IN THE SUPREME COURT OF FLORIDA



CASE NO. 83,731

HARRY FRANKLIN PHILLIPS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

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# ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

FARIBA N. KOMEILY
Assistant Attorney General
Florida Bar No. 0375934
Office of Attorney General
Department of Legal Affairs
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

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## STATEMENT OF THE CASE AND FACTS

The defendant was convicted of the 1982 murder of a parole supervisor, Bjorn Svenson. The jury recommended a sentence of death by a vote of seven to five, and the trial judge sentenced the defendant to death in 1984. This Court affirmed the conviction and sentence in 1985. Phillips v. State, 476 So. 2d 194 (Fla. 1985). The defendant then filed for post-conviction relief, which was denied by the trial court in 1988. On appeal, however, this Court reversed and remanded for resentencing, due to ineffective assistance of counsel in failing to present mitigating evidence to the jury. Phillips v. State, 608 So. 2d 778 (Fla. 1992). The resentencing hearing commenced on April 4, 1994.

### A. State's Case in Chief

The State first introduced into evidence a certified copy of defendant's 1963 conviction for assault with intent to commit first degree murder. (R. 200-02; T. 275). The defendant had been sentenced to fifteen (15) years. (R. 200). A certified copy of the defendant's subsequent 1973 conviction for armed robbery was also introduced. (R. 175; T. 275). The defendant had been sentenced to life imprisonment for this offense. Id.

With respect to the latter conviction, Lieutenant Handcock testified that he had been the investigating officer. (T. 276,

280). On March 21, 1973, a wine and liquor business in Dade county had been robbed by two black males. Id. The perpetrators had gone through the rear door of the warehouse saw the manager, and asked for job application forms. (T. 276-77) . They were sent to a back room to fill out the applications, and they gave the appearance of doing so. (T. 277). The manager left them and went to another room, which is not visible from the public areas. There he removed the business receipts for the day, $36,000 worth of money and checks, from a locked safe. (T. 277-8). The manager placed the money into another box and took it to the office area. Id. The perpetrators then appeared in the office area with guns which they pointed at the manager's head. (T. 278). They were also carrying rope, with which they tied up the manager. (T. 279). They took the money box and worked their way through the warehouse, where they were observed and chased by other employees. Id. The way out was not a "straight walk to the back. You had to know your way through the warehouse." Id. They fled away in a blue chevy, described as having damage to the side. (T. 279-80). A BOLO was issued, and a short time later this vehicle was stopped by the police. (T. 280). The defendant was driving this vehicle. (T. 280-1). Three of the employees from the business subsequently identified the defendant from a photo line-up. (T. 281). The defendant's shoe, which had come off when he was being chased

inside the business, was also recovered and examined. (T. 279, 281-2). There was an identical match with the defendant's foot imprint; swab contents from inside the shoe were also matched to the same blood type as that of the defendant. (T. 282).

The State then presented witnesses as to the murder at issue herein. Nanette Brochin Russell testified she has been a parole officer for fifteen (15) years. (T. 283). In the summer of 1980, she was assigned to the north parole office on Miami Gardens Drive in Dade County, at 1850 Northwest 183rd Street. (T. 284). The victim was her supervisor. Id. At this time, Brochin lived in Miramar, Broward County, with Mike Russell, another parole officer, who is now her husband. (T. 284, 286). She drove a green Toyota Corolla to work every day. (T. 285).

The defendant was assigned to Brochin's parole supervision. From June through October 1980, defendant caused no trouble for Brochin. On November 14, 1980, Brochin was grocery shopping in Broward County. (T. 288, 290-295). While shopping, she saw the defendant in the supermarket. The defendant approached her and stated that he wanted to talk. Brochin refused, stating she would see him at their regularly scheduled appointment on the following Monday. (T. 291). Defendant was insistent, so Brochin agreed to speak with him after she finished her shopping. Brochin then went to her car. The defendant was already standing on the driver's

side of her car. Id. As Brochin approached, he asked to talk to her in the car. She refused and the defendant then asked for a kiss. (T. 292). Brochin again refused, terminated the conversation, got in her car and drove straight home. Id.

While taking the groceries out of her car, Brochin noticed a car turn the corner, turn its lights off and drive past her house. (T. 292-3). Brochin observed the defendant was driving the car. The defendant drove by her house a second time, with the car's lights off. Id.

Mike Russell had been waiting outside the house for Brochin. She told him what had transpired with the defendant at the supermarket. Pursuant to Russell's advice, an incident report was filed with the Miramar Police Department. (T. 293-4). Brochin also contacted her supervisor, the victim, and advised him about the above incidents. Id.

The next morning, Brochin, received a phone call from the defendant, at her residence. (T. 296). Defendant stated that the reason he had met her at the supermarket was that a woman had offered him money to "paralyze" Mike Russell. (T. 296, 313; R. 243). Defendant stated he drove by Brochin's house the night before to 'check this out." (T. 296). Brochin told the defendant that she had reported the previous incident to the police, would include this conversation, and, told him she would see him at his

regular appointment on Monday. (T. 296-7). Brochin had never given the defendant her home address, home telephone number, or a description of her car. (T. 286-7, 297).

On Monday morning, Brochin again told her supervisor, the victim, exactly what transpired with defendant. The victim then reassigned the defendant's case to another Parole Officer, Mr. Brown. (T. 298-299). That concluded Brochin's supervision of defendant. Id. The defendant was informed of this both orally and in writing. (T. 298-9). Defendant was told, by the victim, to stay away from Brochin, to stay away from her house, and to not call or report to her for any reason. (T. 298-9).

The defendant's presence in Broward County, without permission, was a violation of his parole. (T. 299-301). The Parole Commission authorized defendant's arrest for the violations. The defendant was arrested and sent to Lake Butler for his parole revocation hearing. The hearing was held in March, 1981. Based upon Brochin's, Russell's and the victim's testimony, the defendant's parole was revoked. (T. 299-301). The defendant was present when all three parole officers, including the victim, testified against him. Id.

The next time Brochin saw the defendant was in August, 1982. The defendant had been recently released on parole, and assigned to another parole intake office, located across the street from the

Dade County criminal courthouse. (T. 302-3). On August 16, 1982, however, the defendant went to the north parole building and asked to see Brochin. (T. 303). Brochin, who was not defendant's parole officer and had no reason to see him, refused and reported this incident to the victim. (T. 303, 305).

On August 23, 1982, Brochin and Russell were at home, when someone fired four shots, two through their front window. The police were called and they retrieved some of the projectiles from their house. (T. 304-5).

On August 31, 1982, Brochin was required, first thing in the morning, to report to the Dade County criminal courthouse. (T. 305-6). As she entered, the defendant was standing by the elevator. (T. 306). He made.direct eye contact with her. Id. Brochin turned around and took the escalator up to the fourth floor where she was scheduled to be present. Id. When she arrived, the defendant was waiting for her at the escalator and again made eye contact. (T. 306-7). Brochin asked court personnel for assistance, and reported the incident to building security. (T. 307). She **also** called the victim. Id. The victim came to the courthouse. Id. After Brochin finished her business, she went to the parole intake building across the street from the courthouse, (T. 308-9). The defendant had been previously scheduled for a meeting at that building, with parole supervisors, in reference to his August 16, 1982 visit to

Brochin's office. (T. 308). Brochin was informed that the victim and other supervisors had had another meeting with the defendant; the latter had been again instructed to stay away from her. (T. 308).

Ms. Brochin then returned to her office at the north parole building. (T. 308-9). She left her office at approximately 5:00 p.m. that day; the victim was still working there. (T. 309). At approximately 8:30 p.m. that night she was again called to her office; the victim was dead in the parking lot at this time. Id.

Mike Russell is also with the Parole and Probation Department. (T. 317). He confirmed Brochin's account of the 1980 incidents and the defendant's subsequent parole revocation. (T. 318-19). Shortly after the Defendant was taken into custody, but before Russell testified at the revocation hearing, the defendant had called him at home, and said: 'He understood why he was in jail and that he had no problem with me and I had nothing to fear from him." (T. 321).

The day after the defendant was again paroled, on August 11, 1982, Russell saw him at the parole intake office. (T. 323-4). Several days later on August 20, 1982, the Defendant went to Russell's office, and asked to see him. (T. 324). Russell reported the incident to his supervisors, who had a meeting with the defendant. Id. The defendant **was** instructed a) to stay away from

the north office building where Brochin and the victim worked, b) that he was supposed to report to the intake office across from the courthouse, and c) that he was to stay away from Russell. (T. 324-5; 339-40). Three (3) days later, the Russell/Brochin home was shot into. (T. 326).

Benjamin Rivers testified that he was the parole circuit administrator from 1980 through 1986. (T. 333) . He supervised all parole officers in Dade County. (T. 334). In November of 1980, he and the victim had a meeting with the defendant, after the latter's phone calls to Ms. Brochin. (T. 334-5). The defendant was instructed to stay away from Brochin, to not leave Dade County, and, that violating these instructions would result in his parole being revoked. (T. 335-6).

Subsequently, in August 1982, Rivers was advised of continuing problems with the defendant. He scheduled a meeting for 9:00 a.m. on August 31, 1982, in the parole intake office across the street from the Courthouse. (T. 337). The victim was also scheduled to be present at this meeting. (T. 339). Approximately an hour prior to the meeting, Mr. Rivers received Brochin's call reporting the defendant's presence in the courthouse. (T. 381). At the 9:00 a.m. meeting, which the victim also attended, the prior instructions, that the defendant was not to be seen at the north office, where Ms. Brochin and the victim worked, were repeated. (T. 339). The

defendant was again specifically instructed to stay away from the victim, Brochin and Russell; he was told that violation of these instructions would result in parole being revoked again. (T. 340). Later on the same day the victim was found dead in the north building's parking lot. Id.

Reggie Robinson is also with the parole department. (T. 347). He was Mike Russell's supervisor in 1982. Id. The defendant's visit to Russell's office were reported to him. Id. Mr. Robinson, along with two other supervisors, had a meeting with the defendant and instructed him to stay away from Mr. Russell and from the north office. (T. 348). This meeting also took place a few days prior to the shots being fired into the Russell/Brochin home. Id.

The day after the above shooting, Robinson went to the defendant's home to search it for weapons. (T. 348). The defendant lived with his mother, and Robinson obtained permission to search from the defendant's mother. (T. 349). Robinson was additionally authorized to search by virtue of the defendant's parole conditions. Id. The victim also participated in this search. Id. The defendant kept shouting at the victim; he did not want the victim at his residence. (T. 350).

Robinson was also present at the August 31, 1982 meeting with the defendant, when he was told to stay away from the north parole office, and that if he was ever seen there again, "we would send

him back to prison immediately". (T. 352). The victim had been the leading force at the meeting. Id.

The next day, after the victim's murder, Robinson placed the defendant in custody for violation of parole. (T. 353-4). Robinson had spoken with a witness, Ms. Chabrier, who had reported that the defendant had admitted firing a gun, which is a violation of parole conditions. (T. 352-54). Robinson had asked the defendant about his whereabouts at the time of the murder on the previous day. (T. 354). The defendant had stated that he was at Winn Dixie, grocery shopping between 7:50 and 8:30 p.m., and that he had then gone home. Id.

Michael Mangoso testified that he works for the Department of Corrections. (T. 360). He became the custodian of records for the defendant's parole files, when the victim died. (T. 361). The defendant's parole file was admitted into evidence by stipulation of the parties. (T. 362). The file reflects that defendant was first placed on "life parole", on June 17, 1980. (T. 364). The parole commission has the authority to change and lessen the terms of parole. Id. One of the standard terms of the defendant's parole was that he would follow all special instructions given by a parole officer. (T. 365). The victim herein had the authority to make special conditions for the defendant, such as staying away from Ms. Brochin. Id. No approval by the parole commission or other

authority was needed. Id. The aforesaid special instructions at the various meetings with the defendant were all reflected in the file. (T. 366). The defendant had also been notified of said instructions and the change of his parole officer by letter. Id. The file reflects that defendant was again paroled on August 10, 1982. (T. 369). He was assigned to officer Mark Roysin, at the parole intake building across from the courthouse. Id.

Detective Greg Smith, with Metro Dade Police Department, testified that he was the lead investigator in the homicide case herein. (T. 376-7). The victim's body was found in one of the two parking lots at the north parole building, at 1850 N.W. 183rd Street. The rear parking lot is designated for the parole office employees, and is separated by electronic gates from the front lot used by the parolees. (T. 379). There were two fairly large sand piles, approximately 5-6 feet high in the southern border of the rear lot, which is fenced. The rear lot also contained a large Dempsey Dumpster. (T. 381-2). Hand swabs from the victim reflected rust from the dumpster was on the victim's hands. (T. 383). The victim had stayed at the office late that night; he had been taking old phone books to the dumpster to dispose of them. (T. 384-5).

Two civilians from a residence nearby had reported having heard a rally of two or three shots from the parole building area, at approximately 8:30 p.m. (T. 386). Two police officers, who had

been dispatched to the area on an unrelated call, confirmed having heard shots at 8:30 p.m. (T. 388). The civilians had looked over and seen a figure running in a northeasterly direction toward the gates separating the parole building's parking lots, after the first rally of shots. (T. 386). A short time later they had heard a second rally of four or five shots. Id. They then saw a figure running in a southeasterly direction behind a medical building nearby. Id.

The police searched behind the medical building, which is a grassy area. Id. They found one (1) 'fresh" .38 caliber casing. (T. 387). The victim's wounds, however, reflected that he had been shot eight (8) times. (T. 393). No gun, nor any other casings were found despite an extensive search of the whole area. (T. 389, 394). The shooter had thus taken the spent casings with him. Id. Moreover, a .38 caliber weapon holds six bullets, reflecting that the shooter would have had to reload in between the two rallies of eight shots. (T. 388-9) .

The victim's body reflected two wounds under the left arm, one below the other, and a third "graze" wound to the area in the back of the victim's head. (T. 393). The police also observed a "slap mark", a defect caused by a bullet striking an object head on, in the wall in the back of the Dempsey dumpster. (T. 392-3). This mark and the above three (3) wounds were consistent with the victim

lifting the top of the dumpster and putting phone books in, when he was shot at from behind, with the shooter in the area of the sand piles in the rear parking lot. (T. 394). The victim's body, however, had been found approximately 75 feet away from the dumpster. (T. 396). There was no blood, nor any blood splatter marks at or around the dumpster area. (T. 390-1). Two blood splatter areas around the victim's head and feet, however, reflected that the victim had been moving in a northeasterly direction, prior to falling in the area where he was found. (T. 392). Additionally, there were five (5) more wounds to the victim's body; one was in the center of his back through the spine, and the remaining four were full contact wounds to the head. (T. 395-6). The victim could not have moved 75 feet with any of these five wounds,

The totality of the above physical evidence and account of witnesses, reflected that the victim was shot at three times in the back parking lot, from the area of the sand piles. (T. 396). The victim then ran or walked out of the sliding gates through the front lot, for a distance of 75 feet, where he was shot at an additional five times. Id.

The projectiles from the victim's body and the one casing recovered at the scene were all consistent with having been fired from the same weapon, a .38 caliber revolver. (T. 447-50). The

projectiles recovered from the Russell/Brochin home were also consistent with having been fired from the same type of weapon. Id.

After investigating the scene, the police went to the defendant's residence, which was approximately one and a half miles away from the parole building. (T. 397-8). Traveling at a normal speed for the area, it takes a little over 3 minutes to drive from the crime scene to the defendant's residence. (T. 395-401). The Winn Dixie previously mentioned by the defendant, can be similarly reached in a little over 4 minutes. Id.

At the defendant's residence later that night, the police observed an individual exit the house and go to the defendant's vehicle. (T. 401). The defendant was not questioned or searched at this time. Id. At approximately 5 to 6 a.m. the next day, the defendant and his mother left their house and went to the defendant's sister's house. (T. 401-2). At the sister's residence, the defendant was observed exiting twice, removing a small paper bag from his vehicle, and taking same to the sister's residence. (T. 402). The police requested to search the residence but the defendant's sister declined, as was her right to do so. The defendant was then observed going to the Neighbor's restaurant, where he worked. Id. He was asked for an interview, which he agreed to. (T. 404).

Detective Smith had several interviews with the defendant. (T.

404-5, 416). The defendant first stated that on the night of the murder, he had left home at 7:50 p.m. to go to Winn Dixie, in order to purchase 'chicken" and 'orange juice." (T. 406). He had arrived home between approximately 8:15 to 8:30 p.m., and spent the remainder of the evening in his mother's presence. (T. 406-7). The defendant's mother found a grocery store receipt from Winn Dixie, dated August 31, 1982, at 9:13 a.m. (T. 406). Electrical problems at Winn Dixie, earlier during the day, had caused the computer to be erroneously reset, so as to reflect the time as being a.m. instead of p.m. (T. 406-8). The receipt was otherwise accurate.

At a subsequent interview the defendant again denied involvement, but suggested that two people may have been involved in the homicide, due to the number of times the victim had been shot. (T. 416-18). Neither the police nor the media had published the number of shots. (T. 418-19). The next interview with the defendant took place on December 15, 1982. (T. 424). The defendant was quite anxious to inform Detective Smith that some inmates had made negative remarks about him, that these inmates had Smith's address and phone number, and that they knew about his 15 years old son. (T. 421). When asked for the names, the defendant stated it was "confidential". (T. 422).

Smith had then asked about the last encounter between Brochin and the defendant, on the day of the murder. (T. 423). The

defendant denied having seen Brochin at the courthouse, and stated he had gone there to see an attorney named Jim Wood. Id. Mr. Wood at this time was an attorney in private practice; he was previously the prosecutor in the defendant's 1973 robbery case. (T. 423-4). Upon being interviewed, Mr. Woods had stated that he did not have any appointments or other business with the defendant, and had not seen him. Id. The defendant also denied having seen the victim at the last meeting on the day of the homicide. (T. 424). He denied ever having been instructed to stay away from the north parole office, Brochin, or anyone else. (T. 424-6). The defendant also stated that he had never had any problems with the victim; that the victim's search of the Phillips' residence for weapons had gone smoothly; and, that he did not blame the victim for his testimony and subsequent revocation of parole. Id. The defendant stated that, "if someone does me harm, I do them harm", but that the victim had never done him harm. (T. 426).

At his last interview, Detective Smith informed the defendant that the grand jury had indicted him. The defendant became upset and said that there was no case, and that he would not be convicted, as no gun had been recovered and there were no eyewitnesses. (T. 435). Again, no information with respect to the gun or witnesses had been published or disclosed to the media or the defendant. (T. 435). Finally, the defendant also stated: "I

did not kill the mother fucker but I'm glad he's dead". Id. He added, "they better be glad they got me when they did because I would have killed every last mother fucker in that office," followed by, "someone does me harm I do them harm." (T. 435-6).

Detective Smith also interviewed an informant, Malcom Watson, who was an inmate in Dade County jail. (T. 410). In the fall of 1980, the defendant had gone to the dry clean store where Watson was working. (T. 411). The defendant was in possession of a .38 or .357 revolver; he wanted to use it as collateral for a fifty dollar loan. Id. The defendant had said that he was having some problems with his parole officers, that they were trying to violate him on technical violations. Id. Watson had subsequently seen the defendant in Dade County jail, after the homicide, in September, 1982. (T. 412). Watson commented that the defendant finally did it, and the latter responded, "yes, they got to prove it and they can't prove it." (T. 412).

Another inmate, Will Scott a/k/a Smith, contacted Detective Smith within a week after the homicide. (T. 412-14). He had also known the defendant for a number of years. Id. The defendant had asked Scott about the charges against him; Scott had been arrested for assault and violation of probation. Id. The defendant had then responded: "Well, I downed one of those mother fuckers." Id.

Another inmate, Tony Smith, was serving a sentence for

violation of probation, burglary and grand theft. (T. 414-15). He reported that, in August, 1982, prior to the murder, he had been with the defendant at a bar; they had been discussing their mutual probation and parole problems. Id. The defendant was upset and talking about his problems with a male and a female parole officer. Id. According to the defendant, the male parole officer had been "hassling" his mother, whereas the female officer had been 'hassling" both the defendant and his mother. Id. The defendant had said that he had tried to shoot the female and was unsuccessful, but that, 'no matter what, he was going to put a stop to the hassle". (T. 415). At that point the defendant was in possession of a silver or chrome colored .38 or .357 police type revolver. Id.

Dr. Barnhart, the medical examiner, was the last witness in the State's case-in-chief. (T. 458). The graze wound to the back of the victim's head, had been inflicted from within three feet, due to the presence of gun powder residue. (T. 464-5). The bullet did not penetrate or even touch the skull. Id. This wound and the two in the victim's arm would not incapacitate the victim, and would not necessarily cause him to fall immediately. (T. 466). The victim could have run 100 feet with said wounds. (T. 466-70). The gun shot wound to the back, which had penetrated the spinal cord, however, would have caused loss of motor abilities. (T. 468-72).

The remaining wounds to the skull were also **all** immediately incapacitating, as they went right into the brain. Id. None of these wounds had visible gun powder residue, and thus were not fired from close range.

B. **Defendant's case**

The defendant's mother, Laura Phillips, testified the defendant **was** born in 1945, in Belle Glade, Florida. (T. 518). The defendant is one of three children. (T. 517-18). His brother Julius is three years older, and his sister, Ida, is one year younger than the defendant. (T. 536). The defendant's parents both did 'farm work", when they first moved to Florida. (T. 517). They lived out on the farm where conditions were "pretty rough". (T. 520). The family then moved to Miami in 1953. (T. 521). The defendant's father drove a truck and made deliveries; his mother did housework. (T. 521-22). The children were looked after by a neighbor. (T. 523). The defendant's father was not very supportive; his friends **talked about** him gambling, although Ms. Phillips never saw this. (T. 521, 524). The father had a daughter, by another woman, who also stayed with the family. (T. 524). The defendant's parents argued often; the father would hit Ms. Phillips sometimes; the children "would hear it sometimes". (T. 525). The father also hit the defendant, sometimes with an old ironing cord. (T. 526). The father would "drink sometimes," and become violent. (T. 526-7).

When the defendant was a young boy, the father lost his job and left the family. (T. 527-9). Ms. Phillips then supported the family by herself. (T. 529).

The defendant was quiet when he was growing up; he "stayed to himself". (T. 530). He didn't have many friends. Id. When the defendant was about 12 or 13, Ms. Phillips saw him laying on the porch, with blood on his head. (T. 531). She took him to the hospital, where they said he had been shot. (T. 532). At the hospital they "fixed him up", and sent him back home the same day. (T. 532, 539).

The defendant went to jail in 1962. (T. 533). His mother would visit him in jail. Id. The defendant lived with his mother upon his release from jail in 1971. (T. 533). The defendant's brother and sister also lived there. Id. The defendant worked for Miami Sanitation at that time. Id. He would help out his mother paying for food and other bills. Id. The defendant was "a lot quieter" when he got out of jail. (T. 534). He still did not have many friends. Id. He went back to jail in 1973, and got released again in 1980. Id. He then started working at Neighbor's Restaurant, and would help with the bills. (T. 534-5). His mother has kept in touch after the incarceration in this case, by writing letters. (T. 575).

The defendant's brother served in the Navy for 20 years, and

is currently working for the VA hospital. (T. 536). His sister, Ida, works at a library. Id. Both are productive members of the community and have never committed any crimes. Id.

Reverend Jankins testified that he had known the Phillips family for approximately 12 years, when they lived in the Opa-Locka area. (T. 548). In either 1988 and 1989, or 1983 and 1984, the defendant's mother asked him to speak to the defendant in the Dade County jail. (T. 541, 545). The Reverend thus saw him "two or three times". (T. 543). The defendant was "quiet, reserved." Id. The defendant would not say anything; he would smile. (T. 542).

The defendant's brother, Julius, testified that he was employed at the VA Medical Center. (T. 546). He had retired from the Navy after serving for 22 years. (T. 546). His parents were migrant workers, and they lived in a "typical type migrant camp," where running water and only 'very little" electricity were available. (T. 547-8). The family did not have much money. Id. The family moved from Belle Glade when Julius was less than 11 years old. Id. Julius graduated from North Dade High School, which was all black and segregated at the time. (T. 556). Julius had average grades in school. (T. 555). Their step-sister Anne, who was older, moved in with them later. Id. Their father favored Anne. (T. 549) Their father was violent and argued with their mother, in addition to hitting all of them. (T. 550-1). The

defendant was "quiet," did not have many friends, and was 'a loner" . (T. 553). Julius had a good relationship with him. (T. 556). He couldn't believe the defendant had been arrested for the instant crime. Id.

The defendant's sister, Ida, testified that she is married with four children. (T. 560-1). She has been a library assistant for Dade County Public Library system for in excess of twenty-six years. (T. 561). Ida was also born in Belle Glade, Florida, and the family moved to Dade County when she was six years old. Id. She attended the same segregated elementary and high schools as the defendant, but was two years behind. (T. 562-4) . The defendant did not finish high school because he "got in trouble". (T. 563). He was not a good student, and was sometimes tardy for school. (T. 563).

The relationship between her parents was "pretty rough" when she was growing up, because her father used to beat up on her mother, and they were 'fussing and fighting". (T. 564). The father would hit both the defendant and Ida. Id. Ida knew her father was a gambler; he was not home often and was not affectionate. (T. 565-7).

Ida had an "excellent" relationship with the defendant; they were Very close". (T. 565-66). The defendant was a "loner"; he did not date; he was quiet and reserved. (T. 567-8). Ida remembers

when Harry got shot. (T. 568-9). He was 'grazed" on the side of the head, and has a scar above his eye from the shot. Id. He did not stay at the hospital; they treated him and sent him home. Id.

When the defendant was released from jail, he lived with their mother and Ida. (T. 569-70). He worked for the sanitation department for 3 to 4 years and helped with the bills. (T. 570, 573). The defendant bought Ida a typewriter once. Id. He has a very close relationship with Ida's children. Id.

Mr. Samuel Ford was deceased at the time of resentencing, and his testimony from the post-conviction proceeding was read to the jury. (T. 574-5). Mr. Ford was the defendant's science teacher in Junior High School, in the late 1950's. Id. The defendant was very quiet, "sort of withdrawn". (T. 576). He was 'not very fast" as far as his school work was concerned. Id. He was a below average student. Id. The defendant's siblings were average students and energetic. Id. The defendant was a follower, not a leader. (T. 577). He did not speak up in class very often. Id. Mr. Ford does not know whether the defendant had a learning disability, but something was wrong. (T. 578). The defendant was not assertive, and attended to his own business. Id.

Mary Hill Williams testified that she has known the Phillips family since 1945. (T. 587-88). She used to take care of the defendant and his siblings whenever Ms. Phillips was working. (T.

588). The defendant played with the Williams' children, and they got along "real good together". (T. 588). The defendant was quiet, but played and had "a lot of fun" with the children. (T. 588-89). When he was older, the defendant seemed to be "a real nice boy", who respected her. (T. 589). The defendant's parents did not have a good relationship; the father did not stay with the family. Id.

Dr. Jethro Toomer was recognized as an expert in forensic psychology. (T. 596). A forensic evaluation combines psychology and the law. Id. Dr. Toomer was retained by the defense in 1988 for the purpose of testifying at the post conviction proceedings. (T. 597). He conducted a 'psycho social" interview of the defendant as to his life history. (T. 599). Toomer reviewed auxiliary reports, such as affidavits of family members and school teachers, employment and school records, Department of Correction files, prior defense counsel files, and, trial and appellate court files. (T. 598, 601-5). Dr Toomer also conducted psychological testing, utilizing the revised Beta Examination to measure I.Q., and, the Carlson Psychological Survey, the Rorschach test and the Bender Gestalt Design, to assess personality functioning. (T. 602-3). The defendant's I.Q. was 76, in the "borderline range." (T. 606). The defendant is not retarded. (T. 607).

The Bender Gestalt Design, where an individual "basically cop[ies] a drawing", reflected that the defendant had 'some motor

perception problems", and suggested "some organicity or brain damage". (T. 609-10). The test results also suggested that the defendant was "timid" and Very depressed". (T. 610) .

The defendant has a Very concrete level of thinking"; his understanding does not go "beyond the literal meaning of the words". (T. 614). The defendant is thus at a younger chronological age in terms of reasoning ability. (T. 615). The defendant has not abused drugs or alcohol. (T. 616). On the thought disturbance scale, the defendant is 'in the 55 percentile". (T. 616). The defendant has no anti-social tendencies. (T. 617). He does have "some deficits in terms of how he views himself." (T. 618). The defendant's history reflects that he has, 'a kind of developmental disorder"; an impairment 'in terms of the development of social interpretation skills." (T. 632).

In light of the above deficits, Dr. Toomer opined that the defendant does not have 'the mental capacity to plan, to correlate." (T. 624). He cannot weigh consequences or consider what is in his best interest. Id. Based upon the totality of his history, the defendant has suffered from an "extreme emotional disturbance", not only at the time of the instant offenses, but also throughout his life. (T. 630-1). Likewise, the defendant does not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law; these

inabilities are 'life long situations as well". (T. 631-2). The defendant's behavior is motivated by his deficits. (T. 632).

On cross-examination, Dr. Toomer testified that he has never been retained by the State to testify in a penalty proceeding. (T. 636). The Bender test results reflected 'mild motor problems", which 'don't have an impact on judgment". (T. 639). Likewise, the screening test administered by Dr. Toomer suggested that "there might be some organic impairment that needs further evaluation". (T. 641). Dr. Toomer did not ask for or conduct further evaluation to corroborate any organicity or brain damage. (T. 640-41). Dr. Toomer also admitted that many inmates who have been incarcerated for the length of time that the defendant has been imprisoned, are 'depressed given their situation". (T. 612). The defendant's situation differs, allegedly because depression was reported by people who have known him his entire life. Id.

With respect to the anti-social scale scores, Dr. Toomer stated that a sociopath or a person who suffers from an antisocial disorder, does not have "breaks" in behavior, such as periods of being helpful and caring, or holding a job, such as that seen in the defendant's history. (T. 614). However, when asked why the defendant had the ability to conform his conduct to work-place rules but not the law, Dr. Toomer responded that "vacillation" and behaving in an appropriate fashion were, 'an example that I have

seen in a sociopath". (T. 653).

With respect to his opinions as to the defendant's inability to plan, weigh consequences, or determine his best interest, Dr. Toomer stated that he was familiar with a 'Brother White" letter written by the defendant. The letter was written to another inmate, while the defendant was awaiting trial in 1983. (T. 653, 657-59). This letter referenced the names of various inmates on the State's witness list for the original trial herein, and stated, in part:

> Tell Craig next door where I am. In the event we don't meet again, make sure you and (musop) remember these names, Jerry Adams, Tony Smith, William Scott, James Farley, Albert Fox, David Scott. They will do anything to get their freedom. Bro White I'm innocent as hell, I don't care what happens to me anymore. But I have be assured by the fellows at UCI and F.S.P. that the above names will be handle accordingly. I have already send the above names, family addresses to a reliable source on the outside world. I hate like hell to do that but the innocent must suffer. Do take care.

(T. 655, 657; R. 239)

Dr. Toomer testified that the "specific things that I see here is an individual who is depressed". (T. 657). Dr. Toomer had 'no idea" what the above letter could mean. (T. 658). Although previously familiar with the above letter, and despite his exhaustive interviews, Dr. Toomer stated that he would "have to know more about the context of this...", before he could render any opinion as to the defendant's ability to plan and weigh the

consequences of his actions. Id.

Dr. Toomer was also shown a series of alibi notes that the defendant had given to another inmate, Hunter, while waiting trial. (T. 659; R. 322, 237A). With respect to the correlation between the defendant's formulation of an alibi and his alleged inability to plan or weigh consequences, Dr. Toomer opined as follows:

> A. If you're asking me if he's capable of writing these letters the answer is yes, he's capable of doing that. He's not retarded. He's not a vegetable. What we're talking about is an overall intellectual functioning in terms of his ability to function in a way that reflects a way of thinking in terms of weighing the consequences and considering the alternatives and engaging in an appropriate behavior, that's what we're talking about.
>
> Q. Would the consequences of the actions be convincing a jury that he was not at the north parole office at 8:30, 8:31 and may be found not guilty and going home?
>
> A. Well, that's your interpretation. I think there are other alternatives.
>
> Q. That's why you're here doctor. Tell us.
>
> A. I think that if you look at this it doesn't reflect what we talked about earlier in terms of a thought process and in terms of weighing the consequences to me it looks like a very fragmented kind of communication and process that is indicative of what we're talking about.
>
> Q. That he can not plan things that are complicated?
>
> A. No, what I'm saying with regard to his ability in terms of planning and what have you, his actions are not reflective of what we indicated earlier. The high order thought process, in other words, what he does is based upon a weight of consequences, projections of various alternatives and what have you as far as that's concerned its very concrete and not indicative of the aggravated

reasoning process.

(T. 661-62). On redirect examination, Dr. Toomer added that the defendant's formulation of an alibi notes also reflected "depression". (T. 663).

Dr. Joyce Carbonell, a forensic psychologist, evaluated the Defendant in 1988, during the post-conviction proceedings. She was not available at resentencing and her prior post-conviction testimony **was** read to the jury. Dr. Carbonell's evaluation included a battery of psychological tests, review of affidavits from family members and a former teacher, school records for a period of two years, employment records from the city of Miami Sanitation Department, jail records, parole department records, the trial record, police reports and witness testimony. (SR. 12-13; 44).

Dr. Carbonell testified that Defendant's score on the Wechsler Adult Intelligence Scale was 75, consistent with "borderline range" intellectual functioning. (SR. 16). Dr. Carbonell's review of the Department of Corrections' records also reflected several I.Q. tests, with results ranging from 73 to 83. (SR. 41). "Having a low I.Q. score, be it borderline or retarded, doesn't mean you can't ever learn anything. But, your pace may be painfully slow compared to other people". (SR. 19-20).

The Defendant's performance on the Carter Background

Interference Test "was not good". (SR. 20). The test is a screening device for brain damage. (SR. 21). The results, however, were not such that one could conclusively say defendant has brain damage. Id.

The defendant's results on the Rorscharch were indicative of social isolation and withdrawal. (SR. 22). They reflected that defendant was "somewhat easily influenced by his environment. Id. Defendant's results on the Wechsler Memory Scale appear higher than his IQ. Defendant did well on subtests for personal and current information, and those that require rote memory. (SR. 23). He had problems on subtests that require visual reproduction, and memory of prose passages. Id.

The Defendant's MMPI Scores reflected 'naive and unsophisticated thinking", which is "not uncommon in people with lower socio-economic status." (SR. 25). The MMPI results also reflected that defendant 'looked depressed." Id. "He sort of presents with a low energy level, someone who prefers to be alone, relatively isolated, may be overly sensitive to criticism from others." (SR. 26). The Defendant's personality profile indicates that he is "isolated, alienated, inadequately'socialized." (SR. 26, 34).

From the totality of her evaluation, Dr. Carbonell concluded that, throughout his life, the defendant has suffered from

"intellectual functioning in the borderline range". (SR. 33). 'He has mental health problems in that he's socially isolated, he's alienated, he doesn't have essentially inter-personal relationships outside of his family". (SR. 34). The defendant has the characteristics of a "schizoid". Id. This means, "that he has no close friends other than outside his family, chooses solitary activities, is somewhat isolated, is withdrawn, and doesn't relate well to other people", Id.

Based upon her interview with him, the defendant is also "very passive". (SR. 38). He doesn't behave in an assertive fashion. (SR. 57). The defendant's family history and prison records describe him as "quiet" and "easily led". (SR. 39). The prison records, however, reflect a history of "both good behavior and bad behavior". Id. At times he's described as "being difficult and causing problems", and yet he is also described as having "a good attitude", "well-behaved", 'easily led into trouble". (SR. 40). These incongruities are common for someone like the defendant, who is "passive", but not "competent in interacting in the outside world, in getting things done, in getting his ideas across". (SR. 40, 35). The defendant's pattern is that, 'he'll be very passive, then he'll do something in a sense sort of troublesome, but doesn't help him achieve his goal, and then he's simply going to go back to being passive". (SR. 41).

The various circumstances in defendant's upbringing had an effect on the above emotional makeup. (SR. 53). The defendant's "upbringing could be best described as difficult". (SR. 47). The family was "relatively poor". (SR. 48). The father physically abused the defendant and his siblings, and brought home other children who were better treated. Id. The father eventually deserted the family when defendant was preadolescent. Id. The defendant 'withdrew" after that. (SR. 51). The defendant also had little supervision, as his mother worked. (SR. 48).

Dr. Carbonell also stated that Defendant was incompetent to stand trial in 1983. (SR. 59-60). She based her opinion on the Defendant's **above** stated emotional, social, and intellectual background. (SR. 60). Dr. Carbonell stated that Defendant could not aid in his own defense. (SR. 60). According to Dr. Carbonell, the defendant had told her that he never knew that this was a capital case, that he could receive the death penalty; rather he thought he would go back to jail and stay there. (SR. 63,77). The defendant did not fully understand the role of witnesses either. (SR. 76). Likewise, he was unable to provide coherent accounts of events because of his poor remote memory. (SR. 79). The defendant had also stated that he did not understand what was going on in court. (SR. 63). Given the Defendant's make-up, his passiveness, he thought his attorney, who was an authority figure, would take

care of him; he thus went along with everything done or said by the attorney. (SR. 65).

Dr. Carbonell doesn't believe the Defendant can make a "rational choice" under any circumstances. (SR. 70-1). Dr. Carbonel stated that she was aware that certain jail house informants had elicited certain statements from the defendant, but that defendant does not have the ability to resist providing statements; "he's pretty easily led, as people have said for years, and no doubt he'll go along with things". (SR. 95-6)

Based upon the combination of the aforestated mental and background problems, Dr. Carbonell also opined that the Defendant has suffered an extreme emotional disturbance throughout his life. (SR. 103). Similarly, the defendant's deficits make it difficult for him to understand, and, the Defendant **was** unable to conform his conduct to the requirements of law. (SR. 103-4). Additionally, the cold calculated and premeditated aggravator was inapplicable, because the defendant does not operate in **a** "rational and cold manner". (SR. **105).** The defendant does not even possess the ability to form the premeditation necessary to be convicted of first degree murder. (SR. 105). "There is no evidence that he forms premeditation in his general behavior". Id. The defendant "doesn't plan" either. (SR. 87). "There is never any indication in his history that he spent a period of time planning things or

planning certain actions". (SR. 87-8).

On cross-examination, Dr. Carbonell testified that if the Defendant was having trouble with his parole officers because they were threatening him with jail, then shooting the parole officer eight or nine times would be, to a certain extent, consistent with a passive/aggressive personality. (SR. 122-3). However, the defendant's perpetual denial of the killing did not fit, and was contrary to such a personality. Id. Additionally, Dr. Carbonell testified that Defendant **was** not psychotic nor schizophrenic. The Defendant's emotional deficits have been present throughout his life, and he would have been in a similar state for the 1962 conviction for attempted murder of an off-duty police officer, and the 1973 conviction for armed robbery. (SR. 137-9).

Dr. Carbonell then acknowledged being familiar with the Brother White letter written by the Defendant while awaiting trial. (SR. 147-50). Dr. Carbonell's opinion was that this letter was very "primitive", and, did not address an ability to defend, as it did not mention that 'I'm going to tell my attorney about this", "these people are going to testify against me". (SR. 148-9). Dr. Carbonell thought that the statement, "I have been assured by the fellows at U.C.I. and F.S.P. that the above names will be handled accordingly" was 'useless lashing out". (SR. 150). Dr. Carbonell would not expect a competent person to write such a letter. (SR.

151). According to Dr. Carbonell the letter reflected that the defendant was, "hardly someone, who is real interested (sic) in their own defense". (SR. 152).

Dr. Carbonell also acknowledged that she had viewed the handwritten alibi notes which the Defendant had given another inmate, Larry Hunter, while awaiting trial. Id. She reasoned that the notes did not specifically say "I want you to testify for me, I need you to do this," and thus were not a "well constructed alibi," (SR. 152-5). The lack of a prepared script and express instructions lead Dr. Carbonell to dismiss the note as "hardly a prepared alibi". Id. According to Dr. Carbonell, the alibi notes did not indicate that defendant had any understanding of how to "get an alibi defense across", and, had no connection to the ability to relate facts or present a defense. (SR. 167-8).

C. State's Rebuttal Case

The State then recalled Detective Smith for rebuttal evidence. (T. 670). The detective stated that, prior to the original trial, he had additionally interviewed witness Larry Hunter,[1] in the Dade County jail. (T. 670-1). Hunter and the defendant had been in the same part of the Dade County jail. Id. The defendant had approached Hunter in the jail law library, admitted to the killing,

[1] Hunter had also testified at the original trial. (T. 675).

and asked for assistance in forming an alibi for the night of the murder. The defendant had asked Hunter to remember certain dates, times and places. (T. 672). The defendant had given Hunter notes to assist the latter in remembering the information. Id. During a 7-8 month period prior to trial, the defendant had given Hunter 4 such notes. (T. 672). The defendant had also instructed Hunter to contact the defense attorney, and say he was an alibi witness. (T. 673-4). Hunter turned over the notes to his own attorney, who then turned them over to Detective Smith. (T. 671-2, 684).

In the first note, the defendant's attorney of record's name and telephone number appeared on top. (T. 673, R. 322). The note also stated: "8:35 p.m. - 8:55 p.m.", "August 31, 1982, Tuesday Night" '(your watch)". Id. This note then stated:

> Conversation
> You left me in store
> Store was crowded
> Haven't had any conversation with me in jail.
> I loan you 50 dollars. (R. 322; T. 673).

Another note, dated May 31, 1983, stated:

> Tue. 5-31-83
> Say Hunter,
> Remember this date and time
> Tuesday (August 31, 1982) (time between 8:25 - 8:55 p.m.)
> (Store **was** crowded). (Had on a white uniform)
> (chicken and orange juice).

(R. 237A, T. 674). The defendant's fingerprints had been present on at least one of the notes. (T. 677). A handwriting analysis

expert additionally confirmed that the notes were written by the defendant. Id.

The Brother White letter had also been provided by Hunter who had received it from another inmate. Id. Detective Smith had confirmed that an inmate by the name of Edward White was in the Dade County jail at the time. (T. 677-8). The State's witness/discovery list from the original trial, which reflected that the names referred to in the defendant's letter were the same as those in the State's list, was also introduced into evidence.[2]

Detective Smith also testified the defendant had additionally told inmate Watson that, 'he was responsible for the death of Mr. Svenson, that he was not going to go back to prison, that he had warned them on one occasion prior to the shooting at one of them." (T. 681-2). The defendant had also explained that he had disposed of the gun, and the police would not be able to locate it. Id. The defendant had added that as there were no eyewitnesses and no gun, the State would not be able to prove the case. (T. 682).

On cross-examination, the defense established that Hunter had been awaiting trial for sexual battery when he had provided assistance in 1983. (T. 685-87). Subsequent to trial, in 1987, Hunter had signed an affidavit recanting his trial testimony. Id.

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[2] The defendant had, however, referred to William Farley as James Farley. (T. 679-80; R. 239).

Hunter had not, however, appeared or testified at the 1988 hearings on this matter. (T. 687-89). Upon investigation, Hunter, who was in jail when he signed the affidavit, had told Detective Smith that the recantation affidavit was false and his trial testimony was true. (T. 687). The affidavit had been signed under duress from defense investigators, and because Hunter wanted to avoid problems in jail. (T. 687-689).

Dr. Miller is a board certified forensic psychiatrist. (T. 482). He first examined the defendant in January, 1988, during a two and a half hour interview, to assess whether defendant had any mental disorders or mental illness. (T. 483). Dr. Haber was also present at that interview. (T. 508-9). Dr. Miller conducted another interview that lasted for an hour, approximately a week prior to resentencing. (T. 491, 493).[3] He had obtained information as to defendant's history and background, and conducted a mental status examination. (T. 483). The defendant had provided information as to what had happened to him over the course of his life, including poor education, childhood abuse, having been "grazed" by a bullet when he was a teenager, etc. (T. 490, 513-14).

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[3] Dr. Miller had also briefly seen the defendant in February, 1988. (T. 491-2). The defendant had refused to, speak with him at that time, because he didn't know that it was a scheduled visit and defense counsel was not available. Id. The prosecutor was not allowed to conduct any questioning as to what had happened in this interview. Id.

Dr. Miller had also reviewed papers and reports from the other mental health professionals, in addition to having spoken to trial defense counsel. (T. 501, 502, 510, 517). Dr. Miller had not personally spoken to the defendant's family members; he had not personally reviewed defendant's court file, education, and prison records. (T. 501-2).

Dr. Miller stated that his examination of the defendant did not demonstrate any mental illness. (T. 493, 495). There was no evidence of organic brain damage either. (T. 484). The defendant's "70 plus" I.Q. range is indicative of a "borderline average individual, below average intelligence level". (T. 486). A person with this level of intelligence, "would understand what is required of that person by the law". (T. 487). A person with such an I.Q. level is capable of having performed all the acts involved in committing the instant murder, and has the mental capacity to understand that it was wrong. (T. 496-99). The defendant does not have any mental illness or disorder which would prevent him from conforming his conduct to the requirements of the law, either. (T. 495). Similarly, there is no evidence of any emotional disturbance or extreme emotional disturbance. Id. Dr. Miller found the defendant to be 'well mannered", "cooperative", "rational", 'in good contact with reality", and, "aware of his legal situation and circumstances". (T. 493, 495).

Dr. Haber testified that he is a psychologist, in practice for thirty years. (T. 689). He examined the defendant in 1988. (T. 692). He had been provided with both the reports and testimony of Drs. Carbonell and Toomer. Id. In addition to personally conducting a standard exam and administering the Bender Gestalt as a screening instrument, Dr. Haber had reviewed the psychological testing materials utilized by the defense experts. (T. 694). He was thus satisfied that the "complete battery had been done and there was no point to repeat it". Id. Dr. Haber was also familiar with the defendant's employment history, and, the circumstances of the instant crime. (T. 701, 704). He had also reviewed the alibi notes, the Brother White letter, and other motions and letters written by the defendant prior to the original trial. (T. 693-5).

Dr. Haber stated that the defendant did not suffer from any mental illness. The defense expert's diagnosis of a schizoid personality does not constitute a mental illness, mental disorder, or an emotional disturbance. (T. 704-5). "Schizoid" is a personality characteristic; it describes people characterized as "loners". Id. Dr. Haber also disagreed that the defendant was 'passive". (T. 704, 731). There is a difference between a person who is "shy and reserved or quiet" and a person who is passive. (T. 704).

A person with an I.Q. in the '70 range" is borderline or below

average in intellectual performance. (T. 696-99). The I.Q. score was actually devised to reflect how people would do in school, and it may or may not accurately reflect intelligence. (T. 696). Some individuals with low scores, and who perform poorly in school are successful in life. (T. 697).

Dr. Haber considered the defendant's I.Q. score and other test results, in conjunction with the facts of the crime and the defendant's hand written letters from 1983. (T. 695-705). The letters were "very meaningful", as they were written closest to the time of the offense itself, and were indications of the defendant's mentality and abilities. (T. 695). They reflected motor coordination and skills, the ability to communicate, to conceive ideas, to express said ideas and to formulate plans. Id. The letters all reflected "good communication ability". (T. 698-99). The defendant was able to formulate good ideas and communicate them quite well. Id. The letters, as well as Dr. Haber's personal interview, reflected a clear ability by the defendant to express himself 'and communicate exactly and appropriately". Id. The alibi notes and the White letters were:

> clear reflection of a knowledge of and concern with issues that are relevant to the trial and to the matters for which the trial was taking place. They touch on evidentiary issues and they touch on witnesses and testimony and they reflect the knowledge of the adversary nature of the justice system and they reflect a concern with the proceedings that were going on.

(T. 700). The Brother White letter reflects 'original thought and clear ideas as to what the problem is and some idea as to what the solution might be." (T. 703). It evidences the defendant's ability to "plan events." (T. 704).

Dr. Haber stated that, in his opinion, defendant did not suffer either an emotional disorder, or an extreme emotional disturbance. (T. 701, 709). The defendant is not mentally ill. (T. 709). The defendant, 'if he desired", had the ability to conform his conduct to the requirements of the law. Id. The defendant had maintained his job at the Sanitation Department, which reflected the ability to conform his conducts to work place rules and requirements. Id. The ability to accept and follow rules in school or at a job, is the same as the ability to follow the law. (T. 701-2). The defendant also had the ability, 'if he chose", to listen to his parole instructions. (T. 704).

**D. Sentence**

The jury recommended a sentence of death by a vote of seven to five, on April 8, 1994. The sentencing hearing before the trial judge **was** then scheduled for April 20, 1994. At said hearing, the parties did not present any additional evidence, nor did they argue any issues which had not been presented to the jury, The trial judge imposed a sentence of death, having found four (4)

aggravating factors: 1) under sentence of imprisonment; 2) two prior violent felony convictions; 3) disruption or hindrance of the lawful exercise of any government functions; and, 4) murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (SR. 174-81). The trial judge did not find any statutory mitigating factors. (SR. 182-88). The "defendant's low intelligence, his poor family background, his abusive childhood, including his lack of proper guidance from his father," were recognized as nonstatutory mitigating circumstances. (SR. 189). The court, however, gave these circumstances "little weight," having stated:

> . . . The Court would note however, that the defendant's brother and sister who were raised in the same family and circumstances were able to overcome their background and became law abiding, productive citizens. The Court also recognizes that the defendant had a low IQ. However, the evidence also shows that he is street smart. The defendant could follow the rules of work, or parole, when he wanted to. He was able to plan a false alibi and indirectly threaten witnesses. The Court finds that to the extent these nonstatutory mitigating circumstances are found to reasonably exist, then they should be given little weight, as they simply do not extenuate or reduce the degree or moral culpability of the defendant's actions in the committing this homicide. See Roaers v. State, 511 So.2d 526 (Fla. 1987).

(SR. 187).

## SUMMARY OF ARGUMENT

I. The claim that the trial court did not follow the procedures set forth in Spencer, infra, and did not conduct an independent review of the evidence, is unpreserved. Moreover, the claim is refuted by the record, and no prejudice has been shown.

II. Claims of erroneous instructions to the jury are unpreserved. The complained of instructions were all given without objection or at the request of defense counsel. Moreover, no prejudice has been demonstrated as the substance of the instructions was in accordance with this Court's precedents.

III. The claim regarding "hindering governmental function" jury instructions is not preserved for appeal. Additionally, this factor **was** properly applied on the basis of the evidence below.

IV. Claims regarding prosecutorial comments and evidentiary presentation have not been preserved for appeal, and, furthermore, relate to matters for which the evidence was admissible.

V. The claim regarding jury selection has not been preserved for appeal. Additionally, a full Neil inquiry demonstrated that the prosecutor's peremptory challenges were supported by valid race-neutral reasons.

VI. The claim regarding the vagueness of the CCP aggravator has been repeatedly rejected by this Court. Additionally, the factor was properly applied on the basis of the evidence herein.

## ARGUMENT

### I.

### THE REQUIREMENTS SET FORTH IN SPENCER V. STATE, INFRA, WERE FOLLOWED.

The Appellant first argues that the trial court had prepared its order prior to hearing "evidence and argument", and, without "recessing" to consider the appropriate sentence, in violation of Spencer v. State, 615 So. 2d 688 (Fla. 1993). See brief of Appellant at p. 61. This claim has not been preserved for appeal, as there were no objections based upon Spencer or the arguments raised on appeal herein, in the court below. Moreover, the claim is without merit as it is refuted by the record.

In Spencer, this Court held:

> ...We contemplated that the following procedure be used in sentencing phase proceedings. First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order.

615 So. 2d at 690. This Court has also, however, noted that the procedural requirements in Spencer were not the basis for reversal in that case:

> In reversing the convictions at issue in *Spencer* and remanding that case for a new trial, we noted that the trial judge had not followed the sentencing procedure quoted above. The failure of the trial judge to follow that procedure in Spencer, however, was not the sole reason for our reversal in that case. In fact, in *Spencer*, the trial judge committed numerous errors, including the error of engaging in ex *parte* communications with the prosecutor regarding Spencer's sentence.

Armstrong v. State, 642 So. 2d 731, 738 (Fla. 1994).

The record herein reflects that there was an approximately two week interval between the penalty phase before the jury and the sentencing hearing before the trial court. At the conclusion of the penalty phase before the jury, both parties stated that they would file sentencing memoranda, setting forth the aggravating and mitigating factors to be considered by the trial court. (T. 814-15). Both parties in fact did serve such memoranda upon each other and the court prior to the sentencing hearing. (R. 126-139; 141-48).

At the commencement of the sentencing hearing, the trial court first specifically inquired whether either party was going to call any witnesses. (T. 819). Both parties stated that they were not presenting any additional evidence. Id. The prosecution and the

defense then presented arguments. (T. 819-23). The defense argued that this was a circumstantial evidence case and that the resentencing jurors had had difficulties with the issue of whether the defendant was even guilty of the crime charged. (T. 821-22). The trial judge then, prior to pronouncing sentence, expressly addressed the defense argument and noted that there was no law prohibiting a conviction of guilt based upon circumstantial evidence. (T. 823-6). The trial judge also expressed regret that some of the resentencing jurors had not followed his instructions and explanations that the prior finding of guilt was binding at resentencing. Id. The trial judge noted that one of the two jurors herein, who had initially refused to vote and then voted for life imprisonment, had written a letter to him after the rendition of the verdict. (T. 824). The juror had asked the judge to explain how the jurors "could vote on the death penalty when they didn't believe Mr. Phillips was guilty to begin with." Id. The trial judge addressed the inherent problem in a resentencing proceeding where a witness recites the facts of the guilt phase in "two hours", whereas, "[i]t took us almost two weeks of testimony in the original case. They [resentencing jurors1 didn't hear the parade of witnesses as to Mr. Phillips' guilt." Id. The trial judge noted that after he had explained the extensive nature of testimony by various witnesses at the original trial, the juror in question had

expressed satisfaction as to guilt, and stated, "I wouldn't have voted the way I did had I known." (T. 825) .

Having thus addressed defense counsel's only argument at the sentencing hearing, the trial judge then stated that he had prepared an order which was still unsigned. (T. 826). The trial judge then added, "I haven't heard anything this morning to change my mind." Id. The trial court then handed out his proposed order and read his findings of fact to the attorneys, prior to signing the order. (T. 826-44). There were no objections, before or after the recitation of findings, on any grounds based upon Spencer, lack of a recess, or otherwise. The State thus respectfully submits that the Appellant's arguments based upon Spencer, supra, are not preserved for appeal and thus procedurally barred. See, Steinhorst v. State, 412 So. 2d 332, 338 Fla. 1982) ("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.") .

Moreover, this claim is without merit. There is nothing in Spencer which prohibits the trial judge from considering the evidence and arguments presented at the penalty phase before the jury, and preparing preliminary findings as to that evidence, prior to the sentencing hearing. Thereafter, the trial judge has the duty to consider evidence presented to it at the sentencing hearing

and address same prior to imposing sentence. However, in the instant case, the defense did not present any evidence, and, its arguments of lingering doubt, which are not a proper consideration at sentencing,[4] were addressed by the court prior to pronouncement of sentence. That the judge may have prepared preliminary findings prior to the sentencing hearing, made its determination after the hearing, and then finalized its order, is not error, and, in fact in accordance with this Court's prior precedent. See Hernandez v. State, 621 So. 2d 1353, 1357 (Fla. 1993) ('The purpose of the contemporaneity requirement is to implement the intent of the legislature -- to ensure that written reasons are not merely an after-the-fact rationalization for a hasty, visceral; or mistakenly reasoned initial decision imposing death".).

Finally, in the event that this Court deems that a procedural violation did occur in this case, the State submits that no prejudice has been demonstrated. See, Armstrong v. State, 642 So. 2d at 738 ('Further, although, in the instant case, the trial judge may not have followed the procedure we set forth in Spencer, we find no prejudice to Armstrong under the circumstances of this case. Almost all of the arguments and evidence Armstrong presented

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[4] See e.g., Hitchcock v. State, 578 So. 2d 685, 690 (Fla. 1991) reversed on other grounds, 614 So. 2d 483 (Fla. 1993) (no right to have lingering doubt about a defendant's guilt considered as a mitigating factor).

at the sentencing hearing had previously been heard by the trial judge, either at trial or at the hearing on Armstrong's motion for new trial, or were without merit. Moreover, the record reflects that the trial judge allowed Armstrong an opportunity to present evidence at the sentencing hearing. Additionally, none of the other errors at issue in Spencer are present here."). This claim is thus unpreserved for appeal and without merit.

The appellant has also argued that the trial judge did not engage in a "meaningful" or "independent judicial weighing", because he "verbatim" adopted the State's sentencing memorandum, in violation of Spencer, supra, Patterson v. State, 513 So. 2d 1257 (Fla. 1987) and Layman v. State, 652 So. 2d 376 (Fla. 1995). Again, this claim was not raised in the court below and is thus unpreserved for appeal, Steinhorst, supra; See also Spencer at 615 So. 2d 689-90 (defense counsel objected and moved to recuse the trial judge, where the state attorney had participated in drafting the sentencing order and the order was prepared prior to defense counsel having had an opportunity to be heard); Nibert v. State 508 So. 2d 1, 4 (Fla. 1987) (no reversible error where, 'defense counsel did not object when the Court instructed the state attorney to reduce his [sentencing] findings to writing."). As noted previously, the defense had prior notice of, and had been served with the State's sentencing memorandum prior to the sentencing

hearing. At the hearing, the trial judge, after ascertaining that there was no additional evidence and addressing the defense argument, first gave copies of his proposed order to both parties, and then read his findings in open court, prior to signing his proposed order. (T. 826-844). There were no objections by the defense on any of the points now raised on appeal - i.e. that the trial judge had adopted the State's memorandum or that his findings lacked independence. This claim is thus unpreserved for appeal.

Moreover, the instant claim is also without merit. First, contrary to the Appellant's assertion, the sentencing order is not a "verbatim reproduction" of the State's memorandum. Although the Appellant has set forth the memorandum and the order side by side and stated that, "[a]ny differences are highlighted in bold," the record reflects that several paragraphs in both the State's memorandum and the order have been omitted and not set forth in the Appellant's comparison, highlighted or otherwise. See e.g. R. 129-30, SR. 174-5 and Appellant's brief at p. 63. The trial judge did, however, adopt the State's recitation of the record evidence and case law in support of the aggravating and mitigating circumstances, with revisions to reflect his own findings, and after declining the State's requests as to the weight to be accorded to each aggravator. The trial jude also specifically stated that it had, "independently reviewed and weighed the

evidence." (SR. 188-9).

The above adoption of the record evidence and case law was not erroneous and does not reflect any lack of independence. The judge in the instant case had presided over the original trial[5] and drafted an extensive sentencing order detailing the evidence and case law as to each aggravator and mitigator at said time. A copy of said order has been attached to Appellee's brief as Exhibit A. A comparison of this original sentencing order and the State's memorandum at resentencing, reflects that the memorandum set forth the same record evidence and substantially the same case law with respect to the aggravators as that contained in the original order by the trial judge. In its memorandum, the State also argued that the trial court should independently review and weigh the evidence. (R. 137-8). Moreover, the defense, who was afforded the same opportunity to present a memorandum, did not present any contradictory evidence with respect to the aggravators in its memorandum. See defendant's sentencing memorandum, (R. 141-8). Likewise, with respect to the mitigation findings, the resentencing order sets forth substantially the same evidence recited in the defense sentencing memorandum, as well as that set forth in the original sentencing order. The Appellant neither in the court

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[5] The same judge had also presided over the extensive prior post conviction proceedings in this case.

below, nor indeed in this Court, has presented any argument or indicia of inaccuracy in the evidence or case law recited in the resentencing order.

Thus, the trial judge's unobjected to adoption of accurate record evidence and case law in its resentencing order, with appropriate revisions, which evidence and law was substantially the same as that prepared by the judge himself in his original sentencing order and was in conformity with the evidence cited by the defense, made after furnishing the same notice and opportunity to both parties, is not error. See Anderson v. Bessemer City, 470 U.S. 564, 572, 84 L.Ed. 2d 518, 527, 105 S.Ct. 1504 (1985) ("even when the trial judge adopts proposed findings verbatim, the findings are those of the Court and may be reversed only if clearly erroneous."). The Appellant's reliance upon Spencer, is unwarranted, as that case involved participation by the prosecutor in the drafting of the sentencing order on an ex *parte* basis, without notice or any opportunity to be heard by the defense. Likewise, Patterson and Layman, supra, relied upon by the Appellant, involved situations where at the sentencing hearing the trial judge announced a sentence of death without specifying any aggravating or mitigating factors or any facts underlying the decision, and then delegated the drafting of the sentencing order to the prosecution, without any input from the defense. In sum,

the instant claim is unpreserved and without merit.

Lastly, the Appellant has argued that the trial judge had "predetermined" a sentence of death, because, during the course of addressing the defense argument as to the resentencing jurors' difficulty with the issue of guilt, the judge had stated, 'I don't know that I would even accept the jury verdict of 12 nothing for life imprisonment". (T. 825). Again, there was no objection, and no such argument was made in the court below. This contention is thus unpreserved for appellate review. Steinhorst I supra. Moreover, this claim is without merit. As seen above, the statement itself, which was made after the rendition of the jury's recommendation, reflects that there was no predetermination. Additionally, the Appellant has neglected to mention the trial judge's other remarks, made prior to the jury's recommendation, where he had stated that in light of his prior experiences, he would not override a jury recommendation of life. (T. 54). Clearly there was no "predetermination" of a death sentence. All of the issues in the instant claim are thus unpreserved and without merit.

**11.**

**THE CLAIM OF IMPROPER INFLUENCE AND MISLEADING THE JURY IS PROCEDURALLY BARRED AND WITHOUT MERIT.**

The Appellant contends that the trial judge's remarks and instructions were erroneous. The record reflects, however, that these remarks and instructions were not objected to and were in some instances given at the request of defense counsel. The issue is thus unpreserved for review. Steinhorst, supra. Furthermore, the substance of the instructions given reflects that they were in accordance with this Court's precedents and not erroneous.

The Appellant first complains that, during voir dire, the trial judge informed the jurors that the defendant had previously been found guilty by a different jury and that the penalty phase had to be retried due to legal technicalities. (T. 82-3). The record reflects that said instruction was given at the request of and with consent from defense counsel. Prior to the commencement of voir dire, defense counsel requested that the trial judge fashion a response to potential questions from the venire as to the time gap between the sentencing hearings in the instant case:

> **MR. WAX [defense counsel]:** It's a 12 year gap from the last sentencing until we're here today and the jurors may want to ask about it during voir dire or have questions during their deliberations, maybe we should discuss how we're going to deal with it.
>
> They're not entitled to know the original jurisdiction or

original sentence, it could present a problem. Maybe we should deal with it now. (T. 56).

The trial judge responded that he would inform the jurors: "that this case was tried originally and the defendant was convicted of first degree murder and due to legal problems over the years we have to retry the death penalty phase". (T. 57). Defense counsel consented:

> **MR. WAX:** I wouldn't have any problem with that judge, it's fair. Id.

Thereafter, during voir dire, when the trial judge did so inform the potential jurors of the reason for resentencing, there were no objections on any grounds by the defense counsel. (T. **82-3**). The Appellant's contentions are thus unpreserved for appellate review. Teffeteller v. State, 495 so. 2d 744, **746-7** (Fla. 1986) (any prejudicial error from statement to the jury that the defendant, "had been charged with first degree murder, later on that he had a jury trial, was found guilty, received the death penalty, was sentenced and sent to the Florida State Prison, that subsequently his case was heard on appeal and he was remanded back for a retrial on the issue of sentence", was not preserved for appellate review, where defendant failed to object to the statement in the trial court.) . Moreover, where the record reflects that the prior sentence did not play a significant role at resentencing proceeding before the jury, the mention of what occurred in prior proceedings

is not prejudicial. Id; See also Valle v. State, 581 So. 2d 40, 45 (no error where the jury, at defense counsel's request, was instructed that defendant had been previously sentenced to death and that the sentence had been vacated). In the instant case the jury was not even informed as to what previous sentence was imposed; merely stating that the penalty phase has to be retried due to legal problems does not indicate what the prior sentence was. The Appellant's claim with respect to this issue is thus unpreserved and without merit.

The Appellant has next quoted parts of the trial judge's explanation to the jury, prior to the exercise of challenges at voir dire, as to what would occur at side bar. (T. 213-14). In context, and immediately prior to the complained of quote, the trial judge explained that the parties were about to exercise their challenges to the individual potential jurors, in order to choose 14 of the 34. (T. 212-13). The judge added that the challenges would be exercised at side bar, and that there were two forms of challenges. (T. 213). He first explained the function of a cause challenge, and then that of a peremptory. (T. 213-14). With respect to the latter category, the judge stated that a peremptory challenge could be made for any reason, and, that although he did not agree with the rule, as it could lead to 'one sided" juries, it was a law he had to follow. (T. 213). In the context of this

explanation, the judge gave an example of his prior experience with a one sided jury, which the Appellant has quoted. (T. 213). Finally, the judge explained the purpose of sidebar. (T. 214). The judge stated that the reason was so that the jurors could not hear what was being said about them individually. Id. He added that if any members of the venire wanted to know what was being said, they had a right to do so, and, could either call, or, "mail me a postcard and I'll have the court reporter transcribe what they said with you and I'll send you a copy..." Id. There were no objections at any time to the above remarks in the trial court. In this Court, the Appellant has not made any argument as to what prejudice he suffered, either. This claim is thus unpreserved and with merit.

The Appellant has next quoted passages whereby the trial judge erroneously instructed the jury that it could take one vote, and upon objection, immediately rectified the error by reinstructing that the jury could take as many votes as it wished. Again no prejudice has been demonstrated.

The record reflects that, at the conclusion of the hearing, the judge instructed the jury in accordance with the standard, jury instructions, including, in part:

> The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not

> influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

(T. 791). The judge then further explained:

> ...The vote must be unanimous in a regular trial. You can't come back and say three vote this way and two vote this way. It has to be unanimous in a regular trial.
>
> In this case in a death penalty it's not the case. You only take one vote and that vote is the vote. You don't after the vote argue with the people. You don't say stupid, why did you vote that way and argue with the people. The vote has been taken and that's it.
>
> You have to take your time, that's why I didn't rush this trial and that's why I had you come in at 8:00 this morning. It's only 12:35 and I want you people to have as much time as you need to deliberate and I don't care how long it takes. If you're not finished by tonight I'll send you to a very nice hotel. I don't care how long you take, but all your decisions have to be before you take the vote because once you take the vote that's it and you sign whatever form and come back out and there is no further discussion after that.
>
> It's exactly opposite of a regular trial. You take a vote and then you have a discussion. In this you're discussing it and I recommend this but I can't order you to do this. I recommend that all of you get involved in the discussion. You spent four days listening. Now it's your turn to be able to talk.

(T. 798-99). There was no contemporaneous objection at this juncture. After the jury exited to deliberate, defense counsel then objected to the instruction about the jury taking one vote. (T. 800). Defense counsel stated that the jurors may have been

misled to "believe they shouldn't try to influence one or another and talk about their impressions." Id. The defense and prosecution agreed that the jury could take as many votes as they wished. Id. Upon the trial judge's request, the prosecutor then supplied a copy of the case law on this matter.[6]

In the interim, the jury sent back a question as to whether they should, "accept that guilt was found beyond a reasonable doubt?", and also requested 'an order of events". (T. 800-1). The trial judge determined that he would "reinstruct the jury that they can have more the one vote", at the same time as answering their other questions. (T. 802). Defense counsel objected that, "its going to confuse them." Id. The trial judge noted that the jury had not taken a vote yet, and he did not see how the defense would be prejudiced by a reinstruction. Id. Thus after answering the jury's other questions, the trial judge informed the jury that his previous instruction with respect to taking one vote should be disregarded:

> [COURT] : . . .It appears to me now that you can take a vote and that doesn't necessarily have to be your last vote. It could be if you all decide that's what you want, you can vote and discuss the vote and determine from that and as soon as you decide your final vote let me know. Okay?
>
> [FOREMAN]: Yes sir.
>
> THE COURT: Are there any questions as far as that?

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[6] See, Patten v. State, 462 So. 2d 975 (Fla. 1985).

There is no question in your mind as to what I'm saying is different than what I said before you can take a vote?

You can take as many votes as you want. If you want to take it and if nobody wants to change their minds then that's the vote.

[FOREMAN]: That's a big help.

(T. 803). Defense counsel then renewed his objection to the jury being reinstructed, "without any vote from them. They were not deadlocked".

As seen above, the record is clear that immediately upon objection, the trial court rectified its error and informed the jury that it could "take as many votes as you want", prior to any vote having been taken. The purpose of an objection is to apprise the trial court of error so that the court can correct same. Steinhorst, supra. In the instant case that is exactly what occurred. The Appellant has not argued or demonstrated how he was prejudiced in light of the immediate reinstruction as to the correct state of the law. See, Burns v. State, 609 So. 2d 600, 604 (Fla. 1992) (judge's immediate correction of an erroneous instruction on burden of proof was not prejudicial).

Finally, the Appellant contends that, when subsequently the foreman informed the court that two jurors were refusing to vote at all, the trial court erred in failing to give an Allen charge in accordance with Florida Standard Jury instruction 3.06. This issue

is procedurally barred, as the trial judge's response to the jury was in accordance with defense counsel's request in the lower court. Moreover, the giving of an Allen charge in the circumstances here was not only not requested, but would have been reversible error pursuant to this Court's precedents.

The record reflects that, on the second day of deliberations, the foreman sent a note stating that two jurors were refusing to vote because they were unhappy with where the majority was leaning:

> We have read and reread the jury instructions and they are understood by all of us. Unfortunately, there are two (2) jurors who refuse to vote solely because they are unhappy with where the majority is leaning. What are we to do?

(R. 420, T. 810). The trial judge proposed bringing out the jury, asking whether they were "through with their discussions", seeing what the problem was, and "then I'll make a decision as to what to do". Id. Defense counsel, however, proposed to ask the jury, "if they have a majority and to render a verdict based on the majority". Id. (emphasis added). The trial judge agreed and noted that, "If the person doesn't want to vote it should be counted as life imprisonment". Id. In accordance with defense counsel's wishes the judge stated: "As far as I'm concerned, as long as they tell me they're finished with their discussion then I'm ready to consider these votes [refusals] are for life imprisonment." (T. 811).

The jury was then brought in and asked whether it had "completed your discussions." Id. The foreman responded in the affirmative. Id. The judge then ascertained from the foreman that only two (2) people were refusing to vote and that the remaining ten (10) would vote. Id. The judge then told the foreman to, 'put in the vote as it stands." Id. The jury then returned a verdict, and the foreman informed the court that the two people who had been refusing to vote had decided to vote after all. Id. As noted previously in Point I herein, at pp. 87-88, said two jurors had refused to vote because they disregarded the judge's instructions that they had to accept the prior finding of guilt. When the trial judge, after the conclusion of the penalty phase, had explained the extensive nature of the evidence of guilt heard at the original trial, one of said jurors had then become satisfied as to guilt and stated that she would not have voted the **way** she did - i.e. for life imprisonment.

As seen above, the judge's action in first ascertaining that the jury had completed its deliberations, that a 10 juror majority was ready to vote, and then instructing that this majority should record their vote, was in accordance with the defense counsel's request. There was no objection nor any request for any different instructions by defense counsel. As such this issue is procedurally barred. Derrick v. State, 641 So. 2d 378, 379 (Fla.

1994) (claim of erroneous reinstruction, where the capital resentencing jury sent a note reflecting that it had voted and was evenly split, was procedurally barred as the re-instruction was given without objection and with the agreement of defense counsel).

Moreover, this Court has previously held that when a capital sentencing jury erroneously believes that it is at an impasse, giving an Allen charge is reversible error. Rose v. State, 425 So. 2d 521 (Fla.), cert. denied, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983); Patten v. State, 467 So. 2d 975 (Fla.), cert. denied, 474 U.S. 876, 106 S.Ct. 198, 88 L.Ed.2d 167 (1985); Derrick, at 641 So. 2d 379. The Allen charge pursuant to Florida Standard Jury Instruction 3.06 is only applicable at the conviction/guilt stage. The Appellant's reliance upon Jimenez v. Myers, 40 F.3d 976 (9th Cir. 1994); Dixon v. State, 607 So. 2d 86 (Fla. 1992), Warren v. State, 498 So. 2d 472 (Fla. 3d DCA 1986); Nelson v. State, 438 So. 2d 1060 (Fla. 4 DCA 1983); Rodriguez v. State, 462 So. 2d 1175 (Fla. 3d DCA 1985); Duram v. State, 262 So. 2d 733 (Fla. 3d DCA 1972); Lee v. State, 239 So. 2d 136 (Fla. 1 DCA 1970), is unwarranted. All of said cases involve jury deliberations at the guilt determination stage, where a unanimous jury vote is required. A trial court's instruction that the jury must return a verdict prejudices the defendant's right to a "hung jury" at this stage, because each juror must be convinced beyond a

reasonable doubt of the defendant's guilt before a conviction may be obtained. No unanimity is, however, required at sentencing; if seven (7) jurors do not vote to recommend death, then the recommendation is life imprisonment. There is thus no 'hung jury", and no right to **a** mistrial/retrial pursuant thereto. As such no prejudice to the defendant herein has been demonstrated, and this claim is unpreserved and without merit.'

III.

THE DISRUPT OR HINDER GOVERNMENTAL FUNCTION AGGRAVATOR WAS PROPERLY APPLIED IN THIS CASE.

The Appellant first contends that the disrupt or hinder governmental function aggravator is overbroad. He claims the trial judge erred in failing to instruct the jury on narrowing constructions that the hindrance of governmental function must be the sole or dominant motive, and the intent can not be presumed. This claim is not preserved for appellate review, as there were no objections in the lower court on the grounds now raised. Steinhorst, supra. In the Court below, the defense argued that the jury should not be instructed on this aggravator at all, because the evidence did not establish same beyond a reasonable doubt, as

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[7] The prejudice, if any, was solely to the State **as** the record reveals that the two jurors who were refusing to vote had failed to follow their instructions by accepting the prior finding of guilt. The record also reflects that at least one of said jurors would not have made a life recommendation had she accepted the prior finding of guilt.

the victim was not the defendant's parole officer. (T. 736). There were no objections on overbreadth grounds, nor were there any objections to the language of the instruction or any requests that the jury be instructed on sole or dominant motive, as now argued on appeal. An objection as to applicability does not preserve a claim of vague jury instructions. See, Roberts v. Sinsletary, 626 So. 2d 168 (Fla. 1993); Wvatt v. State, 641 So. 2d 355, 360 (Fla. 1994); Hodges v. State, 619 So. 2d 272, 273 (Fla. 1993) (a specific objection to the form of the allegedly vague jury instruction must be made to the trial court in order to preserve the issue for appeal); Jackson v. State, 648 So. 2d 85, 87-8 (Fla. 1994) (same). Moreover, in support of the sole or dominant motive argument, the Appellant has relied upon cases involving the avoid arrest aggravator, Fla. Stat. 921.141(5)(e), such as Perry v. State, 522 so. 2d 817, 820 (Fla. 1988), wherein this Court stated, "where the victim is not a law enforcement officer, we have required strong proof of the defendant's motive [citation omitted], and that it be clearly shown that the dominant or only motive for the murder was the elimination of the witness." In contrast, with respect to the aggravator found in the instant case, this Court has held that it is sufficient when the victim is shown to have been killed during the course of a legitimate governmental function. See, Jones v. State, 440 so. 2d 570 (Fla. 1983) (sniper attack on a police

officer in his patrol car, traveling from an unrelated investigation) .[8]

The Appellant has also argued that the trial judge erred in finding this aggravator because, a) the judge had found this aggravator to be inapplicable at the original sentencing proceeding, and b) there was no evidence that the defendant was going to have his parole revoked by the victim, as the latter was not the defendant's parole officer. Both of these contentions are without merit.

First a resentencing proceeding before a new jury, such **as** that in the instant case, is a "completely new proceeding", and there is no obligation to make the same findings as those made in the prior sentencing proceedings. Kins v. Dugger, 555 So. 2d 355, 358-9 (Fla. 1990); Thompson v. State, 619 So. 2d 261, 266 (Fla. 1993); Poland v. Arizona, 476 U.S. 147 90 L.Ed.2d 123, 106 S.Ct. 1749 (1986) (The trial court's rejection of a particular aggravating circumstance alleged by the prosecution does not constitute an acquittal of that circumstance. Moreover, the 'clean slate" rule

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[8] Foster v. State, 436 So. 2d 56, 58 (Fla. 1983), relied upon by the Appellant, likewise required intent and a dominant motive to eliminate a witness, who is not a law enforcement officer, with respect to the avoid arrest aggravator. As to the hindrance of governmental function factor, this Court merely held that there was insufficient evidence. The evidence had only reflected that two victims had been shot in the back and money was missing; there was no evidence as to what events had preceded the actual killings.

applies where the defendant has not been previously acquitted of the death penalty, and prior sentencing proceedings will not be treated as a set of 'mini trials" or 'mini verdicts" on aggravating factors.)

The Appellant's claim of insufficient evidence is likewise without merit. The record in the instant case reflects that the victim was a parole district supervisor. (T. 284, 309). In that capacity, the victim had previously instructed the defendant to stay away from his former parole officer, Ms. Brochin. (T. 298-99, 365, 372-73). The victim had then testified against the defendant at his parole revocation proceeding for violating said instructions. (T. 370-71) . Upon the defendant's re-release on parole, he again violated the instructions and was again told by the victim that he would be imprisoned. (T. 303-307, 351-52, 371-74). Indeed the last of the repeated violations by the defendant and the meeting between him and the victim as a result thereof, had occurred earlier on the day of the homicide. (T. 305-308, 339-40, 351-52). Moreover, the defendant himself, shortly before the homicide, had complained of being 'hassled" by both male and female parole officers; he stated that he had tried to shoot the female officer'but was unsuccessful, and, added that: 'no matter what, he was going to put a stop to the hassle." (T. 415). Shortly after the homicide, the defendant had stated that he had been responsible

for the victim's death, and that, 'he **was** not going to go back to prison," that he 'had warned them on one occasion" by shooting into one of the parole officer's homes. (T. 681). Finally, the victim was at his place of employment, when he was shot in the parking lot of the parole building. The trial judge's detailed factual findings[9] (SR. 178-79) are thus well supported by the record. In light of this factual basis, the trial judge then explained why he had applied this aggravator at resentencing:

> This Court previously found this factor inapplicable because the court believed that the homicide was committed for revenge. However, the Court submits, that although revenge may have been one motive, it was part of the overall motive of killing a parole official who was in the past, and who would have been at the time of the homicide, one of the persons responsible for trying to have the defendant's parole revoked, for continuing to violate the terms of his parole and for shooting **a** gun which occurred a few days before the homicide. This would clearly hinder a governmental function. Mr. Svenson's only connection with the defendant was as parole officer and parolee. Mr. Svenson's homicide was beyond a reasonable doubt committed to disrupt or hinder governmental function. See Jones v. State, 440 So. 2d 570 (Fla. 1983). (S.R. 178-79).

The trial judge's conclusion as seen above is in accordance with this Court's precedents. The Appellee would note that even a motive of revenge is sufficient evidence of this aggravator. Killing a parole officer, for having performed his governmental

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[9] The detailed factual basis found at resentencing herein is the same as that set forth in the original sentencing order. See Exhibit A, at pp. 4-5.

duty in giving specific instructions to a parolee or testifying at a parolee's revocation hearing, certainly hinders or disrupts governmental functions and the enforcement of laws. Jones, supra; see also, Shere v. State, 579 So. 2d 86, 88 (Fla. 1991) (aggravator upheld, where evidence reflected that defendant had been advised that victim was a 'big mouth' who had 'ratted out' on the defendant as to an earlier crime). The Appellant's contentions are thus unpreserved and without merit.

Finally, the State submits that, in the event that this Court finds insufficient evidence of this aggravator, any error was harmless beyond a reasonable doubt. See, Rogers v. State, 511 So. 2d 526 (Fla. 1987). In the instant case, the trial judge previously sentenced the defendant to death without considering this aggravator. Moreover, in his resentencing order the trial judge found the evidence in this case to be "overwhelmingly aggravating rather than mitigating." (SR. 188-89). In light of the remaining aggravators, especially the weighty factors of two prior violent felonies and having been under a sentence of imprisonment at the time of the murder, there is no reasonable probability that a lesser sentence would have been imposed.

## IV.

## THE CLAIM OF PROSECUTORIAL MISCONDUCT IS UNPRESERVED AND WITHOUT MERIT.

The Appellant contends that, a) the prosecutor's presentation of evidence as to guilt was "prejudicial and unnecessary overkill"; b) the introduction of the factual basis for the defendant's prior violent felony conviction **was** erroneous; c) various comments during closing argument were improper, and, d) the introduction of defendant's prior pleadings, in rebuttal to defense psychological experts' testimony, was error. These contentions are in large part unpreserved, and without merit.

**a) Presentation Of Evidence.**

The Appellant has first stated that the prosecutor, throughout the proceedings, utilized a "prejudicial" chart, which has not been included in the record on appeal. The record reflects that during opening argument the prosecutor referred to a chart setting forth the sequence of events herein from 1980 to 1982. (T. 244). There **was** no objection to said chart. Id. Indeed, as noted by **defense** counsel in the court below, the chart reflected the facts **as** to evidence of guilt. (T. 267). Moreover, the reference to the chart was made only once during opening argument, as set forth above. Thereafter, Ms. Brochin testified that the defendant had gone to her office and asked to see her, after his second release from

parole and a few days prior to the murder, in accordance with the chart. (T. 324). Two other references to the chart were during Detective Smith's testimony. The detective testified that he had spoken with a jail inmate, Tony Smith, whose name was on the chart. (T. 414). He added that the victim and two other parole supervisors had met with the defendant on the day of the murder, August 31, 1982, as reflected on the chart. (T. 424). Again, there were no objections to said references. The chart was not introduced into evidence, nor relied upon during deliberations. This claim is thus procedurally barred, as there was no objection to the chart in the court below. Steinhorst v. State, supra. Moreover, since the chart merely reflected a date sequence of what was being testified to at the resentencing, no prejudice has been demonstrated. See, e.g., Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1987) (It is within the trial court's sound discretion to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case at a resentencing proceeding); compare, Cave v. State, 660 So. 2d 705, 708 (Fla. 1995) (videotaped reenactment, which "dramatized" portions of the crime, was erroneously admitted where the defense objected to its admission).

The Appellant next contends that the admission of hearsay, through the testimony of Detective Smith, was erroneous. Again

this issue has not been preserved and is without merit. Steinhorst, supra; Jalbert v. State, 95 So. 2d 589 (Fla. 1957) (claim of inadmissible hearsay is not preserved for appeal where there was no objection in the court below). The record reflects that prior to the resentencing, the State moved to introduce hearsay, and filed an extensive 'Memorandum of Law Re: Admissibility of Hearsay At Capital Resentencing." (SR. 71-81). Specifically, in reliance upon Fla. Stat. 921.141 and Chandler v. State, 534 So. 2d 701, 703 (Fla. 1988), the State argued that it should be allowed to present hearsay testimony through the lead detective, Smith, summarizing the results of his investigation, including statements of witnesses and evidence introduced during the prior guilt phase, in order to take the resentencing "jurors out of the vacuum and into the big picture", in compact, economical form. (SR. 75-78). At the hearing on the State's above motion, defense counsel agreed that such testimony was admissible:

> [DEFENSE **Counsel]**:...I have reviewed the motion to admit hearsay. I have reviewed the motion. I did extensive research on this.
>
> Frankly, it seems like his [prosecutor's] position is pretty well taken. It's permissible.(T. 14).

During the detective's testimony at the resentencing, there were no objections on hearsay grounds, either. Indeed, immediately prior to the commencement of the hearing, the trial judge again

ascertained that there was an "agreement on the record that the detective is giving a narrative basis." (T. 46). The prosecutor noted that the agreement had saved several days of testimony. Id.

The defense was subsequently allowed full cross-examination of Detective Smith, which, inter alia, elicited extensive hearsay as to lingering doubt.[10] (T. 937-447) . The only limitation on defense counsel was in discrediting the jail inmates' testimony with respect to guilt, as recounted by Detective Smith. The latter testified that said witnesses were in jail at the time of their 1983 trial testimony, with pending charges. (T. 410, 412-15, 683-87). Defense counsel, however, wished to establish bias, due to, inter alia, events that had occurred after said witnesses' testimony at 'the prior trial, and which had no relevance to their 1983 trial/guilt phase testimony. (T. 451-55). As noted by the trial judge, said events had been extensively addressed at the 1988

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[10] The State in its above referenced memorandum filed prior to the resentencing, in reliance upon Sireci v. State, 399 So. 2d 964 (Fla. 1981), King v. State, 514 So. 2d 354 (1987); Hitchcock v. State, 578 So. 2d 685 (Fla. 1990) and Preston v. State, 607 So. 2d 404 (Fla. 1992), had also argued that 'residual doubt" evidence, to demonstrate that the defendant had 'no role" in the crime, was inadmissible. (SR. 74-75). As noted above, the defense had agreed to the State's motion and same had been granted by the trial court. (T. 14). Nonetheless, throughout the resentencing proceedings defense counsel argued and elicited "residual doubt" evidence, over the State's objections. (See e.g. T. 267-69); T. 440-47). Indeed, as the trial judge commented to defense counsel; "I feel I bent over backwards to allow you into the areas which under the lingering [doubt law] you're not allowed into". (T. 456).

post-conviction proceedings and this Court's findings on appeal thereof were binding. (T. 452, 456). On said appeal this Court had specifically approved the lower court's findings, and noted:

> Phillips also cites several examples of good fortune which befell the inmates after they testified against him. For example, Malcolm Watson's life sentence was vacated, William Farley received early parole, and assault charges against William Scott were dropped. However, Phillips submitted no proof that these events were casually connected to the inmates' estimony at trial or that thev took place in fulfillment of promises by the State.

Phillips v. State, 608 So. 2d 778, 780 n.1 (Fla. 1996). (emphasis added). Moreover, as noted previously the defense had already been given considerable latitude to establish impermissible lingering doubt evidence. See p. 74, n. 10 herein. As noted by the trial judge, the defense was not additionally permitted to open up the whole post-conviction case as well. The instant claim is thus procedurally barred and without merit. Steinhorst, supra; Jalbert, supra; Chandler, supra.

The defendant next asserts that the State erroneously introduced the parole officers' testimony, because this testimony constituted an improper attack on the defendant's character and relied upon uncharged, unproven allegations. Again, this contention is unpreserved and without merit. In the court below, the defense filed a motion in limine to preclude any testimony or mention by parole officers or otherwise: a) that the defendant was

on parole, b) that the defendant's parole was revoked, in part based upon testimony by the victim, and as a consequence of his encounters and telephone calls with respect to officers Brochin and Russell, c) that the victim instructed the defendant to stay away from said officers, d) that the defendant, upon re-release on parole, again met with the victim and again approached both Brochin and Russell, in violation of his instructions, e) that the defendant then shot into the Brochin/Russell home, and, f) that on the morning of the homicide the defendant had again approached officer Brochin, and was again told, by the victim, that violations of the prior instructions would result in the defendant being returned to prison again. (R. 110-113).

The defense conceded that the above-said testimony had been admitted at the prior trial herein, and, 'went to the question of the Defendant's motive for killing Bjorn Svenson". (R. 113, T. 50). The defense nonetheless argued that said evidence should be precluded as, "the question of Defendant's guilt is not to be relitigated during the new penalty phase proceeding." Id. With respect to the shooting incident,[11] the defense further argued that it was an uncharged crime which **was** not relevant to either proving the prior violent felony aggravator, or, rebutting lack of prior

[11] The charges from this shooting, which took place a few days prior to the instant murder, were subsequently nolle prossed. (T. 49).

criminal history mitigator. (T. 114). At the hearing on said motion, the State argued that the defendant's history of the two year feud with the parole department proved both the motive behind the crime, as well as establishing the aggravators herein.[12] The trial judge thus denied the motion in limine, having also noted that the same evidence had been introduced at the prior trial, and that the resentencing jury would thus not hear anything that the original jury had not. (T. 5053).

The trial judge's ruling was correct. The test for the admissibility of collateral offense evidence, which is not adduced as similar fact evidence pursuant to the Williams rule, is the standard test for relevancy. See, Griffin v. State, 639 So. 2d 966, 968-9, n.2 (Fla. 1994), Padilla v. State, 618 So. 2d 165, 169 (Fla. 1993). Evidence of motive for a crime is both relevant and admissible, Craig v. State, 510 So. 2d 857, 867 (Fla. 1987).

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[12] The State would note that said testimony was relevant to both the cold, calculated, premeditated, and, hindering law enforcement aggravators, as set forth in Points III and VI herein, at pp. 68-70 and 97-99. The defendant had after all stated that he was responsible for the victim's death as he was "not going to go back to prison", and that he had previously 'warned them" on one occasion by shooting into his parole officers' house. (T. 681). Apart from the defendant's own statement admitting to the shooting, officers Brochin and Russell testified that in fact several shots had been fired into their home only days prior to the murder. Moreover, the bullets recovered from their house were examined and established to be consistent with those fired at the victim, and consistent with having been fired from a weapon which had previously been seen in the defendant's possession.

Moreover, "it is within the sound discretion of the trial court during resentencing proceedings to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case, in order that it may render an appropriate advisory sentence. We cannot expect jurors impaneled for capital proceedings to make wise and reasonable decisions in a vacuum". Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1987); See also, Valle v. State, 581 So. 2d 40, 45 (Fla. 1991) (no error in permitting prosecution to recount guilt phase evidence in resentencing proceeding). This claim is thus unpreserved and without merit.

**b) Introduction Of Facts Concerning Prior Violent Felonies.**

The Appellant contends that the details of the defendant's prior violent felony (1973 armed robbery) were erroneously admitted at resentencing. In the court below, the defense objected to any testimony as to the facts underlying the prior violent felony, on the ground that same had not been introduced at the 1983 penalty phase. Instead, the State had relied only upon the certified copies of the conviction and sentence. (T. 289-90). The claim is without merit. As noted previously, this was a resentencing before a new jury and thus constituted a completely new proceeding where evidence not previously presented was admissible. Kins v. Dugger, Thompson v. State, Poland v. Arizona, supra. Moreover, this Court

has held that details of a prior violent felony (as opposed to the bare conviction) are admissible, as the purpose of sentencing is to engage in a character analysis of the defendant. See, Elledge v. State, 408 So. 2d 1021 (Fla. 1981). This Court has repeatedly held that the detective who investigated the prior felony can testify as to the details of the crime, including summaries of statements by the victim or witnesses. Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992)(detective allowed to testify as to details of prior crime), Long v. State, 610 So. 2d 1268 (Fla. 1992) (detectives permitted to give details of two prior rapes for which defendant was convicted); Breedlove v. Singletary, 595 so. 2d 8 (Fla. 1992) (detectives permitted to give details of California rape including what the rape victim told them about the crime); See also, Rhodes v. State, 638 So. 2d 920, 925 (Fla. 1994) (admission of the weapon used in a prior armed robbery and testimony as to the manner it had been procured, although not necessary to establish the aggravator, was relevant to rebut any inference of long-term mental problems being at the root of the prior offense as well as being the source of the capital offense). The claim is thus also without merit.

**c) Comments During Closing Argument.**

The Appellant contends that several of the State's comments during its closing argument were prejudicial error. This claim is

not preserved for appeal, as the record reflects that there were no objections, on any grounds, for any of the complained of remarks. Likewise, there were no requests for curative instructions nor any motions for mistrial at the closing arguments. See, Fersuson v. State, 417 So. 2d 639, 641 (Fla. 1986); Craig v. State, 510 So. 2d 957, 964 (Fla. 1987) (The proper way to preserve objections to closing argument is to object on a specific ground, request a curative instruction and move for a mistrial in the court below). This claim is thus procedurally barred.

In any event the record reflects that this claim is also without merit. The Appellant first complains of the State's comments which were made in accordance with the evidence presented. The prosecutor argued that defendant was sentenced to fifteen (15) years in prison, for attempted first degree murder in 1962, but that fifteen years did not mean fifteen years, because, in 1973, the defendant was out of prison and committed an armed robbery. The prosecutor added that defendant was sentenced to life imprisonment for the armed robbery, but that "if life meant life", he would not have been released on parole in 1982 committing the instant crime. (T. 743-44). First, this Court has held that it is not fundamental error even when the prosecutor's comments, with respect to a defendant's prior criminal convictions and sentences, can be reasonably deemed to imply commission of future crimes. See,

Freeman v. State, 563 So. 2d 73, 76 (Fla.1990) (prosecutor's impermissible implication that defendant would likely commit future crimes, by first comparing the capital murder to a prior murder committed by the defendant, and the asking, "how many times is this going to happen to this, defendant?" was not preserved in the absence of a contemporaneous objection in the court below. Moreover, this Court stated that the comments 'potential for prejudice" falls far short of the circumstances which require this court to reverse for a new sentencing proceeding."); See also, Parker v. State, 456 So. 2d 436, 443 (Fla. 1985) (claim of improper closing argument, based upon the prosecutor's comment that, 'if life meant life", the capital murder victim "would be alive today", was not preserved for appeal in the absence of a contemporaneous objection in the court below). Moreover, in almost identical circumstances in Parker, supra, where the evidence reflected that the defendant had been sentenced to life imprisonment for a previous murder but was paroled and committed the capital murder, this Court held that, even if preserved, there was no impropriety in such an argument, as: "it is manifestly obvious that 'if life meant life' the defendant would not have murdered these two additional victims. The prosecutor did not predict that the defendant would murder again if sentenced to life imprisonment and paroled after twenty-five years".

The Appellant next complains that the prosecutor argued that the mitigation offered **was** slanderous to people with difficult backgrounds who had not committed any crimes. Again, this contention is not preserved as there was no objection in the court below. The record herein reflects that the defense presented expert testimony that the defendant's actions were the consequence of his upbringing. The State, during its examination of rebuttal witness, Dr. Haber, established that the defendant's impoverished or abusive background did not turn him 'into a killer"; that people raised in similar circumstances and with similar histories did not turn to criminal action; and that the defendant is "a person who has his own mind and who does as he sees fit at a given time." (T. 711-12). The testimony of the defendant's siblings likewise reflected that they had not committed any criminal actions, despite the same upbringing as that of the defendant. In light of said evidence, the prosecutor argued that the defense experts had taken "a wide brush" and 'painted everybody who is raised in poverty" as engaging in criminal behavior. (T. 749) . The prosecutor thus stated:

> That's not fair to everybody else who had a drunken father who turned out to be fine and goes into the Navy for 22 years to serve Viet Nam [the defendant's brother]. To be **a** librarian for 27 years [the defendant's sister]. Not too fair to everybody else who was raised in disarrayed family upbringing. You cannot slander an entire group of people because one of them goes out and

> shoots a state trooper and commits an armed robbery and kills his parole officer the third time he's paroled. You cannot do that. So, what weight shall we give to these mitigating factors? Id.

The above was thus a fair comment on the evidence. Moreover, this Court has held even harsher remarks, which were objected to, as not being prejudicial. See, Jones v. State, 652 So. 2d 346, 352 (Fla. 1995) (prosecutor's comparison of former President Ford and Justice Thomas backgrounds to that of the defendant, made in the context of an argument that defense expert's testimony, as to mental mitigation arising from a foster home upbringing, was "ridiculous" and an 'insult", deemed "not so inflammatory or prejudicial as to warrant a mistrial".)

The Appellant's next contention, that the prosecutor improperly commented that "defendant threatened people", is likewise unpreserved and without merit. The record reflects that the defense experts testified that defendant was a passive individual, who was so deficient that he was incapable of understanding any legal proceedings, did not have the ability to formulate any plans, could not even form simple premeditation, and had been suffering from an extreme emotional disturbance throughout his life.[13] On cross-examination of the defense experts, the prosecutor asked about a letter which the experts had been familiar

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[13] See, Section d, infra, at pp. 86-88.

with, written by the defendant, while he was in jail awaiting trial, to another inmate. (SR. 147-50; T. 653-55) In this letter the defendant had named six state witnesses who had been listed for trial, and stated that he had been assured by other jail inmates that, "the above names will be handled accordingly", and that he had "already sent the above names and family addresses to a reliable source on the outside world. I hate like hell to do that but the innocent must suffer." (T. 678-80; 655, 657). At closing, the prosecutor simply repeated the contents of the letter and the defendant's actions herein, in accordance with the evidence presented, and argued that the defense expert's "opinions are off the mark in this case." (T. 752-3, 761). Comments on the evidence, including threats, to rebut mental mitigation such as that presented in this case, are not improper. Jones, 652 So. 2d at 352-3 (comments concerning the defendant's threats during a prior criminal episode, made in the context of refuting mental mitigation testimony, was deemed to be, "a proper comment on the evidence and was in no way so prejudicial as to warrant a mistrial.").

The Appellant next complains of the prosecutor's unobjected to comment that the victim "probably yelled", after being shot three times and prior to running approximately 75 feet when he was shot another five times. (T. 755). While there was no specific evidence

that the decedent had yelled, a prosecutor is entitled to argue reasonable inferences from the evidence presented. In any event, the trial judge, immediately prior to the closing arguments, instructed the jury that what the attorneys stated was not evidence, and that they should rely upon their own recollection of the evidence. (T. 738-9). Any impropriety was thus not prejudicial to the defendant. Steinhorst, 412 So. 2d at 339 (preserved impropriety in prosecutor's argument, which mistakenly attributed to the defendant a particularly callous remark about one of the victims, was cured by the trial judge's instruction that the jurors were the sole judges of evidence) .

Finally, the Appellant's complaints as to the prosecutor's argument that death was the only appropriate penalty (T. 764-65) are again unpreserved and without merit. The prosecutor, after having summarized the evidence as to all the aggravating and mitigating circumstances, argued that the jury should consider "everything", and concluded that: "The aggravating factors outweigh the mitigating factors. The only sentence that is appropriate for killing under these circumstances this way is the ultimate penalty. We diminish the value of human life. We say Svenson didn't count in his life and death." (T. 764). The Appellant has not cited any authority for any impropriety in said argument. In sum, the instances of improper prosecutorial comment cited by the Appellant

are unpreserved and without merit.

**d) Admissibility Of Prior Letters And Pleadings Drafted By The Defendant.**

The Appellant argues that the State erroneously introduced prior motions and petitions filed by the defendant in 1983. This claim is unpreserved, as the record reflects that defense counsel in the lower court objected to the admission of said documents without specifying any grounds. (T. 693). See Steinhorst, supra. Moreover, this claim is without merit, as the record reflects that said documents were presented in rebuttal to defense psychological expert testimony.

Defense expert Carbonell testified that the Defendant's "deficits" were 'life-long problems", which had always been there. (SR. 138-9). According to Dr. Carbonell, on direct-examination by the defense, the defendant was so deficient that he did not understand what a capital offense was. At the 1983'trial he was not competent and could not aid in his own defense. (SR. 60). According to Dr. Carbonell, the defendant had stated that he was not even aware of the possible penalty of death; he thought he would go to prison and stay there. (SR. 63). The defendant had stated that he did not understand what was going on in court, and he did not ask about it. Id. According to Dr. Carbonell, the defendant did not even understand the "concept of a legal motion".

(SR. 70). He didn't know anything about the law and he let counsel do the talking. (SR. 62). Given the defendant's make up, i.e. his passiveness, he thought his attorney, who was an authority figure, would take care of him, and he thus went along with everything done or said by the attorney. (SR. 65). Based upon these same deficits, Dr. Carbonell opined that the defendant has thus suffered from an extreme emotional disturbance "throughout his life", that he is incapable of even simple premeditation, and, that he "doesn't plan." (SR. 103, 105, 87-8).

In rebuttal to the above testimony by the defense expert, the State presented Dr. Haber's testimony. Dr. Haber disagreed with Dr. Carbonell's assessment of defendant's intellectual capacity, and noted that, in part, a series of handwritten alibi letters, and letters and motions to the court, all drafted by the defendant close to the time of the original trial, disproved the defense expert opinions. (T. 693; 695-704). Said writings, according to Dr. Haber, reflect the defendant's mentality, his skills and ability to communicate, to conceive ideas, to express those ideas, and, to formulate plans. (T. 695, 698-701). Thus the defendant, at that time, had the ability to consult with and advise counsel, and, had a clear knowledge of and was concerned as to various evidentiary and witness testimony issues relevant to the trial. (T. 699-700). Based in part upon his own writings, the defendant

had been competent, did not suffer from any mental illness or any extreme emotional disturbance, was not passive, could appreciate the criminality of his conduct, and had the ability to conform his conduct to the requirements of the law. (T. 700-713). The nature and contents of the prior motions and letters to the court were not delved into on direct examination by the State.

On cross-examination, however, the defense counsel's questions established the nature and contents of the letters and pleadings. (T. 720-28). Defense counsel noted that there were two motions and at least one letter to the court, all requesting dismissal of prior defense counsel. (T. 722, 725, 727). According to the defense, the first motion to dismiss counsel, "basically says that Harry wants a new lawyer", because, 'He didn't like his lawyer." (T. 723). Defense counsel noted that in the second motion to dismiss counsel, the defendant asked "for a particular lawyer to be appointed to represent him; correct?" (T. 725). The defense also inquired whether, in his letter to the court, the defendant had been again "complaining about his lawyer," and 'he's indicating that he has not spoken to his lawyer and that he's tried to get him off his case and wants a new lawyer, correct?". (T. 727). Dr. Haber responded in the affirmative to all of the above questions. (T. 723, 725, 727). The defense also established that the defendant had filed a "handwritten" petition for writ of habeas corpus

raising constitutional issues, and a motion for an Arthur hearing. (T. 722, 726). Although said pleading could have been copied from forms available in the Dade County jail law library, they had to be personalized and tailored to the defendant's own circumstances. (T. 724-26).

As seen above, the defendant's hand written prior pleadings were relied upon in specific rebuttal to the defense expert's testimony that the defendant was a passive individual who allegedly lacked any capacity to comprehend, formulate any plans, or appreciate any legal consequences. There was thus no error. Wuornos v. State, 644 So. 2d 1000, 1009-10 (Fla. 1994) (admission of psychological testimony/evidence to rebut mitigation testimony presented by the defense is not error); Muehleman v. State, 503 so. 2d 310, 315-16 (Fla. 1987) (admission of testimony from three (3) rebuttal State witnesses, as to prior non violent crimes, was proper in order to, "expose the jury to a more complete picture of those aspects of this defendant's history which had been put in issue"); Hildwin v. State, 531 So. 2d 124, 127 (Fla. 1988) ( penalty phase testimony as to uncharged crimes admissible where the defendant opened the door to this type of evidence); Johnson v. State, 608 So. 2d 4, 10-11 (Fla. 1972) (no error in permitting the State to fully inquire as to the defendant's history, in order to determine whether the defense expert witness's opinion had a proper

basis).

Finally, the Appellant has also complained that the prosecutor, in closing argument, "asserted that Mr. Phillips was competent and suggested that this should be held against him." See brief of Appellant, at p. 92. First, as noted previously, there were no objections, nor any motions for mistrial, at any time during the State's closing argument. As such, this argument is not preserved for appeal and is procedurally barred. Ferguson, supra. Moreover, this claim is without merit. The record does not reflect any suggestion that competency should be held against the defendant. Indeed, the record reflects that, at the prosecution's request, the trial judge instructed the jury that "competence" was not at issue in these proceedings and should not be considered. (T. 585-86; 593). The jury is presumed to follow its instructions. Greer v. Miller, 483 U.S. 756, 767, n.8 (1987); Duest v. State, 462 So. 2d 446 (Fla. 1985). , The prosecutor's reference to the fact that the defendant had stated "I don't want that lawyer, I want a different lawyer," (T. 761), was an accurate comment on the evidence elicited by the defense counsel, as noted above. The prosecutor, in context, asked the jury to compare what the defense experts had testified to, "that he doesn't know what he's doing", to what Dr. Haber and the defendant's own letters, with respect to dismissal of his attorneys, had stated. (T. 661). Comments on the

evidence are not error. White v. State, 377 So. 2d 1149 (Fla. 1980); Parker v. State, supra; Craig v. State, supra.

V.

THE PROSECUTION'S PEREMPTORY CHALLENGE WAS PROPER.

The Appellant contends that the trial judge erroneously allowed the prosecution to exercise a peremptory challenge over the defense Neil[14] objection, and also erroneously disallowed a defense peremptory challenge. The Appellant's claims have not been preserved for appeal and are without merit as they are refuted by the record.

With respect to the State's peremptory challenge on potential juror Ralph, the record reflects that jury selection continued after said juror was stricken, with both parties exercising other challenges. (T. 219-225). The defense then affirmatively accepted the panel, only renewing its objection as to its own prior peremptory challenge against another juror, Reyes, which the trial judge had denied pursuant to the prosecutor's Neil objection. (T. 225). There were no renewal of objections to the prosecution's exercise of peremptories, nor any other expressions of dissatisfaction with the panel at this juncture. Id. The prosecutor then agreed to withdraw his Neil challenge of the

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[14] State v. Niel, 457 So. 2d 481 (Fla. 1984).

defense peremptory on juror Reyes, and the trial judge excused said juror. (T. 225-6). The parties then agreed upon the twelfth juror and the two alternates. (T. 226). The panel was thereafter sworn in without any objections or reservations by the defense. (T. 226). The Appellant's claim with respect to the State's peremptory challenge of potential juror Ralph is thus procedurally barred. See Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993), wherein this Court held that Neil issues are waived when a party does not renew or reserve earlier objections immediately prior to the jurors being sworn:

> We do not agree with Joiner, however, that he preserved the Neil. issue for review. He affirmatively accepted the jury immediately prior to its being sworn without reservation of his earlier-made objection. We agree with the district court that counsel's action is accepting the jury let to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection. It is reasonable to conclude that events occurring subsequent to his objection caused him to be satisfied with the jury about to be sworn. We therefore approve the district court to the extent that the court held that Joiner waived his Neil objection when he accepted the jury. Had Joiner renewed his objection or accepted the jury subject to his earlier Neil objection, we would rule otherwise. Such action would have apprised the trial judge that Joiner still believed reversible error had occurred. At that point the trial judge could have exercised discretion to either recall the challenged juror for service on the panel, strike the entire panel and begin anew, or stand by the earlier ruling.

Moreover, the record reflects that the trial judge properly allowed the prosecutor's peremptory challenge of Ms. Ralph. Upon

the defense Neil objection to said peremptory, the prosecution stated that it had a race neutral reason for the challenge, because, Ms. Ralph had "said she is against the death penalty and even though she rehabilitated herself her feelings about the death penalty were not very strong at all,...".. (T. 219-20). The trial judge initially stated that he would allow Ms. Ralph to remain, but requested a response by the defense to the reason given by the prosecutor. (T. 220). The defense did not challenge the prosecution's reason that Ms. Ralph was opposed to capital punishment, and only noted that she was able to follow the law. (T. 220). The record reflects that Ms. Ralph had in fact during voir dire stated that, although she was fair and impartial, "[g]enerally speaking I'm opposed to it [capital punishment]". (T. 124). The trial judge then ruled that the State's challenge was proper:

> **THE COURT:** Well, I personally have a question mark against her name based upon many factors in there. I think it's a proper challenge".(T. 220).

There is no authority prohibiting a trial judge from altering a preliminary ruling, subsequent to having had a complete response from both parties and after consulting his own notes from voir dire, as had occurred in the instant case. The record as seen above reflects that the prosecutor's reason, that Ms. Ralph was opposed to capital punishment, was in fact supported by the juror's

statements, and this reason has been repeatedly upheld as being race-neutral by this Court. See, e.g., Holton v. State, 573 So. 2d 284, 287 (Fla. 1990) (potential juror's opposition to capital punishment is a race neutral reason for the purposes of a Neil inquiry); Kramer v. State, 619 So. 2d 274, 276 (Fla. 1993)(potential juror's equivocation with respect to death penalty is a valid race-neutral reason); Atwater v. State, 626 So. 2d 1324, 1327 (Fla. 1993) (hesitancy and discomfort regarding the death penalty is a race-neutral reason); Walls v. State, 641 So. 2d 381, 386 (Fla. 1994). (Same). The trial judge's ruling was thus entirely proper.[15]

Likewise, the Appellant's complaint with respect to the trial judge's denial of the defense peremptory challenge of juror Reyes is without merit. First, as noted previously, the prosecution withdrew its Neil challenge to said peremptory, the trial court then allowed the defense to excuse said juror, and the latter thus did not serve on the jury. The Appellee therefore fails to see how the defense was prejudiced in any manner. Moreover, the record again reflects that the trial judge's initial ruling in refusing to allow the challenge was entirely proper. The prosecution had made

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[15] The State would note that the trial judge had similarly overruled the State's Neil challenge to the defense peremptory of a potential Hispanic juror, on the basis that the juror's statement that, "capital punishment is necessary in some cases", was a race-neutral reason. (T. 221).

a Neil objection with respect to this peremptory, because the defense was, "striking almost every Latin that comes up without a race-neutral reason". (T. 223). The defense responded that the reason for striking Mr. Reyes was because he had previously served in a criminal drug trafficking federal trial and that it was a '99.9 percent [certainty] that it was a guilty verdict." Id. The prosecution responded that the defense had previously accepted other jurors who had served in a first-degree murder trial,[16] and that the defense had never inquired what verdict had been reached in Mr. Reyes' case. Id. The trial judge noted that Mr. Reyes had not said that he had returned a guilty verdict in the federal case,[17] and asked whether the defense had any additional reasons for the challenge. Id. The defense counsel then stated that Mr. Reyes' wife was a victim of an assault. Id. The trial judge, however, stated that he did not recollect any such statement during voir dire, and asked Mr. Reyes whether his wife had in fact been the victim of any assault. (T. 223-4). Mr. Reyes responded in the negative. (T. 224). The trial judge thus denied the peremptory challenge. Id. The trial judge's initial ruling was entirely proper, as defense counsel's first reason was invalid because it

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[16] The defense had in fact accepted such jurors. See e.g., (T. 217, 220).

[17] The trial judge's observation was correct. (T. 196).

had not been applied to other similarly situated jurors, and, the second reason was without any factual basis. See, State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988)(In order to permit a questioned challenge, the trial judge must conclude that the proffered reason is not a pretext; a challenge based on reasons equally applicable to jurors who were not challenged constitutes impermissible **pretext);** Floyd v. State, 569 So. 2d 1225, 1229 (Fla. 1990) (a facially race-neutral reason must be factually supported in the record). In sum the claims herein are both unpreserved and without merit.

**VP.**

**COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR IS CONSTITUTIONAL.**

The Appellant contends that the CCP factor itself is unconstitutional. This Court has expressly and repeatedly rejected this contention in light of the narrowing constructions ordered by it. Jackson v. State, 648 So. 2d 85, 87 (Fla. 1994) ('we reject the challenge [unconstitutional vagueness] to the [CCP] aggravating factor itself,"); Fotopoulos v. State, 608 So, 2d 784, 794 (Fla. 1992) **(same);** Klokoc v. State, 589 So. 2d 219, 222 (Fla. 1991) ('we reject the claim that section 921.14(5)(i), Florida Statutes [CCP], is unconstitutionally vague)"; see also Arave v. Creech, 507 U.S. 436, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993)(Idaho Supreme Court's

interpretation of an aggravator as referring to a "cold blooded" murderer, does not violate the Eighth Amendment to the Federal Constitution and is not vague); Walls v. State, 641 So. 2d 381, 387, n.3 ("...the limiting construction imposed by the Idaho Supreme Court [in Arave v. Creech] is in harmony with the [Florida Supreme Court's] requirements of Jackson;"). The Appellant has not advanced any new argument as to any deficiency with respect to the narrowing constructions of this factor.

The jury herein was instructed on the narrowing construction as to this factor (T. 371). The trial judge's findings likewise reflect that he applied the proper narrowing constructions:

> The evidence at the trial and sentencing hearing established that on August 31, 1982, Mr. Svenson was the last person to leave the parole office, shortly after 8:30 P.M. The last person who left before Mr. Svenson had left at 8:30 P.M. There was only one car in the parking lot at the time of the homicide and large piles of sand. At the time he was killed, Mr. Svenson was carrying old phone books and depositing them in a dempsey dumpster garbage bin, located in the rear parking lot. The evidence showed that Mr. Svenson **was** shot three times by the dempsey dumpster; twice in the left side of the chest, and once, a graze wound to the head. This evidence indicates that the defendant hid and waited for Mr. Svenson before he shot him. Mr. Svenson then ran approximately one hundred (100) feet and was then shot four times in the head, and once in the spine. The evidence indicated that because eight shots were fired, from a six-shot revolver, and witnesses heard two volleys of shots, that the defendant had reloaded between the two volleys. In addition, the murder weapon was taken from the scene and never recovered, nor were at least seven of the spent casings, Furthermore, there was evidence at the trial, that prior to the homicide, the defendant told

> an acquaintance that "I'm not going to jail again" and that he wanted to put an end to his problems with his parole officer. The defendant had threatened to "get them" if he was violated, and he bragged about the killing shortly thereafter and said it was because they were harassing him.
>
> This evidence clearly establishes beyond a reasonable doubt, a homicide was committed after calm and cool reflection; that was a careful or prearranged plan; and that reflected a heightened premeditation. Furthermore, there was absolutely no moral or legal justification for this killing. The previous finding by this Court of this aggravating factor was upheld by the Florida Supreme Court. Phillips v. State, supra. Nine years later, the case law continues to support the finding. See, e.g., Cruse v. State, 588 So. 2d 983 (Fla. 1991); Swafford v. St,, 533 So. 2d 270 (Fla. 1988) .
>
> The testimony of Drs. Carbonnell and Toomer, that the defendant did not have the intellectual capacity to calculate and plan the homicide is not only contradicted by Dr. Haber, but by the statements and actions by the defendant before and at the time of the homicide. Furthermore, the evidence of the letters from the defendant to his cellmates concerning threats to witnesses and falsifying an alibi, indicate a person who is capable of planning and calculating his actions. The Court finds that the murder of Bjorn Thomas Svenson was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (S.R. 179-80).

The above findings continue to satisfy the elements of this aggravator, in accordance with this court's recent precedents as well as those cited by the trial judge. See, Wuornos v. State, at 644 so. 2d 1008-9 (element of a careful plan or prearranged design is satisfied where the defendant armed herself in advance and the victim was killed in an isolated location. The element of

hightened premeditation was satisfied when the victim was shot once while sitting in his car, crawled out, the defendant ran to the front of the car and shot him again, and the victim was then shot twice further as he was lying on the ground); Griffin, 639 So. 2d 966, 971 (Fla. 1994)(CCP aggravator upheld in the shooting of a police officer during defendant's flight from other crimes. The defendant's statement that he wasn't going back to prison, demonstrated "a substantial period of reflection and thought by the defendant", and the crime **was** without any pretense of moral or legal justification). The instant claim is without merit.

## CONCLUSION

Based on the foregoing, it is respectfully submitted that this Honorable Court should affirm the sentence of death.

Respectfully submitted,
ROBERT A. BUTTERWORTH
Attorney General

FARIBA N. KOMEILY
Assistant Attorney General
Florida Bar No. 0375934
Office of the Attorney General
444 Brickell Ave., Suite 950
Post Office Box 013241
Miami, Florida 33101
PH. (305) 377-5441
FAX (305) 377-5655

**CERTIFICATE** OF SERVICE.

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE was furnished by prepaid first class mail to BILLY H. NOLAS, ESQ., **and** JULIE D. NAYLOR, ESQ., 437 Chestnut Street, Suite 501, Philadelphia, Pennsylvania 19106, on this 11 day of September, 1996.

FARIBA N. KOMEILY
Assistant Attorney General

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