IN THE SUPREME COURT OF FLORIDA

MELVIN TROTTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 82,142

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee generally accepts appellant's statement of the case and facts but submits this supplemental statement.

Defense witness psychologist Harry Krop first evaluated and examined Trotter in 1986 when contacted by the defense office to do a confidential psychological evaluation for competence and possible mitigating factors. He opined that Trotter was competent to stand trial and sane at the time of the offense. (Tr 1483 - 85). His opinions have changed since he first saw him (Tr 1490). Krop had interviewed appellant's mother recently, sister, foster mother, and Danny Wortham who grew up in the same foster home as appellant (Tr 1491 - 92). Krop reviewed Trotter's personal history including being born as a result of a rapist's assault on his mother, the lack of prenatal care, being placed in a foster home in an abusive environment and his school performance (Tr 1494 - 1509).

Krop acknowledged that an evaluation by Dr. Pinkard in 1976 showed Trotter's verbal I.Q. of 81, a performance I.Q. of 97 and a full scale I.Q. of 88 and Pinkard could not explain why Trotter was doing so poorly in school. Pinkard did not see appellant as mentally retarded (Tr 1526). Appellant reported to Krop that he started using crack cocaine in September of 1985. Krop opined that Trotter did not have a *serious or major* mental illness and his diagnosis would have to be cocaine dependency at the time of the homicide (Tr 1542 - 46).

On cross-examination Krop stated that he had interviewed Danny Wortham when the latter was facing murder charges for which he was convicted, not in conjunction with talking to him as a witness but as a defendant in psychologically evaluating him (Tr 1548 - 49). In 1986 there was no evidence of brain damage in Trotter, no evidence of neurological deficit and generally speaking no evidence appellant was unable to control his impulses (Tr 1549 - 50) which could be inconsistent with frontal lobe disorder. Krop understood appellant had five felony and two petty theft convictions; the burglary and robbery occurred in 1985 prior to appellant's cocaine use -- none of those criminal activities was the result of cocaine use (Tr 1553).

Trotter told Krop he stole repeatedly to support his habit when he was on community control to the time of this homicide (Tr 1554). Trotter lied to police several times -- Krop was sure that what he told the police was self-serving (Tr 1557). His PSI indicated a consistent and escalating pattern of criminal activity before the cocaine use and supervisor Botbyl reported that all of his criminal activity from 1979 to the Langford murder was based upon financial gain. Botbyl indicated some of Krop's conclusions regarding the defendant were wrong (Tr 1559). The tests that Krop utilized in 1991 were available in 1986 - 87 and Krop had concluded in 1987 that Trotter knew right from wrong, could understand the nature and consequences of his actions, able in general to control his impulses, competent to stand trial and had no brain damage; Trotter's being conceived

through a rape did not cause frontal lobe damage and there were no hospital records indicating a head injury in his entire life (Tr 1562). One of Trotter's teachers reported that he got an A in science lab and another said that Trotter could do the work and should not have been put in a special education program. Trotter did not flunk out of school - he withdrew. Teachers reported he was not a management control problem; no impulse control problem, no behavioral problems whatsoever. Krop had read the testimony of the Ellingtons who said they loved appellant, treated him well and nurtured him (which is what Trotter also said) (Tr 1565 - 1571). Trotter felt the Ellington home was a stable environment and he felt loved (Tr 1573). Krop admitted it could be a self-serving statement of appellant telling the police the victim attacked him; he has not admitted full culpability (Tr 1576). An MRI was done and reported to be normal with no structural brain damage shown (Tr 1577). Trotter made money working for Tropicana and had sufficient capacity to be a skilled worker (Tr 1595). Krop had conferred together with defense witnesses Dr. Maher and Dr. Wood in one room (Tr 1596). Krop agreed that if the victim did not have a knife and was not coming at Trotter in a threatening manner, then the emotional disturbance mitigating factor did not exist (Tr 1615 - 16). He had no way to support the view that Langford attacked Trotter (Tr 1616). Trotter was not intoxicated with cocaine at the time of the crime (Tr 1618).

Dr. Frank Balch Wood requested that Dr. Maher perform a PET (positron emission topography) scan (Tr 1673). Wood opined that Trotter's capacities were in some ways diminished by the use of cocaine, that seeing money reinvigorated and intensified craving in a way that could not have happened if he did not see the money; he was in an altered state of consciousness (Tr 1721). Wood recommended that Dr. Maher perform a PET scan on Trotter. A group of physicians at St. Joseph's Hospital did the PET scan, and gave results to defense attorney Slater. Wood didn't know if Dr. Maher was present (Tr 1757 58) and did not confer with Dr. Eikman or with Dr. Maher and had no first hand information as to circumstances of taking test (Tr 1758 - 60). In his review Wood observed abnormalities at the base of the frontal lobe, suggesting to Wood the brain is dysfunctional (Tr 1764). He opined that appellant lost his inhibitory self control in an explosion of violence (Tr 1775). On cross examination he admitted he received the report from the doctor who did the MRI that it was a normal brain scan with no structural damage (Tr 1781). He did not receive a report from the doctor who did the PET scan and did not check out his opinion whether it was normal or abnormal. The local facility could do what Wood did in North Carolina.

Wood did not know if Trotter's behavior was goal-directed when he entered the victim's grocery store. He did not confront appellant with possible inconsistencies in his story (Tr 1784 - 89). He was aware that a witness reported Trotter waited outside

cool as a cucumber, thus maintaining self-control. Wood was aware appellant committed a robbery in January 1985 before he started using cocaine, that Botbyl's PSI reported stealing was almost routine for Trotter (Tr 1789). Wood regarded Trotter as "a walking time bomb" but he didn't explode when other customers made purchase (Tr 1792 - 93). Wood opined the victim's presence further triggered Trotter's rage because she was likely to stop him from carrying out the robbery but appellant said he grabbed the money and food stamps from the cash register before he saw the victim. He was able to wait until others left (Tr 1797). He didn't know why appellant also choked the victim. Trotter stopped to get a soft drink although ostensibly obsessed by the desire to obtain cocaine (Tr 1800 - 1801). Wood did not recall appellant arranging for an alibi after the murder (Tr 1816). Trotter was not suffering a blackout.

Defense witness Dr. Michael Maher testified the MRI was essentially normal but the PET scan showed some definite abnormalities (Tr 1832 - 33). On cross, he stated that he had consulted with Dr. Wood on five cases, including Trotter and Wortham (Tr 1848). He is not qualified to read and interpret PET scans, referred it to an outside person Dr. Wood who is not a radiologist or doctor. The scan was done at St. Joseph's in Tampa and he communicated with Dr. Eikman who runs the PET scan and who is a doctor (Tr 1850 -51). Maher did not request a report from Eikman, he wanted a report from Wood. He met and conferred face to face with Krop and Wood on Sunday and discussed

the PET scan; neither Krop nor Wood are doctors (Tr 1851 - 53). Trotter's seven prior convictions are relevant as to his believability (Tr 1854 - 55). The witness acknowledged it was a possibility the reason Trotter killed the victim out of a concern he would be identified and was aware of deposition testimony of Detective Van Fleet that Trotter admitted she could identify him (Tr 1858 - 60); see also Van Fleet testimony at TR 1980 - 82). Maher was aware victim was seventy years old with a heart condition (Tr 1865 - 66) Appellant had street smarts and was able to hide his cocaine problems from his community control officer (Tr 1879 - 81).

In rebuttal the state called Dr. Edward Eikman, medical director of St. Joseph's Positron Center in Tampa, board certified in nuclear medicine, experienced in PET scans who performed one on Trotter (Tr 1946 - 48) Dr. Maher requested his facility run the PET scan on Trotter but Eikman was not requested to do a report although routinely they are so requested. The PET scan was within the range of normal. No abnormalities were present (Tr 1949 - 52).

Dr. Sidney Merin, clinical psychologist and neuropsychologist reviewed the tests performed by KROP and other materials, testified that Trotter was in the borderline range of general intelligence (Tr 1957), opined that Trotter was not brain damaged (Tr 1965), his street wise intelligence was higher then his academic scores (Tr 1966). Trotter was not under influence of extreme mental or emotional disturbance at the time

of the murder; his behavior was organized. He knew what he was doing, his memory for events after supposed use of cocaine was good. His actions demonstrated prefrontal lobe activity and planning and anticipatory behavior. He was goal-directed, he had a motive for stealing money. He remembered he felt for the victim's pulse, not the behavior of someone out of control (Tr 1967 - 69). He could conform his behavior to the requirements of law (Tr 1970).

SUMMARY OF THE ARGUMENT

I. The trial court correctly permitted evidence of appellant's community control status to be introduced. The ex post facto claim is meritless and the law of the case contention is procedurally barred for not being urged in the lower court. It too is meritless and this Court should recognize the applicability of amended F.S. 921.141(5)(a). In any event, any error would be harmless in light of the totality of evidence and the trial judge's sentencing order.

II. Florida Statute 921.141(7), is not unconstitutional as violative of the ex post factor clause. State v. Maxwell, ____ So. 2d ___, 19 Fla. Law Weekly D 1706 (Fla. 4th DCA 1994). Whatever prior impediment existed because of Booth v. Maryland, 482 U.S. 496, 96 L.Ed.2d 440 (1987) was obviated by Payne v. Tennessee, 501 U.S. ___, 115 L.Ed.2d 720 (1991). Evidence of loss to the community traditionally has been considered by the sentencer. Appellant is in error in thinking that F.S. 921.141(7) authorizes nonstatutory aggravation. Finally, any error would be harmless.

III. Use of victim impact evidence did not violate the ex post facto clause. See Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344 (1977); Glendening v. State, 536 So. 2d 212 (Fla. 1988); State v. Maxwell, ___ So. 2d ___, 19 Fla. Law Weekly D 1706 (Fla. 4th DCA 1994).

IV. The lower court did not err in ruling the two year time limit applicable to appellant's belated attempt to challenge his

1985 conviction. Moreover, the evidentiary hearing established that the facts supporting the challenge were available and known to the defense team in 1986 or 1987 and not used.

V. The lower court did not err in failing to grant an evidentiary hearing on the claim that prosecutorial racial bias played a role in seeking the death penalty. That which was proffered by the defense did not satisfy the standard of Foster v. State, 164 So. 2d 455 (Fla. 1992) and appellant alleged no facts suggesting racial bias by prosecutor Crow.

VI. The lower court did not err in denying challenges for cause to prospective jurors Bunting, Flanders, and Nieves. The claim is not preserved since appellant accepted the jury without renewal of his prior objections (Tr 1027). Any error would be harmless. A review of the totality of the record demonstrates the claim is meritless.

VII. The lower court did not error in denying a challenge for cause to prospective jury Panico since she had not formed any opinions and could weigh all information prior to making a decision. The trial court in the best position to observe the juror's demeanor did not abuse its discretion.

VIII. The state did not introduce evidence of nonstatutory aggravation. Evidence regarding appellant's lies to the police was relevant to the HAC and robbery-pecuniary gain aggravators and tended to rebut or reduce the credibility of his other self-serving statements to defense-retained mental health experts (who relied in part on appellant's confessions). The state's cross-

examination of defense witness Krop including the reported assault committed by Trotter was proper since appellant opened the door to the expert's reporting appellant's life history and prosecutor may fully inquire into the history used by an expert in forming an opinion. Parker v. State, 476 So. 2d 134 (Fla. 1985).

IX. The prosecutor's comments during closing argument were supported by the evidence and constituted legitimate advocacy. The comments presently challenged were either not preserved below or simply do not call for a reversal of the sentence imposed. If there were any error, it is harmless.

X. The trial court did not improperly double up robbery and pecuniary gain as it contemporaneously stated it was considering it as one factor (Tr 2193 - 94) after similarly correctly instructing the jury in that regard (Tr 2115). The trial court properly evaluated the mitigating evidence presented.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED BY ALLOWING EVIDENCE OF COMMUNITY CONTROL STATUS AS AN AGGRAVATING CIRCUMSTANCE IN VIOLATION OF THE LAW OF THE CASE AND EX POST FACTO PROVISIONS.

Prior to resentencing appellant filed a motion to prohibit application of F.S. 921.141(5)(a) relying on the ex post facto and due process clauses (R 372 - 374). At a hearing on November 13, 1992, the trial court heard argument (Tr 117 - 129).

In order to satisfy the brief-page limitation rule, appellee will not quote at length from the prosecutor's argument below, but instead adopt and incorporate by reference the argument at Tr 122 - 126. Attached as Exhibit I is the excerpt of that argument.

The trial court denied the motion, ruling:

> "THE COURT: Well, I think under the circumstances, as I understand the Florida law and the penalty phase, I think they start out with what they referred to as the so-called clean slate rule. I think Mr. Crow sort of alluded to that when he talked about a case is sent back for a new penalty phase, and if in the first penalty phase, for whatever reasons, one of the aggravating circumstances wasn't presented, there's nothing that precludes the State from presenting that aggravating circumstances in the second one; likewise, I assume the same would apply to any mitigating circumstances that might have been not presented the first time, could certainly be presented the second time, and perhaps that would include a statutory one. So I'll deny the motion, assuming the State seeks to prove that, which I assume they will, and deny the motion."

(Tr 130)[1]

A. The law of the case contention --

Appellee would first submit that this argument should not be entertained since not urged below. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990). In the lower court appellant argued that use of the amended F.S. 921.141(5)(a) aggravator violated ex post facto and due process by rendering the prior appeal a nullity, the latter a type of North Carolina v. Pearce, 395 U.S. 711, 23 L.Ed.2d 656 (1969), argument which was addressed by the prosecutor's response at Tr 122. This claim (that there has been a violation of the law of the case doctrine) is, consequently, procedurally barred because not urged below.

But even if preserved, relief should be denied. Appellant cites Santos v. State, 629 So. 2d 838 (Fla. 1994), wherein the court condemned the trial court's action when, without the presentation of additional evidence, on remand the lower court erred in ignoring the clear instructions of the Court's decision regarding the presence of the CCP aggravator. The trial court in Santos was simply attempting, improperly, to override this Court on the CCP finding; in the instant case, the trial court was merely giving effect to an intervening legislative clarification

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[1] The mistrial request mentioned by appellant during the prosecutor's opening statement was not for referring to the community control status of Trotter as an aggravating factor but for mentioning house arrest. (Tr 1067).

of the statute, of which this Court had not been apprised. Moreover, since a resentencing proceeding operates as a "clean slate" on the parties -- see Preston v. State, 607 So. 2d 404, 408 (Fla. 1992), Hall v. State, 164 So. 2d 473, 477 (Fla. 1993); Teffeteller v. State, 495 So. 2d 744 (Fla. 1986) -- the trial court was obligated to give effect simultaneously perhaps to two warring principles and resolved the tension appropriately by honoring the legislature's enactment.[2]

In Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), this Court rejected an ex post facto argument similar to that advanced by Trotter:

> [27] In our original opinion in this case, we noted that the court could have found committed by a person under sentence of imprisonment in aggravation because Hitchcock was on parole at the time of this crime. 413 So. 2d at 747 n. 6. The court found this aggravator applicable on resentencing. Hitchcock now argues that this is an ex post facto violation and constitutes double jeopardy because this Court did not recognize parole as the equivalent of being under sentence of imprisonment until *Aldridge v. State*, 351 So. 2d 942 (Fla. 1977), *cert. denied*, 439 U.S. 882, 99 S.Ct. 220, 58 L.Ed.2d 194 (1978). Resentencing proceedings, however, are completely new proceedings. *King v.*

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[2] Even if this Court were to conclude that it is appropriate to apply the reasoning of Brunner Enterprises v. Department of Revenue, 452 So. 2d 550 (Fla. 1984), this Court now has jurisdiction and the opportunity to change the law of the case and it would be in the interest of justice to conform its earlier decision to the legislative enactment, Chapter 91 - 270, section 1, Laws of Florida (1991). See also United States v. Robinson, 690 F.2d 869 (11th Cir. 1982).

> *Dugger*, 555 So. 2d 355 (Fla. 1990). These ex post facto and double jeopardy claims are of no merit because the resentencing occurred after we released *Aldridge*. *See Spaziano v. State*, 433 So. 2d 508 (Fla. 1983), *aff'd*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).
>
> (text at 693)

Appellant argues that the prosecutor misread this authority below. The prosecutor, of course, was responding to an ex post facto argument urged below not a law of the case argument not presented. Hitchcock supports the state on the ex post facto issue and does not address a law of the case problem.

B. Ex post facto --

As noted by the prosecutor below the courts have upheld newly-enacted or new case law interpretations of aggravating factors applied to persons who prior thereto had committed their offenses. See, e.g., with regard to the CCP aggravating factor Combs v. State, 403 So. 2d 418, 421 (Fla. 1981); Zeigler v. State, 580 So. 2d 127 (Fla. 1991); Sireci v. State, 587 So. 2d 450, 454 (Fla. 1991); Foster v. State, 614 So. 2d 455, 461, n. 7 (Fla. 1992); see also Valle v. State, 581 So. 2d 40, 47 (Fla. 1991) (upholding against an ex post facto challenge the new aggravator that the victim was a law enforcement officer engaged in the performance of his official duties since this was not an entirely new factor and the defendant was not disadvantaged by its application. Jackson v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 215, 218 (Fla. 1994); Hitchcock v. State, 578 So. 2d 685, 693 (Fla. 1990), vacated on other grounds, 120 L.Ed.2d 892

(1992) (use of on parole to support under sentence of imprisonment aggravator when resentencing occurred after decision announced in Aldridge v. State, 351 So. 2d 942).

Appellant argues that the Combs-Valle line of cases is distinguishable because the new aggravating factors at issue there were not entirely new but a part of what had been the law. The same is true here. The legislature has not added a whole new aggravator not previously enacted but has only explained that community control is and has the same effect as a sentence of imprisonment. F.S. 921.141(5)(a). See also State v. Smith, 547 So. 2d 613, 617 (Fla. 1989) (J. Shaw, concurring in part and dissenting in part) (citing Lowry v. Parole and Probation Commission, 473 So. 2d 1248, 1250 that where an amendment to a statute is enacted soon after controversies arise as to the interpretation of the original act a court may consider the amendment as a legislative interpretation of the original law and not as a substantive change thereof). State v. Lanier, 464 So. 2d 1192 (Fla. 1984); Lincoln v. Florida Parole Commission, ___ So. 2d ___, 19 Fla. Law Weekly D 2176 (Fla. 1st DCA 1994). It should be noted that on Trotter's prior appeal, two Justices, McDonald and Grimes, were of the view that community control was covered by the then-existing aggravating factor 5(a). Trotter v. State, 576 So. 2d at 695 - 696.

The aggravating factor F.S. 921.141(5)(a) existed prior to appellant's murder of Mrs. Langford and thus, there is no ex post facto violation.

Appellant's reliance on United States Supreme Court decisions is unavailing. In Weaver v. Graham, 450 U.S. 24, 67 L.Ed.2d 17 (1981) a statute was deemed violative of the ex post facto clause because it reduced the amount of gain time deductible from a prisoner's sentence -- the prisoner was disadvantaged by lengthening the time he spent in prison. In Miller v. Florida, 482 U.S. 423, 96 L.Ed.2d 351 (1987) a revised sentencing guidelines statute also disadvantaged the defendant by providing a greater punishment than at the time of the commission of the offense (a presumptive sentence of five and one-half to seven years versus three and one-half to four and one-half years and an actual received sentence of seven years).

In Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344 (1977), the Court rejected an ex post facto argument by a prisoner who committed his first degree murder for which he received the death penalty prior to the enactment of the new capital statute. As Dobbert recognized, citing from Hopt v. Utah, 110 U.S. 574, 28 L.Ed. 262:

> "The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt all remained unaffected by the subsequent statute."
>
> (53 L.Ed.2d at 357).

See also Thompson v. Missouri, 171 U.S. 380, 43 L.Ed. 204 (1898) (no ex post facto violation by change in law making certain evidence admissible). Similarly, in the instant case,

the legislative change did not criminalize formerly innocent conduct, alter the penalty for a criminal offense or change the degree of proof necessary to establish guilt; it merely clarified its intent that community control was a type of sentence of incarceration as Justice McDonald had explained in his dissenting opinion. 576 So. 2d at 695 - 696.

C. Harmless error -- Even if the Court were to reject appellee's previous argument, any error on this point is harmless. In his findings supporting the death sentence the trial judge declared:

> "(1) The crime for which the Defendant was to be sentenced was committed while the Defendant was on community control. This the factor which required reversal of the sentence on the original appeal. The statute was subsequently amended to include community control (F.S. 921.141, 1991). Although the state was permitted to introduce evidence of this factor, this Court would have reached the same conclusion without this evidence."
>
> (emphasis supplied) (R 544)

In light of the multiple remaining unchallenged aggravators (prior violent felony conviction, homicide while engaged in commission of robbery for pecuniary gain, HAC) the result would not be different[3]

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[3] Moreover, the prosecutor made only fleeting reference to the sentence of imprisonment -- community control aggravator in his fifty-page closing argument (Tr 2032, 2048, 2054, 2065).

ISSUE II

WHETHER FLORIDA STATUTE 921.141(7) IS UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AMENDMENT, UNITED STATES CONSTITUTION.

Appellant filed a motion to prohibit application of Florida Statue 921.141(7) as violative of the ex post facto clause (R 244 - 247). He also filed a motion to exclude evidence or argument designed to create sympathy for the deceased.[4] (R 225 - 243) and a motion to preclude victim impact evidence (R 20 - 21). The motions were denied (R 397; Tr 131 - 148).

In State v. Maxwell ___ So. 2d ___ 19 Fla. Law Weekly, D 1706 (Fla. 4th DCA 1994), the Fourth District Court of Appeal upheld the constitutional validity of Florida Statute 921.141(7) and the admissibility of victim impact evidence:

> Section 921.141, Florida Statues, was amended in 1992 to provide:
>
> > (7) Victim Impact Evidence. -- Once the prosecution 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

[4] This motion was granted "except for victim impact evidence and argument presented according to law." (R 399).

> about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

Another statute, section 921.143, Florida Statutes, allows victim statements about the existence of harm resulting from the crime being prosecuted at any felony sentencing. Article 1, Section 16(b) of the Florida Constitution provides that victims of crime, including the next of kin of homicide victims are entitled to be heard in criminal proceedings, to the extent that doing so does not interfere with a defendant's constitutional rights.

The trial court held that section 921.141(7) was unconstitutional for several reasons, including that the statute: (1) interferes with the weighing of aggravating and mitigating factors and will cause arbitrary and capricious results; (2) lacks guidance to the judge on weighing factors; (3) precludes introduction of mitigating evidence; (4) violates the separation of powers doctrine by delegating judicial power reserved to the supreme court, and (5) violates Article I, Section 10 of the Florida Constitution prohibiting the legislature from passing *ex post facto* laws.

It is clear that a victim impact statement should not be considered as an *aggravating* factor in death sentencing. *Grossman v. State*, 525 So. 2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). The eighth amendment prohibits a jury's considering statements concerning personal qualities of a victim in the sentencing phase of a capital trial, unless the evidence is otherwise relevant.

In *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720, *reh'g denied*, ___ U.S. ___, 112 S.Ct. 28, 115 L.Ed.2d 1110 (1991), the United States Supreme Court recognized that the eighth amendment is not *per se* violated by victim impact evidence. And in *Hodges v. State*, 595 So. 2d 929 (Fla.), *cert. granted and judgment vacated on other grounds*, ___

U.S. ___, 113 S.Ct. 33, 11 L.Ed.2d 6 (1992), our supreme court clarified *Payne*, recognizing that victim impact evidence is admissible in the sentencing phase except, as set out in the statute, for characterizations and opinions by family members about the crime, the defendant, or the appropriate sentence. *Id.* at 933.

Here, the trial court was concerned that victim impact evidence is "too prejudicial." However, whether such evidence is too prejudicial is a factor that may be evaluated within the exercise of the court's discretion. Admitting victim impact evidence does not, as claimed, reduce the state's burden in the sentencing phase. Admitting such evidence is relevant in sentencing as it informs the jury, or court, of the particular harm caused. 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 trial court also was concerned that the statute infringes on the supreme court's exclusive right to regulate procedure. But, in *Booker v. State,* 397 So. 2d 910 (Fla.), *cert. denied*, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981), the Florida Supreme Court acknowledged that section 921.141, Florida Statutes, is not unconstitutional on that ground.

The trial court also held that the victim impact subsection violates *ex post facto* principles, because the amendment was adopted after the respondent's crime. However, section 921.141 (7) does not purport to affect personal rights as it relates only to the admission of evidence. This is not unlike a change in procedure such as that upheld in *Glendening v. State*, 536 So. 2d 212 (Fla. 1988), *cert. denied*, 492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989). In *Glendening,*, the court held that a hearsay exception should be applied even though it became effective after the offense.

In Payne v. Tennessee, 501 U.S. ____, 115 L.Ed.2d 720 (1991), the United States Supreme Court overruled Booth v. Maryland, 482 U.S. 496, 96 L.Ed.2d 440 (1987) and South Carolina v. Gathers, 490 U.S. 805, 104 L.Ed.2d 876 (1989) and held that the Eighth Amendment does not bar a capital sentencing jury from considering victim impact evidence. 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. at 735 (citations omitted).

* * *

> 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.
>
> (Id. at 736)

Appellant is clearly unhappy with the result in Payne, supra, and with the Florida legislature's amending the statute in F.S. 921.141(7). Trotter contends that this legislative amendment violates the "unusual" portion of the "cruel or unusual" provision of Article I, section 17 of the Florida Constitution, that evidence relating to the victim's character and loss has never been a permissible factor in Florida capital sentencing and F.S. 921.141(7) establishes an open-ended category of nonstatutory aggravation. Appellant complains (at page 43 of his brief) that such evidence "amounts to victim eulogy", that evidence to "demonstrate the victim's uniqueness as a human being and the resultant loss to the community's members by the victim's death" "is usually what takes place at a funeral."

As Payne recognizes, providing the sentencer "with a glimpse of the life which a defendant chose to extinguish" merely helps restore some balance to the equation and helps the jury "to assess meaningfully the defendant's moral culpability and blameworthiness" by showing "the specific harm caused by the defendant". And it is absurd that a defendant may urge as mitigation -- which appellant does in this case -- that he was a child of rape as if that somehow had any relevance to his character or the circumstances of the Langford murder, see Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 (1978) and

simultaneously contend that it is cataclysmic for the jury to be told that the elderly woman he eviscerated was kind and well-liked by her family and customers.

A. The cruel or unusual punishment contention --

First of all, this argument should not even be entertained since appellant did not argue the cruel or unusual punishment contention in his motion below (Tr 132 - 148). The contention is procedurally barred. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990).

Second, even if properly preserved, the argument is meritless. Whatever the scope of the cruel or unusual punishment provision may be in some other context (such as the availability of the death penalty for mentally retarded defendants), it is not pertinent here. Contrary to appellant's suggestion, F.S. 921.141(7) is not a nonstatutory aggravating factor, State v. Maxwell, supra. And the jury in the instant case was instructed that the statutory aggravating factors were exclusive (Tr 2113).

B. Whether victim impact evidence has been traditionally excluded --

Appellant argues that when the United States Supreme Court held in Booth v. Maryland, 482 U.S. 496 that use of victim impact evidence violated the Eighth Amendment, no substantial change occurred because Booth was essentially in accord with Florida precedent. (Brief, p. 39)

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, 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 Grossman v. State, 525 So. 2d 833 (Fla. 1988), the Court clearly indicated its awareness that Booth was now an impediment to the legislature's prior efforts:

> Florida law provides, however, that prior to sentencing any defendant convicted of a homicide, the next-of-kin of the homicide victim will be permitted to either appear before the court or to submit a written statement under oath for the consideration of the sentencing court. These statements shall be limited solely "to the facts of the case and 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." §921.143(2), Fla. Stat. (1985). Thus, it is

> clear that the Florida Legislature of at least thirty-five other states, has made the judgment" that the effect of the crime on the victims should have a place in the criminal justice system." *Booth*, 107 S.Ct. at 2536 n. 12. It is also clear, however, from the *Booth* decision, that the legislature may not make this judgment in capital punishment cases.
>
> Accordingly, we hold that the provisions of section 921.143 are invalid insofar as they permit the introduction of victim impact evidence as an aggravating factor in death sentencing.
>
> (text at 842)

With Payne overruling Booth the legislature could permissibly enact F.S. 921.141(7) which provides:

> (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.

See also Hodges v. State, 595 So.2d 929 (Fla. 1992) (recognizing that Booth was no longer an impediment to victim impact evidence so long as it was not urged to provide opinions about the defendant and the sentence to be imposed); Stein v. State, 632 So. 2d 1361, 1367 (Fla. 1994) (prosecutor's remarks that victim was married and the father of a child, "brief humanizing remarks" did not constitute grounds for reversal and

if improper were harmless; citing Payne for the proposition that in the majority of cases victim impact evidence serves entirely legitimate purposes).

Appellant relies on Trawick v. State, 473 So. 2d 1235 (Fla. 1985), where the court found improper the use of the shooting of surviving victim Linda Gray to support an HAC finding when that was not relevant to the capital felony. He cites Burns v. State, 609 So. 2d 600 (Fla. 1992), where the court made no mention of the Florida legislature's enactment of F.S. 921.141(7). Trotter mentions that the court has reached differing results in Davis v. State, 586 So. 2d 1038 (Fla. 1991), and Patterson v. State, 513 So. 2d 1257 (Fla. 1987); the results are not so inconsistent. In Patterson the court reversed for other reasons and mentioned a Booth error in passing, prior to Payne. In Davis, the court found Booth-Payne error harmless since the judge limited his written findings in aggravation to statutorily-enumerated factors, as the trial judge did sub judice (R 543, "Victim impact was not allowed to become a focal point in the sentencing proceeding nor has it influenced the court in reaching its decision")

Nor does appellant's reliance on cases such as Porter v. State, 429 So. 2d 193 (Fla. 1983), Coleman v. State, 610 So. 2d 1283 (Fla. 1992), Marshall v. State, 604 So. 2d 799 (Fla. 1992) or Thomas v. State, 618 So. 2d 155 (Fla. 1993) provide evidence that the legislature's enactment of 921.141(7) is improper. The cited cases relate to whether factors irrelevant to the character

of the accused or the circumstances of the crime (an electrocution description in Porter, a negative characterization of the victim in the other cases) carried mitigating weight. Those decisions suggest nothing about whether a jury may hear something about the uniqueness of the life extinguished especially where the 921.141(7) evidence plays no role in the weighing process as explained, infra.

C. Whether F.S. 921.141(7) establishes an open-ended category of nonstatutory aggravation --

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.

It is not accurate to assert that only what 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. See Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986) (evidence used to familiarize jury with underlying facts of the case . . . we cannot expect jurors

empaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum).

Additionally, 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.

D. Harmless error --

Finally, even if this Court were to reject the state's prior argument regarding the propriety of the use of victim impact evidence, any such error is harmless beyond a reasonable doubt. Stein, supra, Davis, supra. See also Valle v. State, 581 So. 2d 40 (Fla. 1990) (Booth error not sufficiently prejudicial); Bush v. Dugger, 579 So. 2d 725 (Fla. 1991) (7 - 5 jury death recommendation would not have been different absent prosecutor's argument predicated on sympathy and revenge); Jennings v. State, 583 So. 2d 316 (Fla. 1991) (any prejudice associated with relevant testimony not of the content or quality as to require reversal under Booth). The testimony of witnesses Timothy Matthews, Elenore Dates and Charles McKnight that the victim was a kind person was brief. The prosecutor's comments about the victim were short (Tr 2079), the jury was instructed that the aggravating factors were limited to those enumerated in the statute (Tr 2113) and the judge stated in his sentencing order that such evidence did not influence him in reaching a decision (R 543). Lecroy v. State, 533 So. 2d 750 (Fla. 1988) (clear that victim impact statement played no role in judge's sentencing order so any Booth error is harmless); Glock v. Dugger, 537 So. 2d 99 (Fla. 1989) (Judge said he did not consider victim impact evidence). Error, if any, is harmless.

ISSUE III

WHETHER THE USE OF VICTIM IMPACT EVIDENCE UNDER F.S. 921.141(7) VIOLATED THE EX POST FACTO CLAUSE.

Appellant filed a motion to prohibit application of Florida Statute 921.141(7) as violative of the ex post facto clause (R 244 - 247) and at the hearing on motions defense counsel announced it would be a "waste of my breath to continue that argument" since it had been rejected on the community control issue (Issue I) (Tr 132) but the defense was not abandoning the issue (Tr 145). The court denied the motion (Tr 146).

As the court noted in State v. Maxwell, ___ So. 2d ___, 19 Fla. Law Weekly D 1706 (Fla. 4th DCA 1994):

> "The trial court also held that the victim impact subsection violates ex post facto principles, because the amendment was adopted after the respondent's crime. However, section 921.141(7) does not purport to affect personal rights as it relates only to the admission of evidence. This is not unlike a change in procedure such as that upheld in Glendening v. State, 536 So. 2d 212 (Fla. 1988), cert. denied, 492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989). In Glendening, the court held that a hearsay exception should be applied even though it became effective after the offense."

And as the prosecutor argued below:

> "In 1976, the Florida Legislature specifically enacted a statute that provided for the sentencer to receive victim impact information. It was amended in '84 to expand it to include psychological and other impact. That has been the law of the State of Florida for decades. In fact, the Payne decision recognized and was based upon the fact that that is the trend in most states, and the

> overwhelming authority throughout the United States. And in fact, that statue applied to all sentencing, and applied in '86 when Melvin Trotter committed the murder of Virgie Langford.
>
> When Booth versus Maryland was first decided subsequent to Mr. Trotter's trial, the Supreme, in 1987, the Supreme Court in Grossman (phonetic) then limited the impact of that statute and said okay, after Booth, it's clear we can't constitutionally apply the statute to capital sentencing proceedings, and from here on out, we restrictively construe it.
>
> What this statute has done, now that Payne has overruled part of Booth, is simply reenacted what was part of the judicial process at the time Mr. Trotter committed his crimes.
>
> So in terms of retroactivity, you have a straight Comb situation where no new factor has really been added in, and it's very appropriate for this to be considered as it was a factor back in sentencing at the time of the incident."

(R 139 - 40)

Additionally, appellee notes that the Florida Constitution provided, even prior to the enactment of F.S. 921.141(7), in Article I, section 16(b):

> "Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to be informed, to be present, and 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."

Trotter can not even assert that there has been detrimental reliance upon Booth v. Maryland, supra, since that decision was issued June 15, 1987, a year after Trotter killed Virgie Langford on June 16, 1986.

In Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344 (1977), the defendant unsuccessfully complained about the subsequent application of the Florida death penalty statutory scheme to the 1971 murder of his children. The Supreme Court explained that even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto. See also Hopt v. Utah, 110 U.S. 574, 28 L.Ed.2d 262 (1884) (change in law permitting the convicted felony to be called as a witness implicating defendant in the crime); Thompson v. Missouri, 171 U.S. 380, 43 L.Ed. 204 (1898) (change in law permitting previously inadmissible evidence to be admitted in defendant's retrial); Glendening v. State, 536 So. 2d 212 (Fla. 1988) (application of F.S. 90.803(23) did not violate ex post facto prohibition).

Dugger v. Williams, 593 So. 2d 180 (Fla. 1991) and Miller v. Florida, 482 U.S. 423, 96 L.Ed.2d 351 (1987), relied on by appellant, are inapposite. Dugger held that retroactive application of a statute making defendants convicted of capital felonies ineligible for mandatory recommendation for executive clemency violated ex post facto; the same level of access to the advantage that existed at the time the criminal offense occurred was improperly denied. In Miller, the ex post facto clause was violated by a revised statute which clearly disadvantaged the defendant and had no ameliorative features, increasing the quantum of punishment for sexual offenses.

In the instant case, F.S. 921.141(7) does not make criminal formerly innocent conduct, does not increase the punishment for

murder or the quantity or degree of proof necessary to establish guilt and is thus not violative of ex post facto under Miller.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY RULING THE TWO YEAR TIME LIMITATION OF RULE 3.850 PRECLUDED A CHALLENGE TO APPELLANT'S PRIOR ROBBERY CONVICTION OF 1985.

Trotter file a motion to preclude his prior 1985 convictions for burglary and robbery on the basis that the plea colloquy was deficient and that Trotter did not understand the rights he was waiving by his no contest plea (R 214 - 224). At a hearing on November 13, 1992, trial defense counsel Slater indicated that he was presenting a motion to preclude the prior convictions as aggravators, a motion to withdraw the 1985 plea and a motion to vacate. The prosecutor responded that he had filed a response to the motion to withdraw plea and the motion to vacate. (Tr 5 - 6) Since the witnesses were available the court decided to hear the testimony.

A. The hearing of November 13, 1992 --

Defense witness psychologist Dr. Harry Krop testified that he evaluated Trotter in 1986 for competency to proceed, mental status at the time of the offense (for the instant homicide) and to determine possible mitigating factors (Tr 9). A year earlier in September of 1985 Trotter entered a plea to charges of burglary and robbery and signed his name to an Acknowledgment and Waiver of Rights (Tr 15). Krop testified that Trotter said he never saw defense attorney Lee, one of his attorneys in the 1985

case and spent only five minutes with defense attorney Moreland in the jail, that the attorneys never discussed the facts of the case, never explained why they thought he would lose if he went to trial (Tr 27 - 28). Krop opined Trotter did not understand his waiver of rights (Tr 31). Krop stated that he communicated Trotter's deficiency to Trotter's lawyers in 1986 and that information was available in 1987 (Tr 32).

On cross-examination Krop conceded that he had determined in 1986 that Trotter had the ability to understand the robbery and murder charges regarding victim Mrs. Langford, the ability to proceed to trial and assist counsel (Tr 34 - 35). Trotter's condition has improved since 1986 (Tr 35). Krop stated that the tested IQ of 72/73 would not be classified as mentally retarded, that Trotter was evaluated at a later time and found to have full scale IQ in the high 80's, an adult normal score (Tr 36 - 37). After Trotter scored an 88 there were subsequent evaluations for the educational system and they decided he was ready for normal school (Tr 38). Low IQ scores might result by the pressure of facing the death penalty (Tr 39). With regard to Trotter's understanding of the Waiver of Rights, Krop knew only what Trotter told him, he did not know the basis of the lawyers' judgment, Krop believed the 1985 plea was his first plea (Tr 40 - 41). Krop admitted Trotter could be informed of his rights by others explaining them even if Trotter did not read the form. Krop did not know Trotter's experience level in the criminal justice system (Tr 42). Krop indicated that he was able to

communicate Trotter's rights to him in 1992, he had no crystal ball to know if Trotter was telling him the truth and other defendants had fooled him (Tr 43 - 44). Billing records of Trotter's former counsel showed a total of three hours conference, it would only take a couple of hours to explain matters to Trotter and Krop would presume attorney and client were talking about the case; he acknowledged there was a "discrepancy between what Mr. Trotter says and what the records reflect" (Tr 46). His opinion would be influenced if attorney Lee "contradicts what Mr. Trotter is saying" Krop was able to explain all to Trotter in one and one-half hours (Tr 47 - 48).

State witness attorney Henry Lee testified that he recalled meeting with Trotter at the jail twice, on July 29 and September 10 (Tr 54) He would have explained the nature of the charge and what people contended he did and if appellant appeared not to understand Lee would have requested a psychiatric evaluation. He did not because he seemed to understand what was happening (Tr 55 - 56). Lee stated he would have gone over the probable cause report initially in his meeting with Trotter (Tr 56) He had no difficulty understanding the facts charged. Trotter had been charged with a four count information (two burglaries, a robbery and attempted robbery) (Tr 57 - 58). After deposing witnesses Lee phoned the prosecutor regarding a plea offer who agreed to drop two charges and allowed a plea to the remaining two counts or a term of community control (Tr 58 - 59). The guidelines called for prison and accepting the plea offer would mean leaving

jail immediately. Lee also informed appellant that from depositions the state had a good case -- the victim Little was a very good witness who knew the defendant, that the witness in the dropped counts was unavailable and Trotter readily accepted the deal (Tr 60). He explained he had a right to jury trial if he didn't take the deal but the probability was jury trial could result in conviction and prison. Lee went into detail about the deposition testimony (Tr 61). He would have communicated the guidelines called for 12 - 30 months prison time and if the state located the other witness prison time would be higher (Tr 62 - 63). Mr. Moreland handled the plea in court (Tr 63). There was no indication Trotter might be incompetent to understand what he was facing and some indication of a previous burglary conviction (Tr 83). The court took judicial notice that defense attorney Slater was the attorney for Trotter at the 1987 plea to a violation of community control (Tr 87).

Following argument of counsel, the trial court ruled that the two-year time period under Rule 3.850 had expired that even if the newly-discovered evidence criteria were used, the evidence Krop talked about was available in 1986 and Krop had told Trotter's lawyers for use in 1987. The court also relied on Banister v. State, 17 F.L.W.D. 2433 (5th DCA 1992) (Tr 110 - 111).

B. The trial court correctly denied relief --

In Bannister v. State, 606 So. 2d 1247 (Fla. 5th DCA 1992), the appellate court held that motions for post-conviction relief

must be filed within two years after the judgment and sentence becomes final. See also Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993) (defendant's failure to raise claim within two years of new facts relied on became known barred relief); Adams v. State, 543 So. 2d 1244, 1246 - 47 (Fla. 1989); Zeigler v. State, 632 So. 2d 48 (Fla. 1993); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989): Johnson v. State, 536 So. 2d 1009 (Fla. 1988); Cook v. State, 596 So. 2d 483 (Fla. 1st DA 1992); Saccucci v. State, 546 So. 2d 1154 (Fla. 1989); Tower v. Phillips, 7 F.3d 206 (11th Cir. 1993). In the instant case appellant's challenge to the 1985 plea colloquy was not only untimely and violative of the two year time limit, but also cannot be excused in light of Dr. Krop's testimony -- found by the trial judge -- that defense counsel was aware in 1986 or 1987 of the possibility of challenging that plea and did not do so.

Appellant's reliance on Koenig v. State, 597 So. 2d 256 (Fla. 1992) is insubstantial. Koenig involved a direct appeal in a capital case where the court held that the record did not establish that the plea of no contest was intelligent and a voluntary waiver of the defendant's constitutional rights. Trotter did not enter a plea to the murder of Mrs. Langford; he had a trial and this Court affirmed the judgment. Trotter v. State, 576 So. 2d 691 (Fla. 1990). Koenig did not involve whether in a collateral attack years after the conviction a petitioner could challenge a plea from which he benefitted by urging the failure to obtain a factual basis for it.

Appellant is not aided by the mystifying reliance on the Supreme Court's decisions in Parke v. Raley, 506 U.S. ___, 121 L.Ed.2d 391 (1992); Custis v. United States, 511 U.S. ___, 128 L.Ed.2d 517 (1994) and Nichols v. United States, 511 U.S. ___, 128 L.Ed.2d 745 (1994). In Parke the Court held that it was not violative of due process for Kentucky to require the accused in a challenge to enhancement of statute under a recidivism statute to produce evidence of invalidity of prior guilty pleas. In Custis the Court held that a defendant in a federal sentencing proceeding may not collaterally attack the validity of previous state convictions that are used to enhance his sentence under the federal Armed Career Criminal Act, except for convictions obtained in violation of the right to counsel. The Court noted that the principles of finality associated with habeas corpus actions "bear extra weight in cases in which the prior convictions, such as one challenged by Custis, are based on guilty pleas, because when a guilty plea is at issue, 'the concern with finality served by the limitation on collateral attack has special force.'" 128 L.Ed.2d at 529. In Nichols the Court upheld the use of uncounseled misdemeanor convictions, as to which no prison term was imposed, to enhance a prison term for subsequent offense; the dissent of Justice Ginsburg disagreed.

ISSUE V

WHETHER THE LOWER COURT ERRED IN FAILING TO HOLD AN EVIDENTIARY HEARING ON APPELLANT'S MOTION THAT RACIAL BIAS PLAYED A ROLE IN THE STATE ATTORNEY'S DECISION TO SEEK THE DEATH PENALTY IN THIS CASE.

At a hearing on pretrial motions conducted on November 13, 1992, the prosecutor asked for a continuance since he had only recently received the motion. He pointed out that he had been assigned by the governor to pursue the case and going forward on the penalty phase (Vol. IV, Tr 168 - 169). The prosecutor added that on Trotter's initial appeal to this Court, three aggravating factors had been found, evidence would be presented on one or two others in this resentencing and that two Justices (including Justice Grimes) felt the death penalty should be upheld on the prior appeal. The prosecutor complained that the timing of the motion, the fact that he never prosecuted in Manatee County, the fact that a gag order had been sought to restrict his contact with the State Attorney's Office, that the presiding judge was not going to be from the Twelfth Judicial Circuit suggested he was being sandbagged (Tr 170).

The court suggested that the argument about the grand jury indictment in 1985 or 1986 "has long since been waived". The prosecutor indicated a desire to know the basis for the scandalous allegation that he was a racist (Tr 174 - 750. The court indicated it would reserve ruling on this issue and the proportionality issue (Tr 186).

Subsequently, at the July 12, 1993 hearing after the jury had returned its 11 - 1 death recommendation, the trial court heard appellant's amended motion to bar death penalty and resentencing based arbitrary, discriminatory and impermissible race (Tr 2130 - 48). The prosecutor argued that under Foster v. State, 614 So. 2d 455 (Fla. 1992) and McCleskey v. Kemp, 481 U.S. 279, 95 L.Ed.2d 262 (1987) the factual allegations in appellant's motion were insufficient to require an evidentiary hearing. The state argued that to the extent that Trotter was relying on a prior history of Manatee County prosecutors, judges and juries that was irrelevant since Mr. Crow was an outside prosecutor with virtually no contact with the Manatee County prosecutor's office and the presiding trial judge was an out-of-circuit judge. The state further argued that there was no pattern and more importantly nothing to show racial bias had an impact on appellant's specific case (Tr 2134 - 35).

Appellant had not identified the cases in which the death penalty was sought versus not sought, no attempt to analyze the many legitimate justifications for pleading a case down or for a jury life recommendation, and thus no basis for an evidentiary hearing (Tr 2136).

The defense then cited five cases out of Manatee County where death sentences had been reversed (E. Garcia, F. Nowitzke, M. Trotter, D. Burns, K. Koenig) (Tr 2140). Appellant argued that 25% of all homicide cases filed on and indicted on in Manatee County had a black victim and no death penalty had resulted (Tr 2141).

The court ruled that the facts alleged were insufficient to warrant an evidentiary hearing, that appellant had not satisfied the criteria of Foster v. State, (Tr 2147 - 48; R 515).

Judge Eastmoore who presided over the resentencing proceeding denied Trotter's Revised Amended Motion to Bar Death Penalty in an order dated July 23, 1993 (R 561).

In Foster, supra, after reviewing statistics proffered by the defendant, this Court concluded:

> "Foster's claim suffers from the same defect [as in McCleskey v. Harris, 481 U.S. 279]. He has offered nothing to suggest that the state attorneys office acted with purposeful discrimination in seeking the death penalty in his case (citations omitted). The trial court was not required to hold an evidentiary hearing on this claim. Harris, 885 F.2d at 1375 (defendant not entitled to evidentiary hearing where he offered no proof that decisionmakers in his case acted with discriminatory purpose).
>
> (614 So. 2d at 463 - 464)

Appellant argues that his statistics in Exhibit A (R 468 - 71) show that a death sentence was not imposed where the homicide victim was black since 1977. But of the seventeen homicide cases involving black victims listed, two are in the pending status, six other were second degree and nothing suggests among the remaining cases whether even there were aggravating factors to qualify for a capital prosecution; or whether the state sought the death penalty and was unsuccessful. (See also R 492 - 94)[5]

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[5] As argued below, the statistics show that there are no death row inmates from Manatee County (R 493), hardly suggestive of racial bias. Of those listed in Exhibit A, Garcia (an Hispanic)

In Exhibit B, Trotter argues there is an excerpt of a deposition of Gene Matthews, a member of the victim's family who testified that a cop told him "Trotter was Van Fleet's nigger" (R 473 - 4). It appears that the deponent was quoting others unrelated to the case and even if the deponent harbored racist views that would not suffice for an evidentiary hearing.

Appellant refers to Exhibit C (R 475 - 77), when prior defense counsel Dubensky allegedly was told by Mr. Langford that family members "wanted to see the nigger fry". While there is some dispute in the record whether Dubensky was included or not on the witness list (Tr 2137, 2142), suffice it to say that even if animosity was expressed to Trotter's counsel in inappropriate terms for appellant's brutal murder of the elderly Mrs. Langford that does not demonstrate improper prosecutorial conduct. What seems not to be disputed or challenged is the representation made by the out of county prosecutor, Mr. Crow, who handled the resentencing proceeding pursuant to a governor's executive order of assignment (R 100 - 102) that race played no factor in the decision to seek the death penalty and that although an opportunity was offered to defense counsel Slater to present

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received post-conviction relief by this Court, Nowitzke was reduced to life, Koenig was reduced to life and both Trotter and Burns were remanded for resentencing.

additional evidence of mitigation none was forthcoming (R 495 - 498, Tr 393 - 94)[6]

Just as the trial judge was correct in his observation that any complaint about the grand jury indictment in 1985 or 1986 "has long since been waived" (Tr 174), so too has any complaint that impermissible racial bias by the former prosecutors of the Twelfth Judicial Circuit, prior to the resentencing proceeding prosecuted by Pinellas County Assistant State Attorney Crow, rendered the resulting sentence unconstitutional. All of what the appellant is now relying on in Exhibits A, B, and C were available to be urged at the original trial and sentencing proceedings and on the prior appeal to this Court -- and it was not. For example, the transcript of May 17, 1987 (R 475 - 477) was a part of the prior appellate record, pages 2274, and 2286 and 2287 in Appeal 70,714. Similarly, the Gene Matthews deposition excerpt at R 472 - 474 was taken on February 2, 1987, some three years prior to this Court's opinion affirming Trotter's judgment on December 20, 1990 -- and yet no issue was made of racial bias in the appellant's brief. What remains,

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[6] Appellant also alludes to the concurring opinion of Mr. Justice Thomas in Graham v. Collins, 506 U.S. ___, 122 L.Ed.2d 269 (1993). While it is true that Justice Thomas historical review of capital punishment showed a concern for the racial bias that led to Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346 (1993), the substance of his extensive analysis is his view that Penry v. Lynaugh, 492 U.S. 302, 106 L.Ed.2d 256 (1989) -- which many had thought was a decision favorable to defendants -- should be overruled 122 L.Ed.2d at 289.

appellee submits, can only be a contention that on remand prosecutor Crow's decision to pursue the death penalty was the result of racial bias and there is not a scintilla of evidence -- even alleged -- to support that.

ISSUE VI

WHETHER THE LOWER COURT ERRED REVERSIBLY IN DENYING APPELLANT'S CHALLENGES FOR CAUSE IN THIS RESENTENCING PROCEEDING.

A. Prospective juror Bunting --

Prospective juror Bunting, a nuclear medical technician (Tr 503), acknowledged that his son was a juvenile delinquent involved in drugs and robbery in Nevada but that would not affect his ability to sit as a juror (Tr 509). He was very much in favor of the death penalty (Tr 515). Despite his views Bunting could follow the law and the instructions furnished by the trial judge (Tr 572).

Bunting was asked if there were any other murder cases that he didn't think the death penalty should be applied, other than his previously-stated self-defense situation and he answered:

> "I can't -- right at this second, I can't -- I can't think of any. I'd have to deliberate on that for a long time, but --"

(Tr 644)

Defense counsel cut off the answer to move to next juror. Subsequently, the defense challenged juror Bunting for cause which was denied (Tr 721) and then exercised a peremptory challenge to strike Bunting (Tr 729).

Appellant complains that Bunting was not able -- without notice -- to formulate scenarios where a life sentence would be more appropriate than death. As this Court explained in Castro v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 435 (Fla. 1994) in rejecting a similar claim where "some of the eight prospective jurors at issue here also expressed strong views in favor of the death penalty but were not excused for cause":

> "We find no error in the trial court's refusal to strike the prospective jurors for cause because of their views on the death penalty. It is obvious from the record that when questioning began the jurors had not been given any explanation about their role in the case. In fact, the trial judge expressed his frustration and said an explanation would be helpful to the prospective jurors, but none was given. Not surprisingly, the prospective jurors had no grounding in the intricacies of capital sentencing. Some of these jurors came to court with the reasonable misunderstanding that the presumed sentence for first degree murder was death. When they were advised that they were responsible for weighing aggravating and mitigating factors, they indicated they would be able to follow the law."
>
> (emphasis supplied
> (19 Fla. Law Weekly at S 436)

Appellant acknowledges that Bunting affirmatively answered the inquiry whether he could follow the law and the instruction given by the judge (Tr 571 - 572), but argues that rote answers do not suffice. The Supreme Court in Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841 (1985) noted that jurors' responses cannot be expected "in the manner of a catechism" 83 L.Ed.2d at 852, which is why deference must be afforded the trial judge who

sees and hears the juror. Rather than being an extremist, as charged by appellant, Bunting was merely a citizen favoring the death penalty who could follow the law.

Morgan v. Illinois, 504 U.S. ___, 119 L.Ed.2d 492 (1992) does not compel reversal. That decision held that it was improper for a trial court to refuse inquiry into whether a potential juror would automatically impose the death penalty upon conviction. Indeed, footnote 4 of Morgan lists Florida as one of the states permitting "reverse-Witherspoon" inquiry. See Gore v. State, 475 So. 2d 1205, 1206 - 1208 (Fla. 1985). No such inquiry was proscribed sub judice. That Bunting did not immediately hypothesize a situation calling for a life sentence did not detract from his stated ability to follow the judge's instruction. Appellant's claim is meritless.

B. Prospective juror Flanders --

Flanders, a retired government worker, recognized that not all first degree murder cases warrant the imposition of death, could listen and apply the judge's instructions to the facts and weigh the various circumstances (Tr 615). There was no problem that the defendant was black and the victim white (Tr 615); it shouldn't come into play at all. Flanders stated that his experience as a combat paratrooper in the Korean War would not affect his opinion on the death penalty. When asked if there were a kind of murder case that he could vote for life, he answered, "I'd have to know what type of case." Then he opined that if a parent shot a child molester he'd give them a medal.

And if someone murdered a police officer, he'd vote for the death penalty. He could go both ways with rape (Tr 683 - 684). He stated that he could listen to the evidence and try to be fair (Tr 685). The defense requested Flanders be excused for cause, the request was denied (Tr 721 - 22) and the defense exercised a peremptory challenge on Flanders (Tr 733).

Appellant contends that prospective juror Flanders' bias was revealed because he provided a highly emotional reaction to the death penalty. Trotter characterizes the juror as having "seemed to equate recommending a life sentence with 'believing in murder'". Brief p. 68. But that characterization is unfair. Flanders acknowledged affirmatively that not all first degree murder cases warrant the death penalty (Tr 615). That Flanders had strong feelings about cop killers or child molesters (neither of which are involved in this case) means only that, as with most citizens, some kinds of offenses are more repugnant than others. Flanders' preferences were no more disqualifying than for example, this Court's seeming preference for the HAC and CCP aggravators over the others enumerated in F.S. 921.141(5). See Maxwell v. State, 603 So. 2d 490, 493 (Fla. 1992) (" . . . the present case involves only two aggravating factors. These do not include the more serious factors of heinous, atrocious or cruel, or cold, calculated, premeditation"). The totality of juror Flanders voir dire responses is that he could follow the instructions of the judge and follow the law. See Gore v. State, 475 So. 2d 1205, 1207 - 1208 (Fla. 1985) (Gore has not shown that

his jury was made up of one or more persons unalterably in favor of the death penalty or that any of the jurors' views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath).

Appellant next misidentifies juror Flanders with juror Fletcher (the latter was not excused and served on the jury -- Tr 1026 - 27). Brief, pp. 68 - 69. Fletcher didn't remember much about the newspaper article, it would not interfere in his determination to recommend either life or death sentence and the defense announced it had no cause challenge for Fletcher (Tr 713 - 718).

The trial court correctly ruled that Flanders could follow the law (Tr 722).[7]

C. Prospective juror Nieves --

The appellant also complains that the trial court's failure to excuse prospective juror Nieves (who was peremptorily excused at Tr 1020) for cause constitutes reversible error, arguing that several responses to a leading question of defense counsel showed a "partiality" to a sentence of death. A general partiality to a particular sentence, whether it be one of life or death, however is not grounds for dismissal for cause. As defense counsel

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[7] Bryant v. State, 601 So. 2d 529 (Fla. 1992) is inapposite. Prospective juror Flanders sub judice, unlike those challenged in Bryant did not indicate that he felt death would be automatically appropriate for someone convicted of premeditated murder. His response was decidedly different (Tr 615).

himself argued, the law allows jurors representing the entire panoply of views in favor of or against the death penalty to sit in a penalty phase (Tr 875) unless they would automatically vote for only one result or unless the record establishes that the juror's view would "prevent or substantially impair" his ability to follow the law and the instructions of the court in deliberating at on an appropriate sentencing recommendation. In particular, the appellant bases his argument on Nieves' statements referring to dismemberment of a victim as being grounds for the death penalty and his response to "that's correct" to a convoluted defense question.

The tiny portion of Nieves comments included in appellant's brief, particularly in light of the unambiguous comments left unquoted, present a distorted view of Nieves' responses. The entire colloquy (Tr 783 - 796, 834, 918 - 928, 998 - 1004) encompasses over thirty pages of material and reflects Nieves to be a blue collar, Hispanic juror, strongly in favor of the death penalty, but who was honest and forthcoming in his answers and who was partial to neither the state nor the defense. For instance, Nieves indicated he lived in a black community and possessed no animosity towards blacks. (Tr 834) He expressed unsolicited an apparently sincere concern over the fairness of a proceeding in which a black defendant's fate was to be judged by a jury that did not at that time contain a black individual. (Tr 1003) Clearly, Nieves was unsympathetic to the role of the police: He believed he had been the object of police brutality

when he was arrested at a family picnic, considered suing the police, and expressed concerns about the professionalism and honesty of the officers he had come in conflict with. (Tr 788 - 790). He indicated that these prior conflicts would not prevent him from judging the police witnesses in the current case fairly and that it would not influence his decision (Tr 790).

During the colloquy he clearly and unambiguously indicated that he qualified as a juror under the Witt v. Wainwright standards. Nieves indicated that although he was strongly in favor of the death penalty, he knew all first degree murderers were not deserving of the death penalty (Tr 792) and expressed an unequivocal and unambiguous acceptance of that premise. (Id.) He indicated he was able, despite his strong beliefs, to make a recommendation of either life or death depending on the evidence and that his views would not prevent him from listening to the evidence and following the process required by law (Tr 792 - 793). He characterized himself as extremely fair and honest (a comment verified by the bluntness of some responses) (Tr 791), and indicated that when his wife began to mention a news article after the first day of jury selection, he immediately stopped her, honoring the judge's instructions that jurors avoid exposure to publicity that might affect their decision (Tr 795). During questioning by the defense counsel, Nieves stated that he wanted to hear both sides of the story and had heard the instructions and the law (Tr 923). He further indicated he would put a "standby" on the state's evidence until he heard the defense side

of the case about the individual and the circumstances surrounding the crime (Tr 924). He again emphatically responded that this was fair and that this was information he "definitely" would want to know before making such a serious decision (Id.)

The quoted response concerning pictures came not from an inquiry of what case would be appropriate for the death penalty, but whether Nieves would be so affected by gruesome pictures, that he would not listen to the remainder of the evidence (a concern repeatedly explored by the defense counsel during earlier voir dires.) Nieves responded:

> "I will listen from the beginning to the end, and then I'll make by decision. Pictures on blood or whatever would not interfere, would not bother me because I've seen them all. I was in Viet Nam and seen that everywhere, so that doesn't affect me." (emphasis supplied, Tr 793).

When the prosecutor asked if he could also consider such evidence if it was relevant to an issue in the case such as how bad the crime was, Nieves indicated that he could and referred to pictures showing victim dismemberment during the crime as something deserving of the death penalty. This example, which had no factual application to the case at hand was simply Nieves assertion that he would not ignore gruesome pictures if they were relevant to proving an issue. The illustration that he gave to emphasize the point should not be construed to be a comment on how he would actually vote in the instant case. Indeed, Nieves referred to the person hypothetically as "the individual" rather than as the defendant.

The "series" of questions upon which the appellant bases the bulk of his argument, is in fact the same leading, compound question asked repeatedly with subtle changes in the wording until the juror was misled into a response which defense counsel desired. This court and others have questioned this type of tactic, in slightly different contexts, and repeatedly indicated that a single affirmative response to a leading question will not be sufficient to outweigh earlier responses. See e.g. Trotter v. State, 576 So. 2d 691 (Fla. 1990) at 694. Johnson v. Reynolds, 97 Fla. 591, 121 So. 793, 796 (1929). See also Hagerman v. State, 613 So. 2d 552 (Fla. 4th DCA 1993) (concerning rehabilitation from leading questions by the judge.) The tactic was particularly inappropriate with a juror who had some obvious difficulty with articulating his positions in English.[8] As initially phrased, the question merely expressed a fear that Nieves would vote for the death penalty despite what he (the defense attorney) says or does. Nieves never indicated he would automatically vote for the death penalty, but rather, indicated "probably." His statement that "it don't [sic] matter what you say" is clearly not a reference to ignoring the evidence because

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[8] Nieves' responses are replete with grammatical errors. See, e.g. Tr at 789 (I did went to court), Tr at 790 (I didn't have no choice.), Tr at 790 (Thats happen (sic) three years ago.). Tr at 790 (No I don't think that would affect.) Tr at 923 (Well, in a way it don't matter what you say), Tr at 922 (I couldn't say nothing); and the record indicates difficulty in understanding what was being asked on some occasions. See, e.g. the exchange between the prosecutor and Nieves at 789, line 11 though 21.

the preceding colloquy had just established how important hearing the defense evidence would be to him in making the decision. Indeed when attorney Slater changed his words in again restating essentially the same question, Nieves again indicated that he wanted to hear the defendant's side of the story but that Slater was not going to prevail by softening his "heart," rather it would have to "be on a specific conclusion" . . . "evidence and all, that kind of issues." Taken in context this is a reassertion of the importance of defense evidence, not a comment that he intends to disregard it. Clearly, the comments of counsel directed toward creating sympathy would not sway him; evidence was what he would concern himself with.

Defense counsel again asks if he will vote for the death penalty "no matter what I'm going to put forward," Nieves again reasserts the importance of hearing the defense side of the story, indicating merely that he had not yet decided the case: "Once I hear his side of the story, I'm given an opportunity to listen to it, it will be my decision . . . So whatever decision I make is strictly confidential as far as I'm concerned." Clearly Nieves is indicating that he has not yet heard the evidence or the defense's side of the case and appears unwilling to speculate on what his vote would ultimately be. Defense counsel again asks the question in the form of expressing his own fears as to what Nieves might ultimately do and why, this time specifically assuring Nieves that he is <u>not asking him "to commit himself.</u>" After the state's objection to the question is overruled, the

defense restates the question for the fifth time and once Nieves acquiesces in his statements, the defense asks no further questions on the issue. Later, the defense successfully objected and prevented further inquiry by the prosecution (Tr at 1002).

The decision of whether a juror meets the standard for being excused for cause is a mixed judgment of fact and law, to be determined by the trial judge based upon what he sees and hears. Hall v. State, 614 So. 2d 473 (Fla. 1993). "Because the trial judge see and hears the prospective jurors, he . . . has the ability to assess the candor and the credibility of the answers given to the questions presented." Green v. State, 583 So. 2d 647, 652 (Fla. 1991). Such a decision is within the discretion of the trial judge, and is reviewable only upon a showing that the discretion was abused or manifest error. Mills v. State, 462 So. 2d 1075 (Fla. 1985), Davis v. State, 461 So. 2d 67 (Fla. 1984). The question on appeal is not whether the court agrees with that finding but whether it is fairly supported by the record considering the entire colloquy of the juror. Trotter v. State, 576 So. 2d 691 (Fla. 1990).

The defense suggestion that Nieves final acquiescence by stating "that's correct" to the fifth version of the question indicates an intention to vote "automatically" for the death penalty is clearly untenable when the record as a whole is considered. Throughout the voir dire colloquy Nieves repeatedly indicated he had not reached a conclusion as to what to recommend and repeatedly indicated, including in his three prior responses

to the same question, that it was necessary for him to hear all the evidence and the defense position. His scrupulous concern for avoiding damaging publicity as well as his concern that the jury contain blacks is also inconsistent with a person who has predetermined the outcome. His honest responses to earlier questions which are clear unequivocal and unambiguous support the trial judge's decision not to grant dismissal for cause.

In considering whether the trial court erred, this could should also consider the contrast between the questions asked of Nieves by the defense and those asked of other potential jurors. Other jurors were asked if they would listen to and consider certain types of evidence in mitigation if authorized to do so by the judge's instructions. No attempt was made to ask these specific and non-compound questions of Nieves. Similarly, the defense in asking Nieves his opinions never explored whether he would follow instructions from the judge if they were inconsistent with his own ideas of what was relevant. Ironically, the court's decision to deny cause challenges concerning jurors Buntin, Flanders and Nieves was preceded by the defense's successful objection that juror Johnson did not meet Witt standards to justify recusal for cause. The defense later argued that since Johnson failed to meet Witt standards and was a minority that the state could not exercise a peremptory challenge against him (Tr 730 - 733). Johnson, a black male who lived in Palmetto, was familiar with the victim and was equivocal about

whether this would affect him,[9] had indicated unambiguously that he could never, under any circumstances vote to recommend the death penalty and stated that he would not follow the judge's instructions on the law in that regard. He felt his concern over keeping his kids would make it difficult to concentrate on the trial and expressed a specific fear that relatives of the defendant might take retribution against his children putting them in danger if he sat on a jury that recommend the death penalty. Johnson repeated these statements on voir dire by the defense and was never rehabilitated in any fashion.

In its objection to Johnson being excused and its later vehement argument that he did not meet the Witt standards, the defense set the stage for the denial of an excuse for cause for Nieves. Having wrongly convinced Judge Eastmore that Johnson's unequivocal responses that he would not follow the law did not qualify him for excuse for cause, the defense could not credibly argue to the same judge that Nieves' more moderate comments required his exclusion.[10] Thus, even if the refusal to excuse

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[9] In fact, the defense moved for a mistrial based upon favorable comments Johnson made about the deceased in the presence of the other jurors (Tr at 577).

[10] The defense wrongfully forced the state to expend a peremptory challenge on juror Johnson rather than allowing an excusal, for cause (Tr 718 - 733). Johnson said it would disturb him to sit because he lives in Palmetto and worried what would happen to his kids if a friend of Trotter sought revenge (Tr 582), it would be difficult to listen to and follow the judge's instructions (Tr 583), would rather not decide whether the defendant gets life or death (Tr 595) and if the evidence and facts justified it he still could not return an advisory sentence of death (Tr 596).

Nieves was error, it was an error occasioned by the erroneous arguments of the defense and one they should not be heard to complain of.

Additionally, Trotter's claim is procedurally barred. Following the selection of jurors and alternates, this colloquy occurred:

> "The Court: What say you, Mr. State Attorney?
>
> Mr. Crow: We accept the jury as seated, Judge.
>
> The Court: Mr. Defense Attorney?
>
> Mr. Slater: We accept the jury as seated, Judge."

(Tr 1027)

In Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993), this Court held that a Neil challenge to a juror was not preserved for appellate review:

> "He affirmatively accepted the jury immediately prior to its being sworn without reservation of his earlier -- made objection . . . Had Joiner renewed his objection or accepted the jury subject to his earlier Neil objection, we would rule otherwise."

See also Mitchell v. State, 620 So. 2d 1008 (Fla. 1993) (Neil issue preserved by defendant's accepting the jury subject to his earlier Neil objection).

Finally, relief should be denied pursuant to Ross.

In Ross v. Oklahoma, 487 U.S. 81, 101 L.Ed.2d 80 (1988), the Court held that a state trial court's erroneous refusal to remove a juror favoring the death penalty which refusal forces the

defense to use a peremptory challenge did not violate the defendant's right to an impartial jury or to due process. The Court explained:

> "Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error. But we reject the notion that the loss of a peremptory challenge constitutes a violation of the right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension . . . [citations omitted]. They are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.
>
> (101 L.Ed.2d at 90)

See also Penn v. State, 574 So. 2d 1079, 1081 (Fla. 1991) (no error in refusing to excuse two jurors who would base decision on the evidence and instructions when one strongly favored the death penalty and second was unsympathetic to those with chemical dependencies; further, any error would be harmless since defendant failed to demonstrate that an incompetent juror sat on his jury).

Assuming, only arguendo of course, that Trotter's objection were properly preserved, and the court agreed with Trotter, any error would be harmless. The instant case involves only a resentencing proceeding, unlike the cases relied on by appellant which dealt with jury selection for both guilt and penalty phases. The difference is important. A serious error in the selection of jurors who are to sit in the guilt phase can be

extremely detrimental to a defendant because of the jury unanimity requirement. A single dissenting juror can, if not persuade the others to his or her point of view, at least cling to that view requiring a mistrial at the resultant hung jury. Such a result cannot obtain for a resentencing. The jury in this case recommended death by an eleven to one vote (R 2123). Even if appellant had been allowed an additional peremptory and been permitted to select a relative to sit on his case, the recommendation would only have changed to ten to two.[11] Thus, any error is harmless beyond a reasonable doubt.

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[11] Two juries after having heard the facts in the instant case and about his background have recommended death by a combined tally of twenty to four, 11 - 1 in this case and 9 - 3 in the first proceeding. Trotter v. State, 576 So. 2d 691 (Fla. 1990).

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY DENYING A CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR PANICO WHO ALLEGEDLY DOUBTED HER ABILITY TO BE IMPARTIAL BECAUSE OF PRETRIAL PUBLICITY AND THE GRAPHIC NATURE OF EVIDENCE TO BE PRESENTED.

Prospective juror Panico recalled reading about the case when it happened forming opinions at that time but hadn't thought about it since then (Tr 519). Panico's husband is an accountant and her sister's husband is a detective with the sheriff's department in the juvenile division (Tr 598 - 599). Panico was a crime victim, her business was burglarized (Tr 600) but there was nothing about that experience that would affect her ability to be fair and impartial in this case (Tr 601) It would upset her to view photos of the crime and initially indicated she was not sure she could put them aside and follow the judge's instructions (Tr 602). On questioning by the defense she stated she didn't recall forming an opinion about the appropriate penalty when she first read about the crime (Tr 676) And she had no opinion now (Tr 677). She would want to be fair to Trotter (Tr 677). She read about this crime in 1986, a stabbing of an elderly person in an attempted robbery (Tr 702) and believed she could follow the judge's instructions and the law (Tr 703).[12] She would weigh all

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[12] Appellant's quoted excerpt from Tr 705 at page 74 of the brief was in response to defense counsel's query "Were you offended by it [the reported homicide]?"

the information before making any decision on sentencing (Tr 707).

The defense sought to excuse Panico for cause because of her awareness of the case from prior newspaper stories and the difficulty with viewing photos (Tr 716) The request was denied (Tr 717) and the defense exercised a peremptory challenge to excuse Ms. Panico (Tr 733).

In Watson v. State, ___ So. 2d ___, 19 Florida Law Weekly S 564 (Fla. 1994), this Court found no reversible error in the trial court's denial of challenges for cause to prospective jurors Webster and Vento, explaining:

> At the outset, it is well to remember the standard by which we review this issue. In *Mills v. State* , 462 So. 2d 1075, 1079 (Fla.), *cert. denied*, 473 U.S. 911, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985), this Court stated:
>
> The competency of a juror challenged for cause presents a mixed question of law and fact to be determined by the trial court. Manifest error must be shown to overturn the trial court's finding.
>
> A fair reading of juror Webster's colloquy indicates that her main concern was that if Watson's lawyers did not call any witnesses, he would not be getting a fair representation. She did not indicate that she would find him guilty if he presented no evidence. To the extent that her later answers could be characterized as ambiguous, the trial judge was clearly within his discretion to deny the motion to excuse for cause. Because of counsel's obscure questions and the short venire on the subject, it is difficult to discern what caused juror Vento to say that if Watson put on no evidence he did not know whether he

> could follow the law. However, this was not the reason Vento was challenged. The motion to excuse Vento for cause was premised on the fact that he had said that he had a burglary the previous night. Thus, Watson's attorneys waived any objection they might have had to Vento. Since the trial judge gave Watson one additional peremptory challenge, he is not entitled to reversal unless both jurors were improperly excused. Clearly, he has failed to demonstrate error with respect to both of the jurors.

With respect to Ms. Panico's remarks, the totality indicates that while it might be an unsettling experience, irrespective of whether she had read anything in the papers seven years earlier, she would be able to listen to the information presented. And she had not formed an opinion on whether death or life was an appropriate sentence (Tr 706 - 709):

> MR. BLOUNT: But now when we come into the courtroom, the law says that we have to just forget about that and not allow that in any way to affect resolving such a significant issue that we have here.
>
> Isn't it going to be a little bit difficult for you to forget all that stuff you heard about Mrs. Langford being a sweet lady and a kind lady and helping everybody? If none of that is ever presented in the courtroom here, don't you think that may still have some, if you've got a little decision to make, some impact in resolving this issue?
>
> PROSPECTIVE JUROR PANICO: You know, I -- I don't know. It' hard for me to say what my reaction would be to information before I would see it. I -- I really don't know..
>
> Like I said, I would -- I definitely would want to be fair to Mr. Trotter. I feel that I would. I would weigh out all of the information before I would make any decision about his sentencing.

MR. BLOUNT: Do you feel, though, that it would be a little bit difficult?

PROSPECTIVE JUROR PANICO: Oh, yes, it will be difficult.

MR. BLOUNT: Difficult because of what you already know?

PROSPECTIVE JUROR PANICO: It would be difficult for me irregardless of if I knew anything or not. It would be hard for me.

MR. BLOUNT: But does it make it more difficult because of what you know already about the whole case?

PROSPECTIVE JUROR PANICO: I -- I don't know.

MR. BLOUNT: You can't say it would or you can't say it wouldn't?

PROSPECTIVE JUROR PANICO: I really -- I really don't know. I'd like to think that I could be fair and impartial. I'd like to think that.

MR. BLOUNT: Do you think you come into this courtroom with a clean slate about this case, or do you think --

PROSPECTIVE JUROR PANICO: No.

MR. BLOUNT: Your slate probably already has something on it about this case?

MR. CROW: I'm going to object to some extent because he has been determined to be guilty. I think that part of the slate --

MR. BLOUNT: Other than that? Obviously, we all know he's guilty. But the other information, you know, about the details of the offense, about Mrs. Langford and everything --

PROSPECTIVE JUROR PANICO: Right.

MR. BLOUNT: That slate isn't clean; is it?

> PROSPECTIVE JUROR PANICO: Because it was so long ago, I really don't think that I would be -- that I would be thinking about that, no.
>
> I think I would be able to listen to the information, yes. There's -- of course, it would be unsetting. I don't think you'd be human if it didn't upset you somewhat, yeah.
>
> MR. BLOUNT: Did you, at the time you read these articles and you were thinking about this, form any opinion as to whether or not Mr. Trotter should receive a life sentence for what he did or a death sentence for what he did?
>
> PROSPECTIVE JUROR PANICO: No. No, I did not.
>
> (emphasis supplied)

With respect to appellant's complaint that Panico's responses were not sufficiently unequivocal, appellee responds that the entire purpose of Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841 (1985) was to remove appellate second-guessing as to whether an honest venireperson had made it "unmistakably clear" what their views on capital punishment were.

> "This is because determinations of juror bias cannot be reduced to question and answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or maybe unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror."

(83 L.Ed.2d at 852 - 853)

See also Taylor v. State, 638 So. 2d 30, 32 (Fla. 1994); Hannon v. State, 638 So. 2d 39, 41 (Fla. 1994); Foster v. State, 614 So. 2d 455, 462 (Fla. 1992); Green v. State, 583 So. 2d 647, 652 (Fla. 1991) (trial judge is in best position to determine if peremptory challenges have been properly exercised); Lusk v. State, 446 So. 2d 1038 (Fla. 1984).

With regard to Trotter's assertion that exposure to pretrial publicity impermissibly taints the juror, this Court has held that such exposure is not enough to raise the presumption of unfairness. Bundy v. State, 471 So. 2d 9, 19 (Fla. 1985); Castro v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 435 (Fla. 1994). Juror Panico announced she did not recall forming an opinion about the appropriate penalty when she first read about the crime and had no opinion now (Tr 676 - 77). She believed she could follow the judge's instructions and the law, and would weigh all the information before making any decisions (Tr 703, 707). See also Turner v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 630 (Fla. 1994) (record reflects that not only had jurors not formed any opinion about the case, but some could not even recall what they had read or heard).

With regard to Panico's asserted lack of enthusiasm for viewing photographs, any comparison with cases wherein a prospective juror displayed an inclination to convict irrespective of the evidence is inapposite where here prospective jurors initially were told that Trotter "has been found guilty of

the crime of murder in the first degree. Subsequently, you will not concern yourself with the question of his guilt." (Tr 261) Any ambiguities present in her responses can be attributable to the fact that "the prospective jurors had no grounding in the intricacies of capital sentencing." Castro, supra, at S 436.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED BY ALLEGEDLY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF NON-STATUTORY CIRCUMSTANCES.

A. Evidence that Trotter lied to police --

Prior to resentencing the defense requested in a motion in limine to exclude statements made by the defendant. The prosecutor argued that this jury needed to be educated about the facts, and that Trotter's admissions were relevant to aggravating factors such as pecuniary gain for the accompanying robbery (Tr 229 - 233). The court denied the defense motion, observing:

> "I don't think it's a question of retrying guilt. But when you've got a new jury that knows absolutely nothing of the facts, you've got to acquaint the jury with enough of the facts so that they can make an intelligent, informed decision in their recommendation to the court.
>
> And I cannot automatically exclude the statements if they go to the matter of informing the jury as to what happened."

(Tr 235)

That ruling was eminently correct. See Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986); Chandler v. State, 534 So. 2d 701, 703 (Fla. 1988); Valle v. State, 581 So. 2d 40, 45 (Fla. 1991).

The trial court correctly denied a mistrial request by the defense which urged that the prosecutor's opening statement was improper, since the purpose for playing the confessions was to show Trotter's statements were not true. The prosecutor responded that appellant's statements were not consistent with the evidence (Tr 1065). Since the resentencing proceeding would deal in large measure with the mental and emotional mitigating factors urged by the defense, it was appropriate for the jury to know the facts of the case to best evaluate the opinion testimony of proffered mental health experts. With respect to the objection during the testimony of witness Van Fleet, the prosecutor reiterated that Trotter's confessions were relevant to the pecuniary gain and commission of a robbery aggravators and Trotter's commission of the homicide (Tr 1193).[13]

Appellant argues that it was improper for the state to portray Trotter as deceptive, evasive and dishonest by eliciting from state witness Tim Matthews that victim Virgie Langford was an unlikely candidate to have attacked Trotter when appellant relied on that version in one of his confessions (Tr 1289 - 90). But the purpose of such evidence was not merely to portray Trotter as a liar, a somewhat minor pejorative term considering appellant's brutal destruction of Mrs. Langford, but also to

---

[13] The trial court reiterated that what happened at guilt phase was relevant, "they (the jury) cannot possibly come up with an intelligent decision in sentencing unless they know what occurred in connection with the offense" (Tr 1200).

place into proper focus the opinion testimony of mental health experts Dr. Krop and Dr. Wood and Dr. Maher who eagerly opined regarding whatever self-serving admissions Trotter had made to them in the effort to suggest that there was greater mental mitigation than the evidence supported, and whose opinions were inconsistent with facts of the case.

Appellee offers no apology for the prosecutor's eliciting on cross-examination of Dr. Krop that Trotter may have lied to him. In essence, appellant is permitted at a penalty phase to "testify" via surrogate mental health experts as to what the appellant told them, without exposure to cross-examination of the declarant himself. Additionally, decisions such as Nibert v. State, 574 So. 2d 1059 (Fla. 1991) mandate that significant deference be given to such views if unrebutted. If prosecutors may not vigorously and meaningfully cross-examine to expose the weaknesses of such opinions, then there would be little point in continuing the exercise of sentencing proceedings or in the alternative, all sentencing determinations would be made by mental health experts rather than judges and juries. Dr. Krop a retained psychologist contacted by and called by defense (Tr 1483) on cross-examination when asked if he could say whether Trotter had an impulse control problem at the time of the crime responded:

> A. I can only to some degree say that based on what Mr. Trotter reported was going on in his life at that time.

Q. Only based upon the truth or falsity of what he told you.

A. To some degree that's correct."

(Tr 1552)

When asked whether appellant's burglary and robbery in 1985 occurred prior to Trotter's ever using cocaine the witness answered:

"A. Most likely, yes.

Q. Most likely? You don't know?

A. Based on his self-report, that's correct."

(Tr 1553 - 54)

Krop had no information that Trotter's prior crimes did not occur prior to his using cocaine but Trotter told Krop he stole repeatedly to support an alleged habit (Tr 1554). When asked if stealing, an act of dishonesty, was relevant to someone's credibility, Krop sought to distinguish a dishonest act from a dishonest statement (Tr 1554 - 55). Krop then conceded that Trotter had lied when he initially told police that he did not know Langford and had never been in her store. And appellant gave a "dishonest statement" when he told officers he had been to the store but not that day. Krop conceded it was "correct" that Trotter misdirected the police by making up a scenario involving a green car and two named other persons; it was a fabrication (Tr 1555). It was "most likely" a lie Trotter's statement to police regarding his fingerprints possibly being on the victim's neck because he checked for her pulse; there was evidence he choked

her from the autopsy report (Tr 1556). In fact, "Everything he told me could be a lie, yes." (Tr 1556) and "I'm sure that what he told the police was an attempt -- a self-serving statement" (Tr 1557).[14]

Appellant alludes at page 84 of his brief to two comments by the prosecutor in closing argument at Tr 2040, 2065 relating to Trotter's lying. Neither remark was objected to below, although other comments were (Tr 2068 - 2076). Any complaint now is untimely and procedurally barred. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990). Nor is it accurate to contend that the state was urging consideration of appellant's lying as a nonstatutory aggravator. The prosecutor earlier told the jury of his responsibility to establish aggravating factors from the five enumerated in the statute upon which they would be instructed (Tr 2032 - 33)[15]

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[14] The instant case is not like Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984)_ where repeated comments that the defendant was lying were construed as an improper comment on the failure to testify; in a capital sentencing proceeding where there is an expansive view on the admissibility of evidence with the use of hearsay testimony and experts relying on a defendant's statements to them, a defendant is in effect testifying and a prosecutor may permissibly show that appellant's self-serving version is inconsistent with the other evidence. Additionally, there was no complaint below that the cross-examination of Dr. Krop constituted an improper comment on appellant's failure to testify so any complaint here ab initio is untimely.

[15] Further, the trial court instructed the jury that the aggravating factors were limited to statutory-enumerated factors (Tr 2113 - 15)

Rather, it is more correct to characterize the prosecutor's remarks about appellant's lies as refuting the mitigation proffered and inconsistent with the state's other evidence demonstrating aggravating factors.

Appellant errs in contending that Trotter's admissions in his confessions, Exhibits 15 A-D (Tr 1213 - 19, Tr 1226 - 38, Tr 1244 - 1257, Tr 1261 - 1271) added nothing. Rather, the statements show an evasive, defendant avoiding responsibility by changing his version of events to account for the facts known by police. Appellant first reported he saw the victim on the floor and ran away (Tr 1216 - 16), then saw the victim who was waiting on another customer (Tr 1227) but admitted taking the money when Midge and Darryl left (Tr 1229). Later he admitted taking food stamps (Tr 1248) and selling them for cocaine (Tr 1253) and finally conceding the victim died after a confrontation with him, but asserting that she attacked him and they scuffled over the knife (Tr 1264 - 69).

The confessions were useful to show the facts of the crime, the HAC and pecuniary gain factors and the materials considered by both defense and mental health experts in informing their opinions on the presence or absence of mitigating factors.

B. Evidence of a Violent Act Not Resulting in Criminal Charges --

On the prosecutor's cross-examination of defense witness psychologist Krop, this colloquy ensued:

Q. (By Mr. Crow) I think you mentioned on direct examination that one of the results, and you were talking generally at the time, of neglect or an abusive childhood is that people carry a lot of anger and rage around inside them.

A. That's possible.

Q. Did you ever find any indication that Melvin Trotter is carrying that kind of baggage?

A. The only violent act to the degree that we're talking about that that rage apparently came out was on the night or the day of this offense. I have no other significant history of that type of baggage being carried around.

Q. Well, you know he's committed a prior robbery.

A. I'm aware of that.

Q. Okay. And you know he was involved in at least one violent domestic incident.

A. I'm aware of that.

Q. And you're aware that there was at least an accusation that he assaulted someone with a two by four.

MR. SLATER: Objection. May we approach the bench?

THE COURT: You may.

(Tr 1580 - 81)

The defense requested a mistrial urging a violation of the prior motion in limine. The prosecutor responded that they had agreed not to introduce the assault in their case in chief, but that the defense had opened the door by extensive inquiry into Trotter's life and criminal history. The court agreed (Tr

1581).[16] The witness then answered he was aware of an allegation of additional violence by Trotter, that Trotter had some history of aggressive or violent behavior and that it was an escalating pattern from 1979 up to the Langford murder. It was "hard to tell" whether appellant had rage that suddenly explodes; Krop had no evidence he's carrying rage around with him (Tr 1582 - 84).

The court correctly ruled that appellant had opened the door. Krop had testified on direct examination and was asked whether a proclivity towards violence was a genetic or behavioral trait (Tr 1488), discussed the history, background and environment of Trotter (Tr 1489 - 1544) including the fact that appellant was conceived as a result of a rape (Tr 1495) and there was an abusive environment (Tr 1499), conditions in a foster home (Tr 1517, schooling (Tr 1523), the death of relatives (Tr 1533), weight gain (Tr 1535), Trotter's self-report of drug use (Tr 1542). See Parker v. State, 476 So. 2d 134, 139 (Fla. 1985) (We find that it is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis . . . We conclude that the trial court properly allowed the cross-examination of the psychologist on the

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[16] Defense counsel seemed to acquiesce on the ruling: "Judge, I don't believe I did, but if that's what the court's ruling is, is it denying my motion for mistrial and motion to strike?" When the court said yes, defense counsel added "Okay" (Tr 1581).

contents of the case history); Hildwin v. State, 531 So. 2d 124 (Fla. 1988) affirmed, 490 U.S. 638, 104 L.Ed.2d 728 (1989).[17]

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[17] It appears that the prosecutor was not simply making up a story about an assault with a 2 x 4; rather, Krop admitted that Trotter had reported to him that his friends related that he got real aggressive (Tr 1582 - 83). And while it may be improper in cases such as Robinson v. State, 487 So. 2d 1040 (Fla. 1986) for the prosecutor to ask family members and an employer if they were aware the accused had subsequently been jailed on an unrelated rape charge, the same cannot be said for inquiring of a mental health expert as to matters forming the basis of an opinion on the multitude of experiences the witness had described in direct testimony.

ISSUE IX

WHETHER THE LOWER COURT ERRED BY FAILING TO GRANT A MISTRIAL OR GIVE CURATIVE INSTRUCTIONS WITH REGARD TO THE PROSECUTOR'S CLOSING ARGUMENT.

A. Comments that only paid witnesses testified as defense witnesses --

Trotter complains of the following prosecutor remarks:

> (1) "Now, the burden of proof for mitigation lies not with me, but with the defense. They must reasonably convince you that, if they want you to find a mitigating circumstance, that they've put on reasonably convincing proof that it exists. And we'll talk a little but later about how no person that knew Melvin Trotter prior to this murder took the witness stand. The people who took the witness stand were people that were paid to do so, the people that knew him, with the exception of one person who did an investigation in 1977."
>
> (Tr 2033 - 34)

> (2) "I don't know. We've heard a lot of references, a lot of innuendo, a lot of rumor: I read this, I'm convinced; I saw this, I'm convinced. These people were all here Monday, the experts had their little confab, but they didn't bring him in so you could assess the truthfulness or the credibility or the accuracy. Everything was filtered through the lenses of paid experts."
>
> (Tr 2044)

* * *

> (3) "You know, sometimes don't you just want to maybe see one of those experts, see a bring scan on one of them and check the blood flow to that part of their brain that holds, that controls their common sense?"

(Tr 2046)

* * *

(4) "Well, did you verify anything about the conditions of the home? Yes. I talked to Danny Wortham. I think that's the name. And he told me about the terrible conditions in the home, and I verified it and confirmed it through that man.

Well, you know, I'm from Pinellas County, and I never heard of Danny Wortham until last week, but you heard his name and awful lot, didn't you? And who is he? He's a convicted murderer. Don't you think that if he's telling you 'I relied on this information,' he should have shared that with you?

As a matter of fact, this was kind of a reunion week. All the guys from the Danny Wortham case got to come back to Manatee County and have another get-together, the same team. Just a coincidence, I guess.

Where are all these HRS records? Not in evidence."

(Tr 2053)

* * *

(5) "Again, the whole reunion of the guys from the Danny Wortham case just happen to get together on Melvin Trotter's."

(Tr 2057)

Appellee would submit that while appellant now complains about prosecutorial remarks that only paid witnesses testified for the defense, he is changing the grounds of his objection from that presented below which he may not do. Steinhorst, supra; Occhicone, supra. In the trial court appellant sought a mistrial

because prosecutor argued (1) the defendant will get out of prison and the deceased's family will have to stay vigilant (Tr 2068), (2) witness elimination was being argued, (3) the prosecutor mentioned he was from Pinellas County, (4) that Danny Wortham was a convicted murderer and that he and Trotter were victims of the Ellington foster home (Tr 2070), (5) the wolf-caribou simile, (6) the defendant was a "murder machine", (7) the family reunion of the guys from the Wortham case (Tr 2071), (8) that attempted strangulation was HAC, (9) calling the knife an instrument of death, (10) urging the defense might be that Trotter has no conscience (assuming that such an entity exists) (Tr 2072), (11) arguing the defendant has no witnesses when he is a friendless orphan (Tr 2073).

The prosecutor's response was that it was appropriate for him to comment on the evidence (the defense had put on hearsay evidence that Wortham verified information) the reference to conscience and murder machine was in response to the defense experts' opinion that Trotter was fixated in his behavior and unable to control or inhibit his violent responses, and that attempted strangulation did constitute HAC (Tr 2074).

Appellant may not for the first time on appeal initiate a complaint that the prosecutor argued about paid witnesses. In Steinhorst, supra, this Court declared:

> Furthermore, in order for an argument to be cognizable on appeal it must be the specific contention asserted as legal ground for the objection, exception, or motion below."

(412 So. 2d at 338)

Accord, Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); Bertolotti v. Dugger, 514 So. 2d 1095 (Fla. 1987); Occhicone, supra; Rodriguez v. State, 609 so. 2d 493 (Fla. 1992); Craig v. State, 510 So. 2d 857, 864 (Fla. 1987) (motion for mistrial based on certain grounds cannot operate to preserve for appellate review other issues not raised).

But even if the claim were properly preserved for appeal, the Court should affirm. The instant case is unlike Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990). There the Court found prosecutorial misconduct that permeated the case.

> "We find error in the prejudicial admission of irrelevant and deliberately misleading evidence repeatedly elicited by the state attorney over appropriate objection. While isolated incidents of overreaching may or may not warrant a mistrial in this case the cumulative effect of one impropriety after another was so overwhelming as to deprive Nowitzke of a fair trial."

(Id. at 1350)

Examples included improper and irrelevant cross-examination whereby the witness was asked if another psychiatrist had called him a hired gun, improper attempts to impugn the integrity of the witness with false and misleading evidence and other improper behavior. The prosecution's strategy throughout the entire trial was to discredit the whole notion of psychiatry in general.

In the instant case, in contrast, there was no such attempt to discredit mental health experts; in fact, the prosecutor used an expert, neuropsychologist Dr. Sidney Merin as a rebuttal

witness (Tr 1953 - 1977) and argued the value of his testimony to the jury (Tr 2054, 2057 - 58, 2061).

See also Bertolotti v. Dugger, 883 F.2d 1503, 1518 (11th Cir. 1989) (experts agree that because psychiatry and psychology are "arts not sciences" reasonable proffessionals can differ in their diagnosis . . . it is unexceptional to anyone with a modest amount of trial experience, partisan psychologists and psychiatrists will often disagree in courts of law).

Here, the prosecutor's arguments to the jury dealt with the appropriate weight they should give to the testimony presented; if the facts and evidence were inconsistent with the opinions and theories of the mental health experts or if those experts did an inadequate or questionable job in attempting to confirm the facts provided to them, then the jury should accordingly give little weight to their testimony. See Walls v. State, 641 So. 2d 381, 390 - 391, and fn. 8 (Fla. 1994). A comment regarding the experts and the brain scan to check the blood flow to their brain that controls common sense (Tr 2046) is simply legitimate prosecutorial argument, if picturesque, that their testimony did not square with the evidence just as the prosecutor argued that the jury should reject the defense experts' views that Trotter became fixated in his behavior and was an automaton who could not stop what he was doing (Tr 2074, 2061). The prosecutor's comment regarding Danny Wortham (Tr 2053) emphasized that point that perhaps the defense expert was not as forthcoming as he should have been when testifying that he verified certain information

from Wortham without disclosing that Wortham was a convicted murderer.

In summary, the prosecutor's argument was a legitimate comment on the evidence presented and did not suffer any of the vices present in Nowitzke.

As to the alleged comment on defendant's failure to testify, there was no contemporaneous defense objection, probably because all present recognized the context to be a reference to other witnesses whom defense experts had interviewed rather than who actually testified. See the preceding paragraph at Tr 2043 - 44 and the statement "these people were all here Monday" i.e., defendant's mother, brother, friend and others. The prosecutor's comment was appropriate since the defense relied on hearsay evidence and presented their testimony vicariously. Moreover, the defense made no contemporaneous objection to the closing argument except for the comment concerning parole eligibility -- and the untimely objection at the conclusion of the prosecutor's argument constitutes a procedural bar. See Nixon v. State, 572 So. 2d 1336 (Fla. (1990) (while a motion for mistrial may be made as late as the end of the closing argument, a timely objection must be made in order to allow curative instructions or admonishment to counsel); Lindsey v. State, 636 So. 2d 1327 (Fla. 1994) (Because Lindsey failed to object to the testimony when given, and on the ground now argued, he failed to preserve this issue for review.

B. Comments about failure to call witnesses --

The only objection advanced below pertaining to the prosecutor's comment on the failure to call witnesses was as follows by defense counsel:

> And finally, the piece de resistance of prosecutorial misconduct is the prosecutor's, unsubstantiated by fact or law, supposition in front of the jury that, quote, "This is the type of crime which would alienate his family and friends, and that's why the defendant has not witnesses," point out again, and grafting on to my argument of victim impact, this is the hideous and invidious situation brought about by the case when we have a black man who is friendless and raised basically in an orphan situation with the family members, the prosecutor knows the status of other family members of our client who are in the custody of the State.
>
> MR. CROW: Well, I don't know that.
>
> MR. BLOUNT: Well, then, you can't read the newspaper, Counselor.
>
> MR. CROW: I don't live here, Counselor.
>
> MR. BLOUNT: You keep reminding the jury of that, sir.
>
> THE COURT: Mr. Blount, you gentlemen will address your remarks to me --
>
> MR. CROW: Yes, sir.
>
> THE COURT: -- and not to each other.
>
> MR. BLOUNT: Yes, sir. I agree. I apologize.
>
> MR. SLATER: That goes for the State also, I assume, Judge. You're looking at Mr. Blount. He started it.
>
> THE COURT: It goes for all counsel, and I don't need to be reminded on what goes on.

(Tr 2072 - 73)

The prosecutor's statement below which occasioned the defense objection at Tr 2073 was:

> And there's another strategy that you saw developed. Now, we read the man alone statement from the P.S.I., Ken Botbyl said. And it was written a year after he was arrested, I think in 1987. You know, does it surprise you, after seeing the evidence in this case, that when Melvin Trotter is arrested for this vicious, horrendous crime, that people don't stand in line and say, hey, I'm a friend of Melvin Trotter. I want to back him up some. No, that doesn't surprise me. It shouldn't surprise anybody that this kind of commission of a crime would alienate family members, friends and anyone else who had ever known him.

(Tr 2065)

Appellant complained below of this and yet does not urge it here. Instead, he cites remarks in his brief at pages 91 - 92 from Tr 2043 - 44. 2052, 2059, 2065 and 2066 -- none of which were urged. Said failure is a procedural bar under Steinhorst, supra and Occhicone, supra. See Mordenti v. State, 630 So. 2d 1080, 1084 (Fla. 1994) (The majority of the issues raised by Mordenti were not objected to at trial and, absent fundamental error, are procedurally barred); Davis v. State, 461 So. 2d 67 (Fla. 1984); Rhodes v. State, 638 So. 2d 920, 924 (Fla. 1994).

But even if appellant's claim were adequately preserved, it is meritless. The prosecutor quite properly could argue the quality of the evidence presented by appellant and the absence of underlying testimony by witnesses with firsthand knowledge of the facts to support the theories of the mental health experts who had no first hand knowledge of Trotter's life. In State v.

Michaels, 454 So. 2d 560 (Fla. 1984), this Court held that it was not error for the prosecutor to argue on the failure of the defendant to call his daughter to support a self-defense argument; this witness was not deemed equally available to the prosecution because of the normal bias the daughter would have toward the father and against the state. See also Buckrem v. State, 355 So. 2d 111 (Fla. 1978); Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991) (witness is not equally available when there is a special relationship between the defendant and witness); Romero v. State, 435 So. 2d 318, 321 (Fla. 4th DCA 1983).

In Walls v. State, 641 So. 2d 381 (Fla. 1994), this Court explained, when rejecting a defense argument that the trial court had improperly rejected expert opinion testimony concerning the statutory mitigating factors:

> "Certain kinds of opinion testimony clearly are admissible -- and especially qualified expert opinion testimony -- but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking.
>
> (emphasis supplied)
> (641 So. 2d at 390 - 391)

And in footnote 8, the Court opined that reasonable persons could conclude that the facts of the murder were inconsistent with the presence of the two mental mitigators. If judge and jury can reject the opinions of mental health experts when unsupported by "the facts at hand" the prosecutor may also argue

that the supporting facts have not been presented by those closest to appellant to know.[18]

C. Comment regarding Wolf and Caribou --

Appellant next argues that the prosecutor improperly argued in closing:

> "This is a man who, like a wolf following a herd of caribou, has selected probably the most vulnerable victim in Palmetto. A 70-year-old lady, who's weak and can't overpower him, and who is in the store alone, after the lunch hour, when the crowds are gone and that's when he strikes."

(Tr 2055)

There was no immediate defense objection but later the defense objected to the wolf-caribou simile in combination with other objections (Tr 2071). The court correctly denied relief (Tr 2074).

In Cronnon v. Alabama, 587 F.2d 246, 251 (5th Cir. 1979) habeas relief was denied upon a claim that the prosecutor improperly argued what kind of fiendish ghoul could have committed this crime and referred to the assailant's desire to hear the squish of her blood, because it was completely in accord with the evidence. In Collins v. State, 180 So. 2d 340 (Fla. 1965), this Court upheld the prosecutor's reference to the accused as a vulture, a vile creature and a beast. In Puiatti v.

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[18] Appellant errs in arguing that this is a comment on defendant's failure to testify; rather, it is a prosecutorial argument on the weight to be afforded the weak evidence that has been presented.

State, 495 So. 2d 128 (Fla. 1986), a challenge to comments which characterized the defendant as an animal were deemed to have no merit and indeed "require no discussion". Id. at 130. See also Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982) (affirming despite prosecutor's argument that the killing was an animalistic attack).

The prosecutor in the challenged remark did not call the defendant an animal but used a simile to compare his cunning and selectivity in preying upon a helpless, defenseless woman -- which was supported by the evidence (unlike the situation in Rhodes v. State, 547 So. 2d 1201 [Fla. 1989] where the vampire comment was not supported by the record)[19]

D. Comment that the family would have to be vigilant lest Trotter be released --

The prosecutor argued:

> And finally, I believe it will be argued to you that, as it was suggested in voir dire, that life in prison meant life imprisonment with no parole for 25 years, and whether that will be 25 or whether the seven he's already been is going to count to that, we don't know. But sometime in his 50's, he'll be eligible for parole. And the suggestion is going to be made for you all, this is a horrible existence. It's sufficient. Death is not appropriate.

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[19] If everyone adopted in literal fashion a complaint when animals are mentioned the prosecutor apparently could be condemned for calling the victim a caribou. The context of the prosecutor's argument, however, shows he was not engaged in name-calling, only describing a cruel crime perpetrated on the weak.

> Well, does Mr. Trotter portray himself as a person discontented with living in custody? He's put on another person, added a hundred pounds, and seems quite content.
>
> Is it so horrible as Mr. Slater may try to portray? You haven't's heard any evidence in that regard, no. It's not sufficient punishment for the terrible crime that he committed. And it's not sufficient that when those 25 or those 18 years, counting the seven he's been in custody, come up, that the State and his family must be vigilant for the rest of his life to argue and cajole with bureaucrats to keep him in prison.

(Tr 2067 - 68)

The instant challenged argument was not improper. The two choices the jury was called upon to select from was a recommendation of death or life imprisonment with no eligibility for parole for twenty-five years. The prosecutor permissibly could argue that if they selected the life option, with the seven years served Trotter could be eligible for release in eighteen years and the family would have to be vigilant in urging the prison authorities not to release him then. See Harvey v. State, 529 So. 2d 1083 (Fla. 1987). Especially since death was the more appropriate penalty here. The prosecutor did not give the argument condemned in cases like Teffeteller v. State, 439 So. 2d 840 (Fla. 1983) and Grant v. State, 194 So. 2d 612 (Fla. 1967) that the defendant would kill again if released. Since the prosecutor's argument was proper and based on a correct understanding of the law the trial court did not err in denying a request for mistrial.

E. Argument designed to put jury in the victim's place and re-enactment of the stabbing --

Appellant finally objects to the argument of the prosecutor:

> What does the evidence tell you in recreating the assault upon her that led to her death?
>
> Well, first of all, you know that Virgie Langford was a 70-year-old lady who was still recuperating from open heart surgery. She couldn't even lift heavy boxes. She was no threat to a 180-pound man. She had no hope of overpowering him.
>
> And we know that she was choked, and Dr. Wood told you, the medical experts told you that's not a blow to the neck. Sustained pressure to the neck. Miss Langford's face-to-face with her assailant who would eventually murder her, staring into his eyes as he tried to take her breath away, tried to restrict the flow of blood into her brain, tried to overpower her.
>
> And as the fear had to mount, as the terror had to continue in her mind, the assault continued with brutal force. She's taken around to where this knife is, her necklace and glasses knocked off, fingernail marks, if you will recall, on the right side of her neck. Bruising, more bruising on the right, but bruising on both sides in the muscles and the mucosal lining of the tissues underneath. And as Melvin Trotter had his right hand on her throat, he took this knife and stabbed her again and again and again and again and again. Knife wound penetrating into her liver, through her stomach, and into her pancreas. And what was probably a final coup de grace, a slashing injury opening up her abdomen, and her intestines flowing out.
>
> Unnecessarily torturous to the victim? A terrified victim knowing she has no avenue of escape, trying to survive suffocation, and then repeatedly stabbed with a brutal, severe, horrendous stab wound.

> And then she was left for dead. Whether she lay five minutes or ten minutes, I don't know that anyone can say exactly. We know that she was there at least 25 minutes moaning in pain while the paramedics attempted to save her life. And as she lay, words are really inadequate to describe what she experienced. And I certainly do not pretend to possess enough eloquence to recreate that feeling, what she went through. But there is one piece of evidence you have, there is one photograph, and it's a terrible thing to look at. But that's what Mrs. Langford experienced. That gives you one snapshot, one instant of the ordeal she suffered. But it has to be multiplied, because she wasn't suffering for an instant. But for second after second, into minute after minute, while she was conscious, not given pain medication in an attempt to save her life, she lay on the floor of store where she had worked for fifty years.
>
> And we bickered about, well, was it a three-inch wound or a six-inch wound or an inch wound. That's how big it was. These were brutal, horrendous wounds, causing excruciating pain.

(Tr 2040 - 42)

Appellant contends that the prosecutor' dramatization of the homicide was improper.[20]

Appellee disagrees. One of the issues to be resolved in this resentencing proceeding was whether the Langford homicide was especially heinous, atrocious or cruel. F.S. 921.141(5)(h). Proper resolution of that issue called for an evaluation of

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[20] It should be noted that appellant's complaint about the prosecutor's re-enacting the crime formed part of the basis for a requested mistrial (Tr 2076). The defense sought no other relief such as a curative instruction.

whether the nature of the wounds as described in the testimony of medical personnel and others, the nature of the victim's physical condition as described by her relatives and whether such a crime warranted a (5)(h) finding or was rather the self-defense-manslaughter type of offense Trotter had described to the police in one of his confessions.

Appellant also complains about the argument:

> Now, what do we know? We know Melvin Trotter is left-handed. We know the wounds went from the right side, deep to the pancreas and the stomach and the liver. We know she was strangled by application of force to both sides of her neck. And we know there's another wound, the same angle again as these wounds down here, but up higher (indicating). It didn't penetrate deeply because it struck a rib, and it seems to be out of sync with the other wounds.
>
> What does that suggest to you? Well, it suggests, I believe, that as he sat there and stabbed her (demonstrating), taking the knife into her midsection at an angle consistent with a left-handed person, facing his victim, stabbing her again and again as she collapsed, the wounds to the rib cage, as she fell down, the knife stuck higher, five or six inches higher on the body because it did not penetrate the ribs, and as she lay on her right side behind the counter he took the knife and did this (demonstrating), in a sawing motion, as Dr. Wood described, sawing through the cartilage of her rib, made that eviscerating wound to the other side of the body.
>
> Melvin Trotter walked out of that store with two or three spots of blood on his shirt, none on his shoes. And how did he do that? There was no struggle over the knife. He stabbed a helpless victim, and then after she was on the ground, cut her abdomen open (demonstrating).

> Now, this isn't something I have to prove, I believe the evidence suggests to you overwhelmingly that that is what happened. But again, have they reasonably convinced you that that's not exactly what happened back on June 16th, 1986?
>
> Now, this wasn't an injury -- Of course we know how far the knife went in, you've got the picture right here, almost to the hilt. And we know the clothes, as the knife is drawn out, are going to wipe off some of the blood. The knife wasn't flaying (sic) around like this (demonstrating), casting blood off here or blood of here. It was purposefully, efficiently used, in and out again and again and again (demonstrating), and then in a sawing motion to open up her midsection.

(Tr 2050 - 51)

To the extent that appellant's complaint is the footnote observation that the defense bears the burden to disprove aggravating circumstances, appellee disagrees (and this was not urged as a complaint below). Rather, it was appropriate argument designed to convince the jury that the injuries were the result of deliberate, powerful efforts and not a mere accidental stabbing.

Finally, even if the court were to determine that any of the prosecutor's remarks were improper, any error would be harmless. Bertolotti v. State, 476 So. 2d 130 (Fla. 1985).

ISSUE X

WHETHER THE SENTENCING JUDGE ERRED BY (A) IMPROPER DOUBLING UP ROBBERY AND PECUNIARY GAIN AND (B) RECITING THAT HE CONSIDERED THE OTHER NONSTATUTORY MITIGATING FACTORS.

At sentencing the trial court listed the five aggravating factors it found, which included homicide committed during the

commission of a robbery and pecuniary gain (Tr 2189 - 90; R 543 - 44). When the sentence was imposed, the prosecutor and trial judge engaged in the following colloquy:

> MR. CROW: Judge, I may have missed it in your order, but one of the instructions the Jury was given was particularly on the robbery and pecuniary gain; that while both were proven, they should consider just one. And I didn't notice if your order dealt with that fact or not. If it did --
>
> THE COURT: It did.
>
> MR. CROW: Okay, because I think the record should reflect whether you considered that as one.
>
> THE COURT: I only considered it as one.
>
> MR. CROW: Okay.

(Tr 2193 - 94)

There was no improper doubling up; the trial court explained he was considering robbery-pecuniary gain as one factor.

Moreover, as the prosecutor's inquiry attests, the trial judge had instructed the jury on the aggravating factors of homicide committed during the commission of a robbery and pecuniary gain and had specifically instructed the jury as required by Castro v. State, 597 So. 2d 259 (Fla. 1992) that:

> "If you find both aggravating circumstance number three and aggravating circumstance number four based upon the same aspect of the offense you should consider them as only a single aggravating circumstance."

(Tr 2115)

It would be irrational to conclude that the trial judge understood the law when instructing the jury but violated it when

applying it himself, especially when the judge contemporaneously explained that he considered the two as one factor. See also Jackson v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 215 (Fla. 1994) (reversal is not warranted where the trial court either merges the factors into one, or as was done in this case, finds only one of the factors to apply).

Appellant's second point on this issue is that the trial judge did not follow the correct procedure in evaluating the mitigating evidence. Appellant complains that it is ambiguous for the trial court to state in the section regarding mitigating circumstances that:

> "(6) The court has considered the other nonstatutory factors presented by the defendant."

(R 546)

Appellee submits that there is no ambiguity; the trial court expressly found some nonstatutory mitigation:

> (3) The Defendant has a below average I.Q. and has had both family problems (abuse and neglect) and developmental problems. He obviously had a disadvantaged background.
>
> (4) The Defendant may have suffered from a frontal lobe brain disorder which slowed down his reaction times.
>
> (5) The Defendant is remorseful to some degree; it is difficult, however, to separate his true remorse for the killing of Virgie Langford from his self pity over his own predicament.

(R 545 - 46)

And in the "weighing" section of the order the judge recited:

WEIGHING THE CIRCUMSTANCES

> The Court finds the aggravating circumstances outweigh the mitigating circumstances. While the statutory criteria for mental or emotional disturbance were met, they amount to "less than insanity but more than the emotions of the average man, however inflamed." See, State v. Dixon, 283 So. 2d 1 (Fla. 1973). Defendant's inability to conform his conduct to the law is a circumstance, " . . . provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state." State v. Dixon, supra, at page 10. The range of activities encompassed in these circumstances is necessarily broad. In some cases cocaine additional or a frontal lobe brain disorders might give rise to a mental disturbance such as to outweigh any aggravating factors. This is not one of those cases.
>
> The Defendant was observed viewing the store before entering it. There is no evidence that he was under the influence of any drug or acting in a bizarre manner. He was stable enough to wait until the store was empty before entering and was stable enough to ask his girlfriend to provide an alibi for him. He was obviously aware of the wrongful nature of his act.
>
> The Defendant was a cocaine addict and was affected by his addition. The Court finds, however, that while the Defendant robbed the store to get money to buy cocaine, his addiction and not a "mental illness" was the motivating factor in the robbery and murder. In sum, the Defendant's use or abuse of cocaine does not excuse the particularly shocking nature of this murder or outweigh the aggravating factors proven.

(R 546 - 547)

The trial judge did consider nonstatutory mitigation presented. See Krawczuk v. State, 634 So. 2d 1070 (Fla. 1994); Peterka v. State, 640 So. 2d 59 (Fla. 1994) (sentencing order sparse but satisfactory); Green v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 372, 373 (Fla. 1994) (focus of Campbell is that trial judge must give weight to mitigating factors. This concern is met by the trial judge's weighing. Although the sentencing order might not comply strictly with the requirements of Campbell, the trial judge clearly gave careful consideration to the mitigating factors); Pietri v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 487 (Fla. 1994) (while trial judge did not expressly evaluate each nonstatutory mitigating factor in the instant case, record showed trial judge considered all the evidence and possible mitigating factors); Cook v. State, 581 So. 2d 141 (Fla. 1991) (Campbell error harmless).

Appellant's contention must be rejected.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the judgement and sentence of the trial court 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 5th day of January, 1995

OF COUNSEL FOR APPELLEE