have been avoided had Gibson previously been provided proper care and attention when released from prison (Vol. XVI, p. 9) and Gibson's seemingly oblivious observation that he just wanted to get help and "try to get back out in society and live a normal life." (p. 12). [9]

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[9] Finally, even if the Court were to find the testimony of appellant's family members inadmissible, such error would be harmless in light of the multiple valid aggravating factors and the paucity of mitigation.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN FINDING THE CCP AND HAC AGGRAVATING FACTORS.

A. The cold, calculated and premeditated aggravating factor --

In Owen v. State, 596 So. 2d 985 (Fla. 1992), this Court approved the trial court's CCP finding:

> "The court's finding that the murder was committed in a cold, calculated and premeditated manner was also adequately established. Owen selected the victim, removed his own outer garments to prevent them from being soiled by blood, placed socks on his hands, broke into the home, closed and blocked the door to the children's room, selected a hammer and knife from the kitchen, and bludgeoned the sleeping victim before strangling and sexually assaulting her."

(text at 990)

The instant case is similar. Appellant Gibson had been working at the fertilizer plant earlier that morning at 4:00 or 4:30 and he left without 'informing any of his coworkers. Appellant, two or three weeks prior to the murder was seen off the property of the plant and had told DeWayne Bryant and Matt Street he was jogging in the early morning hour; he was wearing boots at the time (Tr 1122, 1147).[10] Appellant previously had made comments to his coworkers that "she looks good" and "that

[10] Clifford Watts had seen Gibson down the road a ways from the plant several times prior to the homicide (Tr 175). Albert Young also had seen Gibson prior to September 30 walking back to the plant in the early morning hours (Tr 1189).

wouldn't be bad" when Lupita Luevano was seen washing her car in the yard (Tr 1125).[11] Rick Murrish testified that about a month prior to the murder he found cement blocks positioned outside the house beneath the bathroom and bedroom windows where you could see right into the shower (Tr 1292). Gibson purchased the Sprite at the convenience store where the victim worked at 5:30 a.m. when she was not at work (Tr 1203 - 10) and then left it still full at her home when he killed her (Tr 1356, R 80). Obviously, his interest in drinking the purchased Sprite was less than determining the victim's whereabouts. He left the Sprite bottle near where he left his fingerprints -- on the siding underneath the point of entry window.

Appellant argues that the trial court's finding is inadequate (the planned watching of the victim in this case I find does rise to that level of an aggravating circumstance -- S 14 - 15). While perhaps the trial court was not as articulate and expansive as Gibson would prefer, nevertheless, the court was determining that Gibson had engaged in heightened premeditation -- from the time he had observed her as potential prey working in her yard -- and that this was not merely a homicide occurring during a momentary rage or while in a state of panic. The instant case is unlike Cannady v. State, 620 So. 2d 165 (Fla. 1993), wherein the defendant had been involved with an

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[11] Appellant admitted to police having seen the victim wash her car from his place of employement (Tr 1672).

emotional dispute and argument with his wife, then consumed fourteen beers prior to the murder. The subsequent murder of victim Boisvert who Cannady believed to be the cause of his wife's suffering constituted "only mad acts prompted by wild emotion". Unlike Padilla v. State, 618 So. 2d 165 (Fla. 1993), the defendant here was not responding to a beating he had received, "a case of a spontaneous act that resulted from his fear of the victim."

Appellant cannot compare himself to the defendant in White v. State, 616 So. 2d 21 (Fla. 1993) who committed the crime while he was high on cocaine and in Gore v. State, 599 So. 2d 978 (Fla. 1992) there apparently was no formulation of a calculated plan -- only a robbery or sexual assault that got out of hand.

Appellant alludes to Dr. Silver's and Dr. Wald's testimony to negate the finding of deliberation. But as noted elsewhere in this brief the cross-examination of these witnesses yielded the fact that Gibson is manipulative, who over reports and tells people things they might want to hear that he has more control than he would let on, that his forgetfulness of events is inconsistent with an explosive personality disorder and the doctors did not verify much of the self-history reported by Gibson. Appellee has previously alluded to Gibson's practice of destroying the heads of his victims when the opportunity avails itslef, p. 46, supra.

Finally, even assuming arguendo that this Court would conclude that there is insufficient evidentiary support for the

CCP aggravating factor, any error is harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Here, there are unquestionably three valid aggravating factors (HAC, prior conviction of a felony involving the use of violence [Thompson homicide], and homicide committed during the commission of a burglary) and no mitigation. This Court has repeatedly determined, under similar circumstances, that the harmless error doctrine applies as such an error would not have altered the sentencing outcome. See Sochor v. State, 580 So. 2d 595 (Fla. 1991), revised following remand from the United States Supreme Court 619 So. 2d 800 (Fla. 1988); Wyatt v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 351 (Fla. 1994)(three valid aggravators outweigh minimal mitigation even if two invalid aggravators eliminated); Vining v. State, ___ So. 2d ___ 19 Fla. Law Weekly S 251 (Fla. 1994) (three valid aggravators remain with one minor mitigating factor present, death sentence approved after striking CCP); Street v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 159 (Fla. 1994) (death upheld after striking HAC and CCP); Power v. State, 605 So.2d 856 (Fla. 1992) (three remaining valid aggravators and lack of mitigation render erroneous CCP finding harmless); Gore v. State, 599 So. 2d 978 (Fla. 1992) (after striking CCP, three remaining aggravating factors merit death); Green v. State, 583 So. 2d 647 (Fla. 1991) (three valid aggravators, no mitigators, death appropriate after striking CCP); Holton v. State, 573 So. 2d 204 (Fla. 1990) (three valid aggravators present after striking CCP); Thompson v. State, 619

So. 2d 261 (Fla. 1993) (three valid aggravating factors remain after striking CCP, death sentence approved); Valdes v. State, 626 So. 2d 1316 (Fla. 1993) (three valid aggravators with insignificant mitigation remain after striking CCP). Green v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 372 (Fla. 1994) (3 valid aggravators remains with weak mitigation after striking HAC).

B. The heinous, atrocious or cruel aggravating factor --

The trial court instructed the jury on the "HAC" aggravator (p. 392) and found that factor to be present in imposing the death sentence (Vol. XVI, p. 14, 17 - 18):

> "You broke into Lupita Luevano's home,. You raped her. You sodomized her by having anal intercourse with her. You bound her, she was choked. And you beat her about her face.
>
> According to Dr. Graves, you broke her cheekbones, you broke her jaw, you broke the upper plate of her mouth. You displaced an eye. And you crushed her skull to the point that brain matter was showing. She was choking on her own blood.
>
> We can only imagine with fear and terror what she was going through the last minutes of her life. The tremendous fear, tremendous terror and the tremendous pain. You invaded the privacy of her home. You invaded the privacy of her body. The pictures displayed how you destroyed her God given beauty. This young woman was a very beautiful twenty-year-old person.
>
> (p. 17 - 18)

The testimony of Dr. Walter Graves supports the court's ruling. The victim suffered depressed fractures of the frontal portions of the skull; one eye was so distorted the eyeball was

displaced, both cheekbones, jaw bone at the bottom and roof of the mouth were fractured. The bones were so pushed in on her skull that brain tissue was coming out of the facture sites (Tr 1797). The severity and overlapping of the injuries were so extensive that it was impossible to give an accurate number of the blows struck. A fairly heavy object such as a barbell would have had to be used to cause such injuries. There was much bleeding -- the victim swallowed or inhaled about a pint of her blood into her stomach (Tr 1799 - 1803). There was a tear or laceration in the anus caused at or about the time of death (Tr 18080. Strangulation might have been a contributing factor in the death as evidenced by the tightly wrapped shirt around the neck (Tr 1811). After infliction of the fatal blow the victim would have lived anywhere from a few minutes up to perhaps twenty to thirty minutes (Tr 1812). None of the injuries would have caused instantaneous death (Tr 1817).

See also State's Exhibits 2 - 5 (R 71 - 74).

This Court has consistently found the HAC aggravator to be present under circumstances similar to the case at bar. Heiney v. State, 447 So. 2d 210 (Fla. 1984) (bludgeoning murder victim with claw hammer was HAC); Thomas v. State, 456 So. 2d 454 (Fla. 1984) (victim Bettis beaten, kicked or bludgeoned so severely that his skull was fractured in many places); Lamb v. State, 532 So. 2d 1051 (Fla. 1988)(victim struck six times in the head with a claw hammer); Cherry v. State, 544 So. 2d 184 (Fla. 1989) (victim literally beaten to death; left temporal bone was

fractured and skull dislocated from the spine at its juncture); Bowden v. State, 588 So. 2d 225 (Fla. 1991) (beating in head with "rebar" is HAC); Bruno v. State, 574 So. 2d 76 (Fla. 1991) (victim hit on the head and shoulders with a crowbar in excess of ten times); Zeigler v. State, 580 So. 2d 127 (Fla. 1991) (victim beaten savagely on the head with a blunt instrument after being shot); Owen v. State, 596 So. 2d 985 (Fla. 1992) (sleeping victim struck on the head and face with five hammer blows); Marshall v. State, 604 So. 2d 799 (Fla. 1992) (victim struck on the back of the head); Colina v. State, ___ So. 2d ___, 19 Fla. Law Weekly S176 (Fla. 1994) (victims bludgeoned on head with a tire iron).

Appellant argues that a single head blow could have caused unconsciousness as in Scull v. State, 533 So. 2d 1137 (Fla. 1988) (In Scull one homicide victim's death supported HAC and the other did not when both were beaten by a baseball bat). The instant case contains in addition to the multiple head blows, testimony by neighbor Tracey White that there was a short bloodcurdling scream at 6:40 in the morning (Tr 1215).

Appellant complains that the state failed to prove anal rape. Dr. Graves testified that there was a tear or laceration in the anus consistent with insertion by a penis or finger caused at or about the time of the death (Tr 1808). Crime lab analyst at the crime scene observed what appeared to be seminal fluid in both the anus of the victim as well as her vagina (Tr 1491). But even if it were to be held such evidence was insufficient, that would not detract from the determination that the manner of death was heinous, atrocious or cruel.

ISSUE IX

WHETHER THE TRIAL COURT GAVE VAGUE AND OVERBROAD JURY INSTRUCTIONS ON THE "HAC" AND "CCP" AGGRAVATORS.

The trial court gave the following pertinent instructions to the jury at the penalty phase:

> "Number 3, the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was consciousless or pitiless and was unnecessarily torturous to the victim.
>
> Number four, the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification."

(p. 392)

Appellant argues herein that the instructions on both aggravators, "HAC" and "CCP" were vague and overbroad. He may not prevail. With respect to the HAC instruction, while appellant below urged that it was vague (p. 214), he is mistaken since the instruction was not that condemned in Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (1992) and this instruction has been approved by this Court in Taylor v. State, 630 So. 2d 1038 (Fla. 1993) and Hall v. State, 614 So. 2d 473 (Fla. 1993).

With respect to the CCP instruction, appellant complained below only about the lack of evidentiary support for it, not its vagueness under the Constitution (p. 223 - 225). Thus, the claim here challenging the constitutional validity of the instruction has not been preserved for appellate review. Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993); Lambrix v. Singletary, ___ So. 2d ___, 19 Fla. Law Weekly S 330 (Fla. 1994); Lightbourne v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 331 (Fla. 1994); Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993).

ISSUE X

WHETHER THE LOWER COURT ERRED BY FAILING TO FIND AND WEIGH MITIGATING CIRCUMSTANCES.

Appellant contends that the trial court should have found as mitigating circumstance his childhood environment, learning and mental disability, that he was a good employee, that he maintained control when provided medication counsel and the structured environment of prison , his explosive personality and impaired capacity to appreciate the consequences of his actions and to control his conduct.

The trial court explained its rejection of proffered mitigation. The court explained that it was not convinced that Gibson was under the influence of extreme mental or emotional disturbance "based upon the testimony I heard from the psychologist and psychiatrist that at the time that that was in fact the case." Similarly, the court was not convinced that Gibson's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired (Vol. XVI, p. 15).

The court recited that it "listened intently" to the psychologist and psychiatrist who reported that Gibson was sane and competent. While they testified that appellant became violent upon his attempts to resolve conflict:

> "They also presented testimony that there was overreporting, and I took that into consideration. That perhaps you were trying to grasp for a defense in presenting to the psychologists or psychiatrists the best possible presentation for a defense in your

> case. I considered the fact that years earlier your I.Q. was higher, yet it fell in front of these individuals. And I considered that in terms of your attempting to manipulate your defense in this case."
>
> (Vol. XVI, p. 16)

While noting appellant's anger, the court concluded that on two occasions his use of violence caused death (p. 17). Gibson does not explain the nature of any asserted right to become angry in the homes of others and to kill their residents. (Thirty blows to the head of Lester Thompson with a machete, the half dozen blows with a barbell to the face and head of Lupita Luevano).

The trial court's rejection of the mental health expert testimony is amply supported by the record Dr. Silver did not verify what appellant told him in the family history and thought Gibson was overreporting; he could not have made the explosive disorder judgment without the information appellant furnished (p. 300 - 301). And the witness conceded the inconsistency of an intermittent explosive disorder diagnosis with the claim of appellant that he didn't remember the violent episodes (p. 302 - 03). Some of appellant's self-history reported in 1982 were different from that in 1992 (p. 304). This expert acknowledged that Gibson may have more control over his actions than what he let on since his "explosions" occur in a civilian context when someone is murdered but he is well-behaved in jail. Gibson wanted to tell him of every difficulty in which he would appear psychologically unhealthy (p. 307, 313).

Similarly Dr. Wald testified that his testing did not confirm appellant's stated history of blackouts and Wald did not verify Gibson's self-history; it seemed unusual that only two blackouts involving appellant occurred during his commission of two murders (p. 333). Gibson gave details of what happened on the day of September 30, but claimed not to recall anything about the murder. There are no major memory gaps except where he claims to have blacked out when he killed someone (p. 338). Gibson possibly falsified or exaggerated information and Wald did not test for falsification (p. 340). The likelihood of suffering from blackouts -- remembering cleaning up and not remembering other things is relatively low (p. 345).

With respect to appellant's good behavior in a structured jail environment, the correctional officers added that Gibson had not had much interaction with other inmates (p. 119 - 120, 125 - 126). Coworkers who testified that they had not had problems with Gibson also did not socialize with him -- they spent only workdays with him. Even those who knew appellant best -- his stepmother Billie Ruth Gibson and father William Gibson -- describe him as a liar (p. 185 - 186) and "couldn't tell if he was telling the truth or not" (p. 254). His father admitted that appellant does not confide in him (p. 262) and thought that he would lie to make the situation seem better than it was (p. 274). If the court failed to comment sufficiently on this, it would clearly be harmless error. See Wickham v. State, 593 So. 2d 191 (Fla. 1991).

Appellant herein simply is attempting to ascribe greater weight to the proffered evidence than the sentencing judge chose to credit. See Nixon v. State, 572 So.2d 1336 (Fla. 1990) (clear that trial court considered and rejected all mitigating evidence offered); Robinson v. State, 574 So.2d 108 (Fla. 1991) (no error in failing to find additional mitigating factors; trial court's comprehensive order discussed all mitigating presented and reflected upon it considered and weighed it); Sanchez-Velasco v. State 570 So.2d 908 (Fla. 1990) (failure to find extreme mental or emotional distress and inability to appreciate the criminality of conduct not error; judge could appropriately reject it since the evidence was not without equivocation and reservation); Zeigler v. State, 580 So.2d 127 (Fla. 1991) (judge explained why he was giving little or no weight to the mitigating evidence); Sochor v. State, 580 So.2d 595 (Fla. 1991) (OK for trial judge to reject mitigating factors; although several doctors testified as to defendant's mental instability, one testified he had not been truthful and another that he had selective amnesia and deciding about the family history as mitigation is within the trial court's discretion); Jones v. State, 580 So.2d 143 (Fla. 1991) (while a poor home environment in some cases may be mitigating, sentencing is an individualized process and the trial court may find it insufficient); Ponticelli v. State, 593 So. 2d 483 (Fla. 1991) (rejecting defense argument that court failed to consider unrebutted mitigating evidence; trial court found doctor's testimony "speculation" and there was competent, substantial

evidence to support rejection of the mitigating evidence); Pettit v. State, 591 So. 2d 618 (Fla. 1992); see also Atkins v. Singletary, 965 F.2d 952, 962 (11th Cir. 1992) (Although Atkins argues that the trial judge did not consider nonstatutory factors, it is more correct to say that the trial judge did not accept -- that is give much weight -- to Atkins nonstatutory factors).

CONCLUSION

"Appellant is a good man, except that sometimes he kills people." (Fead v. State, 512 So. 2d 176, 180, Justice Grimes, concurring in part and dissenting in part). Mr. Gibson has demonstrated by his conduct that the death penalty statute was enacted precisely for those like him who have repeatedly killed his fellow citizens. The judgments and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 30th day of September, 1994.

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OF COUNSEL FOR APPELLEE.