IN THE SUPREME COURT OF FLORIDA

MICHAEL LEE LOCKHART,

Appellant,

v. Case No. 82,096

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

The following is offered to supplement and/or clarify the statement of the case and facts recited by the appellant:

Upon Lockhart's request to dismiss attorney Eble, the court instructed Lockhart that if he proceeded pro se he would be required to follow the same rules of evidence and procedure as anybody else in the courtroom. The court noted that he would try to make the rules clear but, nonetheless, Lockhart was going to have to follow the same rules. (R 176)

Prior to the penalty phase the defendant requested that the court order the state to help him obtain medical records from St. Charles Hospital in Toledo, Ohio and also assist in obtaining a witness, Janet Lockhart, from Toledo, Ohio. The state agreed to get the St. Charles Hospital records but, with regard to Janet Lockhart, the prosecutor represented that she would not attend the proceeding voluntarily. He stated that she had refused to voluntarily come to Florida because she was a victim of the defendant's and, therefore, didn't want anything to do with him. (R 183) The prosecutor also represented that Janet Lockhart was victimized like the other women were, but she was spared her life.[1] (R 188) The defendant was then told that he could read her statement to the jury. (R 188)

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[1] A progress report from Toledo, Ohio, shows that on 12/16/85, Mrs. Lockhart, the defendant's ex-wife, reported that Lockhart had broken into her home on the 15th and threatened her life if she did not let him see her baby. Mrs. Lockhart promised to go to her parent's home, get the child and return. She was allowed to leave but was told by the defendant that he would get her if

Lockhart was allowed to question prospective jurors Baxter, Fessel and Himes regarding their religion. (R 261, 353, 411) When he attempted to question prospective juror Courier as to whether she believed in "our Savior, the Lord Jesus Christ," the state objected and the court instructed him he did not want any questions relative to religious beliefs except as it relates directly to capital punishment. (R 273)

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she called the police. She also reported that he had stolen checks from her checkbook, forged her name to one and cashed it for $250.

SUMMARY OF THE ARGUMENT

Lockhart contends that the plea of guilty was not intelligently and voluntarily made. He contends that the record fails to establish an adequate plea colloquy due to insufficient questions concerning appellant's mental health and insufficient explanation of the rights appellant was waiving. It is the state's contention that the plea colloquy sufficiently comports with *Florida Rule of Criminal Procedure 3.172*.

Lockhart asserts that his waiver of the right to counsel was not knowingly and intelligently made. He contends that the trial court misled him as to what standards he would be held to if he proceeded pro se and what assistance the court would give him as a pro se defendant. It is the state's contention that the waiver of counsel was proper and that the record does not support appellant's claim that he was misled by representations from the trial court.

Appellant alleges that the trial court in the instant case erroneously refused to permit him to voir dire the panel concerning the strength of their beliefs in the death penalty, their religious beliefs, and their preconceived opinions about what was an appropriate punishment in this case. It is the state's position that the limitations by the trial court were within the court's discretion and appellant has failed to show an abuse of that discretion.

Appellant also claims that prospective jurors Lee and Gillman should have been excused for cause. Although Lee and

Gillman were removed from the jury by peremptory strikes, Lockhart still had two peremptory strikes remaining at the close of voir dire. Accordingly, the claim is barred. Assuming, arguendo, that the claim was properly preserved, a review of the voir dire of both Gillman and Lee shows that the trial court properly denied the challenges for cause.

Appellant's claim that the trial court's statements to the jury panel during the voir dire constituted a violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), is procedurally barred and without merit.

Appellant also contends that it was error for the trial court to allow Detective Wilbur to testify during the penalty phase concerning the facts of the murders committed by Lockhart in Texas and Indiana for which he was convicted and given death sentences. It is the state's position that the trial court properly admitted this evidence. The defense had the opportunity to cross-examine Detective Wilbur and the opportunity to present testimony or evidence to rebut the testimony.

Appellant argues that the trial court erred in allowing Detective Wilbur to testify concerning the circumstances surrounding the Texas conviction for the murder of Officer Halsey and also that the trial court erred in admitting photographs of his victim in Indiana, Wendy Gallagher. It is the state's position that the photographs were properly admitted and that the testimony concerning Officer Halsey did not become a feature of the case. Furthermore, error, if any, was harmless.

The trial court in no way limited the presentation of mitigating evidence and a new penalty phase is not required. In accordance with this Court's decision in Hamblen the trial court properly precluded counsel from making such an independent investigation when it was against Lockhart's wishes.

The trial court adequately renewed the offer of counsel prior to the sentencing hearing after engaging in a Faretta-based inquiry with appellant prior to the penalty phase.

A review of the trial court's order shows that the trial court did indeed consider the relevant mitigating evidence before him in making his determination as to the appropriate sentence.

The assault on Jennifer Colhouer was the result of a particularly lengthy, methodical and involved series of atrocious events and although the evidence from the instant crime standing alone is sufficient to establish the cold, calculated, and premeditated factor, when considered in context with the prior murder, it is clear that the defendant had a particular plan to commit these heinous offenses.

Appellant contends that the trial court's statement that 'the defendant presented no evidence of any kind and an explanation of his conduct could only be gleaned from interviews he has given to newspaper reporters, none of which mitigated in his favor,' constituted a violation of Gardner v. State, 430 U.S. 349 (1977). It is clear, however, that this is not a Gardner violation because the trial court did not consider the evidence in aggravation, the jury recommended death, and the court found four aggravating factors.

This Court has previously rejected the argument that Hamblen is inconsistent with Klokoc and must be overturned. Farr v. State, 621 So. 2d 1368 (Fla. 1993); Durocher v. State, 604 So. 2d 810 (Fla. 1992). Appellant has failed to provide any reason why these cases should be overruled.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ACCEPTING APPELLANT'S PLEA OF GUILTY IN THE INSTANT CASE.

Lockhart contends that the plea of guilty was not intelligently and voluntarily made. He contends that the record fails to establish an adequate plea colloquy due to insufficient questions concerning appellant's mental health and insufficient explanation of the rights appellant was waiving. It is the state's contention that the plea colloquy sufficiently comports with *Florida Rule of Criminal Procedure 3.172*.

"The rule specifically provides that a trial judge should, in determining the voluntariness of a plea, inquire into the defendant's understanding of the fact that he is giving up the right to plead not guilty, the right to a trial by jury with the assistance of counsel, the right to compel the attendance of witnesses on his behalf, the right to confront and cross-examine adverse witnesses, and the right to avoid compelled self-incrimination." Koenig v. State, 597 So. 2d 256, 258 (Fla. 1992). At the time Lockhart entered his plea the court made the following inquiry:

> THE COURT: Sir, you're now under oath; therefore, should any of your answers to my questions be false or incorrect, you could be prosecuted for perjury.
>
> How old are you?
>
> THE DEFENDANT: I'm twenty-nine.

THE COURT: How far in school did you go?

THE DEFENDANT: High school diploma, GED.

THE COURT: Can you read and write the English language?

THE DEFENDANT: Yes.

THE COURT: Are you now under the care of a psychiatrist or a psychologist?

THE DEFENDANT: No.

THE COURT: Are you now taking or under the influence of any drugs, narcotics, medicines, or alcohol?

THE DEFENDANT: No.

THE COURT: Have you any complaints about any of the representations made up to this date by Mr. Eble or the Public Defender's Office?

THE DEFENDANT: I'm sorry?

THE COURT: Have you any complaints about the representation made by Mr. Eble or anyone else in the Public Defender's Office?

THE DEFENDANT: Absolutely none.

THE COURT: By entering a plea of guilty, you're giving up certain rights. These are: the right to a speedy and public trial; the right to a trial by jury; the right to confront and cross-examine in court all witnesses against you; the right to testify on your own behalf or remain silent or compel witnesses to come to court to testify for you; the right to require the State to prove that you are guilty beyond and to the exclusion of every reasonable doubt; and most importantly of all, the right to the presumption of innocence to which you are entitled at all times.

Do you understand that you are giving up all of these rights by pleading guilty?

THE DEFENDANT: Yes.

THE COURT: Is anyone forcing, compelling, or threatening you to do this?

THE DEFENDANT: No.

THE COURT: Has anyone promised you any hope of reward or leniency or anything to get you to do this?

THE DEFENDANT: No.

THE COURT: You understand by doing this, you are subjecting yourself to two possible sentences: One sentence could be death by electrocution; and the other sentence could be life imprisonment with no hope of parole for a minimum of twenty-five years. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And you understand that the Court has indicated I will impanel a jury to make a recommendation to the Court as to which appropriate sentence to call; do you understand that?

THE DEFENDANT: Yes.

THE COURT: Are you an American citizen?

THE DEFENDANT: Yes.

THE COURT: You also understand that you are giving up your right to appeal to a higher court anything that went on in this case by doing what you're doing?

THE DEFENDANT: Yes.

THE COURT: What says the State?

MR. JORDAN: May I see the Indictment, Judge?

THE CLERK: We don't have the file.

MR. ALLWEISS: Judge, from recollection, this event occurred in Pasco County, Florida on January 20th, 1988. The victim in the case was Jennifer Colhouer.

> The Defendant is alleged to have gone into the home of Jennifer Colhouer, and by means involving stabbing and other unlawful means, killed her from a premeditated design to effect her death, and doing certain acts that were perpetrated on her.
>
> This is all reflected in the Indictment; it's all reflected in affidavits in the file, which, I believe, set forth in more detail all of these facts.
>
> THE COURT: These are the facts to which the State is prepared to plead. Are there any additional facts you wish to bring forth to the Court at this time or any dispute with the facts which you wish to make at this time?
>
> THE DEFENDANT: No, Your Honor.

(R 129 - 132)

Nevertheless, counsel for appellant contends that the plea colloquy engaged in between the court and appellant was too limited. He contends that although the court did inquire about present psychiatric care that an inquiry into past psychiatric care was also necessary.

This Court in Krawczuk v. State, 19 Fla. L. Weekly S 134 (Fla. March 17, 1994), rejected a similar claim. Krawczuk contended that his mental state deteriorated prior to trial and that a sufficient plea colloquy would have demonstrated the need for further psychiatric evaluations. This Court disagreed stating that although it is understandable that the defendant facing trial for first degree murder would become increasingly nervous and depressed, neither the defense nor the state requested further evaluation and there was nothing in the record

showing a reasonable ground for the court to order such on its own. Therefore, this Court held that the trial court conducted a proper and sufficient plea colloquy.

In the instant case, other than the actual facts of the crime there was nothing to suggest any mental infirmity on the part of the defendant. Clearly, the fact that the defendant committed an unusually brutal and heinous crime does not warrant a per se conclusion on the part of the trial court that the defendant suffered from mental infirmity. Many otherwise sane criminal defendants commit heinous and atrocious acts that are beyond the consideration of the average citizen. E.g., Trepal v. State, 621 So. 2d 1361, cert. denied, 114 S.Ct. 892 (1993); Gillian v. State, 582 So. 2d 610 (Fla. 1991); Sanchez-Valesco v. State, 570 So. 2d 908 (Fla. 1990).

Further, the record shows that despite numerous prior reviews of Lockhart's mental condition that there is nothing to support a conclusion that Lockhart was incompetent to enter a plea. In the sentencing order for Lockhart's conviction in Indiana for the first degree murder of Wendy Gallagher, the trial court considered both of the mental mitigators.[2] With regard to the extreme mental and emotional disturbance factor, the Indiana court found:

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[2] Lockhart's prison records from Indiana and Wyoming are contained volume V, the exhibit file. These pages are not numbered. Some of the exhibits are numbered and, where possible, those numbers are cited.

> There is no believable evidence to support any variety of mental or emotional disturbance. There was no direct evidence of how Michael Lee Lockhart was acting or reacting emotionally on October 13. From the physical evidence, we know Ms. Gallagher suffered multiple tailed knife wounds described by the autopsy report as superficial and irregular. From this and the number of wounds the court concludes Michael Lee Lockhart was taking his time, teasing his victim with minor cuts. The death did not come as a result of a sudden surge of anger or resentment. Multiple knife wounds usually indicate high emotional involvement, but are invariably the stabbing or slashing variety. Most of Ms. Gallagher's wounds had irregular edges caused by a sawing act instead of stabbing or slashing. Such time consuming torture indicates to this Court a cool, calm demeanor. (Vol V, State Exhibit ID(b) number 20 -- Composite: Indiana Judgment and Sentence)

With regard to the statutory mitigating factor of capacity to conform conduct to the requirements of the law, the Indiana court found:

> This mitigating factor is the old insanity defense since repealed. Because this section has not been repealed, it will be considered as it presently exists. There is a tendency to explain defendant's conduct by suggesting no sane person could possibly do these things to another human being. Dr. Skadegaard called it rage directed at females. Yet we have heard from other witnesses that Michael Lee Lockhart was quite capable of a normal relationship with women. His violent aberrant behavior was selective and quite controllable. It was not the result of any mental disease or defect. There was no evidence that he had been drinking or on drugs. (Vol V, State Exhibit ID(b) number 20 -- Composite: Indiana Judgment and Sentence)

Additionally, a 1986 Wyoming psychological report provided that Lockhart had a IQ of 95 with no psychopathological indications. The psychologist concluded that Lockhart was not emotionally disturbed. There is not and never has been any evidence that Lockhart suffered from any mental infirmities that would render his plea involuntary. Furthermore a review of the legal arguments made by Lockhart during the motion hearings, during the penalty phase and at sentencing clearly shows that he was suffering from no mental infirmities.

As a review of the foregoing plea colloquy shows, the entry of this plea was clearly within the guidelines set forth in *Florida Rule of Criminal Procedure 3.172* and should be affirmed on appeal.

Further, even if there was some deficiency in the entry of the plea, the state contends that remand is not warranted. Appellant, as a pro se defendant, did not file a notice of appeal in this case. Rather, the notice of appeal was filed by order of this Court on August 30, 1993. (R 102 - 103) At that point this Court directed the trial court to appoint counsel for appeal purposes because appeals in capital cases are by law automatically reviewed by this Court. Appellee recognizes this Court in Koenig v. State, 597 So. 2d 256 (Fla. 1992), held that review of a guilty plea by a death row inmate is required even if he doesn't file a motion to withdraw his plea. Here, however, not only has Lockhart not moved to withdraw his plea, there has been no actual representation by appellant that he has any desire

to withdraw his guilty plea. This Court has no way of knowing whether Lockhart would not simply enter another guilty plea in the event of a remand. Absent such a representation, the state contends that remand is be unwarranted. Thus, if this Court should find error, the state suggests that this Court should, as it did in Kilgore v. State, Case No. 76,521, order a hearing to determine if Lockhart wishes to withdraw his plea.

ISSUE II

WHETHER APPELLANT'S WAIVER OF COUNSEL WAS SUFFICIENT UNDER FARETTA V. CALIFORNIA.

Lockhart contends that his waiver of the right to counsel was not knowingly and intelligently made. He contends that the trial court misled him as to what standards he would be held to if he proceeded pro se and what assistance the court would give him as a pro se defendant. It is the state's contention that the waiver of counsel was proper under Faretta v. California, 422 U.S. 806 (1975) and that the record does not support appellant's claim that he was misled by representations from the trial court.

The Supreme Court has described the Faretta holding as a recognition that "a defendant may elect to act as his or her own advocate," signifying the defense of one's own case. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983). While the Supreme Court has not defined the particulars of a Faretta inquiry, the Eleventh Circuit has established the following factors that the trial court should consider in determining whether a criminal defendant is aware of the dangers of proceeding pro se:

> (1) the background, experience and conduct of the defendant including his age, educational background and his physical and mental health; (2) the extent to which the defendant had contact with lawyers prior to the trial; (3) the defendant's knowledge of the nature of the charges, the possible defenses, and the possible penalty; (4) the defendant's understanding of the rule of procedure, evidence and courtroom decorum; (5) the defendant's experience in criminal trial; (6) whether standby counsel was

> appointed and the extent to which he aided the defendant; (7) whether the waiver of counsel was the result of mistreatment or coercions; or (8) whether the defendant was trying to manipulate the events of the trial.

Stano v. Dugger, 921 F. 2d 1125 (11th Cir. 1991), quoting United States v. Fant, 890 F.2d 408, 409 - 10 (11th Cir. 1989) (per curiam), quoting Strozier v. Newsome, 871 F.2d 995 at 998 (11th Cir. 1989).

When appellant moved to discharge his counsel, the court inquired as follows:

> **THE COURT:** You may have a seat, please. You are now under oath. Therefore, should any of your answers to my questions be false or incorrect, you could be prosecuted for perjury.
>
> How old are you, Mr. Lockhart?
>
> **THE DEFENDANT:** Twenty-nine.
>
> **THE COURT:** How far in school did you go?
>
> **THE DEFENDANT:** GED.
>
> **THE COURT:** Okay. Can you read and write?
>
> **THE DEFENDANT:** Yes, I can.
>
> **THE COURT:** Are you under the care of any psychiatrist or psychologist?
>
> **THE DEFENDANT:** No, I am not.
>
> **THE COURT:** Are you now taking or under the influence of any drugs, narcotics, medicines or alcohol?
>
> **THE DEFENDANT:** No, I am not.
>
> **THE COURT:** Have you ever been held to be legally incompetent by any court of law?
>
> **THE DEFENDANT:** No, I have not.

THE COURT: Okay. Prior to being incarcerated, were you employed?

THE DEFENDANT: No, I was not.

THE COURT: Okay. What type of jobs have you held during the course of your adult life?

THE DEFENDANT: Shipping clerk, truck driver, military.

THE COURT: Okay. You have indicated before, you wish to represent yourself at this hearing. Is that correct? Is it still your wish?

THE DEFENDANT: Yes, I do.

THE COURT: Okay. Do you understand and have I fully explained to you the disadvantage of representing yourself?

In other words, you're not going to have anyone talking for you.

You're going to have to make the decisions as to what questions to be asked.

You're going to have to make the decision as to what witnesses, if any, to present, anything you wish to address to the jury.

Do you understand that?

THE DEFENDANT: Yes. I totally understand that, Your Honor.

THE COURT: You understand also that there is an attorney available?

The Court has previously indicated you're eligible to have an attorney represent you, and which would be Mr. Eble; do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: But you understand -- are you freely and voluntarily telling this Court you do not wish Mr. Eble to represent you?

THE DEFENDANT: No, I do not.

THE COURT: Okay. Now, do you understand you're going to have to be required to follow the same rules of evidence and procedure as that of everybody else; do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. Do you understand that among the trial proceedings, if there's a question asked and there's an objection made, I grant an objection, and I do not allow the question to be answered, that the jury would not hear the answer?

Do you understand that?

In other words, this is part of the trial procedure.

THE DEFENDANT: Yes.

THE COURT: Okay. Now, do you have any objections to Mr. Eble being seated in the courtroom, being available to answer any questions that you may have, not to represent you, but merely answer any questions as to procedure or as to law which you may have?

THE DEFENDANT: Um -- I -- I -- I, myself, would rather him not be here because I will not ask him any questions.

THE COURT: Okay. Do you have any objections if the Court directs that he be present, even if he does not answer any questions.

THE DEFENDANT: I think that's up to the Court to decide, Your Honor.

THE COURT: Okay.

THE DEFENDANT: But I would prefer him not to be present at all.

This colloquy sufficiently comports with the requirements of Faretta.

The colloquy also shows that the trial court clearly informed Lockhart that he would have to follow the same rules as everyone else. As Faretta explicitly recognizes:

> The right of self representation is not a license to abuse the dignity of the court. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel". 422 U.S. at 835 note 46, 95 S.Ct. at 2541 note 46 (emphasis supplied).

The court also ordered that the public defender Mr. Eble be available to the defendant if the defendant should at any time change his mind or desire to ask Mr. Eble any questions. (R 178) Thus, if Lockhart at any time had questions of procedure, he was free to not only ask the court, but also inquire of Mr. Eble.

Appellant's assertions to the contrary, the record shows that the trial court did indeed give Mr. Lockhart instructions throughout the proceeding as to proper questioning of the perspective jurors, questioning of the witnesses and the presentation of evidence. Furthermore, the court did not limit Mr. Lockhart's presentation of evidence in his defense. To the contrary, the court only told him that his closing arguments had to relate to evidence that was presented or to whether this evidence was actually introduced. (R 451 - 455) At that point Mr. Lockhart had a question and asked for counsel. The proceedings were recessed and counsel was obtained for Mr. Lockhart to consult. (R 546) After consulting with counsel the

defendant asked for a recess in order to obtain evidence to be introduced. After the recess, Lockhart represented to the court that he did not wish to put on any evidence to inflame Mrs. Colhouer or to upset her further. He requested that the closing arguments start immediately. (R 552 - 553)

The trial court conducted the requisite Faretta inquiry. Accordingly, this claim should be denied.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN RESTRICTING APPELLANT'S VOIR DIRE EXAMINATION AND IN DENYING APPELLANT'S CAUSE CHALLENGE TO JURORS LEE AND GILLMAN.

A. Restriction of Voir Dire

Appellant contends that the trial court in the instant case erroneously refused to permit appellant to voir dire the panel concerning the strength of their beliefs in the death penalty, their religious beliefs, and their preconceived opinions about what was an appropriate punishment in this case. It is the state's position that the limitations by the trial court were within the court's discretion and appellant has failed to show an abuse of that discretion.

The latitude accorded to attorneys during voir dire questioning is within the sound discretion of the trial court. Ragsdale v. State, 609 So. 2d 10 (Fla. 1992); Stano v. State, 473 So. 2d 1282, cert. denied, 474 U.S. 1093; Carol v. Dodsworth, 565 So. 2d 346 (Fla. 1st DCA 1990); Baker v. State, 517 So. 2d 753 (Fla. 2nd DCA 1987); Valdez v. State, 585 So. 2d 479 (Fla. 3d DCA 1991); Klinsky v. State, 414 So. 2d 234 (Fla. 4th DCA), review denied, 421 So. 2d 67 (Fla. 1982). While counsel must have an opportunity to ascertain latent or concealed prejudgments by prospective jurors, it is the trial court's responsibility to control unreasonably repetitious and argumentive voir dire. Stano v. State, 473 So. 2d 1282 (Fla.) cert. denied, ___U.S. ___, 114 S. Ct. 474 U.S. 1093 (1986). The trial court can ask

questions and properly limit the defendant's inquiry. Slaughter v. State, 301 So. 2d 762 (Fla. 1974), cert. denied, 420 U.S. 1005.

First, appellant contends that the trial court limited Lockhart from questioning potential jurors' feelings on the death penalty. The record shows that the trial court made an initial inquiry of all the prospective jurors concerning their feelings on the death penalty. (R 198 - 201) Then both the state and the defendant were allowed to question the jurors concerning relevant matters including their position on the death penalty. The record is replete with instances where the defendant questioned jurors on their position on the death penalty. (R 249, 261, 271, 279, 299, 300, 302, 310)

The only limitation the trial court made upon the defendant's questioning regarding the death penalty was during the voir dire of prospective juror Fessel. Lockhart asked Fessel, "If I was to ask you if you believed in the death penalty, would you say you believe in the death penalty more or less or is it even -- ". The court granted an objection to the question and instructed the defendant that the question as phrased indicated a qualitative belief. The court further instructed Lockhart that a question that is relevant on the proceedings is whether or not the juror is willing to apply a recommendation for the death penalty as proscribed by statute and whether the juror strongly believes in it or weakly believes in it is irrelevant. (R 358) The defendant did not object to the

court's ruling. The ruling was within the trial court's discretion and appellant has failed to show an abuse of that discretion. Furthermore, the record shows that prospective juror Fessel did not sit on the jury (R 360) and that subsequent to this ruling the defendant continued to question prospective jurors concerning the depth of their feelings on the death penalty. (R 408, 412)

Appellant also complains that he was limited in his voir dire questioning of prospective jurors regarding their religious beliefs. Again this is a matter within the trial court's discretion and appellant has failed to show an abuse of that discretion. Further, the record shows that Lockhart was allowed to question prospective jurors regarding church attendance and certain religious beliefs. (R 261, 353, 411) The only limitation placed upon this questioning was when the state objected to Lockhart questioning the prospective juror, Mrs. Courier, as to whether she believed in "our Savior, the Lord Jesus Christ?" The court instructed Lockhart that he would not allow any questioning regarding personal religious beliefs except as it related directly to the question of capital punishment. (R 273) Lockhart continued to question prospective jurors regarding church membership and attendance.

"Inquiry on voir dire as to the jurors' religious affiliation and beliefs is irrelevant and prejudicial and to ask such questions is improper." Davis v. Minnesota, 8 Fla. L. Weekly Fed. S 156 (May 23, 1994), cert. denied, (Ginsberg, J.,

concurring), quoting State v. Davis, 504 N.W. 2nd 767, 771 (Minn. 1993). See also State v. Allen, 616 So. 2d 452 (Fla. 1993), approving 596 So. 2d 1083 (Fla. 3d DCA 1992) (en banc); Joseph v. State, 19 Fla. L. Weekly D 861 (3d DCA April 19, 1994). Cf. Mitchell v. State, 622 So. 2d 1156 (Fla. 5th DCA 1993). Accordingly, the minimal limitation was within the trial court's discretion.

B. Denial of challenge for cause

Appellant also claims that prospective jurors Lee and Gillman should have been excused for cause. Appellant apparently concedes that this claim is procedurally barred. Nevertheless, appellant contends that the procedural bar should be excused because he represented himself.

In order to show that a trial court committed reversible error in denying a challenge for cause, the defendant must show that all peremptories were exhausted and that an objectionable juror had to be accepted. Hall v. State, 614 So. 2d 473 (Fla. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 109, 126 L.Ed.2d 74 (1994); Pentecost v. State, 545 So. 2d 861, 836 n. 1 (Fla. 1989); Charter v. State, 576 So. 2d 691 (Fla. 1990). Although Lee and Gillman were removed from the jury by peremptory strikes, Lockhart still had two peremptory strikes remaining at the close of voir dire. Accordingly, the claim is barred. This procedural bar is not excused by the fact that the defendant represented himself. As the United States Supreme Court recognized in Faretta, 422 U.S. at 835 n. 46, the right of self-representation

is not a license to abuse the dignity of the court. Neither is it a license not to comply with relevant rules or procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel. See also Jones v. State, 449 So. 2d 253 (Fla. 1984). Neither is the failure to use all of his peremptory challenges excused by his alleged belief that he would be stuck with the next two jurors. Lockhart was aware that he could backstrike. Therefore, he could have used one of his peremptories to strike one of the last two jurors and then made a determination to keep the new juror and use his last peremptory as a backstrike or strike the newest prospective juror. There was no requirement that he use both at the same time. Nevertheless, he did not choose to use either of the two remaining strikes. Therefore, he has failed to establish that a truly objectionable juror sat on his jury.

Assuming, arguendo, that the claim was properly preserved, a review of the voir dire of both Gillman and Lee shows that the trial court properly denied the challenge for cause. Gillman stated that he was retired police officer who would abide by the laws and his personal opinion didn't matter, that the decision would be based upon the evidence. He also stated that he did not feel that everyone who killed a police officer should die. (R 296 - 304) Prospective juror Lee also stated that she could be fair and impartial although she had seen news on this case. She

didn't think that there would be any hostility to her from family and friends if she recommended life. (R 275 - 279). In Penn v. State, 574 So. 2d 1079 (Fla. 1991), this Honorable Court rejected a similar claim and held that it was not an abuse of the trial court's discretion to refuse to excuse prospective jurors for cause because they ultimately demonstrated their competency, that they would base their decisions on the evidence and the instructions. The refusal to dismiss Lee and Gillman for cause is based on the factual determinations. It was within the trial court's discretion and Lockhart has failed to show an abuse of that discretion. Valdes v. State, 626 So. 2d 1316 (Fla. 1993).

ISSUE IV

WHETHER THE TRIAL COURT'S STATEMENTS CONSTITUTED PROPER DENIGRATION OF THE JURORS' SENSE OF RESPONSIBILITIES IN A CAPITAL PROCEEDING REQUIRING REVERSAL FOR A NEW PENALTY PHASE.

Appellant contends that the trial court's statements to the jury panel during the voir dire constituted a violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). This claim is procedurally barred and without merit.

First, as appellant concedes, this claim is procedurally barred because it was not raised at trial. Thus, it has not been preserved for review. Sochor v. State, 619 So. 2d 285, 292 (Fla.), cert. denied, ___U.S. ___, 114 S. Ct. 638 (1993). Again appellant attempts to excuse a procedural bar by virtue of his pro se representation. As previously noted, when the defendant undertakes to represent himself, he is still bound by the rules of procedure. Faretta, 422 U.S. 806; Jones, 463 U.S. 745. Despite appellant's claim that as a pro se defendant he should not be bound by rules, the record shows that Lockhart did make numerous objections and did not blindly accept the statements by the trial court. (R 484) Accordingly, this claim should be denied as procedurally barred.

Even if this claim was not procedurally barred, it is the state's position that the trial court's statement to the jury, as well as the instructions given to the jury both before voir dire and after the proceedings were an accurate statement of Florida law and the jury's role. (R 193, 583 - 584) Where the trial

court gives the jury an accurate statement of Florida law this Court has held that there is no violation of Caldwell. Socher v. State, 619 So. 2d 285, 291 (Fla. 1993); Rose v. State, 617 So. 2d 291, 297 (Fla. 1993); Combs v. State, 525 So. 2d 853 (Fla. 1988); Grossman v. State, 525 So. 2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989). This position has been upheld in the United States Supreme Court upon review. Dugger v. Adams, 489 U.S. 401, 407 (1989); Darden v. Wainwright, 477 U.S. 168, 184, n. 15 (1986).

ISSUE V

WHETHER APPELLANT WAS DENIED HIS RIGHT OF CONFRONTATION WHEN THE TRIAL COURT ADMITTED THE HEARSAY EVIDENCE OF DETECTIVE WILBUR REGARDING LOCKHART'S INDIANA AND TEXAS JUDGMENT AND SENTENCES.

Appellant contends that it was error for the trial court to allow Detective Wilbur to testify during the penalty phase concerning the facts of the murders committed by Lockhart in Texas and Indiana for which he was convicted and given death sentences. It is the state's position that the trial court properly admitted this evidence.

Florida law clearly provides that in a penalty phase "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 afforded a fair opportunity to rebut any hearsay statements." *Section 921.141(1), Fla. Stat.* (emphasis added). The defendant was afforded the opportunity to rebut this evidence and the testimony was properly admitted.

Detective Wilbur testified that the defendant's sixteen year old victim in Indiana, Wendy Gallagher, had come home from school and was last seen around 4:00 p.m.. (R 468) Wendy Gallagher was discovered by her fifteen year old sister. He testified that both Wendy and Jennifer Colhouer were naked from the waist down, that their bras were pushed upon and breasts exposed. Wendy Gallagher had twenty-one to twenty-seven torture wounds. (R 469) Wilbur testified that the defendant conned his way into both

homes, that Wendy was bound and gagged and that her wounds were the same. (R 484, 485) He testified that Wendy's thumbs were tied between her fingers to cause pain. (R 486) Detective Wilbur testified that it was his opinion that Wendy Gallagher was sexually assaulted. (R 497) Wilbur testified that he attended both trials and was familiar with the files from both cases. Based upon the foregoing it was his opinion that both the crimes were sexual in nature. (R 497)

With regard to the murder of Officer Halsey in Beaumont Texas, Wilbur testified that Officer Halsey was on patrol one afternoon and saw what he thought was a drug dealer, in a known drug area, driving an 1986 red Corvette with a Florida tag on it. Some time later, Officer Halsey again spotted the vehicle. In checking the vehicle out, he found that the tag on the Corvette was stolen from Florida. Officer Halsey knocked on the door of Lockhart's room at the Best Western. A scuffle broke out and Officer Halsey was shot once in the forearm. Officer Halsey then fearing for his life asked the defendant to not shoot him again.[3] Lockhart shot and killed him and then fled the motel in the Corvette with the Florida tag. (R 491, 492) Officer Halsey was shot with a .357 caliber weapon that was stolen from a policeman's residence in Ohio. Detective Wilbur testified that he connected the murder in Texas to the one in Florida from a nationwide bulletin regarding the shooting death of Officer

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[3] Wilbur alleged that Lockhart had confessed to the Texas police that Halsey begged for his life. (R 499)

Halsey. The bulletin had a picture of Michael Lockhart as well as a description of the vehicle he was driving. At that time Wilbur had a composite sketch of a possible suspect for the Colhouer murder. The similarities between the picture of Lockhart and the sketch of the suspect were very close. The bulletin stated that Lockhart was driving a 1986 red Corvette which displayed a Florida tag that was stolen in Tampa, but had a stolen Missouri tag inside. Wilbur testified that the suspect vehicle that he was looking for had a Missouri tag on it at the time that Jennifer was killed. (R 493) It is the state's position that this testimony by Detective Wilbur was properly admitted.

Recently, this Court in Wyatt v. State, 19 Fla. L. Weekly S351 (Fla. June 30, 1994), reviewed this identical claim and found no error. Wyatt claimed that it was error for the State to present hearsay testimony of several police officers concerning Wyatt's prior violent felonies. Citing Waterhouse v. State, 596 So. 2d 1008 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct. 418, 121 L.Ed.2d 341 (1993) this Court held that hearsay evidence of this nature is admissible in the penalty phase.

In Waterhouse v. State, 596 So. 2d 1008, this Court made it clear that hearsay testimony is permissible provided the defendant has a fair opportunity to rebut it. Because defense counsel in Waterhouse was afforded the opportunity to cross-examine the detective who testified concerning Waterhouse's prior conviction for second degree murder, this Court found no error in

the admission of this testimony. Id. at 1016. In the instant case, not only did the defense have the opportunity to cross-examine Detective Wilbur, he was also afforded the opportunity to present testimony or evidence to rebut the testimony.

Appellant relies on this Court's opinion in Dragovich v. State, 492 So. 2d 350 (Fla. 1986) to support his claim that in order for him to fairly rebut the testimony of Detective Wilbur he would have turned the penalty phase into a mini-trial. This Court's concern in Dragovich was with the admission of hearsay reputational evidence as opposed to prior criminal convictions. This Court made it clear that the evidence of prior criminal convictions is admissible and only placed a limitation upon the admission of pending charges, near arrests and reputation. The evidence presented in the instant case concerned crimes for which Lockhart had already been convicted. This evidence was properly admitted and was appropriately considered by the jury.

Appellant also claims that the trial court improperly limited his right of cross examination. Any limitations made on the appellant's cross examination of Detective Wilbur were within the discretion of the trial court and appellant has failed to show an abuse of that discretion.

Furthermore, in light of the fact that Lockhart pled guilty, asked for the death penalty, did not present any evidence in rebuttal, committed a particularly aggravated murder against an innocent young girl in her home, as well as having convictions for another murder against a young girl and the murder of a

police officer, it is beyond a reasonable doubt that error, if any, was harmless.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPHS OF THE MURDER OF WENDY GALLAGHER AND ADMITTING DETECTIVE WILBUR'S TESTIMONY WITH REGARD TO THE MURDER OF OFFICER HALSEY.

Appellant contends that the trial court erred in allowing Detective Wilbur to testify concerning the circumstances surrounding the Texas conviction for the murder of Officer Halsey and also that the trial court erred in admitting photographs of his victim in Indiana, Wendy Gallagher. Lockhart concedes, however, that this Court has held that in a capital sentencing proceeding the state may introduce testimony as to the circumstances of any prior violent felony conviction, rather than just the bare facts of that conviction. He contends however, that the details of the crimes became a feature of the penalty phase and that the prejudicial value outweighed the probative value. It is the state's position that the photographs were properly admitted and that the testimony concerning Officer Halsey did not become a feature of the case. Furthermore, error, if any, was harmless in light of the nature of the crime, the overwhelming evidence supporting the aggravating factors and the defendant's own request for the death penalty.

With regard to the photograph, this Court has repeatedly stated:

> "The current position of this court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in the case. Relevancy is to be determined in a normal manner, that is, without regard

> to any special characterization of proffered evidence. Under this conception, the issues of 'whether cumulative', or 'whether photographed away from the scene,' are routine issues basic to a determination of relevancy, and not issues arising from any 'exceptional nature' of the proffered evidence."

State v. Wright, 265 So. 2d 361, 362 (Fla. 1972). See also Henninger v. State, 251 So. 2d 862, 864 (Fla. 1971); Meeks v. State, 339 So. 2d 186 (Fla. 1976). And, in Henderson v. State, 463 So. 2d 196 (Fla. 1985), this Court stated:

> "Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Those whose work products are murder of human beings should expect to be confronted by photographs of their accomplishments. The photographs are relevant to show the location of the victims' bodies, the amount of time that had passed from when the victims were murdered to when the bodies were found, and the manner in which they were clothed, bound and gagged."

Id. at 200

The admission of photographic evidence is within the trial court's discretion and a court's ruling will not be disturbed on appeal unless there is a clear showing of abuse. Wilson v. State, 436 So. 2d 908 (Fla. 1983). This discretion includes the admission during the penalty phase of photographs of victims from a prior violent felony. Wyatt v. State, 19 Fla. L. Weekly S351, S352. Appellant has failed to show an abuse of that discretion.

The photographs of the Indiana victim, Wendy Gallagher were relevant to establish the circumstances of the prior violent felony and the aggravating factor of cold, calculated, and

premeditated. Thus, unlike Duncan v. State, 619 So. 2d 279 (Fla.), ___ U.S. ___, 114 S.Ct. 445, 126 L.Ed.2d 385 (1993), wherein this Honorable Court held that the admission of the photograph of the prior victim was not relevant and that its prejudicial value outweighed its probative value, in the instant case the photographs were relevant to establish two aggravating factors.

With regard to the prior violent felony aggravating factor, the photographs illustrated the circumstances of the crime as testified to by Detective Wilbur, and supported his contention that the murder was sexual in nature. This was a fact that was disputed by the defendant at trial as well as herein.

As to the cold, calculated, and premeditated factor, Detective Wilbur used these photographs to explain the similarities of the murders of sixteen year old Wendy Gallagher and fourteen year old Jennifer Colhouer. (R 484 - 487) These similarities rebutted the suggestion that the murder may have been the result of a sexual assault that went wrong and supported the state's contention that the murder was cold, calculated, and premeditated; a "particularly lengthy, methodical, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." Preston v. State, 444 So. 2d 939, 946 - 47 (Fla. 1984).

In Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977), this Court held that a prior victim should be allowed to testify concerning the events which resulted in the conviction as opposed

to restricting the evidence to the bare admission of the conviction. This is so because the purpose for considering aggravating and mitigating circumstances "is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty his called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for jury and the judge." Id. at 1001. See also Stewart v. State, 558 So. 2d 416, 419 (Fla.), cert. denied. ___ U.S. ___, 114 S.Ct. 478, 126 L.Ed.2d 429 (1991); Tompkins v. State, 502 So. 2d 415, 420 (Fla. 1987); Slawson v. State, 619 So. 2d 255, 260 (Fla.) cert. denied, ___ U.S ___, 114 S. Ct. 2765 (1994).

As this Court noted in Slawson, "it must be remembered that the propriety of a sentence of death is not a function of merely tabulating aggravating versus mitigating factors. . . . Rather the sentence and determination is a result of a weighing process during which each factor must be assigned a qualitative weight. Accordingly, it is only logical that records of evidence of the circumstances underlying the aggravating and mitigating factors may be considered in assigning a relative weight to each factor." Id. at 259 - 60. Thus, the admission of the photographs allowed the jury the opportunity to compare the two crimes to make a determination as to the circumstances surrounding the crimes and whether they established the aggravating factors of prior violent felony and/or cold, calculated, and premeditated. The consideration of these photos in the context of the other

evidence aided in the final determination as to whether the defendant deserved the ultimate sentence. Wyatt, supra.

Similarly, with regard to the testimony concerning Officer Halsey, the testimony was properly admitted and did not become a feature of the penalty phase. See, Wyatt; Waterhouse. Nevertheless, as this Court noted in Tompkins, 502 So. 2d at 420, that "even if we assume that the victims of the prior offenses are unavailable for the panel to confront, the officer's testimony was clearly harmless under the facts of this case. The state introduced certified copies of the appellant's prior convictions. This evidence alone is sufficient to establish the aggravating circumstance." Accordingly, error, if any, is harmless beyond a reasonable doubt.

ISSUE VII

WHETHER THE TRIAL COURT IMPROPERLY RESTRICTED APPELLANT'S PRESENTATION OF MITIGATING EVIDENCE.

Appellant contends that the trial court precluded him from investigating and presenting mitigating evidence to the jury and that the court required him to testify as the only means of presenting mitigation, thereby forcing him to choose between two constitutional rights. Appellant also contends that the trial court erred in requiring the public defender to remain available to the defendant but precluding him from making investigation into mitigating evidence without the defendant's approval. It is the state's position that no reversible error was committed.

The record reflects that when Lockhart moved to discharge his counsel and asserted his right to proceed pro se, the trial court instructed him that he would have to follow the same rules of evidence and procedure as everyone else and that he would have to make the decision as to what witnesses to present. (R 176) Lockhart then requested assistance in obtaining a witness, Janet Lockhart, and medical records from Toledo, Ohio. (R 182-3) The state represented that Janet Lockhart would not attend the proceeding voluntarily because she was a victim of Lockhart's. (R 183) The trial court told Lockhart that he could introduce a statement Janet Lockhart made to Detective Robert Hobbs, from the State of Texas. (R 188) At the close of the state's case the prosecutor informed the court that Lockhart had received the medical records he had requested. (R 538) Lockhart asked for

and was given permission to review his Wyoming prison records. (R 542) Lockhart then noted his understanding that he could make reference to other statements made through other witnesses. (R 541) The court told him he could make any statements he wished as long as it related to evidence presented. (R 542) The court told him:

> "THE COURT: You have a right to give an opinion as to anything you want to, but it must be under oath as a witness, not during final arguments. You have the right, at this time, if you wish, to give an opinion of anything you wish to. You may do so. You may be placed under oath, as any other witness, and you may testify as any other witness, but if you choose not to testify, then the only comments to which you can make during final arguments are those directly related to the evidence actually introduced. You can't bring in anything new in final argument.
>
> (R 544)

At that point Lockhart requested and received an opportunity to consult with legal counsel. (R 546) After consulting with Mr. Eble, Lockhart requested and received an opportunity to review the evidence that he wished to present during the penalty phase (including Janet Lockhart's statement). (R 549) After the recess Lockhart represented to the court that he did not wish to put on any mitigating evidence. (R 552) This was not a new position by Lockhart but was rather a continuation of his original statements to the court at the time of his plea. (R 122-27) The trial court in no way limited the presentation of mitigating evidence and a new penalty phase is not required.

Appellant's claim that the trial court erred in precluding the public defender from investigating and presenting mitigating evidence is also without merit. This Court in Hamblen v. State, 527 So. 2d 800 (Fla. 1985) rejected a similar claim stating:

> While we commend Hamblen's appellate counsel for a thorough airing of the question presented by this issue, we decline to accept his logic and conclusions. We find no error in the trial judge's handling of this case. Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of Faretta.

Id. at 804

See, also, Durocher v. State, 604 So. 2d 810 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct. 1660, 123 L.Ed.2d 279 (1993) (defendant may waive participation in the penalty phase; no requirement that a special counsel be appointed.)

Appellant's reliance on Koon v. Dugger, 619 So. 2d 246 (Fla. 1993) to support his claim that his former lawyer should have been allowed to investigate and present mitigating evidence is misplaced. In Koon, this Court recognized the right of a competent defendant to waive presentation of mitigating evidence. Nevertheless, out of concern with problems where a trial record that does not accurately reflect a defendant's waiver of his right to present any mitigating evidence, this Court established a prospective rule to be applied in such a situation. When a defendant, against his counsel's advice refuses to permit the presentation of mitigating evidence in the penalty phase, counsel

must inform the court on the record of the defendant's decision. Counsel must indicate whether based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel discussed these matters with him and despite counsel's recommendation, he wished to waive presentation of penalty phase evidence. Id. at 250.

First of all, the ruling in Koon was prospective only. The trial in the instant case occurred some four years before this decision was rendered. Furthermore, unlike Koon, Lockhart was not represented by counsel. Lockhart was representing himself and made his own determination to not present mitigating evidence. Thus, in accordance with this Court's decision in Hamblen, the trial court properly precluded counsel from making such an independent investigation when it was against Lockhart's wishes.

ISSUE VIII

WHETHER THE TRIAL COURT ADEQUATELY RENEWED THE OFFER OF COUNSEL TO APPELLANT BEFORE THE FINAL SENTENCING HEARING.

Appellant contends that even though the court had previously engaged in a Faretta-based inquiry with appellant prior to the penalty phase, that the court's inquiry at the beginning of the sentencing hearing on December 12, 1989, was insufficient under *Florida Rule of Criminal Procedure 3.111(d)(5)*. It is the state's position that the trial court adequately renewed the offer of counsel prior to the sentencing hearing.

Florida Rule of Criminal Procedure 3.111(d)(5), provides:

> "If a waiver is accepted in any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which a defendant appears without counsel. (emphasis added)

As appellant concedes, the trial court conducted a Faretta-type hearing prior to the entry of the plea. Prior to the sentencing hearing in the instant case the trial court stated, "Michael Lockhart, you are present in the courtroom at this time. You previously waived your right to be represented by counsel. Do you now desire to have an attorney represent you in these proceedings?" To which the defendant replied, "No.". (R 632) A review of this exchange clearly indicates that the trial court, after having repeatedly offered counsel to the defendant, sufficiently complied with the rule by renewing the offer of counsel. There is nothing in the rule that requires the trial

court to go through an entire Faretta inquiry at each stage of the proceeding. See Waterhouse v. State, 596 So. 2d 1008, at 1014 (Fla. 1992) (standards of Faretta were met despite lack of final hearing). The rule merely requires that the court renew the offer of counsel. Clearly the court in the instant case did so and no error was committed. Cf. Pall v. State, 19 Fla. L. Weekly D450 (Fla. 2nd DCA 1994) (although Judge asked the appellant if he still wanted to represent himself, he did not renew offer of assistance of counsel).

ISSUE IX

WHETHER THE TRIAL COURT PROPERLY CONSIDERED THE MITIGATING EVIDENCE.

Appellant contends that the trial court's order fails to make clear and independent findings as to mitigating circumstances suggested by the record. He contends that although appellant declined to present any mitigating evidence that it was the trial court's responsibility under Hamblen v. State, 527 So. 2d 800 (Fla. 1985), to comb the record for potentially mitigating evidence. It is the state's position that a review of the trial court's order shows that the trial court did indeed consider the relevant mitigating evidence before him in making his determination as to the appropriate sentence.

In Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) the defendant "presented a large quantum of uncontroverted mitigating evidence" including physical and psychological abuse which the trial court improperly dismissed because of Nibert's age. A mental health expert had testified as part of the defense case opining that Nibert was under the influence of extreme mental or emotional disturbance and that his capacity to control his behavior was substantially impaired. In the instant case the defense did not urge any mitigation. This Court has made it clear that because nonstatutory mitigating evidence is so individualized the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish. This is not too much to ask if the

court is to perform the meaningful analysis required in considering all the applicable aggravating and mitigating circumstances. Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990)

Although Lockhart was not actively desirous of seeking life imprisonment in lieu of the death penalty, the trial court thoroughly reviewed any potential mitigating evidence the jury might have considered prior to its returning a 12 to 0 death recommendation. The court concluded that none of it compared in weight to the aggravating factors; 1) previous convictions for two first degree murders, 2) committed during the course of a sexual battery, 3) homicide committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, 4) the killing was heinous, atrocious or cruel. F.S. 921.141(5)(i). (R 636-39) As in Hamblen v. State, 527 So. 2d 800 (Fla. 1988) and Pettit v. State, 591 So. 2d 618 (Fla. 1992), the sentencing judge considered possible mitigation even though not urged. The trial court's rejection of potential mitigation in the weighing process is sufficiently clear.

Appellant contends that in addition to the possible potential mitigating evidence considered by the trial court that a review of the record shows the existence of other possible mitigating evidence. A review of Lockhart's record shows that much of the evidence Lockhart now claims constitutes mitigating evidence does not hold up to close scrutiny as it is either

rebutted by the record or does not serve to mitigate the instant crime.[4]

In addition to the three murders which Lockhart committed within months of each other,[5] a review of Lockhart's records shows that prior to committing these murders Lockhart engaged in a pattern of escalating criminal conduct. After being placed on probation, he was charged with several violations of that probation. He was arrested in October of 1985 by the Toledo police for disorderly conduct and resisting arrest at the local theater. Lockhart subsequently failed to appear before the Municipal Court and warrants were issued for his arrest. On December 16, 1985, Lockhart's ex-wife Mrs. Janet Lockhart reported that Mr. Lockhart had broken into her home on the 15th and threatened her life if she did not let him see their baby. She was only allowed to leave when she promised to go to her parent's home and get the child and return. Although he released her, she was told by Lockhart that he would get her if she called the police. Mrs. Lockhart also reported that Lockhart had stolen five checks from her checkbook on or about December 4, 1985 and that he forged her name to one check and cashed it for $250. His probation officer reported that several efforts had been made to

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[4] Lockhart's prison records from Indiana and Wyoming are contained volume V, the exhibit file. These pages are not numbered. Some of the exhibits are numbered and, where possible, those numbers are cited.

[5] Wendy Gallagher's murder was on October 13, 1987, Jennifer Colhouer's was on January 20, 1988, and Officer Halsey's was on March 22, 1988. (R 493)

locate the probationer and that Mrs. Lockhart had reported that Lockhart was in Florida where he had borrowed a friend's truck and not returned it. The truck was found abandoned near Tampa, Florida. On December 27, Lockhart was arrested in Quincy, Florida on a local charge of petit theft. Mr. Lockhart was then reincarcerated in the State of Wyoming and sentenced to 2 - 4 years imprisonment. The Wyoming records also show that although the defendant denied having any alcohol or drug problems, Lockhart was given every opportunity to receive treatment for drug abuse problems and that he rejected same.

Lockhart's intake summary of April 14, 1986, shows that he claimed to have a happy childhood in a large Ohio family where he had a good relationship with nonalcoholic, noncriminal parents. The record shows he had eleven years of schooling and then obtained his G.E.D. The record also shows that Lockhart had psychological testing which revealed that his I.Q. was 95. Furthermore, despite appellant's claim that he was discharged from the Army based on mental problems, the psychological interview shows that Lockhart was discharged from the Army because of family problems; mainly the difficulty he was having with his wife. Psychologists determined that Lockhart was not emotionally disturbed; merely antisocial.

Furthermore, a review of the Indiana sentencing order shows that no truly mitigating evidence was ignored by this trial court. The Indiana sentencing order shows that there was no mental or emotional disturbance found nor was there any evidence that he had been drinking or on drugs at the time of the crime.

The decision as to whether mitigation has been established lies with the trial court. Petit v. State, 591 So. 2d 618, 621 (Fla. 1992); Sireci v. State, 587 So. 2d 450 (Fla. 1991). When reviewed as a whole it is clear that the trial court did not fail to find any truly mitigating evidence as competent substantial evidence supports the rejection of any potentially mitigating evidence. Pettit; Ponticelli v. State, 593 So. 2d 483 (Fla. 1991). Furthermore, any failure on the trial court's part to fail to discern kernels of potentially mitigating evidence from the record is clearly harmless in light of the minimal evidence of mitigation and the substantial evidence in support of the aggravating factors. Cook v. State, 581 So. 2d 141 (Fla. 1991).

ISSUE X

WHETHER THE TRIAL COURT ERRED IN FINDING THE INSTANT HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED FASHION.

Appellant contends that the trial court incorrectly found the cold, calculated, and premeditated aggravating circumstance. He contends that this case was merely a sexual assault that went wrong. It is the state's contention that the evidence clearly supports the trial court's finding that instant murder was committed in a cold, calculated, and premeditated fashion.

This Court has defined cold, calculated, and premeditated as a careful plan or prearranged design to kill. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The aggravator is properly found when the facts show a "particularly lengthy, methodical, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." Nibert v. State, 508 So. 2d 1, at 4 (Fla. 1987), quoting Preston v. State, 444 So. 2d 939, 946 - 47 (Fla. 1984). A review of the facts in the instant case clearly shows that the assault on Jennifer Colhouer was the result of a particularly lengthy, methodical and involved series of atrocious events.

The record shows that Lockhart went to Jennifer Colhouer's house after school when he knew she would be home alone. Lockhart conned his way into the house and got a knife from the kitchen where upon he pricked, prodded and teased Jennifer into the upstairs bedroom. (R 532) Jennifer Colhouer was then choked

with a towel to the point of unconsciousness. (R 521 - 522) Then, while the young victim was still alive, Lockhart took the knife and slit her stomach open from her rib cage to her vagina. (R 522) Jennifer Colhouer was then turned over and raped anally. Upon climax, Lockhart withdrew and ejaculated on her thigh. (R 532)

The evidence from the instant crime standing alone is sufficient to establish cold, calculated, and premeditated. When considered in context with the prior murder, it is undeniable that the defendant had a particular plan to commit these heinous offenses. The commission of this murder was identical to that of Wendy Gallagher committed a few months earlier; the heinous acts committed on Jennifer Colhouer were not the result of passion or rage but part of well thought out and rehearsed plan. Under these circumstances the trial court properly found the cold, calculated, and premeditated aggravating circumstance. See Owen v. State, 596 So. 2d 985 (Fla. 1992) (CCP established where defendant selected victim, put socks on hands, closed and blocked door to children's room, selected weapons from kitchen and bludgeoned sleeping victim before strangling and sexual assaulting her).

ISSUE XI

WHETHER THE TRIAL COURT IMPROPERLY REVIEWED AND CONSIDERED INFORMATION NOT CONTAINED IN THE RECORD PRIOR TO SENTENCING APPELLANT.

Appellant contends that a statement made by the trial court that 'the defendant presented no evidence of any kind and an explanation of his conduct could only be gleaned from interviews he has given to newspaper reporters, none of which mitigated in his favor,' constituted a violation of Gardner v. State, 430 U.S. 349 (1977). It is the state's position that the trial court did not commit a Gardner violation.

Recently, this Court in Hendrix v. State, 19 Fla. L. Weekly S227 (Fla. April 21, 1994), reviewed a similar claim. In Hendrix this Court distinguished Gardner and found no violation because the trial judge in Hendrix did not rely on the extra material in imposing sentence, the jury recommended death, whereas, Gardner's sentence was a jury override, and Hendrix had five aggravating factors, whereas Gardner had one. In the instant case, the trial court did not consider evidence in aggravation that was outside of the defendant's knowledge. The record shows that the defendant was informed the trial court had reviewed this information. (R 638) Furthermore, the trial court rejected any information that he had read in the newspaper and did not consider it in aggravation or in mitigation. (R 95) The trial court was merely attempting to fill in the blanks that the defendant himself left by requesting the death penalty. Furthermore, as in Hendrix, Lockhart's jury recommended death.

And, finally, Lockhart has four aggravating factors. Accordingly, since the record clearly reflects that the trial court did not rely on the information to support the sentence, error, if any, is harmless.

ISSUE XII

WHETHER THIS COURT SHOULD RECEDE FROM HAMBLEN V. STATE AND ITS PROGENY.

Appellant's review of the case law leads him to suggest that Hamblen v. State, 527 So. 2d 800 (Fla. 1988) and its progeny should be overturned. Appellee suggests that Hamblen be retained. In Hamblen, supra, this Court opined:

> While we commend Hamblen's appellate counsel for a thorough airing of the question presented by this issue, we decline to accept his logic and conclusions. We find no error in the trial judge's handling of this case. Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of *Faretta*. In the field of criminal law, there is no doubt that 'death is different,' but, in the final analysis, all competent defendants have a right to control their own destinies. This does not mean that courts of this state can administer the death penalty by default. The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence. A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law.

(Id. at 804)

As in Hamblen, the trial court in the instant case articulated possible mitigating factors the jury may have considered resulting from the evidence presented. See also Pettit v. State, 591 So. 2d 618 (Fla. 1992) (trial judge considered the testimony of the effect of Huntington's chorea).

Lockhart contends that Klokoc demonstrates that Hamblen is unworkable. In Klokoc the trial court appointed special counsel to represent the public interest in bringing forth mitigating factors when the defendant refused to allow his counsel to actively participate and refused to allow the presentation of family member mitigation evidence; that a different procedure was utilized in Klokoc than in Hamblen, Pettit or the instant case does not mean that only Klokoc is workable. This Court was able to fulfill its appellate responsibility not only in Klokoc but also in Hamblen, and in Pettit and in this case.

This Court has previously rejected the argument that Hamblen is inconsistent with Klokoc and must be overturned. Farr v. State, 621 So. 2d 1368 (Fla. 1993); Durocher v. State, 604 So. 2d 810 (Fla. 1992). Appellant has failed to provide any reason why these cases should be overruled. Accordingly, the state urges this Court to once again reaffirm Hamblen and its progeny.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, this Honorable Court should affirm the judgment and sentence of the trial court.

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 James Marion Moorman, Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 17 day of August, 1994.

OF COUNSEL FOR APPELLEE.