IN THE SUPREME COURT OF FLORIDA

MICHAEL ALAN LAWRENCE,

Appellant,

v. Case No.: 82,256

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the lower court, will be referred to in this brief as the state. Appellant, MICHAEL ALAN LAWRENCE, the defendant in the lower court, will be referred to in this brief as Lawrence. All references to the instant record on appeal from resentencing will be noted by the symbol "R"; to the transcripts of the resentencing, by the symbol "T"; to the supplemental record on appeal, by the symbol "SR"; and to the original sentencing transcript, by the symbol "OT." All references will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

In Lawrence v. State, 614 So. 2d 1092 (Fla. 1993), Lawrence raised the following issues: (1) the trial court erred in admitting collateral crime evidence of Lawrence's burglaries, stolen weapons, and use of cocaine; (2) the trial court erred in admitting the testimony of jailhouse informant Larry Sutton; (3) the trial court erred in finding that Lawrence committed this murder to avoid arrest; (4) the trial court erred in finding Lawrence committed this murder in an especially heinous, atrocious, or cruel manner; (5) the trial court erred in finding that Lawrence committed this murder in a cold, calculated and premeditated manner; and (6) the trial court erred in not finding Lawrence's cocaine use in mitigation.

This Court affirmed Lawrence's conviction of first degree murder, vacated Lawrence's conviction and sentence for kidnapping, and reversed the death sentence and remanded for resentencing. Of the seven aggravating factors found by the trial court, this Court found that only three had been proven beyond a reasonable doubt -- under sentence of imprisonment, prior violent felony, and pecuniary gain. "[D]ue to the peculiar facts of this case," namely the admission of substantial similar fact evidence in the guilt phase, this Court was not convinced that the state had shown "beyond a reasonable doubt that the similar fact evidence of

other crimes did not affect the penalty phase." Id. at 1096-97.

SUMMARY OF THE ARGUMENT

Issue I: Lawrence's claim that the trial court erred in failing to instruct the resentencing jury on reasonable doubt is procedurally barred for two reasons -- this claim was not raised in Lawrence's first direct appeal, and Lawrence did not request a definitional instruction on reasonable doubt at his resentencing, Nevertheless, case law makes clear that such an instruction in the penalty phase is not constitutionally required,

Issue II: Lawrence's claim that the trial court improperly admitted the testimony of state witness Crowell that Lawrence had told her of his intent to rob the Majik Market is procedurally barred, because Lawrence did not object on collateral crime evidence grounds below. In any event, the trial court correctly admitted this evidence as relevant to prove the aggravating circumstance of pecuniary gain,

Issue III: The trial court did not abuse its discretion in permitting the jury to hear the former testimony of state witness Gardner because it was relevant to give the resentencing jury an overview of the facts of the instant murder. Further, the state established that it had exercised due diligence in attempting to locate Gardner.

Issue IV: Lawrence's claim that defense counsel's decision not to call any witnesses at his resentencing was the equivalent of Lawrence's waiving the presentation of mitigation without a proper inquiry misrepresents the record. It is clear that Lawrence did not waive the presentation of mitigation, which was elicited through state witnesses (a fact acknowledged by defense counsel), argued by defense counsel, and considered by the trial court.

Issue V: The trial court did not abuse its discretion in permitting the state to compare Lawrence's situation in the penalty phase to a Biblical story, as this argument was a permissible analogy to the requirements of Florida's death penalty statute. The state properly stated the weighing requirements of the jury, using the Biblical story to demonstrate such a weighing process.

Issue VI: Lawrence's claim that the trial court incorrectly found that Lawrence committed the instant murder for pecuniary gain is procedurally barred, based on Lawrence's failure to raise this claim in his first direct appeal to this Court. Nevertheless, the state proved beyond a reasonable doubt that Lawrence committed the instant murder for pecuniary gain, based on Lawrence's statements, the missing money, the open cash register, and the location of the victim's body.

Issue VII: The trial court applied the proper standard in rejecting Lawrence's cocaine use on the night of the murder as mitigation. The trial court fully considered the two statutory mitigating circumstances argued by Lawrence, and considered one as nonstatutory mitigation based on a request by Lawrence, before correctly concluding that cocaine use had had no substantial effect on Lawrence's behavior on the night in question.

Issue VIII: Lawrence's claim that Florida's victim impact statute is unconstitutional is procedurally barred, as Lawrence failed to object below on the grounds now asserted on appeal. In any event, Windom makes clear that Lawrence's claim hold no merit.

ARGUMENT

Issue I

WHETHER THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE RESENTENCING JURY ON THE DEFINITION OF REASONABLE DOUBT.

Lawrence claims that the trial court erred in failing to instruct the jury in the penalty phase on reasonable doubt, Lawrence, however, proceeds to argument without clarifying whether his argument is that such an instruction is required during all penalty phases, or just in resentencing penalty phases.

If Lawrence's argument is that this instruction should be given in all penalty phases, Lawrence is barred by the law of the case doctrine from raising this claim in his appeal from resentencing, as he did not challenge the failure to give this instruction in his first direct appeal.[1] This Court has consistently held that the law of the case doctrine applies to bar consideration of issues which could have been presented in a prior appeal. This Court noted in Rogers v. State, 23 So. 2d 154 (Fla. 1945): "Nothing is presented here which we think warrants us in departing from our opinion and judgment in that case which became the law of the case insofar as it determined all the

[1] The trial court did not instruct the jury on reasonable doubt in the original penalty phase (OT 701-03).

issues which were presented, or which might have been presented at that time." Id, at 155 (emphasis supplied).

This Court reaffirmed this principle in Strazzulla v. Hendrick, 155 So. 2d 1 (Fla. 1965), observing that the law of the case principle existed to avoid reconsideration of points which were, or should have been, adjudicated in a former appeal of the same case; and that its purpose was to lend stability to judicial decisions, to avoid piecemeal appeals, and to bring litigations to an end as expeditiously as possible. See also Airvac, Inc. v. Ranger Ins. Co., 330 so. 2d 467 (Fla. 1976) (the law of the case doctrine is applicable to issues which could have been, but were not, raised). Because Lawrence could have raised this issue in his prior appeal to this Court, this Court should refuse to address it at this juncture,

If Lawrence's claim is only that resentencing juries should be provided with such an instruction, this issue is procedurally barred for a second reason. During the charge conference, defense counsel made no suggestion that the trial court instruct the jury on the definition of reasonable doubt (T 137-42). Consequently, during jury instructions, the trial court advised the jury only that each aggravating circumstance had to be proven beyond a reasonable doubt, and that a mitigating circumstance did not have to be proven beyond a reasonable doubt (T 163-64).

Because Lawrence did not request a definitional instruction below, he failed to preserve this claim for appellate review. Esty v. State, 642 So. 2d 1074, 1079-80 (Fla. 1994); Armstrong v. State, 642 So. 2d 730, 737 (Fla. 1994); Parker v. State, 641 So. 2d 369, 375 (Fla. 1994); Kight v. State, 53 So. 541 (Fla. 1910). Despite Lawrence's claims to the contrary, the trial court's failure to define reasonable doubt to the resentencing jury does not constitute fundamental error, as shown in the above cases.

Should this Court reach a different conclusion, the standard reasonable doubt jury instruction (referred to by Lawrence in his Initial Brief at 18 n.2) is, by its own very specific wording, written to be delivered only during the guilt phase of a trial:

> A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must nat influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.
>
> It is to the evidence introduced upon this trial, and to it alone, that you are to look for that proof.

> A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence of the lack of evidence.
>
> If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.

Fla. Std. Jury Instr. (Crim.) 2.03 Plea of Not Guilty; Reasonable Doubt; and Burden of Proof at 12-13 (March 1989).

There is no similar instruction contained in the standard penalty phase jury instructions. Instead, during the penalty phase of a capital trial, a resentencing jury is told only that "the defendant has been found guilty of (crime charged). Consequently, you will not concern yourselves with the question of [his] [her] guilt," **Fla. Std. Jury Instr. (Crim.)** Penalty Proceedings -- Capital Cases at 74 (June 1992).

Lawrence has cited to no Florida law or case which requires the giving of an instruction defining reasonable doubt to a resentencing jury. The debate about whether such an instruction is advisable is not the issue. Instead, the focus is whether such an instruction is required. Clearly, on the federal level, it is not required, or even necessarily recommended. See Victor v. Nebraska, 127 L. Ed. 2d 583 (1994); Holland v. United States, 348 U.S. 121, 140 (1954); Hopt v. Utah, 120 U.S. 430 (1887); United States v.

Adkins, 937 F. 2d 947, 950 (4th Cir. 1991); United States v. Hall, 854 F. 2d 1036, 1039 (7th Cir. 1988).

Lawrence's reliance on Sullivan v. Louisiana, 124 L. Ed. 2d 182 (1993), is misplaced. There, the United States Supreme Court held that reasonable doubt jury instructions which affirmatively misstate the law cannot constitute harmless error. Because this case does not involve a misstatement of the law, but the trial court's failure to give a constitutionally unrequired definition of reasonable doubt to a resentencing jury, Sullivan is inapposite. See also Henderson v. Kibbe, 431 U.S. 145 (1977) (an omitted jury instruction is less likely to be prejudicial than a misstatement of the law).

Issue II

WHETHER THE TRIAL COURT PROPERLY PERMITTED STATE WITNESS CROWELL TO RELATE LAWRENCE'S STATEMENT TO HER THAT LAWRENCE INTENDED TO ROB THE MAJIK MARKET.

Lawrence has phrased this issue in collateral crime evidence language. In reality, collateral crime is not the issue; rather, the issue is whether the trial court properly admitted as relevant Lawrence's statement to Crowell about his plan to rob the Majik Market.

Any collateral crime evidence claim is procedurally barred because Lawrence failed to object on this precise point in the trial court. Peterka v. State, 640 So. 2d 59 (Fla. 1994). When the prosecutor asked Georgia Crowell about whether Lawrence said anything to her in October 1986[2] about a plan to commit a robbery, defense counsel objected only on the grounds of relevance (T 94, 96).[3] The prosecutor explained that he sought to admit this line of testimony because Lawrence had admitted to going to the Majik Market with the intent to rob it, and Lawrence in fact "went in there and killed" the victim (T 95). The trial court permitted the testimony, after which defense counsel

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[2] Lawrence committed the instant murder on September 29, 1986 (R 1).

[3] Crowell testified as to these statements at Lawrence's first trial, with no defense objection (OT 232).

moved for a mistrial (T 96). Ms. Crowell then testified that Lawrence had told her that he was "across the street in an attempt to rob it, but he couldn't do it after looking at the clerk." (T 96).

If this Court were to reach the merits nevertheless, the record clearly shows that the state did not seek admission of this evidence to show a collateral crime, but sought admission because it was relevant to prove an aggravating circumstance. As this Court is well aware, the decision to admit evidence is committed to the sound discretion of the trial court, and such a decision should not disturbed on appeal absent a showing of abuse of discretion. Muehleman v. State, 503 So. 2d 310, 315 (Fla. 1987); Jent v. State, 408 So. 2d 1024 (Fla. 1981), -- cert. denied, 457 U.S. 1111 (1982).

As the above record passage indicates with great clarity, the state sought the admission of this testimony to prove an aggravating circumstance, i.e., that the murder was committed for pecuniary gain (R 88). Crowell's testimony helped to establish this factor, and Lawrence can show no abuse of discretion by the trial court. Further, any argument that this constituted collateral crime evidence is nothing more than a red herring. See Thompson v. State, 619 so. 2d 261, 266 (Fla. 1993); Johnson v. State, 465 So. 2d 499, 506 (Fla. 1985).

In any event, any error on this point was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Beyond a reasonable doubt, Crowell's testimony on this point did not affect the jury's verdict, based on its extremely limited reference.

Issue III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE STATE TO READ THE TESTIMONY OF SONYA GARDNER TO THE JURY.

It is within the sound discretion of the lower court during resentencing proceedings to allow the jury to hear and see probative 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). The sentencing court in this case did not abuse its discretion in permitting the jury to hear the former testimony of Sonya Gardner because it was relevant.

The state presented the testimony of Tom Tucker, who had attempted to locate Sonya Gardner for service of a trial subpoena, Tucker stated that, based on "past information," he began his location efforts in Santa Rosa County in police reports and complaints, and contacted several people in Santa Rosa County who might have known Gardner (T 65). Because Tucker had no home or permanent address for Gardner, he also attempted an Oklahoma[4] phone number (T 65-66). After "one family" Tucker had contacted spoke with Gardner, Gardner called Tucker (T 66). Tucker advised Gardner why he

[4] The last known address for Gardner was in Oklahoma (T 68-69).

was looking for her; Gardner was reticent about coming in and did not want Tucker to know where she was -- a campsite "somewhere in Blackwater State Park over in Santa Rosa County" (T 66).

Gardner finally agreed to come in, but did not show up at the appointed time, and called later to say she would not be coming in at all (T 66). Gardner advised that she did not wish to leave expensive camping equipment, was scared of people in the area, and did not want her life to be a mess as a result of testifying again (T 66). Gardner's boyfriend called at 5:00 p.m. on the day before trial to advise that Gardner would come in only if forced, and that he would have to give Tucker directions as they were "some 10 miles back in the woods" (T 67, 69). Although Gardner's boyfriend stated that he would call back the next day, he did not (T 67). Tucker was unable to serve Gardner with a subpoena before trial to "force" her to attend (T 68).

The state pointed out that it had sent a subpoena to Gardner's last known address -- Post Office Box 264, Tyrone, Oklahoma -- on May 29, 1993, and had received a receipt signed by Benton Gardner, Sonya Gardner's ex-husband (T 68-69). The state alleged that Sonya Gardner was an "essential witness who was present with the defendant at the scene of the crime and who heard the defendant's confession shortly after the crime." (T 70). The state acknowledged that

Sonya Gardner would not speak to any of the aggravating circumstances, but would

> give the jury an overview of the underlying facts of the murder so the jury will not have to decide this case in a vacuum. The Supreme Court has stated that the trial court has discretion to allow some of the testimony of the underlying murder so that the jury will not have to make its decision in a vacuum, and that was the purpose of this testimony.

(T 71). The trial court held that the state had not shown that Gardner was unavailable (T 71).

Later, the court reconsidered its ruling:

> On reflection unless I somehow manage to get her in here, I think I am willing to change my ruling about Sonya Gardner's availability+ I am concerned about relevance. One of the things that occurred to me and, Mr. Dees, I know that one of the mitigating factors you have just touched on it, I think one of the mitigating factors you may argue my have to do with whether the defendant acted under extreme mental or emotional distress or stress and if, in fact, she was with the defendant on the night of the killing, she may be able -- I don't know what her -- 1 don't know if her testimony speaks to that.
>
> I would be more inclined to allow -- unless you are going to announce that you're not going to argue that as a mitigator, Mr. Dees, I would be more inclined [t]o allow that than a great deal of facts about who did what with guns afterwards. I don't really think that speaks to any of the aggravating factors or mitigators.

> [State]: She did say that he was tripping on cocaine.
>
> [Defense]: That's the only mitigating factor we're going to raise, Your Honor.
>
> [State]: Then we'll have it ready.
>
> [Court]: I think if she -- if there's testimony in there about what she saw and heard right around the time of the murder, some, though maybe not to [a] great extent, some of that may be -- but particularly if it deals with his demeanor or state of mind, I think that may be appropriate.

(T 105-06). Defense counsel renewed his objection (T 107).

Based on case law from this Court, the trial court ruled incorrectly at the first juncture. Section 90.804(2)(a), Florida Statutes (1993), provides that former testimony may be admitted only if the unavailability of the witness is proven pursuant to **Fla. Stat.** § 90.804(1) (1993). This section required the state to exercise due diligence in making a good faith effort to locate Gardner. Jackson v. State, 575 So. 2d 181, 187 (Fla. 1991). See also McClain v. State, 411 so. 2d 316, 316 (Fla. 3d DCA 1982) ("The proponent of the former testimony must establish what steps it took to secure the appearance of the witness , . . .").

Clearly, the state exercised due diligence in making a good faith effort to locate Gardner. In May 1993, a month before the trial, the state attempted to serve Gardner at

her last known address in Oklahoma, Several days before trial, the state contacted local persons who might have kept in touch with Gardner, and finally got a lead. Although the state requested that Gardner come in, Gardner did not show and stated that she would not show unless forced. And, although the state had hoped to get directions to Gardner's remote campsite from Gardner's boyfriend, the boyfriend had not called by trial time to leave directions. Compare Thompson v. State, 619 So. 2d 261, 265 (Fla. 1993). Contrast Rivera v. State, 510 So. 2d 340, 341 (Fla. 3d **DCA** 1987) (declarant never subpoenaed, no showing of any efforts to locate); McClain, 411 So. 2d at 317 (state "did nothing to procure [the witness's] attendance.").

The trial court corrected its ruling of exclusion later, based on the court's perception that Gardner's testimony would be helpful to Lawrence in establishing the mitigating circumstance listed in **Fla. Stat.** § 921.141(6)(f) (1993),[5] i.e., impairment due to cocaine use. Although Gardner's testimony could have established such a factor, as she was present at the crime scene with Lawrence, the fact remains that this evidence, as proffered by the state, was relevant for the reason propounded by the state: Gardner's testimony would have given the jury an overview of the

[5] "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

underlying facts of the murder. Based on the relaxed evidentiary standards of **Fla.** Stat. § 921.141(1) (1993),[6] the trial court properly admitted Gardner's former testimony, even if the state had not met its burden of proof regarding unavailability.

Lawrence also submits that, because Gardner's testimony was given in the guilt phase "where issues are different from those here," it was inadmissible. Initial Brief at 31. Lawrence contends he "might have taken a completely different approach in cross examining Gardner, had he been given the opportunity . . . ." Id. If this were such a concern below, Lawrence certainly failed to articulate it so that the trial court could consider it. Accordingly, Lawrence is precluded from advancing this point here for the first time. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

In any event, if the trial court committed error on this point, any error was harmless. Gardner's testimony was not used to relitigate Lawrence's guilt, but only to familiarize the jury with the underlying facts of the case. As this Court aptly observed in Teffeteller,

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[6] "[E]vidence may be presented as to any matter that the court deems relevant to the nature of the crime . . . . Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence . . . ."

> [o]ne of the problems inherent in holding a resentencing proceeding is that the jury is required to render an advisory sentence of life or death without the benefit of having heard and seen all of the evidence presented during the guilt determination phase.
>
> * * * *
>
> [R]elevancy is the test of admissibility. The essence of appellant's claim here is that the photograph was not relevant to prove any aggravating or mitigating factor and should, therefore, not have been admitted. The issue, however, is broader than framed by appellant. Section 921.141(1), Florida Statutes (1985), provides in pertinent part that in capital sentencing proceedings, "evidence may be presented as to any matter that the court deems relevant to the nature of the crime." . . . . We cannot expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum.

495 So. 2d at 745. See also Hill v. State, 515 So. 2d 176, 178 (Fla. 1987) (evidence regarding previous jury's finding of premeditation was "essential for the jury to carry out its responsibility").

Further, as acknowledged by the state (T 71), Gardner's testimony did not aid the state in establishing any of the aggravating circumstances found by the trial court, i.e., committed by a person under sentence of imprisonment, previous conviction of a violent felony, and committed for pecuniary gain (R 87-88). As is very clear, Gardner's

testimony placed Lawrence at the murder scene at the relevant time period, described Lawrence's demeanor after the murder, and related Lawrence's admission of guilt to her (T 113-19). These were critical points the resentencing jury was entitled to hear under Teffeteller so it could understand the underlying facts and render a "wise and reasonable decision.' There is no reasonable possibility that any error committed on this point affected the jury's verdict. State v. DiGuilio, 491 So, 2d 1129 (Fla. 1986).

Issue IV

WHETHER THE TRIAL COURT PROPERLY PERMITTED LAWRENCE'S COUNSEL TO REST WITHOUT CALLING ANY WITNESSES IN THE SENTENCING PHASE.

Lawrence claims that, when defense counsel announced rest without calling any witnesses in the sentencing phase, the trial court was required to conduct an inquiry to determine whether Lawrence had waived the presentation of mitigating evidence. Lawrence has confused the instant scenario with that of Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993), and related cases cited by Lawrence.

In Koon, this Court explicitly identified its concern as the scenario where a defendant waives his right to present any mitigating evidence, but the record does not adequately reflect this waiver. Here, there is no claim or indication that Lawrence wished to waive his right to present mitigating evidence. Instead, the record shows only that defense counsel strategically chose to rest Lawrence's case when he did, without the presentation of any witnesses in the defense case (T 134).[7]

Further, the record shows that defense counsel argued for life imprisonment and the applicability of two

[7] At his original sentencing, the only witness called in mitigation was Lawrence's mother, who simply asked for leniency and life imprisonment (OT 676).

mitigating circumstances: (1) The murder was committed while Lawrence was under the influence of extreme mental or emotional disturbance, because Lawrence was high on cocaine (T 159); and (2) Lawrence's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired, because Lawrence was high on cocaine (T 160). As acknowledged by defense counsel (R 49-SO), evidence of both of these circumstances was presented through two state witnesses, Sonya Gardner (T 110, 116-18) and Melvin Summerlin (T 103-05). Defense counsel also argued that the weight of mitigation was significant (T 160-61). Contrast Deaton v. Dugger, 635 So. 2d 4, 8 (Fla. 1993), cert. denied, 130 L. Ed. 2d 182 (1994) ("no evidence whatsoever was presented to the jury in mitigation").

The record also shows that the trial court instructed the jury on these two statutory mitigating circumstances, and one nonstatutory circumstance (T 163). Although the trial court found that no mitigation had been proved (in the alternative, was entitled to slight weight), the trial court fully considered these circumstances (SR 89-90). See Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988) (the trial court considered mitigating evidence, "thereby protecting society's interests in seeing that the death penalty was not imposed improperly.").

Issue V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE STATE TO MAKE A BIBLICAL ANALOGY DURING ITS CLOSING ARGUMENT.

The trial court, in the exercise of its discretion, controls the comments made in closing arguments, and this Court has repeatedly held that the trial court's ruling on these matters will not be overturned unless a clear abuse of discretion is shown. Hooper v. State, 476 So. 2d 1253, 1257 (Fla. 1985), cert. denied, 475 U.S. 1098 (1986); Davis v. State, 461 So. 2d 67, 70 (Fla. 1984). The trial court did not abuse its discretion in permitting the state to compare Lawrence's situation to a Biblical story, as this argument was a permissible analogy to the requirements of Florida's death penalty statute.

During the state's closing argument, the prosecutor reviewed the jury's duties under Florida law, correctly informing the jury that it must weigh the aggravating circumstances against the mitigating circumstances:

> It's a weighing process. In this process of weighing, this process that we use in the justice system is very, very old. In fact, there's a story in the Bible that illustrates this process that I'm going to tell you about. It's back in Daniel, Chapter 5, you might be familiar with it, there was a king named Belshazzar who was king in Babylon, and one night he was having this great big party for a thousand of his lords and he was drinking wine.

(T 144-45). Defense counsel objected, alleging this was "improper argument, " (T 154). The trial court overruled the objection, and the prosecutor continued:

> As I was saying, Belshazzar is king over Babylon. He's having this great party for a thousand of his lords, and he's drinking wine out of all these vessels that came from the house of God in Jerusalem. Everybody is having a great big party and they are worshiping all these false gods, and all of a sudden this hand appears out of thin air and starts writing on the wall, and that's where we get that expression the handwriting in on the wall.
>
> This handwriting is on the wall and Belshazzar is real upset about it because he can't read it and nobody else can read it, and he call for his astrologers and soothsayers and everybody else to read the handwriting on the wall. And he says if anybody can read it, I'll give them a gold chain and scarlet clothes and I'll make them a third of the kingdom. Nobody can read it. Be's real upset about it.
>
> So then his wife comes to him who's the queen and she says don't worry about it, there's a guy here, his name is Daniel and he can probably translate it, This fellow has got a lot of talent and has a gift for interpreting dreams and all kinds of stuff and he can probably translate it for you. So they send for Daniel, and Daniel looks at it and he says I can translate it for you, but you're not going to like what you hear, and the king says go ahead and translate it. And he says basically what it says is your kingdom has been numbered and you've been weighed in the balances and found wanting.
>
> So we do a weighing process. We do a weighing process to see whether or not

> Michael Lawrence has been weighed in the balances here today and found wanting. You weigh the aggravating factors against the mitigating factors. . . .
>
> . . . .
>
> There's some heavy weight in this case, ladies and gentlemen, heavy weight to support the imposition of the death penalty. Michael Lawrence has had his day in court. He's been weighed in the balances. He's been found wanting. Think about it. How much weight do you want to give to the mitigating evidence that he was using cocaine? How much does that weigh? How much is it worth? You have to decide. You have to decide on your own how much weight you want to give the mitigating evidence. . , .

(T 145-47, 150-51).

As the above portions of the record show, defense counsel objected to the Biblical references. However, because defense counsel did not move for a mistrial and request a curative instruction below, he failed to preserve this point for appellate review, and this Court should decline to address it. Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982); Palmer v. State, 486 So. 2d 22, 23 (Fla. 1st DCA 1986); Oliva v. State, 346 So. 2d 1066, 1068 (Fla. 3d DCA 1977).

If this Court nevertheless reaches the merits of this issue, it is well aware that "[w]ide latitude is permitted in arguing to a jury. Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments."

Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982) (citations omitted; emphasis added). See also Bertolotti v. State, 476 so. 2d 130, 134 (Fla. 1985) (proper closing arguments "review the evidence , . , and explicate those inferences which may reasonably be drawn from the evidence."); Spencer v. State, 133 So. 2d 729 (Fla. 1961).

In Paramore v. State, 229 So. 2d 855 (Fla. 1969), the prosecutor read passages from the Bible during closing argument. This Court held that "[c]ounsel should not be so restricted in argument as to prevent references by way of illustration to principles of divine law relating to transactions of men as may be appropriate to the case." Id. at 860-61. Similarly, the prosecutor here properly stated the law regarding the weighing of aggravating and mitigating circumstances, and simply used the Biblical passage as an illustration of the jury's duty.

In any event, there is no reasonable possibility that the comment affected the jury verdict, State v. DiGuilio, 491 so, 2d 1129 (Fla. 1986), because "there is probably very little that the prosecutors themselves could have advanced which would have been any more damning of the conduct of this appellant than the gruesome evidence which was presented from the witness stand." Spencer, 133 So. 2d at 731-32.

Issue VI

WHETHER THE TRIAL COURT CORRECTLY FOUND THAT LAWRENCE COMMITTED THE INSTANT MURDER FOR PECUNIARY GAIN.

Lawrence claims that, because the evidence offered in support of this factor was consistent with a reasonable hypothesis that Lawrence killed the victim out of anger and took the money from the cash register as an afterthought, the state did not prove the pecuniary gain factor beyond a reasonable doubt. Lawrence, however, proceeds to argument without noting that he did not challenge this aggravating factor in his first direct appeal. Thus, this issue appears to be procedurally barred by the law of the case doctrine.

This Court has consistently held that the law of the case doctrine applies to bar consideration of issues which could have been presented in a prior appeal. This Court noted in Rogers v. State, 23 So. 2d 154 (Fla. 1945): "Nothing is presented here which we thing warrants us in departing from our opinion and judgment in that case which became the law of the case insofar as it determine all the issues which were presented, or which might have been presented at that time." Id. at 155 (emphasis supplied). This Court reaffirmed this principle in Strazzulla v. Hendrick, 155 So. 2d 1 (Fla. 1965), observing that the law of the case principle existed to avoid reconsideration of points which were, or should have been, adjudicated in a

former appeal of the same case; and that its purpose was to lend stability to judicial decisions, to avoid piecemeal appeals, and to bring litigations to an end as expeditiously as possible. See also Airvac, Inc. v. Ranger Ins. Co., 330 so. 2d 467 (Fla. 1976) (the law of the case doctrine is applicable to issues which could have been, but were not, raised). Because Lawrence could have raised this issue in his prior appeal to this Court, this Court should refuse to address it at this juncture.

In the event this Court reaches the merits of this claim, the state proved a pecuniary motivation for the murder beyond a reasonable doubt. Clark v. State, 609 So, 2ci 513 (Fla. 1992). Sgt. Kyle Tennant testified that, when he arrived at the murder scene, the cash register, located in the front of the store, was open and empty (T 82, 84); Tennant stated that the victim was found in a back storeroom (T 82-84). Patricia Blackmon, a supervisor with Majik Markets, testified that $58.00 was missing from the store (T 88). Georgia Lee Crowell testified that, in September 1986, Lawrence told her about a plan to commit a robbery (T 94); Lawrence also told Crowell in October 1986 that he attempted to rob the subject Majik Market but could not do it (T 96). Sonya Gardner's prior testimony established that Steve Pendleton exited the Majik Market carrying the same paper bag he carried in the store, but Lawrence exited the store carrying a small bag (T 116).

Based on this evidence, the trial court concluded:

> The defendant was convicted of robbery with a firearm, and that conviction was affirmed by the Supreme Court. Lawrence v. State, supra t 1097. The defendant now argues, relying on Clark v. State, 609 So. 2d 513 (Fla. 1992), that the evidence supporting this aggravating factor is circumstantial, and that it is possible the taking of cash from the register was merely an afterthought. This case bears no resemblance to Clark, in which property belonging to the victim was taken after the killing. Clark involved a motive distinct from robbery, and the facts of the murder suggested robbery was not the motive, Nothing suggests anything other than robbery was behind this murder. The fact that the victim was taken to a storeroom before the shooting belies Lawrence's contention that the killing may have been in response to an argument (a contention supported by nothing but conjecture, apart from testimony by another store patron that the clerk had been rude to him). The clerk was shot twice in the top of the head and the register emptied. Any conclusion other than robbery as a motive for this murder strains credulity beyond the breaking point. This aggravating factor was established beyond a reasonable doubt.

(SR 88).

This case is similar to Henry v. State, 613 So. 2d 429 (Fla. 1992), Larkins v. State, 20 Fla. L. Weekly S228 (Fla. May 11, 1995), and Allen v. State, 20 Fla. L. Weekly S397 (Fla. July 20, 1995), in which this Court upheld findings of pecuniary gain. A combination of Lawrence's statements, the missing money, the open cash register, and the location of

the victim all combine to establizl.l that pecuniary gain was the motivating factor for the murder,

If this Court disagrees, the erroneous finding of pecuniary gain was harmless beyond a reasonable doubt. Given the strength of the evidence supporting the remaining aggravating circumstances -- committed while under sentence of imprisonment and previous conviction of a violent felony[8] -- and the lack of mitigating circumstances, there

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[8] Regarding these two aggravating factors, the trial court found:

> 1. The capital felony was committed by a person under sentence of imprisonment.
>
> The evidence is undisputed on this issue. At the time of the murder Lawrence was on parole for the 2d degree murder of his wife approximately ten years earlier. Parole constitutes a sentence of imprisonment for these purposes. This aggravating factor was established beyond a reasonable doubt.
>
> 2. The defendant was previously convicted of a felony involving the use of violence toward another person.
>
> Murder in the second degree is a felony involving the use of violence against another person. The evidence showed the defendant strangled his wife. This aggravating circumstance was established beyond a reasonable doubt.
>
> Lawrence has argued that the effect of these two aggravating factors should be diminished because they arose from the same earlier conviction for murder. The court rejects this contention. Lawrence's prison sentence and parole

is no reasonable possibility that the sentencing court would 'have given a lesser sentence without the pecuniary gain aggravating factor. See Sochor v. State, 619 So. 2d 285 (Fla. 1993); Maqueira v. State, 588 Sa. 2d 221 (Fla. 1991), cert. denied, 112 S. Ct. 1961 (1992); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied 112 S. Ct. 955 (1992); Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988).

Although Lawrence has not raised proportionality as a separate issue, the state asserts that Lawrence's death sentence is proportionate to death sentences affirmed by this Court in cases involving similar facts and a similar balance of aggravating and mitigating circumstances. See Jones v. State, 652 So. 2d 346 (Fla. 1995) (Jones stabbed two victims in place of business and robbed them; three aggravating circumstances -- under sentence of imprisonment, prior violent felony conviction, and pecuniary gain -- and no mitigation); Lowe v. State, 650 So. 2d 969 (Fla. 1994) (Lowe shot victim in convenience store; two aggravating

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> did in fact result fram his previous act of murder. The court does not believe this fact diminishes the significance that, at the time of the second killing, Lawrence was still under sentence of imprisonment and was at liberty to kill his victim in this case entirely because he had been paroled as a matter of grace.

(SR 87).

circumstances -- prior violent felony conviction and committed during a robbery -- and no mitigation); Mills v. State, 476 So. 2d 172 (Fla. 1985) (Mills shot victim in home; four aggravating circumstances -- under sentence of imprisonment; prior violent felony conviction; felony murder; and great risk of death -- and no mitigation); Bundy v. State, 471 So. 2d 9 (Fla. 1985) (Bundy abducted and killed victim; two aggravating circumstances -- under sentence of imprisonment and previous kidnapping, murder, and burglary convictions -- and no mitigatian); Agan v. State, 445 so. 2d 326 (Fla. 1983) (Agan stabbed fellow inmate in revenge; two aggravating factors -- under sentence of imprisonment and previous murder and robbery convictions -- and no mitigation).

Issue VII

WHETHER THE TRIAL COURT APPLIED THE PROPER STANDARD IN REJECTING AS MITIGATION LAWRENCE'S COCAINE USE ON THE NIGHT OF THE MURDER.

"Finding or not finding a specific mitigating circumstance applicable is within the trial court's domain, and reversal is not warranted simply because an appellant draws a different conclusion," Stano v. State, 460 So. 2d 890, 894 (Fla. 1984), cert. denied, 471 U.S. 1111 (1985). There is no reason for this Court to disturb the trial court's rejection of cocaine use as statutory or nonstatutory mitigation, in that the record contains positive evidence that Lawrence suffered no diminishment of mental capacity or severe emotional or mental disturbance on the night of the murder.

Lawrence quotes the trial court's consideration of cocaine use as to two statutory mitigating circumstances -- extreme mental or emotional disturbance, and capacity of the defendant to appreciate the criminality of his conduct -- and as to nonstatutory mitigation to conclude that the trial court applied the wrong standard in rejecting cocaine use as nonstatutory mitigation. Placed properly in context, the trial court's ruling in this regard was eminently proper.

Defense counsel argued for the applicability of two statutory mitigating factors in his sentencing memorandum:

> Clearly, a reasonable inference can be made that defendant Lawrence was acting under emotional distress from the evidence presented by the state. Again, state witness Conti testified that the victim was extremely rude to him when he was in the store prior to the incident, Witness Gardner observed that Lawrence was "really upset and shaking" when he returned to the automobile upon leaving the store. Later, on the beach, she stated that he was "acting real nervous and tense, and turning around and throwing his arms up in the air and stuff". Finally the alleged admission by Lawrence to Gardner that he had killed the clerk because "she made me mad". Certainly, a reasonable inference can be made that Lawrence killed the clerk while acting under emotional distress during an argument with the victim that turned violent.
>
> Finally, the evidence presented by the state established that the capacity of defendant Lawrence to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. State witness Sonya Gardner testified that Lawrence told her during the evening prior to the incident that he was on cocaine. Her observations of Lawrence later that night led her to believe that he was "tripping on cocaine". But, even more convincing evidence was presented through state witness Melvin Summerlin. Lawrence allegedly told Summerlin that "I can't remember what happen at the majik market, I was strung out on cocaine".

(R 49-50). Defense counsel argued for no nonstatutory mitigation (R 50).

The trial court found no evidence in support of either statutory mitigating factor (SR 89), but considered mental and emotional disturbance as a nonstatutory factor:[9]

> The evidence of any mental or emotional disturbance, apart from the effects of cocaine usage on the night in question, is slight, Although Lawrence's use of cocaine may have contributed in some way to his commission of this murder, the evidence does not support a conclusion that it had any substantial effect. The court finds, in the alternative, that this non-statutory mitigating factor has not been proved, or that, if it were to be considered at all, it is not entitled to substantial weight*

(SR 90) (emphasis in original).[10]

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[9] Although the trial court stated in its written order that it considered mental or emotional disturbance as nonstatutory mitigation at Lawrence's request (SR 90), this "request" appears to be absent from the record, in that it is not contained in defense counsel's sentencing memorandum (R 45-52) or in defense counsel's argument at sentencing (R 34-43). At sentence imposition, however, the trial court referred to mental or emotional disturbance as being the only nonstatutory factor argued by defense (R 55).

[10] This conclusion is supported by the trial court's first written sentencing order, in which the court referred to the PSI in its discussion of nonstatutory mitigation:

> The defendant offers the suggestion that the defendant was addicted to cocaine and simply could not remember what happened. The defendant's presentence investigation reveals that the defendant may have had more than a passing interest in marijuana in the 1970's but no marijuana related offenses after 1976. There are no cocaine related offenses revealed on the presentence investigation.

(OR 985).

Thus, the trial court did not hold that cocaine use was "not a mitigating circumstance unless it results in behavior that is the equivalent of a 'mental or emotional disturbance."' Initial Brief at 52. Instead, the trial court found some evidence of cocaine abuse, but found it had no substantial effect on Lawrence's behavior on the night in question. Such a finding has been upheld by this Court in similar cases. See Duncan v. State, 619 So. 2d 279, 283-84 (Fla. 1993); Cook v. State, 542 So, 2d 964, 971 (Fla. 1989); Mason v. State, 438 So. 2d 374, 379 (Fla. 1983).

The trial court also found evidence of any mental or emotional condition to be slight (R 90). The only evidence of mental or emotional disturbance was Lawrence's statement that the victim made him angry and Gardner's description of Lawrence as "really upset and shaking" after the murder. Based on other record evidence, notably, that Lawrence was not too upset to rob and leave the store, and recount the events later, the trial court justifiably rejected this as mitigating evidence. Compare Duncan, 619 So. 2d at 283-84; Preston v. State, 607 So. 2d 404, 411 (Fla. 1992); Bruno v. State, 574 So. 2d 76, 82-83 (Fla. 1991).

Issue VIII

WHETHER FLA. STAT. § 921.141(7) (1993) IS CONSTITUTIONAL.

Lawrence claims that Florida's victim impact statute, section 921.141(7), is unconstitutional because (1) it leaves the judge and jury with unguided discretion, allowing for imposition of the death penalty in an arbitrary and capricious manner, (2) it is vague and overbroad, (3) the Florida Constitution does not permit use of victim impact evidence, (4) it infringes on the exclusive right of this Court to regulate practice and procedure, and (5) application of it to Lawrence violates the ex post facto clauses of the federal and state constitutions. However, Lawrence neglects to inform this Court that he made none of these arguments to the trial court.

Prior to the victim impact evidence, defense counsel objected, claiming that, at the time of the original penalty phase, victim impact testimony was inadmissible (T 131). This is the totality of defense counsel's objection. Counsel made no specific argument regarding the unconstitutionality of the statute, and certainly did not raise the five grounds now presented to this Court. It is well settled that objections must be made with sufficient specificity to apprise the trial court of the potential error and to preserve the point for appellate review.

Castor v. State, 365 So, 2d 701 (Fla. 1978); Clark v. State, 363 So. 2d 331 (Fla. 1978). Because defense counsel did not object specifically on the grounds now asserted by Lawrence, this Court should deem this issue to be procedurally barred, and decline to address it on the merits. Bertolotti v. State, 565 So. 2d 1343 (Fla. 1990).

In the event this court concludes otherwise, conspicuously absent from Lawrence's initial brief is a citation to Windom v. State, 656 So. 2d 432 (Fla. 1995), which issued prior to the filing of Lawrence's initial brief. There, Windom asserted that the testimony of a police officer concerning her observation of a victim's son in a anti-drug program constituted nonstatutory aggravation. This Court cited to Payne v, Tennessee, 115 L. Ed, 2d 720 (1991), the **Fla. Const.** art. I, § 16 and section 921.141(7) in holding that the procedure for admitting victim impact evidence did not impermissibly affect the weighing of aggravating and mitigating factors as approved in State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1984), or interfere with a defendant's constitutional rights. This Court continued:

> [S]ection 921.141(7) indicates clearly that victim impact evidence is admitted only after there is present in the record evidence of one or more aggravating circumstances. The evidence is not admitted as an aggravator but, instead, as set forth in section

> 921.141(7), allows the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." § 921.141(7), Fla. Stat. (1993). Victim impact evidence must be limited to that which is relevant as specified in section 921.141(7). The testimony in which the police officer testified about the effect on children in the community other than the victim's two sons was erroneously admitted because it was not limited to the victim's uniqueness and the loss to the community's members by the victim's death.

Windom, 656 So. 2d at 438.

Windom also attacked the application of section 921.141(7), claiming that application of the statute to him violated the ex post facto clauses of the United States and Florida Constitutions, since section 921.141(7) became effective on July 1, 1992, and he committed the murders on February 7, 1992. This Court disagreed, and adopted the reasoning of the Fourth District Court of Appeal in Maxwell v. State, 647 So. 2d 871 (Fla. 4th DCA 1994), on this point: Because "[s]ection 921.141(7) only relates to the admission of evidence[, it] is thus procedural." Windom, 656 So. 2d at 439.

To the extent that Windom does not address all of Lawrence's claims, the state addresses the merits of Lawrence's argument, but this Court need not do the same. The presentation of brief humanizing remarks do not

constitute grounds for reversal, and if improper, were harmless beyond a reasonable doubt. See Stein v. State, 632 so. 2d 1361 (Fla.), cert. denied, 115 S. Ct. 111 (1994). Here, the victim's mother testified that the victim and her son had been living with her at the time of the victim's death (T 132). Although the victim's son had not seen his father since his parents had divorced, the father regained custody after the victim's death and removed the son to another state (T 132-33). The victim's mother stated that the impact on the family was great, as she had raised her daughter's son for quite awhile and now saw him only once a month (T 133). This testimony constituted only two pages of the resentencing transcript. Compare Windom, 656 So. 2d at 441 (Anstead, J., concurring) (only five pages of transcript).

In any event, Florida's death penalty statute 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), cert. denied, 416 U.S. 943 (1984). 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 -- 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 victims' 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).

That same year, this Court held that, despite section 921.143(2), the legislature could not permit victim impact evidence "as an aggravating factor in death sentencing," based on in Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989). Grossman v. State, 525 So.2d 833, 843 (Fla. 1988). However, in 1991, the United States Supreme Court overruled Booth and Gathers in Payne.:

> 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.

115 L. Ed. 2d at 736,

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

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

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

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

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

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

> Amendment provides a mechanism for relief.

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

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

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

Id. (citations omitted).

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

> (7) Victim impact evidence - Once the prosecutor has provided evidence of the existence of one or more aggravating

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

Since this amendment, this Court has upheld the admission of victim impact evidence. See Windom, 656 So. 2d at 432; Stein, 632 So. 2d at 1361; Hodges v. State, 595 So.2d 929 (Fla. 1992).

Of course, the fact that victim impact evidence is not *per se* inadmissible under Payne does not mean that it is *per se* admissible under section 921.141(7). Indeed, 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. Thus, victim impact evidence, other than "characterizations and opinions about the crime, the defendant, and the appropriate sentence," is admissible, if found relevant by the trial court. 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, 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 in reaching a recommendation. 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.

The Payne Court 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,

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm Lawrence's sentence of death.

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. Mail to NADA M. CAREY, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 3rd day of November, 1995.

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