IN THE SUPREME COURT OF FLORIDA

KEYDRICK JORDAN,

Appellant,

v. CASE NO. 84,252

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT OF
THE NINTH JUDICIAL CIRCUIT IN
AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The State accepts Jordan's rendition of the Case as put forth in his brief, except as to those matters related to his points on appeal.[1] The State will include relevant matters regarding the Case in its arguments, so this Court is provided a complete view of the surrounding circumstances as to each of Jordan's points.

STATEMENT OF THE FACTS

Guilt Phase

The State's version of the relevant facts in the Guilt Phase follows. Mary Rosenweig was Ann Mintner's friend and walking companion (T.1169-70). On the morning of the murder, she and Ann were taking their early morning walk around Lake Davis, when they separated so Ann could place her change purse, which she was carrying, in her car (T.1171-73). As Mary continued slowly, she turned to her right, saw a young black man standing at Ann's car and heard him order Ann: "Give me your key[s].1175)." Mary's attention focused on Ann, and she saw Ann get "panicky" and start

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[1]The Appellant was the defendant in the trial court. The Appellee, THE STATE OF FLORIDA, was the prosecution. In this brief, the Appellant will be identified as "Jordan". Appellee will be identified as the "State". The symbol "R" will be used to designate the record on appeal including pre-trial and post-trial hearing transcripts. The symbol "T" will designate the Transcripts of the Guilt Phase and the Penalty Phase. "SR" represents the Supplemental Record. "p" represents pages of Jordan's brief. All emphasis is supplied unless otherwise indicated.

to run toward her (T.1175). Mary heard "some loud noise," which she came to realize were shots (T.1175). To Mary, "It seem[ed] like he was just shooting and shooting (T.1177-78)." Ann was lying face down on the ground when Jordan fired the final shot (T.1177-78). Mary watched Jordan run away, then returned her attention to her dying friend (T.1178). Mary "saw the blood coming out of [Ann] and [she] turned her over to see if she was alive, and all that horror was in front of her (T.1178)."

Peter Cherry was jogging around the lake that ill-fated morning (T.1188). As he came around the lake he heard gunshots (T.1189). All he could make out of the person who ran away "was medium build, dark hair, ... male build (T.1190)." He heard 6 shots in even rapid succession (T.1190). After the last gunshot, he "saw somebody lying on the ground with blood (T.1191)." Mary was upset and kept expressing her disbelief as to what had just occurred (T.1191-92). Peter held Mary as they waited with Ann for the ambulance to arrive (T.1193).

Ginger Fakete, lived right across the street from Lake Davis. She was up around 7 a.m. that morning and "in the back of [her] house in the bathroom when [she] heard the shots. (T.1199)." She heard "a couple of what [she] thought were shots, and then as [she] was going down the hall toward the living room [she] heard about

four more (T.1199)." She went to her living room window, which faced the street, and saw a young black man running down Lake Davis drive away from the victim (T.1200-01).

Chris Barlow was driving home from his job at the emergency department at Florida Hospital, when he observed "[a] gentleman acting suspicious (T.1206)." It was cold out and he was carrying his shirt balled up in his hand (T.1206). He made eye contact with him, and the guy "was real paranoid, and he kind of started running away (T.1209." Chris drove about 1½ blocks when he saw an ambulance and a police car in his rearview mirror approaching him (T.1208). Jordan matched his recollection of the guy he saw that morning (T.1210-11). After Chris saw the ambulance and police car, he turned around, followed Jordan to a housing project, watched Jordan go over a fence, and then returned to the lake to tell the police what he had seen (T.1211-13). They followed Chris back to the location where Jordan jumped the fence, but they were unable to locate him (T.1214).

Dr. Hegert, the Medical Examiner, testified there were 6 separate entrance gunshot wounds in Ann's body (T.1280-88). Two (2) of the wounds were in her arm and armpit (T.1286). ***The other four (4) were in her back*** (T.1280-84). It was three (3)of those back gunshot wounds that caused the massive hemorrhage into her

chest cavities, because the projectiles penetrated her heart, lung and liver (T.1282-84, 1296). Ann Mintner "was a 76-year-old white female who weighed 140 pounds, measured 63" or 5' 3" and was in good physical condition (T.1292)."

Vicki Meyers testified Jordan and Sam Tory, her uncle, arrived at her place sometime after dark Friday evening, August 7th, and Jordan was there until Saturday morning, "between 6 and 6:30 (T.1309-11)." Vicki claimed neither alcohol or drugs were consumed by either herself or Jordan (T.1311). As Jordan left, Vicki asked him where he was going, to which he replied "to rob somebody (T.1311)." Her uncle was sleeping when Jordan left (T.1312). Although she did not see a gun on him when he left, she had seen Jordan with the murder weapon on prior occasions (T.1313-15).

Sam Tory testified that he shared a bike with Jordan, which was damaged when he went to Cumberland Farms to get some beer (T.1337-38). Jordan helped him fix it at Vicki's, and Jordan spent the night there. They shared the 12-pack Sam got at the store (T.1340-41, 53).[2] Tory went to sleep between 11 p.m. and midnight

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[2]There was no indication who drank how much. Sam admitted having a few beers prior to the 12-pack (T.1353). He thought that when he arrived, Jordan was drinking Cisco with Vicki (T.1353). There was no testimony as to what % alcohol Cisco is, although Jordan alleges in his brief at p.7, that it is a "high alcohol cheap wine." Recall that Vicki said that neither she or Jordan drank (T.1311).

Friday night (T.1340). He woke up at around 8 a.m. Saturday, and Jordan was gone (T.1341). The next morning, Sunday, he found Jordan at Michelle Daniel's (T.1342). Jordan told him "***he had popped someone*** (T.1342-44, 1362, 1368-70, 1376)." "Popped" is slang for "shoot" someone (T.1344). Sam then saw on T.V. the bike he shared with Jordan (T.1345). Aware that his fingerprints were on the bike as well as Jordan's, he called "Crime Line" (T.1345). When he called, he was aware that there was a $1,000.00 reward, "but that wasn't the important [sic] of the call, [he] didn't want to be in there, something [he] didn't do (T.1345-46)." Sam had not asked the police or State Attorney for assistance with his pending battery charge (T.1346). He was not with Jordan the morning of the murder, and he did not tell Jordan to go rob someone (T.1376).

Robert Torro, 14-years-old, in ***proffered*** testimony related that in the early evening of August 7th, he was playing "hoops" with friends in the area of Reeves Terrace, when Jordan stopped by and asked him to drop in at his place later on (T.1411-12). He made a mistake when he told the police he saw Jordan at the basketball courts on a 10-speed, it was later, around 10 p.m. (T.1419). Around 7:30, 8:00 p.m., he stopped by Jordan's apartment and Jordan asked him to show him crack houses, so he could sell some crack (T.1412-13). Jordan asked Robert if he had ever robbed

anyone, and when Robert replied "no", Jordan showed him a .25 caliber handgun, and asked: "Would you like to go jack somebody (T.1413)?" Robert identified the murder weapon as the weapon Jordan had shown him the evening before Ann's death (T.1414). The trial court excluded all of this testimony except seeing Jordan with the murder weapon on Friday evening (T.1425, 1430).

Michelle Daniels was living with Jordan when the murder occurred (T.1434). She accompanied him to the Orlando Police Department, and was present when Investigator Gauntlett found the murder weapon (T.1435, 1438-39). On the morning of August 8th, she was woken early by Jordan, who told her he couldn't sleep, that he had a bad dream (T.1435-36). She gave him two pills and told him to lie down (T.1436). Jordan appeared to be sweating when he woke her up, but he had had bad dreams before and woken up sweating (T.1436). She assumed he was with her the night before the murder (T.1436-37).

Detective Parks testified that Jordan initially denied any knowledge of the murder (T.1450). Jordan asked to speak with Michelle, and after 10 to 20 minutes with her, indicated he wanted to talk to Detective Parks (T.1451-52). Jordan then gave details of the murder, which included the alleged participation of Sam Tory (T.1452-53). However, Jordan admitted it was he who approached Ann

Mintner, and that after that he did not see Sam anymore (T.1454). Jordan placed the gun up to Mrs. Mintner's face or body, and asked for the keys to the car (T.1454). She did not comply, walked away, and Jordan's gun "accidentally went off (T.1454)." Jordan's taped confession was played for the jury (R.1224-1242; T.1455).

Greg Scala, firearms expert, testified that the murder weapon was a semi-automatic, necessitating the trigger being squeezed each and every time the gun was to be fired (T.1484-85). Further, there was gunshot residue in the vicinity of at least 3 of the bullet holes in Ann's shirt(T.1486-88).

Penalty Phase

The trial court found the following Aggravating Factors were proven by the State beyond a reasonable doubt:

> 1. The crime for which the defendant is to be sentenced was committed while he was under a sentence of imprisonment or placed on community control.
>
> On May 1, 1992 ... Jordan, pled guilty and on June 24, 1992 was placed on community control by this court for a period of two years for the crime of robbery... in this circuit. The murder of Ann Mintner occurred in August 1992, while the defendant was on community control. This aggravating circumstance was proved beyond a reasonable doubt.
>
> 2. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

a) On August 6, 1987, the defendant ... was convicted of Burglary of a Dwelling and Lewd Assault Upon a Child ... .

b) On May 1, 1992, ... Jordan pled guilty and was convicted of Robbery before this Court.

c) On June 30, 1993, ... Jordan pled nolo contendere before this Court and was ***convicted of Murder First Degree [of Thelma Reed]***.

Each of these felonies involved the use or threat of violence to another person. This aggravating circumstance was proved beyond a reasonable doubt.

3. The capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, or escape after committing or attempting to commit a robbery.

The defendant ... was charged with Attempted Robbery with a Firearm in Count II of the indictment and convicted of that crime by the jury. The defendant acknowledged in his tape recorded statement, exhibit "P", that at the time of the homicide he was attempting to force Ann Mintner to surrender her car keys at gun point with the intent of stealing the car. This capital felony was committed, therefore, while the defendant was engaged in an attempt to commit the crime of robbery. This aggravating circumstance was proved beyond a reasonable doubt.

4. The capital felony was committed for pecuniary gain.

...The court has weighed the fact that the murder of Ann Mintner was committed while the defendant was attempting to commit the crime of robbery and has therefore not weighed separately the defendant's motivation for pecuniary gain in arriving at its decision. In other words the Court

has weighed aggravating factors 3 and 4 as a single factor. (R.1941-43)

Jordan has extensively documented his mitigation evidence in his brief, and the State will rely on the trial court's findings on such, which are, of course, afforded a presumption of correctness (R.1943-50). However, the State would relate the following Penalty Phase testimony of Michelle Daniels, Jordan's girlfriend for 2 months up to and including the murder, who he called to testify as to his relationship with her daughter, Nicole (R.584-93). Michelle admitted on direct having "a hard time coming to terms with what happened and what he did ... (R.589-90)." When Jordan woke her up the morning of the murder, ***she did not remember his having an odor of alcohol about him*** (R.592). On cross, she testified that when she fell in love with him, ***she did not know he was a murderer, rapist, or robber*** (T.598-99).[3] "***That's not something I'd want her [Nicole] to look up to*** ... (R.599)." The trial court found, "as did the jury, that ***the aggravating circumstances outweigh[ed] the mitigating circumstances present***." (R.1950)

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[3]Jordan was on community control for the robbery of Ronnie Goodman's car, where he threatened to kill Goodman and ordered his girlfriend to shoot him (1685-90). Also, he had raped, murdered, and set Thelma Reed's place on fire to cover up his deeds before Ann's murder (R.1941-42; T.1702-13).

SUMMARY OF THE ARGUMENT

I. The trial court found the testimony of Dr. Strang and Ms. Carol Brown was relevant to proving the heinous, atrocious, or cruel (HAC) aggravating circumstance. Dr. Strang testified as to the victim's fear before she was murdered, and Ms. Brown testified as to Jordan's state of mind when he murdered her. Both were properly qualified, and a proper predicate was provided prior to their testimoy. Jordan's argument that Ms. Brown did not examine Jordan is completely disingenuous in this *pre-Dillbeck* case. Error, if any, was harmless beyond a reasonable doubt given the trial court's directed verdict on HAC, the fact the jury was not instructed on the same, and Ms. Brown's favorable testimony for mitigation.

II. Contrary to Jordan's assertion, the trial court did not find Jordan made a preliminary showing of racial prejudice. Rather, the trial court's purpose in holding a hearing on this matter was to create a record for this Court as to why the decision was made by the State to take a plea in the Thelma Reed murder, and proceed to trial on the Ann Mintner murder. The Fifth District's reversal of the trial court's order regarding interrogatories was correct, if not for the wrong reason, because, as the trial court found, Jordan never reached the threshold to even necessitate an evidentiary hearing.

III. The prosecutor has a duty to interrogate witnesses and conduct investigations. A prosecutor's presence at an interrogation is one factor to be considered in the totality of the circumstances regarding the voluntariness of a defendant's confession. The prosecutor in this case was doing his job.

IV. Jordan's self-serving exculpatory statement was properly excluded by the trial court during Sam Tory's cross-examination. Jordan's admission against interest to Tory that he "popped" someone occurred on a Sunday morning. His inadmissible remark that he did not mean to kill the victim occurred the following evening. The facts surrounding the murder belie his exculpatory remark. Error, if any, was harmless beyond a reasonable doubt, given those facts, and the fact that during his penalty phase, Jordan elicited the exculpatory statement during cross-examination of a State witness.

V. Jordan conceded at trial that this Court has held that the State may argue both premeditated and felony murder.

VI. The trial court correctly exercised its wide discretion regarding voir dire. Jordan's request for juror questionnaires to screen prospective jurors for cause was granted, and they accomplished their purpose. Some of the jurors struck for cause, were in fact individually voir dired.

VII. Jordan attempted to gain discovery from the State at the Penalty Phase, without invoking reciprocal discovery. There was no *Brady* material withheld, and Jordan has failed to identify any such material.

VIII. Jordan opened the door to rebuttal of mitigation regarding life sentences. The claim is waived in any event, because Jordan failed to request a cautionary instruction or move for a mistrial regarding the alleged prejudicial testimony, which also demonstrates its harmlessness.

IX. Jordan's arguments regarding his juvenile dispostitions were not raised below and are waived. Consideration of the same in aggravation was harmless given his prior robbery and capital murder convictions. Jordan is merely disagreeing with the weight the trial court afforded his mitigation evidence, which is an insufficient basis for challenging his sentence. There was no *Grossman*[4] error, rather it was a clerical error which Jordan knew of at the time he was sentenced. The trial court correctly denied the presentation of irrelevant mitigation. Polygraph examinations are inherently unreliable. The jury did not consider nonstatutory aggravation. The prosecutor did not use such in closing.

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[4]*Grossman v. State*, 525 So. 2d 833 (Fla. 1988).

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY EXERCISED ITS WIDE DISCRETION IN MATTERS PERTAINING TO THE ADMISSION OF EVIDENCE DURING THE PENALTY PHASE, REGARDING AN AGGRAVATING CIRCUMSTANCE WHICH THE STATE ARGUED DURING THE PENALTY PHASE, BUT WHICH THE TRIAL COURT DETERMINED, PRIOR TO ITS CHARGE TO THE JURY, WAS NOT APPLICABLE.

What Jordan casts as a claim challenging the admissibility of some of the State's penalty phase evidence, in fact concerns the ***weight*** given to the testimony of two of the State's expert witnesses. The testimony of Dr. Samuel Strang and Carol Brown was ***relevant***, and therefore, ***admissible***, in proving the "perception[s]" of the murderer and the victim at the time the murder took place pursuant to the heinous factor. Even if this Court were to find error occurred regarding this testimony, it would be harmless beyond a reasonable doubt for several reasons, not the least of which was the fact that ***the trial court directed a verdict as to the heinous factor, and did not instruct the jury upon it***. The trial court succinctly delineated the problem with Jordan's first claim in its ruling at the hearing on his "Motion for New Penalty Phase":

> As to the admission of evidence tending to support the aggravating circumstance of heinous, atrocious [or] cruel, ***if I were to grant the***

> ***motion, I would, in effect, be ruling that anytime the State introduces evidence of an aggravating circumstance later found by the Court not to be sufficiently supported would require a new penalty phase proceeding***, which took place here. (R.429-30)

"During the penalty phase, the state is limited to introducing evidence that proves an aggravating circumstance or rebuts a mitigating circumstance argued by the defendant (citations omitted)." *Randolph v. State*, 562 So. 2d 331, 338 (Fla.), *cert. denied*, 498 U.S. 992, 111 S.Ct. 538, 112 L.Ed.2d 548 (1990). Both the state and defendant can present evidence at the penalty phase that might have been barred at trial; however, to be admissible, evidence must be relevant and its admission is within the trial court's wide discretion. *Chandler v. State*, 534 So. 2d 701 (Fla.), *cert. denied* 490 U.S. 1075, 109 S.Ct. 2089, 104 L.Ed.2d 652 (1988).

This Court has clearly delineated "that there is a different standard for judging the admissibility and relevance of evidence in the penalty phase of a capital case, where the focus is substantially directed toward the defendant's ***character***." *Hildwin v. State*, 531 So. 2d 124, 127 (Fla. 1988), *affirmed*, 490 U.S. 638, 109 S.Ct. 2037, 104 L.Ed.2d 728 (Fla. 1989), *reh. denied*, 492 U.S. 927; *accord, Valle v. State*, 581 So. 2d 40, 46 (Fla. 1991). In *Elledge v. State*, 346 So. 2d 998, 1001 (Fla. 1977), this Court

further delineated:

> the purpose of considering aggravating and mitigating circumstances is to engage in a ***character analysis*** of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case.

Accord, Hildwin at 127; *Valle* at 46. Therefore, "evidence that would not be admissible during the guilt phase could properly be considered in the penalty phase." *Hildwin* at 127, *citing Alvord v. State*, 322 So. 2d 533, 538 (Fla. 1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976).

§921.141(1), Fla. Stat. (1991), established the parameters regarding evidence which the trial court could entertain during the Penalty Phase in this cause:

> In the proceeding, evidence may be presented as to ***any matter that the court deems relevant to the nature of the crime and the character of the defendant*** and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsection (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. ...

An aggravating circumstance must be proven by the State beyond a reasonable doubt. *Valle v. State, supra.* This Court interpreted the aggravating factor of heinous, atrocious, or cruel to mean:

> It is our interpretation that heinous means

> extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that ***cruel*** means designed to inflict a high degree of pain with ***utter indifference to, or even enjoyment of, the suffering of others***. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

As regards the cruel component of this aggravator, this Court has found that where a defendant ***"enjoyed or was utterly indifferent to the suffering of his victim,"*** the aggravator was applicable. *Rodriguez v. State*, 609 So. 2d 493, 501 (Fla. 1992); *See also, Shere v. State*, 579 So. 2d 86 (Fla. 1991); *Cheshire v. State*, 568 So. 2d 908 (Fla. 1990); *State v. Dixon, supra.* This Court has further delineated that the "unnecessarily torturous" aspect of the aggravator "pertains more to the victim's perception of the circumstances than to the perpetrator's." *Hitchcock v. State*, 578 So. 2d 685, 692 (Fla.), *cert. denied*, 112 S.Ct. 311 (1991); *citing Stano v. State*, 460 So. 2d 890 (Fla. 1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985). Thus, even if a defendant "might not have meant the killing to be unnecessarily torturous that does not mean that it actually was not

unnecessarily torturous, and, therefore, not heinous, atrocious, or cruel." *Id.*

"***The mindset or mental anguish of the victim*** is an important factor in determining whether this aggravating circumstance applies." *Phillips v. State*, 476 So. 2d 194, 196 (Fla. 1985). "***Fear and emotional strain*** may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." *Preston v. State*, 607 So. 2d 404, 409-10 (Fla.), *cert. denied*, 113 S.Ct. 1619 (1992); *See also Hitchcock v. State, supra*, at 693; *Rivera v. State*, 561 So. 2d 536, 540 (Fla. 1990); *Phillips v. State, supra*, at 196; *Mason v. State*, 438 So. 2d 374 (Fla. 1983), *cert. denied* 104 S.Ct. 1330 (1984); *Adams v. State*, 412 So. 2d 850 (Fla.), *cert denied*, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). "Moreover, the victim's mental state may be evaluated for purposes of such determination in accordance with a ***common-sense inference*** from the circumstances." *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988), *cert. denied*, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989); *See also Preston v. State, supra*, at 946 ("victim ***must have*** felt terror and fear as these events unfolded" [emphasis this court's]). The heinous factor has been found in circumstances similar to those found in this cause as seen in the opinions cited by the prosecutor in his

"Penalty Phase Bench Brief" (R.1827):

In *Smith v. State*, 515 So. 2d 182, 185 (Fla. 1987), *cert. denied*, 485 U.S. 971, 108 S.Ct. 1249, 99 L.Ed.2d 447 (1988), the defendant argued that the judge erred in permitting evidence of a 1960 manslaughter conviction relevant to an aggravating circumstance. In finding that the trial court did not error, this Court noted: "The state voluntarily chose ***not*** to introduce evidence of this conviction as ***direct evidence*** but reserved the right to introduce the conviction as rebuttal evidence." The clear inference from this statement is the State ***can*** choose to introduce direct evidence to prove an aggravating circumstance. Indeed, such evidence is introduced through the medical examiner in strangulation cases, which "...are nearly per se heinous." *See Hitchcock v. State, supra*, at 693; *Sochor v. Florida*, ___ U.S. ___, 112 S.Ct. 2114, 2121, 119 L.Ed.2d 326 (1992). The direct evidence supplied by the medical examiner to prove the heinous factor relates to whether the victim was conscious or not. ***Compare*** *Hitchcock; Adams v. State, supra; Holton v. State*, 573 So.2d 284, 292 (Fla. 1990); *Thompkins v. State*, 502 So. 2d 415, 421 (Fla. 1986); *Johnson v. State*, 465 So. 2d 499, 507 (Fla), *cert. denied*, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985); ***with*** *Rhodes v. State*, 547 So. 2d 1201, 1208 (Fla.1989)(strangulation of

semiconscious victim not heinous); *Herzog v. State*, 439 So. 2d 1372 (Fla. 1983)(same).

"We must presume the trial judge to have been familiar with this body of case law... ." *Sochor*, 112 S.Ct. at 2121. "...[W]e can [also] presume that the jury disregarded the factor[s] not supported by the evidence." *Fotopolous v. State*, 608 So. 2d 784, 792 (Fla. 1992), *cert. denied*, 113 S.Ct. 2377 (1993), *citing to Sochor*, 112 S.Ct. at 2122. In this cause, where the trial court allowed direct evidence related to the heinous factor, but found it to be insufficient to allow a penalty phase instruction upon it, error, if found, would be harmless beyond a reasonable doubt. *Id.*; *See also Hunter v. State*, 660 So. 2d 244, 252-53 (Fla. 1995).

Jordan alleges at the outset of his first claim: "The trial court found only three aggravating circumstances, neither [sic] very compelling (p.30)." The trial court, in fact, found four (4) aggravating circumstances were proven beyond a reasonable doubt: 1. Jordan murdered Ann Mintner while on community control; 2. prior capital and violent felony; 3. during a robbery; and 4. pecuniary gain (R.1941-43). However, given precedent emanating from this Court, the trial court combined aggravators 3 and 4 into one aggravator. The three aggravating circumstances, not the least of which included ***the capital murder of Thelma Reed***, were ***very***

compelling, and notwithstanding Jordan's representation that "[t]he trial court found myriad factors in mitigation," it also found:

> The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The Court finds, as did the jury, that ***the aggravating circumstances outweigh the mitigating circumstances present***. (R.1950)

Dr. Samuel Strang was a "Clinical Gerontologist" in Ft. Lauderdale, and Director for the Center for Applied Gerontology there (T.1717, 1812). Carol Brown was a Mental Health Therapist in private practice, a nationally Certified Counselor, and licensed by the State of Florida in Mental Health (T.1732, 1764). The trial court made extensive findings regarding the ***relevancy*** of the testimony of Carol Brown and Dr. Samuel Strang (T.1759-63).

At the Penalty Phase Charge Conference, Jordan argued as to the giving of the instruction on the heinous factor: "There is no basis in fact or in law for this instruction (T.2590)." The trial court disagreed as to Ann Mintner's fear, nonetheless, ***it directed a verdict on the heinous factor***, and declined to give the instruction (T.2592-93).

The trial court did not error in allowing the State to prove the heinous factor, as there was some evidence as seen from the aforementioned authorities. *Hunter* at 252. The State's position

on this claim is best viewed in light of the following argument made by the prosecutor below:

> The Supreme Court [of Florida] ha[s] been criticizing prosecutors for years about the way we prove heinous, atrocious and cruel.
>
> Well, now, I'm giving this Court and the Supreme Court expert testimony on every single aspect of that aggravator. (T.1755)

The testimony of Dr. Strang was relevant to proving Ann Mintner's "perception" of her murder. *Hitchcock, supra*, at 692. The testimony of Carol Brown was relevant to proving Jordan's "perception" when he chased a 76-year-old woman, shooting her 6 times, once when she was already face down, simply because she panicked when he demanded her car keys. *Rodriguez v. State, supra*, at 501. If the perception of the victim and the murderer may be inferred, then why can't direct evidence be produced to prove as much?[5] Jordan's first claim really concerns the ***weight*** to be afforded the testimony of these two witnesses, which is a matter for the jury, ***not*** the admissibility of this evidence.

A. <u>The Testimony of Ms. Brown and Dr. Strang was Relevant</u>.

A trial court's conclusions of fact come to an appellate court clothed in a presumption of correctness. *Shapiro v. State*, 390 So.

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[5]The State does not concede that direct proof of H.A.C. is required in every applicable case. However, under the facts of this case, it was possible to present direct, as opposed to inferred evidence of this aggravator.

2d 344, 346 (Fla. 1980). The trial court found: "The facts in *Rodriguez*, ... bear a strong similarity to the facts in this case involving the flight of the victim." Those facts were as follows:

> After the shooting, Rodriguez ***bragged***[6] that when Mr. Saladrigas would not turn over his belongings, Rodriguez shot the man twice, first in the knee and then in the stomach. As his victim ran, pleading for his life, Rodriguez shot him again because Saladrigas still had not given up his watch. After being wounded, Mr. Saladrigas ran over 200 feet with his attacker in pursuit only to be shot a fourth time behind a car where he sought cover. These facts set this murder apart from the norm of capital felonies and support the conclusion that ***Rodriguez enjoyed or was utterly indifferent to the suffering of his victim.*** (Citations omitted)

Rodriguez v. State, supra, at 501. The trial court was also aware of this Court's finding on the heinous factor in *Bonifay v. State*, 626 So. 2d 1313 (1993):

> In *Bonifay* there was no evidence that would reflect on the defendant's state of mind at the time of the killing to support a finding that it was torturous murder exemplified by the desire to inflict high degree of pain, or another indifference or enjoyment of the suffering of another. (T.60-61)

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[6]Jordan supplemented the record with the Deposition of Carlos Almanza taken by him on April 14, 1993 (SR.44-100). Almanza related that he was incarcerated with Jordan before the latter was tried for the Ann Mintner murder (SR.83-94). He overheard Jordan "***boasting*** about what he had done (SR.83)." Jordan "was ***boasting*** about what happened to Mrs. Reed (SR.88)." Jordan told a fellow inmate in the recreation yard at the Orange County Jail, that he "set her on the chair and then she was set afire. He said she deserved what she got (SR.90-91)." Jordan also spoke about the Ann Mintner murder stating "he's got that one beat. That lady that got gunned down in the park (SR.91-92)."

Given the similarity of the facts between *Rodriguez* and this cause, the trial court found Carol Brown's testimony (T.1764-1785) relevant to proving Jordan's state of mind as he chased and fired six shots into a fleeing, 76-year-old woman, simply because she would not give him her car keys. As to Ms. Brown's testimony, the trial court found it insufficient in proving beyond a reasonable doubt that Jordan "had a desire to inflict a high degree of pain," or "that he had an utter indifference to the suffering of another," or "that he enjoyed the suffering of another (T.2590-91)." On that basis the trial court declined to give the heinous instruction, and directed a verdict regarding that factor (T.2592-93). Nevertheless, there was ***some*** evidence of the heinous factor. *Hunter*, at 252.

The testimony of Dr. Strang was relevant to proving the victim's fear.[7] Despite the fact that the trial court declined to find the heinous factor, it did find Ann Mintner "suffered fear":

> And I find there is sufficient evidence to find beyond a reasonable doubt that this death was not instantaneous with the first shot and that ***the victim suffered fear, emotional strain and terror, that although it was a shooting death, it was not a quick death, that she ran and suffered abject***

[7]Even if Dr. Strang had not testified, Ann Mintner's fear could have been found "in accordance with a common-sense inference from the circumstances." *Swafford*, at 277; *Preston*, at 946.

terror of the most fearful kind, and it was, in fact, as described her worst nightmare. (T.2590-91)

B. <u>Carol Brown Was Qualified to Express Her Opinion Subsequent to a Proper Predicate</u>.

A trial court has wide discretion concerning the admissibility of evidence and the subjects about which an expert can testify. *Stano v. State, supra.* §90.704 Fla. Stat. (1992), provides that an expert may rely on facts or data not in evidence in forming an opinion if those facts are of "a type reasonably relied upon by experts in the subject to support the opinion expressed." This Court has held a proper predicate was laid for the testimony of a chief medical examiner regarding the cause of death and the condition of a victim's body, despite the facts that she did not perform the autopsy or that the autopsy report was not admitted into evidence, where the State properly qualified her as an expert, and she formed her opinion based on the autopsy report, toxicology report, evidence receipts, photographs of the victim's body, and all other paperwork filed in case, and those facts were of a type reasonably relied upon by experts. *Capehart v. State, supra,* at 1012-13. In *Cheshire v. State, supra,* at 913, one of the evidentiary errors asserted by the defendant was that the trial court improperly qualified a man as an expert in blood-spatter

evidence; this Court decided that claim as follows:

> It appears Miller's qualifications consisted of a single forty-hour course, three prior qualifications as an expert and his own field experience. While we agree that these qualifications are open to reasonable question, we nevertheless believe that the trial court did not abuse its discretion in allowing this expert testimony. Any deficiencies in an expert's qualifications, experience and testimony may be aired on cross-examination, provided there is some reasonable basis to qualify the expert. We believe such a basis existed on the record.

Carol Brown's testified during her proffer examination as follows:

> A I have a Bachelor's in Psychology, Master's in Counselors Education, I'm nationally certified counselor, licensed mental health, State of Florida. I've been in private practice for nine years working with offenders and victims. (T.1732)

She further testified on proffer that she had been requested by a Court to do over 500 evaluations of offenders (T.1732). She had been qualified in court to give an opinion in the area of mental health evaluations approximately 35 times (T.1732). As part of her evaluations she was "called upon to make predictions of future behavior or ... past mental states (T.1732-33)." She, with the aid of her husband, who is a professor, "did a computer line search, [they] pulled up everything [they] could find" on the following topic:

> A On the history that I had pertaining to trauma, children who are exposed to trauma at an early age in life, and the consequences of their [in]corporating that into their penalties and the likelihood of their offending based on that, and whether or not they could be -- they were treatable or could be treated and the success of treatment in these cases. (T.1737-38)

On proffer redirect she testified she was provided a box full of information on Jordan.[8] Given these materials, Ms. Brown did an evaluation of whether Jordan was a ***"sociopath"*** (T.1739-40). After review of Jordan's files, and her research, she came to the opinion that "he met every criteria of the DSM III-R for the sociopath (T.1740)." The trial court's ruling upon Ms. Brown's status was as follows:

> THE COURT: The only question for me right now is her qualification as expert, and I qualify her.
>
> MR. WEST: Will she be able to render the opinion that my client is a sociopath, allow her to render that based on her qualification and experience?
>
> THE COURT: I do [sic]. (T.1772)

The same predicate was laid in her testimony before the jury (T.1764-68).

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[8]On her direct examination before the jury Ms. Brown testified that those materials constituted over 1,000 pages on Jordan's history from 2½ years old to the present (T.1767). These materials included Dozier files, HRS records, psychological exercises, letters from psychiatrists who had seen him over the years, history of arrests, and behaviors, the same materials relied on by Jordan's experts (T.1767-68).

Given these facts and the aforementioned authorities, Jordan's assertion that Ms. Brown "was not qualified to express her opinion which was without sufficient predicate" is disingenuous at best. As in *Capehart*, a proper predicate was laid for her testimony, and she was certainly more qualified to testify regarding Jordan's sociopathic personality than the "blood-spatter" expert in *Cheshire*. As in the latter opinion, "[a]ny deficiencies in an expert's qualifications, experience and testimony may be aired on cross-examination... ," which is exactly what Jordan's counsel did. *Id.* at 913.

Jordan's cross-examination of Ms. Brown elicited that she was not a psychologist, but a Master-level Therapist (T.1790). He introduced his self-serving exculpatory statement over the State's objection, which was found inadmissible in the guilt phase, "That he didn't mean to kill [Ann Mintner], that he didn't intend to do that (T.1788-90)." In fact, Ms. Brown, a ***State*** witness, became the best witness Jordan had during the penalty phase as the following testimony will demonstrate.

First, regarding the murder of Clyde Presley, which Jordan witnessed when he was approximately 5½-years-old, she testified that if he had therapy then, "***we might have a different person sitting there today*** (T.1793-94)." Ms. Brown testified Jordan from

"infancy ... ***never had a chance*** (T.1797)." She also testified that it would not surprise her that "***by 12 years old he was a full blown alcoholic;***" or that he "***witnessed sexual abuse of others or the victimization of others*** (T.1800)." When asked over the State's objection "***what's a six-year old going to do, ... can't run away, can he***?"; Ms. Brown responded: "He could try to run, but ***where was he going to go***[?] (T.1799-1801)." The defense concluded its cross-examination of this ***State's witness*** when she testified as follows:

> Q And whether Keydrick suffered abuse, as perhaps others did?
>
> A I'm sure he suffered abuse, no doubt in my mind.
>
> ***This young man's life was trashed. But we are at a point in time here where his personality has developed, and it has been trashed.***
>
> He has now developed every sociopathic symptom that there is available in the book, and you have three or four, you're labeled [sic] sociopath. He meets all the criteria.
>
> And the literature indicates that most literature will say it's ***untreatable***, there is nothing that you could do at this point.
>
> ***We have a trashed life. It's not his fault his life is trashed, but at this point we cannot treat that successfully.***
>
> Q ***I don't know that I asked you that question.***
>
> A I know you didn't.
>
> Q ***But, maybe we should talk about that for a***

moment. Are you saying that the people around him, the things that were done to him as a child have stripped him of any chances?

A ***I think vandalized his development***. The normal chronological development of a child takes place, and certain things were introduced into their life to produce healthy individuals. ***Everything introduced to his life boils in abolition, aggression, abuse, neglect, a lack of nurturing, all of these things led to what he became today***.

Q ***And if somebody had done something somewhere, maybe we could have saved three lives***?

A ***Maybe***.

Q ***Thelma Reed***?

A ***Yes***.

Q ***Ann Mintner***?

A ***Yes***.

Q ***And Keydrick Jordan***?

A ***Right, if someone had done something***.

MR. WEST: Thank you, Miss Brown. (T.1802-03)

The significance of this testimony is obvious. First, it came from a ***State's witness***, and it was in direct accordance with the defense case in mitigation. Further, it completely undermined anything Ms. Brown said prior to it. Ms. Brown's testimony under cross-examination did more than demonstrate any deficiencies in her qualifications as spoken of in *Cheshire*, it ***made*** Jordan's case for

mitigation before he even put one on. It also demonstrates that the testimony complained of by Jordan as error, if so found, would be harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Ms. Brown's testimony that Jordan's life was "***trashed***," that he "***never had a chance***," and that the murders of Thelma Reed, Ann Mintner, as well as the ruination of his own existence, may not have transpired if he had received treatment at the right time, made his case for mitigation before any of his witnesses, including his experts, even testified.

The end of Ms. Brown's cross-examination also serves to demonstrate that his counsel elicited the testimony that he was "***untreatable***" (Jordan's Brief at 42, 46), and he did nothing to correct it. Rather, he remarked, "***I don't know that I asked you that question***," followed by, "***But, maybe we should talk about that for a moment***." Jordan received favorable testimony regarding mitigation from a ***State's*** witness and sought to exploit it, neglecting to object to her testimony regarding his untreatability in the process. Given the enormity of the favorable testimony he received from Ms. Brown, her gratuitous remark "we cannot treat that successfully," was of no import to him at the time it was

made, why should it be now?[9] Clearly, his counsel elicited this testimony, and did not object to it at the time it occurred, thereby affording the trial court the first opportunity to correct any error. Error, if any, was invited, and he should not be allowed to complain about it now. *Pope v. State*, 441 So. 2d 1073 (Fla. 1983).

It was only after Jordan "opened the door" that the prosecutor on redirect asked Ms. Brown whether his personality would ever change (T.1804). *See Preston v. State*, 528 So. 2d 896, 899 (Fla. 1988), *cert. denied*, 109 S.Ct. 1356, 103 L.Ed.2d 824. Nor did Jordan object to the State's query on redirect regarding a potential personality change. It was only after Ms. Brown had been excused, that he objected to the testimony he initially elicited on cross.

Jordan argues at pages 41 and 45 that it was improper for the State to elicit alleged "profile testimony" from Ms. Brown. He bases this argument upon the following question posed by the

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[9]Jordan's motion to strike Ms. Brown's entire testimony does not preserve this issue, because there was no specific contemporaneous objection to her remark regarding treatment, which would have allowed the trial court the first opportunity to deal with any problem at the time it occurred, not after she had finished testifying and left the stand. Besides, he invited it. Nor did he request a curative instruction as to this remark. He did ask for a general cautionary instruction as to "the very limited purpose for which [her testimony] was introduced (T.1805-07)." He did not move for a mistrial.

prosecutor: "In looking at Mr. Jordan's -- all the information you've been given, does he appear to fit that profile of offender who has come to gain pleasure from violence (T.1780)." Ms. Brown answered, "Yes" (T.1780). After the defense objected on the record, the question was rephrased as follows:

> Q Do you have an opinion today as to whether the circumstances of this particular case Mr. Jordan enjoyed the suffering that he inflicted upon Miss Mintner in this case?
>
> A Yes, I believe he did. (T.1780-81)

When the prosecutor attempted to ask what she based her opinion on, the defense objected "based on lack of qualifications, lack of factual predicate and speculation (T.1781-82)." The objection was overruled and Ms. Brown spoke of the "previous murder," which was that of Thelma Reed (T.1782).

Jordan alleges in his brief that Ms. Brown's reference to the Thelma Reed case was somehow improper, and that it became a feature of the trial. This argument is fallacious for two obvious reasons. First, Ms. Reed's murder was one of the aggravating circumstances in the penalty phase. Dr. Anderson, Deputy Chief Medical Examiner, District 9, a stipulated forensic pathologist expert, testified as to his on-scene examination of Ms. Reed, and the forensic autopsy he performed later that same day, before Ms. Brown even took the

stand (T.1702-10). Thus, Ms. Brown's testimony did not make Ms. Reed's murder a feature of the penalty phase. Second, her murder was one of the factors upon which Ms. Brown based her opinion. As Jordan pointed out in his brief at page 38: "Brown reviewed school records, psychological evaluations, as well as Jordan's ***criminal history*** (T.1767-68)," just as his experts did.

Jordan, at page 43 of his brief, disingenuously argues Ms. Brown never examined him. His appellate counsel well knows, or should know, that Jordan's trial was before *Dillbeck v. State*, 643 So. 2d 1027, 1031 (Fla. 1994), and the subsequent codification of that opinion's rule of law in Fla. R. Crim. P. 3.202 (Effective January 1, 1996), regarding a State mental health expert being allowed to examine a defendant who intends to present expert testimony of mental mitigation during the penalty phase of a capital trial. In short, Ms. Brown would not have been allowed to examine Jordan. All she could rely upon in her analysis of Jordan was the 1,000 pages she was provided, much, if not all of which was generated when the trial court granted the State's motion to release "Medical/Psychological Records from Department of Corrections," to which Jordan's trial counsel had "no objection," and of which his own experts would have reviewed (R.1799-1801).

As regards Jordan's argument on page 45 regarding alleged

"offender profile testimony," Ms. Brown's testimony was not presented "as substantive evidence of guilt." Jordan was already found guilty of capital murder in the guilt phase. Rather, Ms. Brown's testimony was relevant to the nature of Ann Mintner's murder, and Jordan's character, pursuant to §921.141(1).

Jordan's "new or novel scientific principle" argument on page 45, although creative, is unpreserved. *See Hayes v. State*, 20 Fla. L. Weekly S296, S299 (Fla. June 22, 1995); *Robinson v. State*, 610 So. 2d 1288, 1291 (Fla. 1992); *Correll v. State*, 523 So. 2d 562 (Fla.), *cert. denied* 488 U.S. 871 (1988). His trial counsel never objected to Ms. Brown's testimony on *Frye* grounds as seen in the aforementioned cases.[10]

As regards Jordan's prejudice argument seen on pages 46-47, the State would rely on previous argument concerning relevancy. Again, it was Jordan that invited the "untreatable" testimony, which he chose to ignore until Ms. Brown had left the witness stand. It was entirely proper for Ms. Brown to rely upon Jordan's past criminal history, including the capital murder of Thelma Reed, in forming her opinion, just as his experts did. His argument as to waiver of the "no significant criminal history" mitigator

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[10]*Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

precluding such reliance is meritless. *See Johnson v. State*, 608 So. 2d 4, 10 (Fla. 1992).

The trial court correctly exercised its broad discretion in matters pertaining to the admission of evidence. Ms. Brown's testimony was relevant, and therefore, admissible. Jordan's first claim as it relates to her, although couched in terms of admissibility, actually concerns the weight to be given her testimony, which is well settled as being a jury function. Even if this Court should find the trial court erred, it was harmless beyond a reasonable doubt given her testimony on cross-examination, and the fact that the trial court found the heinous factor was not proven beyond a reasonable doubt, thereby declining to instruct the jury upon it.

C. **Dr. Strang's Testimony Was Properly Admitted.**

At page 47 of his brief, Jordan alleges that Dr. Strang's testimony was based upon an insufficient predicate without delineating how it was insufficient. Again, a trial court has wide discretion concerning the admissibility of evidence and the subjects about which an expert can testify. *Stano v. State, supra.* Dr. Strang's qualifications as a clinical gerontologist were previously discussed, and Jordan does not challenge his being properly qualified as he did Ms. Brown. His proffer direct

examination established the basis for his opinion regarding Ann Mintner's fear when she was murdered (T.1718).

Dr. Strang's proffered testimony regarding the victim's mental state at the time of the murder was as follows:

> A I have been asked on several occasions to basically do premorbid psychological autopsy to determine the state of mind, the condition of a person prior to or around the time of the crime.
>
> Q And in this instance do I understand that your testimony in summary form would be that Mrs. Mintner had a heightened fear of being accosted because of her prior burglaries and because of her experience at Jordan Marsh.?
>
> A And her general profile, yes, sir, that is correct, her age, her sex, her situation.
>
> Q General profile, being that she was in her seventies?
>
> A She was an elderly lady, yes, accosted in the street, and with a predisposition or presensitivity because of being burglarized before.
>
> Q So, in other words, all elderly women meet the general profile?
>
> A No, sir. Elderly women that are accosted in the street meet this profile, not all elderly women, per se.
>
> Q The general profile is that elderly women that are accosted?
>
> A Yes, sir. And, again, the third qualifying factor is if they've had predisposition or presensitization.

Q And your conclusion is, if I understand you, that she would be more afraid than other people?

A Yes, sir, might be. (T.1726-27)

The trial court, cognizant of *Preston v. State, supra*, ruled Dr. Strang's testimony relevant to proving the "fear, emotional strain, and terror of the victim during events leading up to [the] murder" (T.1730, 1759-63).

Once again, Jordan argues admissibility when he is really arguing the weight to be given Dr. Strang's testimony. He repeatedly argues "Anybody" would have been afraid at page 48 of his brief. This argument fails for two reasons. First, Dr. Strang's testimony demonstrated that Ann Mintner was ***not*** just anybody, but an elderly victim acutely sensitive to such a crime as the one Jordan intially attempted before murdering her (T.1815-17). Ann Mintner's acute sensitivity demonstrates the relevance of Dr. Strang's testimony.[11] The State's use of his testimony to prove Ms. Minter's mental state is analagous to proving psychological trauma to a victim, which results from extraordinary circumstances not inherent in the crime charged as a reason for departure in a noncapital case. *See State v. Rousseau*, 509 So. 2d 281, 283-84

[11]Of course, the best witness to testify as to the victim's fear, would have been the victim herself, but she was murdered.

(Fla. 1987). Second, if "***anyone*** would have been afraid," as Jordan repeatedly insists, where's the prejudice in Dr. Strang's testimony.

D. <u>Error, If Any, Was Harmless Beyond A Reasonable Doubt</u>.

The trial court found the State did not prove the heinous factor beyond a reasonable doubt, and so, the jury was never instructed upon it. It can be presumed that the jury disregarded this factor found not supported by the evidence by the trial court. *Fotopolous v. State, supra*, at 792. Therefore, error if any, as to the testimony of Ms. Brown and Dr. Strang was harmless beyond a reasonable doubt. *Id.*

As regards Ms. Brown's testimony, a ***State's*** witness made Jordan's case for mitigation before he called a single witness. Her cross-examination undermined whatever she said on direct and tremendously aided his case in mitigation. Her analysis of Jordan during her proffered recross coincided with the testimony of Jordan's experts, Mr. Sullivan and Dr. Phillips, as to his past (T.1745-48, 1793-1803, 2102-2303, 2306-2451). They just reached different conclusions as to how Jordan's past translated to his behavior when he murdered Ann Mintner. It should be noted, that Mr. Sullivan's geneological study did not include any discussion with Jordan about the murders he committed (T.2293). Dr. Phillips

found that Jordan suffered from an ***"antisocial personality disorder" [sociopath]*** according to the DSM III-R, which he determined was allegedly negated by an "intermittent explosive disorder" (T.2420-22). Ms. Brown also determined Jordan to be a ***sociopath*** by the criteria in the DSM III-R. Given these facts, Ms. Brown's testimony was harmless beyond a reasonable doubt.[12]

As regards Dr. Strang, Jordan's repeated insistence that ***"anyone"*** would have been afraid under the circumstances faced by the victim when she was murdered, certainly negates any harm that may have resulted from his testifying as to her fear at that time. Further, even if Dr. Strang had not testified, a "common-sense inference from the circumstances" surrounding the murder would have been that Ann Mintner was in "abject fear" for her life.[13] Error, if any, regarding his testimony, was also harmless beyond a reasonable doubt.

POINT II

THE GRANTING OF THE STATE'S PETITION FOR WRIT OF CERTIORARI WAS CORRECT, WHERE ARTICLE II, SECTION 3, OF THE FLORIDA CONSTITUTION PROHIBITS THE

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[12]Jordan's fn. 74 at p.89 of his brief reads: "The State's offer of Ms. Brown's testimony was ***very limited in scope***. The State attempted to use Ms. Brown to establish that Jordan enjoyed killing Mintner, thereby satisfying one prong of the HAC aggravating circumstance."

[13]For that matter, a similar inference could be drawn that Jordan "enjoyed" killing Ms. Mintner.

JUDICIARY FROM INTERFERING WITH THE PROSECUTOR'S DISCRETION REGARDING THE DEATH PENALTY.

Jordan asserts at page 56 of his brief that the District Court of Appeal of Florida, Fifth District [henceforth Fifth District], "completely missed the point. [His] guilty plea in the Reed case had no bearing on the resolution of the Mintner case." In fact, that was exactly the point, and still is if Jordan has any basis for arguing this claim. Jordan's plea in the murder of Thelma Reed, who was black, and the State's pursuit of the death penalty in the murder of Ann Mintner, who was white, was the only basis for his contention that the prosecutor's decision in the Mintner case was racist. If, as he claims, the plea in the Reed case "had no bearing on the resolution of the Mintner case," then this basis, which, in and of itself was legally insufficient to trigger an evidentiary hearing based upon *Foster v. State*, 614 So. 2d 455, 463-64 (Fla. 1992), fails, and Jordan's entire argument is fallacious.

However, it is not even necessary to address this claim on the merits because it is procedurally barred. As phrased, Jordan's second claim alleges in essence that the ***Fifth District erred*** in granting the State's Petition for Writ of Certiorari, yet, he never appealed to this Court the Fifth District's denial of his motion

for rehearing.[14] It is the State's position that Jordan's challenge to the Fifth District's decision is untimely, rendering his second claim procedurally barred. Without waiving its procedural default argument, the State would address the merits of Jordan's claim.

"Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." Art. II, §3, Fla. Const.; *State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986); *Accord, State v. Donner*, 500 So. 2d 532, 533 (Fla. 1987).[15] Thus, "the Florida Constitution prohibits the judiciary from interfering with the prosecutor's decision to seek the death penalty in a first-degree murder case." *State v. Donner, supra*, at 533. In *Donner*, this Court, citing *Bloom* and federal precedent, recognized:

> the judiciary has authority to curb pre-trial prosecutorial discretion "'only in those instances where impermissible motives may be attributed to the prosecution, such as bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights'."

Donner, at 533, *citing Bloom*, at 3 [*quoting United States v. Smith*,

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[14]*State v. Jordan*, 630 So. 2d 1171 (Fla. 5th DCA 1993).

[15]*See also, Cleveland v. State*, 417 So. 2d 653 (Fla. 1982); *State v. Cain*, 381 So. 2d 1361 (Fla. 1980); *Johnson v. State*, 314 So. 2d 573 (Fla. 1975).

523 F.2d 771, 782 (5th Cir. 1975), *cert. denied*, 429 U.S. 817, 97 S.Ct. 59, 50 L.Ed.2d 76 (1976)].

In *Foster v. State, supra*, at 463-64, this Court addressed a trial court's refusal to conduct an evidentiary hearing so as to allow the defendant to show that the use of the death penalty in Bay County, Florida, was racially discriminatory. This Court found that Foster "offered nothing to suggest that the state attorney's office acted with ***purposeful discrimination*** in seeking the death penalty (federal citations omitted)." *Id.* Once again, this Court recognized the "wide discretion" afforded prosecutors in their determination of when to seek the death penalty:

> The Court in *McCleskey* held that:
>
> [T]he policy considerations behind a prosecutor's traditionally "wide discretion" suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties "often years after they were made." Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.
>
> ... Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand ***exceptionally clear proof*** before we would infer that the discretion has been abused.

Foster at 464, *quoting McCleskey v. Kemp*, 481 U.S. 279, at 296-97, 107 S.Ct. 1756, at 1769-70, 95 L.Ed.2d 262 (1987) (citations omitted). This Court declined to adopt Justice Barkett's proposal of a relaxed standard borrowed "from the *Neil* and *Slappy* peremptory challenge line of cases,"[16] opting instead to follow the United States Supreme Court's "***exceptionally clear proof***" standard for alleged claims of prosecutorial discrimination. *Id.* The majority determined that Foster's proffered study of some of the murder/homicide cases prosecuted by the Bay County State Attorney's Office did "***not*** constitute '***exceptionally clear proof***' of discrimination, therefore, "[t]he trial court was not required to hold an evidentiary hearing on this claim." *Id.*

Jordan's alleged racial claim was based solely upon the State's acceptance of a plea regarding the Thelma Reed capital murder in return for a life sentence, and its pursuit of the death penalty in Ann Mintner's murder. If "Jordan's guilty plea in the Reed case had no bearing on the resolution of the Mintner case," as Jordan asserts on page 56 of his brief, then he has nothing to show discrimination, and the discussion stops there.

However, Jordan's plea in the Thelma Reed murder had

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[16]*Foster*, dissent at 467; *State v. Neil*, 457 So. 2d 481 (1984); *State v. Slappy*, 522 So. 2d 18 (Fla.), *cert denied*, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988).

everything to do with his "Motion for Evidentiary Hearing to Establish Grounds to Preclude Impossibility of the Death Penalty Due to Racial Discrimination", and was in fact the very essence of his claim (SR.184--196). In that motion, after relating facts regarding the two murders, Jordan alleged:

> The defendant, through counsel, advised the prosecutor that he would plead to the two pending first degree murder charges in exchange for a life sentence even if the sentences were to be consecutive. When the offer was rejected by the prosecutor, ***the defendant, though [sic] counsel, said that he would plead to one of the first degree murder charges if the prosecutor would waive the death penalty as to that one. The defendant, through counsel, left the choice of which murder he would plead to up to the prosecutor. The prosecutor chose the case involving the black victim and offered the plea to the Thelma Reed case and agreed to waive the death penalty***. ... ***Thelma Reed was black***.
>
> 4. In contrast, the state has rejected all offers by the defendant to resolve the above-styled first degree murder charge to a sentence of less than death. In this case, he is accused of the first degree murder and attempted robbery of Ann Mintner on August 8, 1992 in the vicinity of Lake Davis. [Facts surrounding murder related.] ... ***Ann Mintner was white***.
>
> 5. When comparing the facts and circumstances of the two murders outlined above it is clear that the murder of Thelma Reed was at least as horrible, if not more horrible, than the murder of Ann Mintner. ***The only significant difference is that Thelma Reed was black and Ann Mintner was white***. This evidence strongly suggests that racial considerations unconstitutionally played a part in the decision to

> seek the death penalty for the murder of Ann Mintner and as such, satisfies the requirement of *McCleskey* and *Foster*. (SR.188-90)

In Jordan's Response to the Fifth District he argued:

> ... [T]he Respondent has made a factual showing as well as a statistical showing[17] illustrating how ***death was waived in the case involving the black victim while the Petitioner insisted on going forward with the death penalty in the case with the white victim. This occurred notwithstanding that the Petitioner chose which case in which to waive the death penalty in exchange for a plea (the black victim) and refused the Respondent's offer to plead guilty to first degree murder in the second case (the white victim) in exchange for a consecutive life sentence.*** (SR.148)

Clearly, Jordan's plea on the Thelma Reed murder had everything to do with his motion in the Ann Mintner murder, otherwise he would not have had a claim at all, as Jordan's own argument at page 54 of his brief demonstrates:

> The defendant was willing to plead as charged to both murders, receive consecutive sentences and spend the rest of his life in prison. When the State rejected Jordan's offer, Jordan offered to plead guilty to one murder. ***He did not care which.[18] The prosecutor chose to accept a plea and***

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[17]Jordan was speaking to his attachment, Bob Levenson's article for the Orlando Sentinel (SR.192-96), which the trial court ruled inadmissible because "it's not of sufficient expertise or scientific dignity for admission in these proceedings (R.485-486)."

[18]The Fifth District did not miss the point. In footnote 2 of its opinion it recognized:

"Had the state opted to take the plea in the Mintner case and proceed to trial in the Reed case, the defense could have asserted that it was racially discriminatory for the state to assure a conviction in the case involving the

> ***life sentence for the Thelma Reed (black victim) murder. The State persisted in its quest for a death sentence for the Ann Mintner (white victim) murder***.

Given the "***exceptionally clear proof***" standard of *Foster* and *McCleskey*, there was insufficient evidence to prove "***purposeful discrimination***," and the trial court should have summarily denied Jordan's motion without granting an evidentiary hearing. However, it would appear that the trial court was influenced by his suggestion that it "adopt Justice Barkett's suggested standard for review of the state constitutional claim he has raised (SR.185-86)," which is not the law regarding his alleged claim.

Nonetheless, contrary to Jordan's repeated assertions that "the trial court obviously agreed that Jordan had made a threshold showing of potential racism" as seen at pages 55 and 60, the real reason behind the trial court's allowing an evidentiary hearing on this matter was aired at the hearing on the State's Motion to Quash Subpoena's and his Motion for New Penalty Phase:

> THE COURT: My purpose in holding the hearing is to create a record for the Supreme Court of why the decision was made.
>
> Since there is no doubt they will be called upon to review the decision, and I intend at the hearing

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white victim while risking an acquittal or lesser verdict than first degree in the case involving the black victim. Once the state accepted the defendant's offer, it was in a no-win situation."

to follow the suggestion you just made.

In fact, Jordan's inference is totally refuted by the trial court's ruling at the conclusion of the evidentiary hearing:

> THE COURT: I'll deny your motion to disallow the death penalty on the issue of racial bias. ...
>
> I don't find that the evidence, although admitted under grounds of relevance, of, supports the suggestion that the decision here was racial[ly] motivated. ...
>
> Because the argument to the, to be made by the defense under the theory he's put forth in *Foster* is that a death penalty is being sought in a given case where it might not otherwise be sought; and that decision to seek it in a given case is motivated by issues of racism. ***The issue doesn't even get to that threshold here because the death penalty was sought in both cases and then waived in one for tactical reasons that I find to be sufficient and supported in the record.***
>
> ***Because of the unique circumstances of this case I proceeded to an evidentiary hearing, even though I find that the showing required by the majority in Foster has not been met. But because of the unique circumstances of having two first degree murder cases pending simultaneously, one with a black victim and one with a white victim, I felt it was prudent to create a record and proceed to the evidentiary hearing. But I do affirmatively find that the threshold required by the majority has not been met.***
>
> ***In considering the position stated by Justice Barkett, I find that the threshold she suggested has not been met either. There is no competent evidence here of a pattern of racism supported by statistics which meet evidentiary standards.*** (R.544-46)

With the clear understanding, and in spite of, the trial court's finding ***"that the threshold required by the majority [in Foster] has not been met,"*** the State provided its race neutral reasons for seeking the death penalty in Ann Mintner's murder, in keeping with Justice Barkett's dissent in *Foster*, even though the trial court determined that "***the threshold she suggested has not been met either.***" The State does not concede, and in fact emphatically denies that the State was required to provide race neutral reasons for its seeking the death penalty, given its "complete discretion" in such a decision, and absent the lack of requisite proof of ***purposeful discrimination***. *State v. Bloom, supra*, at 3; *State v. Donner, supra*, at 533; *Foster* at 463-64.

In fact, since the dissent in *Foster* is not the law, the State should not have been ordered to do so, and constituted judicial interference with prosecutorial discretion, in violation of the *Separation of Powers* doctrine. However, in that the trial court's reason for so doing was to create a record for this Court, the State will relate its reasoning in seeking the death penalty in one case and not the other. Again, in so doing, it does not concede that the trial court's action was proper, or in keeping with this Court's clear mandate in *Foster*.

At the outset of the evidentiary hearing, which was not required, the prosecutor provided a lengthy analysis of why he sought the death penalty in the Ann Mintner murder, as opposed to the Thelma Reed murder, the substance of which was as follows:

> The Court will find from the, find that ***the reason for the plea in the Thelma Reed case was obvious, it was the fact that the Thelma Reed evidence was weaker than the evidence in the case of Ann Mintner, that is the evidence of guilt.*** ...
>
> . The reason the plea was going to be accepted was because of the difference -- . . ***.in the quantum of the evidence in the two cases; the fact in the Thelma Reed case, while having enough evidence to prosecute, might be lost; and that the Ann Mintner case because of the strength of the evidence was virtually unloseable. They were also instructed that the evidence of their mother's murder would be admissible and would be used in the penalty phase of Mr. Jordan's case, and would be a substantial reason why Mr. Jordan would eventually get the death penalty.*** (R.443-46)

The emphasized conclusion of the State's proffer was, in fact, its "race neutral reason" for pursuing the death penalty in the Ann Mintner murder, instead of the Thelma Reed murder (R.515-16).

The State has included the aforementioned proffer in its argument owing to several representations made by Jordan in his initial brief, which it would take exception to. At page 55 of his brief, Jordan represents to this Court that "the Reed murder (rape and strangulation during a burglary followed by arson to destroy

evidence) appears much ***more egregious*** than the Mintner murder (***garden-variety shooting*** in the course of an attempted robbery). As regards Jordan's ***more egregious*** allegation, the State would point out that he elicited from Dr. Anderson on cross-examination, the following testimony regarding Thelma Reed's murder:

> Q I understand. ***But this woman may very well have died during the commission of the sexual assault without any purposeful attempt to cause her death***?
> A ***That is a possibility***. It's also possible that the force was being applied just from the front and it was long enough, ***she became unconscious to quiet her down. Whether or not that would be to kill her, I can't really say***.
>
> Q In other words, you've seen lots of these kinds of injuries incidental to sexaul assaults?
>
> A Yes, usually not to the point -- well, sometimes to the point of death, yes. But in some clinical settings, yes, the person survives and has neck injury, but basically survives. (T.1712-13)

Without downplaying the murder of Thelma Reed, because both murders were equally egregious, there was a possibility that Jordan ***accidentally*** murdered her trying to keep her quiet as he raped her. In fact, at page 9 of his brief, Jordan relates: "The medical examiner conceded that Reed possibly died during a rape without any intent to kill."

On the other hand, he stalked and shot Ann Mintner six (6) times as she fled for her life, with the obvious ***purposeful attempt***

to cause her death, which leads to the other aspect of Jordan's characterizations of the two murders the State takes great exception to. His representation that Ann Mintner's murder was merely a "***garden-variety shooting,***" is positively outrageous. Besides being a distortion of the facts surrounding her death, it completely dehumanizes Ann Mintner. The very fact that her murder can be referred to in such a demeaning fashion, reflects the casual manner in which Jordan disposed of a helpless, fleeing elderly woman. Again, both the murders of Ms. Reed and Ms. Mintner were equally egregious. The decision as to which case to seek the death penalty for was not a matter of race but of proof.

Jordan's representations on page 57 of his brief that Thelma Reed's daughters "testified that the prosecutor permitted them to have little, if any, input in the resolution of their mother's murder," should be considered in light of precedent holding that "the decision to initiate criminal prosecutions for felonies rests with the state attorney, not the victim," and the actual record. *See McArthur v. State*, 597 So. 2d 406, 408 (Fla. 1st DCA 1992). Pat Strickland testified that she personally met with the prosecutor 2 or 3 times (R.451).[19] She, and her four siblings, met

[19]Ms. Strickland and her sister, Rosas A. Hall were Jordan's witnesses.

with the prosecutor at the State Attorney's Office to discuss Jordan's plea regarding their mother, Thelma Reed's, murder (R.452).[20] On direct examination, Ms. Strickland testified that Mr. Ashton had informed her "***there was not enough evidence so her case was weaker than the other case*** (R.452)." She further testified that she did not believe the decision had already been made to accept the plea in her mother's case (R.452). All she and her siblings wanted was "***we just really wanted him to get the chair*** (R.452)." Her cross-examination was far more revealing as regards Jordan's racist claim:

> Q ***Does it matter to you which, did it matter to you which case he got the death penalty on as long as it was on one of them***?
>
> A ***No, as long as he got it on one of the cases, it didn't matter.***
>
> Q When you left the meeting did you understand that one of the reasons for this was to get the death penalty for Mr. Jordan in some case?
>
> A Yes.
>
> Q Did you believe that that was the reason for the plea?
>
> A Yes.
>
> Q ***Have you ever during any of your contacts with my***

[20]Also present at this plea meeting with Ms. Strickland and Ms. Hall, were Vivian, Ronnie, and Bobbie. (R.451)

office had any reason to believe that your mother's case was dealt with in a way, or that your mother's race changed in any way the way you were dealt with, or the way your mother's case was dealt with?

A ***No***. (R.455-56)

If Ms. Reed's family was allowed to have little input in the prosecutor's decision to seek the death penalty as Jordan maintains, which was clearly in keeping with the aformentioned precedent regarding prosecutorial discretion, they most certainly were afforded an explanation regarding the basis of that decision, and according to Jordan's own witness it was not racially motivated as he alleges. Jordan is correct in his representation at page 58 of his brief that Ann Mintner's relatives were not consulted much either.[21] However, Tom Mintner's deposition, which was considered by the trial court, reflected that he also was apprised by the prosecutor as to the weakness of the Thelma Reed case (SR.128-29).

Finally, Jordan makes the following representation in footnote 60 at the bottom of page 57: "Additionally, the State agreed that the plea resolution of the Reed case had no bearing on the resolution of the Mintner case." In fact, the State's reply to his motion for rehearing before the Fifth District reflects quite the

[21]She was survived by her daughter Georgiann and her son Tom. (SR.103-129)

opposite:

> What the decision of this Court articulates is the inherent injustice in ***Jordan's attempt to preclude the State from seeking the death penalty in <u>both</u> cases based solely upon their disparate treatment by the prosecutor in accordance with Jordan's <u>own</u> proposal***. (SR.172)

Further on, the State argued:

> As this Court's decision so aptly acknowledges, Jordan has already received a clear benefit (avoidance of the death penalty) from his plea in one case. He should not now be permitted to turn the shield into a sword by which to attempt to escape the death penalty in ***<u>both</u>*** cases. (SR.172-73)

As regards Jordan's comment, and the Fifth District's, regarding the naivete of the prosecutor, the State rejoindered, again reflecting his representation is incorrect, as follows:

> ...[T]he prospect of a racial challenge to the death penalty in the Mintner case was perceived to outweigh the benefits to be derived from a sure conviction in the Reed case. (footnote omitted) ***And, as pointed out in footnote two of this Court's decision, the allegation of racial discrimination could only have been avoided by declining Jordan's offer to plead in either of the two cases.*** (SR.173-74)

Contrary to Jordan's assertion that the Fifth District "completely missed the point," and notwithstanding its assumption that the prosecutor was naive, it quite astutely saw through the facade, and determined what was the point. If what Jordan alleges was true,

that the plea in the Thelma Reed murder had nothing to do with this case, then he had nothing upon which to base his alleged claim of racism.

Even if the Fifth District did miss the point, its opinion reversing the trial court's order allowing interrogatories to be taken of the prosecutor and his superiors, was right for the wrong reasons. *See eg. Combs v. State*, 436 So. 2d 93 (Fla. 1983). That is, in the absence of "***exceptionally clear proof***" of "***purposeful discrimination***", there was no basis for the trial court to call for an evidentiary hearing, much less order the State Attorney's Office to answer interrogatories in clear violation of the *Separation of Powers* doctrine.

POINT III

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN DENYING JORDAN'S MOTION TO DISQUALIFY THE PROSECUTOR.

Jordan's third claim is based upon a fallacious assumption that the prosecutor's presence at his interview was somehow improper, causing the prosecutor to become a "non-testifying witness" at his trial [Initial Brief at 63, 65]. In fact, this Court has recognized that ***"the presence of a prosecuting attorney***

is ... one factor to be considered in assessing the 'totality of the circumstances' in order to determine whether a defendant's statements are constitutionally admissible." *Suarez v. State*, 481 So. 2d 1201 (Fla. 1985), *cert. denied*, 476 U.S. 1178, 106 S.C. 2908 (1986). If this Court recognizes that the presence of a prosecutor is one factor to consider in determining the "totality of the circumstances" regarding the constitutional admissibility of defendants' statements, then the clear inference is that it is entirely proper for a prosecutor to be present when a suspect is being interviewed.

In fact, it is the ***duty*** of the State Attorney to ***interrogate*** witnesses. *Barnes v. State*, 58 So. 2d 157, 159 (Fla.1952). "As constitutional officers, [footnote omitted] State Attorneys must necessarily conduct complete and thorough ***investigations*** to determine whether or not they should execute the statutory oath required of them in filing informations." *State, Office of State Attorney for 20th Judicial Circuit v. Sievert*, 312 So. 2d 788, 791 (Fla. 2d DCA 1975). "***Mere first-hand knowledge*** of facts that will be proved at trial is not a per se bar to representation." *United States v. Hosford*, 782 F.2d 936, 938 (11th Cir.), *cert. denied*, 476 U.S. 1118, 106 S.Ct. 1977, 90 L.Ed.2d (1986). Therefore, a prosecutor's "***mere presence*** at the giving of the statement does

not, without more, disqualify him from prosecuting the case." *State v. Christopher*, 623 So. 2d 1228, 1229 (Fla. 3d DCA 1993).

The presence of a prosecutor during the interview of a potential capital murder suspect was acknowledged in *Schwab v. State*, 636 So. 2d 3, 4-5 (Fla.), *cert. denied*, 115 S.Ct. 364, 130 L.Ed.2d 317 (1994) and *Suarez v. State*, 481 So. 2d 1201 (Fla. 1985), *cert. denied*, 476 U.S. 1178, 106 S.C. 2908 (1986). In *Schwab*, the prosecutor flew to Ohio with a Cocoa policeman to interview the suspect. *Id.* at 4. After being returned to Brevard County, the prosecutor again joined the officer in interviewing Schwab. *Id.* This Court recognized the prosecutor's presence at both interviews in its opinion. *Id.* at 4-5. This Court recognized that Schwab had "no constitutional right to consult with a state attorney," [citation omitted] and recognized the following facts were dispositive of his claim:

> Schwab had been given and had waived his *Miranda*[22] rights several times in Ohio, and he was *Mirandized* again shortly after the exchange with White [prosecutor]. He never, however, asked for an attorney. ***Schwab was well aware of the adversarial nature of criminal proceedings and knew that White was the state's counsel, not his. In spite of all this, he spoke to White voluntarily***. ...

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[22]This Court's fn. 1, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d (1966).

Id. at 5.

In *Suarez*, unlike the circumstances in *Schwab* and in this cause, the defendant, prior to his admissions, already had a public defender representing him, and the prosecutor did not notify his counsel that he was interviewing him, in violation of DR 7-104(A)(1). In affirming the trial court's denial of Suarez' motion to suppress his statements, this Court found as follows:

> ***Although the presence of a prosecuting attorney is still one factor to be considered in assessing the "totality of the circumstances"*** in order to determine whether a defendant's statements are constitutionally admissible, we find no unconstitutional intrusion in this factual situation.

Id. at 1207. The emphasized portion of this Court's holding clearly contemplates the presence of a prosecutor when a suspect is being interviewed.

The record in this cause, in light of the aforementioned authorities, demonstrates the lack of merit to Jordan's third claim. At the hearing on Jordan's motion to suppress his statements, Officer Parks testified that Jordan requested to speak to the prosecutor, Jeff Ashton, regarding Sam Tory (R.96-97, 101). Not only did Jordan want to talk to the prosecutor, he also admitted during his direct examination at the suppression hearing that he knew Mr. Ashton worked for the State (R.140). On cross-

examination he admitted Mr. Ashton showed him his identification, and again, that he knew he was a prosecutor (R.154-55).

The trial court made explicit factual findings regarding Jordan's interview [R.2001-02] and denied Jordan's motion to suppress, finding in part as follows:

> ...I will den[y] the motion to suppress each of the three statements: the oral confession to Investigator Parks and both taped statements. I find that the Defendant was fully informed of his Fifth Amendment rights appropriately by the investigators, and I further find that the information regarding those rights was not new to the defendant; ***he had been through numerous Court proceedings previously and was well aware of his rights*** to remain silent and his rights to counsel at an appropriate stage of proceedings; the *Miranda* warnings, the rights to counsel, and the rights that have been delineated in the cases following *Miranda*; the rights that have been articulated by the Supreme Court to discourage some very specific misconduct by law enforcement officers. (R.203)

The trial court also made the express finding that Jordan understood that Mr. Ashton was the "prosecutor" and that they were "***adversaries***" (R.206).

Prior to the trial court's ruling on Jordan's motion to disqualify the prosecutor, Mr. Ashton argued as follows:

> I have not been subpoenaed by the defense at the trial. There is no evidence that I have any exculpatory evidence that the Defense might wish to present.
>
> I can represent to the Court that I am not going

to be called by the State in any way to testify as a witness.

Those are the only two grounds upon which I might be disqualified.

Mr. West says that the jury is going to conclude that I have superior knowledge or more knowledge than they do about Mr. Jordan. But it's going to be apparent from the facts and from what you have already heard that all of my conversations with Mr. Jordan are on the tape.

So the jury will have everything that I have. (R.222)

The trial court's ruling on Jordan's motion to disqualify the prosecutor was as follows:

THE COURT: I will deny your motion to disqualify the prosecutor.

In so doing, I will note for the record that we heard testimony from Mr. Ashton last week in the motion to suppress, and I allowed the Defense some latitude in presenting the evidence because of the allegations of Mr. Ashton's involvement and I wanted to hear when the Defense was able to develop any participation beyond the questions and answers disclosed in the transcripts of the statements given by the Defendant or whether there were any conversations of any substance that took place outside of that record, and further whether that evidence was able to be adduced and presented without the testimony of the prosecutor at trial.

And I heard nothing that would form a foundation or basis to disqualify the prosecutor or require his testimony at trial. ...

There is no information that he has that he vouches for.

> ***He simply poses questions and that does not require his testimony***. He is not even required to authenticate the tape so that can be done though other witnesses.
>
> And I am denying the motion. (R.225-227)

The trial court's conclusions come to this Court clothed with a presumption of correctness, and in view of the aforementioned authorities were in fact correct.

At page 63 Jordan asserts he had a right to a "disinterested" prosecutor, but the authorities he cites for this proposition clearly exhibit circumstances where the prosecutors had ***personal*** interests involving relations by marriage, which may have affected the manner in which they prosecuted their respective cases. That is not the case here. The prosecutor in this cause was performing his ***duty*** to ***interrogate*** witnesses and conduct thorough ***investigations*** to determine whether or not to prosecute Jordan for capital murder. *Barnes*, at 159; *State v. Sievert*, at 791. In short, he was doing his job.

As pointed out at the outset of this argument, Jordan alleges at pages 63 and 65 that the prosecutor's voice on the audiotaped interview caused him to become a "non-testifying witness at Jordan's trial." The trial court's finding supra clearly refutes this argument (R.225-27). The prosecutor simply posed questions,

"and that ***[did] not require his testimony***" (R.227). Further, there was "***no information that he [had] that he vouche[d] for***" contrary to Jordan's assertion to that effect in his brief at page 65.

Jordan's assertion on pages 66 and 69 that the prosecutor had improper racist motives was addressed in depth in the State's previous argument as to his second claim. In short, the record clearly refutes this unsubstantiated conclusory allegation.

As to his assertion on page 66 that the prosecutor "pushed the envelope," most of the matters alleged as support for this conjecture were previously addressed in argument to the first two claims. His allegation that Ashton called Keydrick a "demon", besides being taken out of context, is waived because he voiced only a general objection, without requesting a cautionary instruction to disregard, or moving for a mistrial (T.2728). *See United States v. Young*, 410 U.S. 1, 105 S.Ct. 1038, 1044-45, 84 L.Ed.2d 1 (1985); *Muehleman v. State*, 503 So. 2d 310, 317 (Fla. 1987), *Ferguson v. State*, 417 So. 2d 639, 641-42 (Fla. 1982).

Needless to say, Jordan's representation of what the prosecutor said in his opening statement regarding Ann Mintner's final walk around Lake Davis, and what was actually said are two different matters, and the State will rely on this Court's review of the record (T.1149-53). However, the trial court overruled his

objection on this matter, and he never requested a cautionary instruction, of which it is presumed a jury will follow, and has been held to be a necessary prequistite to a motion for mistrial. *See Greer v. Miller*, 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618, 631 (1987); *Ferguson v. State, supra.*

Jordan's argument regarding the wording of his taped confession about being "tore up" seen at pages 68-70, concerns matters properly raised in rebuttal. The State's rebuttal challenged Dr. Phillips' conclusion that Jordan was intoxicated when he murdered Ann Mintner, and therefore, that the shooting was unintentional. The prosecutor's closing argument concerning this matter, which Jordan alleges was "hotly contested," was "fair comment," and it was up to the judge and jury to decide what weight to give the evidence and testimony. *See Mann v. State*, 603 So. 2d 1141, 1143 (Fla. 1992). The penalty phase aspect of this issue exhibits the prosecutor properly challenging his polygraph results in that they are inherently unreliable. Similarly, it was proper for the prosecutor to introduce evidence refuting Jordan's assertion that he was an alcoholic.

Finally, Jordan's assertion at page 70 that the prosecutor argued that he "was a lost cause" and that "[w]e should kill him" is merely his inflamatory representation of the prosecutor's

closing argument, to which the State will defer to this Court's objective review of the same. Jordan's entire argument as to this claim, when carefully scrutinized, is no more than an attack on the prosecutor for doing his job in the adversarial setting of a capital murder trial.[23] "In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant ... vacating the sentence and remanding for a new penalty-phase trial." *Bertolotti v. State*, 476 So. 2d 130 (Fla. 1985). Without conceding as much, even if the trial court did error in failing to disqualify the prosecutor, it would be harmless beyond a reasonable doubt, because a different prosecutor would have had the exact same evidence as to Jordan's guilt and aggravation during the penalty phase. *DiGuilio*.

POINT IV

THE TRIAL COURT CORRECTLY EXERCISED ITS WIDE DISCRETION IN MATTERS PERTAINING TO THE ADMISSION OF EVIDENCE WHERE IT DID NOT ALLOW JORDAN TO ELICIT ON CROSS-EXAMINATION OF A STATE'S WITNESS A SELF-SERVING EXCULPATORY STATEMENT.

At first blush it may seem that *Johnson v. State*, 653 So. 2d 1074 (Fla. 3d DCA 1995), which is allegedly premised upon the "*rule*

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[23]Or, as Jordan wrote on page 66 of his brief, egaging in "***vigorous prosecution***."

of completeness" found in §90.108 Fla. Stat. (1993), is dispositive of this claim. However, a closer reading of Professor Ehrhardt's analysis of this rule, which the Third District cited as authority for its ruling, does not necessarily lead to the same conclusion reached by the panel in that opinion. *See*, Ehrhardt, *Florida Evidence* §108.1 (1995 ed.). The State's reading of that analysis leads to its conclusion that the trial court in this cause correctly limited Jordan from eliciting an exculpatory comment he made to Sam Tory when the latter was under cross-examination, because it was ***inadmissible hearsay***. Jordan's self-serving statement that "he did not mean to kill the victim" occurred during a ***separate conversation, on a different day,*** than the statement he made that he had "popped somebody" (T.1341-44, 1368-76, 1378-1400).

The "rule of completeness" is explained by Professor Ehrhardt as follows:

> ...§90.108 provides that when a portion of a writing, document or recorded statement is admitted, an adverse party has the right to require the remainder of the writing or document to be introduced if fairness requires that it should be considered contemporaneously. [footnote omitted] The opposing party is entitled to have a portion of the writing introduced only insofar as it tends to explain or shed light upon the part already admitted.

Id. at 33. Thus, the "rule of completeness" of §90.108 concerns

writings, documents, or recorded statements, not testimony regarding part of a conversation. However, the rule has been interpreted by Florida Courts to apply to conversations as well. It is the manner in which the rule is currently interpreted as regards testimony concerning conversations, which the State respectfully submits requires rethinking in view of Professor Ehrhardt's analysis.

Professor Ehrhardt states:

> Although the language of section 90.108 does not cover testimony regarding part of a conversation, a similar consideration of the potential for unfairness may require the admission of ***the remainder of a conversation*** to the extent necessary to remove any potential for prejudice that may result from the original evidence being taken out of context. [footnote omitted]

The important aspect of this statement, and one which the State submits has been missed by the Courts, including this one, is Professor Ehrhardt's reference to "the remainder of **a** conversation." For example, this Court in *Christopher v. State*, 583 So. 2d 642, 645-46 (Fla. 1991), which like the Third District in *Johnson, supra* at 1075, mistakenly cited the following portion of *Eberhardt v. State*, 550 So. 2d 102, 105 (Fla. 1st DCA 1989), *rev. denied*, 560 So. 2d 234 (Fla. 1990):

> ...the rule of completeness generally allows admission of the balance of the conversation as

> well as ***other related conversations*** that in fairness are necessary for the jury to accurately perceive the whole context of what has transpired between the two. Ehrhardt, *Florida Evidence*, §108.1 (2d Ed. 1984).

Although the First District cites Professor Ehrhardt as authority for its expansion of the "rule of completeness" to include "other related conversations", no such language is found in his second edition.[24] Further, it is the State's position that he would not favor such an expansion either in view of his discourse which follows.

Professor Ehrhardt analyzed this Court's use of the "rule of completeness" regarding a video-taped interview of a defendant in *Long v. State*, 610 So. 2d 1276 (Fla. 1992):

> The opinion seems to suggest that fairness ***always*** requires the remainder of a statement to be introduced. ***Such an interpretation is contrary to the intent of section 90.108.***

Ehrhardt, at 34, n.3. Further, he recognized that "the rule of completeness" does ***not*** mean that the remainder of a document or writing is "***automatically*** admissible when requested or offered by the adverse party." *Id.* at 35.

Professor Ehrhardt finds there are two limitations to

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[24]The 1993 edition contains the same language quoted above from the 1995 edition.

admissibility under the rule. *Id.*

> First, since the purpose of the rule is to insure that a part of a writing or statement is not taken out of context, other parts of ***the writing or document*** which relate to the same subject and tend to explain the meaning of the portion already received are admissible under section 90.108 [footnote omitted].

He further recognized regarding this first limitation: "Section 90.108 grants wide discretion to the trial judge in making the determination." *Id.* at 36. The second limitation recognized by him, and which the State finds most significant regarding Jordan's self-serving statement to Tory, "relates to whether the evidence admitted under this section must also be admissible under other evidentiary rules." *Id.* at 36. After presenting the views of recognized scholars on this question, Professor Ehrhardt opined as follows:

> While it is not clear which interpretation the Florida courts should adopt, [footnote omitted] it seems undesirable to adopt a strict rule either that evidence offered under the rule of completeness must be otherwise admissible or that otherwise inadmissible evidence is automatically admissible. ***A trial judge should be very hesitant to admit otherwise inadmissible evidence under section 90.108***, but should have the discretion to do so if "fairness" demands. ***The general unreliability of inadmissible evidence should be one of the court's considerations in determining whether fairness requires admission***.

It follows that the trial court in this cause correctly

exercised its wide discretion in not allowing Jordan's inadmissible self-serving statement into evidence. And, despite this Court's reference to *Eberhardt*, it still reached the correct result in *Christopher*, and the State submits that result refutes Jordan's current claim. As in *Christopher*, the facts in this cause concern ***two separate and distinct conversations on different days***.

The trial court asked Tory questions which clearly established the separateness of the conversations (T.1397). The trial court's ruling, regarding Jordan's exculpatory statement to Tory on Monday night, was as follows:

> THE COURT: Mr. West, it's my conclusion that the statements from this second discussion are from, clearly, a second discussion, that they're not subject to the same exceptions to the hearsay rule and they are beyond the scope of what was offered by the State in their direct examination.
>
> And I will sustain the State's objection to you inquiring into those areas at this point. (T.1399)

Given Professor Ehrhardt's analysis, the trial court in the instant cause correctly exercised its wide discretion.

However, if this Court should deem that the trial court erred, it was harmless beyond a reasonable doubt in view of the following matters. *DiGuilio*. As regards the guilt phase, the manner in which Jordan murdered Ann Mintner refutes his self-serving comment that he "didn't mean to kill her." As regards the penalty phase,

as previously delineated in the State's argument as to Jordan's first claim regarding Carol Brown's testimony, he was allowed to elicit on her cross-examination that he "didn't mean to kill her" (T.1788-90).[25] So, there was no error as to the penalty phase.

POINT V

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN DENYING JORDAN'S MOTION TO PRECLUDE THE STATE FROM ARGUING BOTH PREMEDITATED AND FELONY MURDER.

It is well settled in Florida that "the state may proceed on theories of both premeditated and felony murder when only premeditated first-degree murder is charged." *Young v. State*, 579 So. 2d 721, 724 (Fla. 1991), *cert. denied*, 112 S.Ct. 1198 (1992). "Also, a special verdict form demonstrating which theory the jury based its verdict on is not required." *Id., citing Haliburton v. State*, 561 So. 2d 248 (Fla.), *cert. denied*, 111 S.Ct. 2910 (1990).

Jordan conceded this point in his initial "Motion to Preclude First Degree Felony Murder Theory of Prosecution" (R.1074, 5.). The trial court accepted the concession at the pre-trial hearing on this and other motions, denying it without comment (R.234-235). At the conclusion of the State's case-in-chief, the trial court ruled as follows regarding Jordan's motion for judgment of acquittal on

[25]When the trial court ruled during the guilt phase on this matter, Jordan requested that Tory be kept under subpoena so that his statement could come out during the penalty phase (T.1401-04).

the first degree murder count:

> THE COURT: I find the evidence to be sufficient to support a jury finding of first degree murder under either premeditated first degree murder or felony first degree murder.
>
> The testimony here is the actual fatal shots have been delivered while the victim was on the ground or the last shot so that there was more than enough time for the defendant to have reflected what was taking place.
>
> And, in addition, there was evidence that his killing took place in connection with, as part of the set of facts and circumstances surrounding the attempted armed robbery. (T.1500-01)

This finding, which of course is afforded a presumption of correctness, refutes Jordan's argument on page 75 that "[t]he evidence does not support a conviction for premeditated murder." *See Young*, at 723.

The matter arose again at the charge conference regarding the jury instruction (T.1525-27). Jordan argued the jury had to be unanimous in convicting under either theory, to which the trial court correctly responded: "If your argument were to prevail, then *Haliburton* would have to be reversed (T.1527)." *See also Young.*

Jordan never objected to the prosecutor's closing argument on the alternative theories of felony and/or premeditated murder, and he can't be heard to complain now (T.1549-62). Of course, this was entirely proper. *Young*, at 724. His contention as to the jury

question is also waived, because his suggestion (T.1597) became the basis for the trial court's response in writing to the jury's question, which he, along with the prosecutor, approved (T.1601-02).

As regards Jordan's reference to *Boler v.State* [and *Oats v. State*], Case No. 85,623, currently pending before this Court, the State would rely on the arguments presented in its brief and at oral argument in that cause. In short, this Court held in *State v. Enmund*, 476 So. 2d 165 (1985), that an underlying felony is not a necessarily included offense of felony murder. Further, the Florida legislature intends that the offenses of first degree murder, as well as the predicate felony are separate offenses, and each must be punished separately. §775.021(4), Fla. Stat. (1991). Jordan's conviction and sentence for attempted armed robbery should be affirmed.

POINT VI

THE TRIAL COURT CORRECTLY EXERCISED ITS WIDE LATITUDE IN REGULATING PROCEEDINGS BEFORE IT, IN THIS INSTANCE, VOIR DIRE.

A. Scope of Voir Dire

"A Trial court has wide latitude in regulating proceedings before it." *Johnson v. State*, 608 So. 2d 4, 9 (Fla. 1992), *cert. denied* 113 S.Ct. 2366 (1993). "The scope of voir dire questioning

rests in the sound discretion of the court and will not be interfered with unless that discretion is clearly abused." *Vining v. State*, 637 So. 2d 921, 926 (Fla.), *cert. denied* 115 S.Ct. 589 (1994). Jordan's counsel "was able to explore the potential jurors' understanding of the two-part procedure involved and their ability to follow the law as instructed by the judge in the penalty phase. *Id.*

Jordan's rendition of the circumstances relating to his sixth claim neglects crucial facts which the State herein supplies. First, Jordan asked for, and received, the submission of questionnaires to prospective jurors for purposes of determination of potential bias regarding pre-trial publicity and other matters germaine to challenges for cause (R.256-289). He drafted numerous questions, many of which were used on the questionnaire that was ultimately constructed for the purpose of screening prospective jurors for cause (R.256-289, 1245-1254, 1322, 1340-1643, 1699-1761; T.33-1104). Second, the trial court made the following finding on the record regarding jury selection:

> THE COURT:...After the two days of initial questioning the general voir dire, the voir dire of the whole panel, the prosecutor examined the 42 jurors qualified for an hour and a half, and ***the defense examined them for just short of seven hours, and I wanted the record to reflect that each party had been given as much time as they felt they***

needed, I believe, to examine those jurors before selection. (T.1267-68)

Jordan's conclusory allegation on page 77 of his brief that his voir dire of prospective jurors was limited, besides lacking adequate record support, other than mere page cites, is quite obviously without substance. He first cites T.182-83, but a review of the record exhibits that he requested, and received, further questionning of the first panel (T.183-200). The next four record cites concern improper questionning by his counsel regarding the weight to be afforded aggravating and mitigating circumstances, to which the State's objection was properly sustained (T.284, 570-75, 581-84, 783). His next complained of limitation, exhibits his use of a prospective juror to sensitize her panel to his penalty phase mitigation regarding his abusive and traumatized childhood, to which the State's objection was once again properly sustained (T.882). His last two record cites again exhibit improper questions related to the weight of penalty phase factors, of which the trial court properly sustained the State's objections (T.991-93, 1033-37).[26]

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[26]In fact, there were other instances besides those cited by Jordan, in which the prosecutor objected on "***weight***" grounds (See eg. T.198, 200, 377, 387, 391-93, 570-75) and on asking improper questions such as how they would "feel" about the Thelma Reed murder or whether HRS had all the money it needed to care for its clients (See eg. T.186-90). These are merely examples, the record is replete with such instances.

The trial court correctly exercised its sound discretion as regards the scope of voir dire questioning. Even if it did not, his argument as to this claim is waived because he accepted the jury that was seated without objection (T.1110). *See e.g., Joiner v. State*, 618 So. 2d 174, 175 (Fla. 1993) (Defendant "affirmatively accepted the jury immediately prior to its being sworn without reservation of his earlier-made objection," rendering it waived.) It is harmless beyond a reasonable doubt, given his acceptance of the panel, the use of his requested questionnire to screen for cause, and his counsel's "***seven hours***" of voir dire (T.1267-68). *DiGuilio; Vining*, at 926.

B. <u>Individual Voir Dire</u>

"The granting of individual and sequestered voir dire is within the trial court's discretion." *Jackson v. State*, 498 So. 2d 406, 409 (Fla. 1986), *cert. denied*, 483 U.S. 1010, *reh. denied*, 483 U.S. 1041; *quoting Davis v. State*, 461 So.2d 67 (Fla. 1984), *cert. denied*, 105 S.Ct. 3540 (1985); *See also, Pietri v. State*, 644 So. 2d 1347, 1351 (Fla. 1994). "The trial judge has great discretion in deciding if prospective jurors must be questioned individually about publicity the case may have received." *Johnson, supra*, at 9;

citing Mu'Min v. Virgina, 111 S.Ct. 1899 (1991).[27]

Jordan's comment on page 78 "that there is no case which holds that --under federal law, in every capital case, without exception -- 'individualized segregated voir dire is constitutionally required,' [citation omitted]," is disingenous at best. *Mu'Min* demonstrates that the converse is true, that the United States Supreme Court, like Florida, defers to the trial court's sound discretion on this matter. *See also, Cummings v. Dugger*, 862 F.2d 1504, 1508-09 (11th Cir.); *cert. denied*, 109 S.Ct. 3169 (1989). Given this precedent, Jordan's smorgasboard of alleged prejudice seen on pages 79-80 fails to demonstrate that the trial court abused its discretion regarding individual voir dire.

Jordan's claim as to individual voir dire is waived. First, at the conclusion of the first day of voir dire, July 19, 1993, Jordan's counsel suggested "it would be quicker if we did it individually rather than the panels (T.222)." The prosecutor disagreed (T.222). The trial court took the matter under advisement: "We'll have 12 in the jury deliberation room at 9:00 in

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[27]As the undersigned was preparing this brief he was handed this Court's opinion in *Boggs v. State*, Case No. 83,409, February 8, 1996. *Boggs* is clearly distinguishable from this cause, and analagous to *Pietri*, in that Jordan's requested questionnaire was used in part to weed out prospective jurors tainted by pre-trial publicity. Like *Pietri*, no juror who had formed an opinion actually sat on the jury, because they were removed for cause, and unlike *Boggs*, Jordan was not forced to use peremptories to remove the same.

the morning, and ***I'll think about it overnight as to whether we'll do it one at a time*** (T.223)." The next morning, July 20, 1993, Jordan's counsel failed to renew his request for individual voir dire, nor did he renew it at any subsequent time.

Further evidence of waiver came after 35 prospective jurors had survived the initial voir dire cause (T.507-513). The prosecutor suggested they question the remaining prospective jurors "***individually*** until we get 42 and then stop (T.509)." The trial court explained how that fit into its desire to achieve a venire of 42 potential jurors from which to choose the jury, and requested Jordan's counsel consider the prosecutor's suggestion (T.509-511). Jordan's counsel responded after consideration: "My suggestion is that we call this panel and question them as we have the others (T.512)." The Court then ordered the prosecutor: "Question them as we have before... (T.524)." Finally, as previously argued, he affirmatively accepted the panel before it was sworn. *See Joiner, supra*.

Jordan's smorgasboard of alleged jury tainting at pages 79-80, when viewed in context and carefully scrutinized, simply does not reflect the prejudice he argues. He alleges "several of the potential jurors expressed open hostility toward" him and references ***one***, Mr. Henderson, because he was the only one.

Further, Mr. Henderson was ***individually*** voir dired,[28] a fact which Jordan conveniently neglects to relate, and his opinion, as alleged by Jordan on page 80, that he "favored death in all murder cases because the law lets too many criminals 'get away with murder,'" occurred at that time and was never heard by his panel. Jordan's reference to Ms. Mathiesen as knowing the victim and "expressing her concern" about her ability to be impartial, inflates her response to a simple question regarding her ability to remain impartial, and she was immediately stricken for cause with no objection from the State (T.253-258).

As regards the other potential jurors Burnham, McCollum, Fluke, Meyers, Eatmon, Jensen, Fogle, Greenlee, Beauchaine, Cobb, Kafka, and Hart, Jordan never asked that their respective panels be stricken because they had been tainted, and, of course, he accepted the chosen jury. His reference to Michelle Bruens as favoring the death penalty because of "prison overcrowding" besides being taken out of context, is of no merit because he allowed her to sit on his jury (R.1717-19; T.271-72, 1108-10). Further, a review of the subsequent questioning of potential jurors after the alleged prejudicial remarks were made, in most instances reflects the other

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[28]Some of the potential jurors that were struck for cause were ***individually*** voir dired. (See eg. T.168-73/Ms. Finnigan and Mr. Henderson; T.592-95/Ms. Kutch)

potential jurors did not agree with the opinions expressed (See eg. Mr. Henderson's "animosity in his heart" about Ms. Mintner's murder, T.35-45; Ms. Snyder found Ms. Burnham's views on life imprisonment "a little bit more radical" than her own, T.78, 97; Mr. Jensen's automatic death for 1st degree murder,[29] followed by Mr. Zubricky expressing his feelings not as strong T.279-80; Mr. Greenlee's opinion that he "absolutely" would not recommend death because Jordan had killed twice followed by his entire panel expressing they disagreed with him T.396-413; Ms. Cobb's panel did not agree with shifting the burden of proof T.547-48.)

The aforementioned instances are only used as examples, and are not meant to be exclusive of potential jurors clearly expressing their ***own*** views on various alleged prejudicial remarks made by Jordan, which he claims tainted his jury, and which emphatically refutes as much. These instances also serve to demonstrate that if this Court should find there was error regarding Jordan's claim, then it was harmless beyond a reasonable doubt, particularly in view of his failure to strike respective panels, his acceptance of the jury, and his allowing one of the complained of jurors [Ms. Bruens] to sit on his jury. *DiGuilio.*

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[29]A review of Jordan's voir dire of prospective jurors finds his counsel repeatedly using "automatically" imposing death in an obvious attempt to elicit a particular response (T.33-1104).

POINT VII

THE TRIAL COURT CORRECTLY EXERCISED ITS WIDE DISCRETION IN DENYING JORDAN'S MOTION FOR EXCULPATORY EVIDENCE AT THE PENALTY PHASE WHERE HE DID NOT INVOKE FLA. R. CRIM. P. 3.220 SO AS TO AVOID RECIPROCAL DISCOVERY.

Jordan invoked discovery as to the guilt phase, but did not as to the penalty phase for strategic reasons. At the penalty phase [and now] he attempted to get through the back door, without paying at the front door, or, in less colloquial terms, he attempted to gain discovery from the State at the penalty phase without invoking reciprocal discovery. His claim as to unspecificed, unsubstantiated, and unsupported *Brady*[30] material is unpreserved, and to the extent he is attempting to preserve any future *Brady* claim, this Court should unequivocally find this issue procedurally barred now and forever.

Fla. R. Crim. P. 3.220(b)(1)(xi), regarding discovery, applies to the penalty phase in a capital murder case. *See Elledge v. State*, 613 So. 2d 434, 435 (Fla. 1993). "'A prosecutor is not constitutionally obligated to obtain information dehors his files for the purpose of discovering information which defense counsel can use ...' *Morgan v. Salamack*, 735 F.2d 354, 358 (2nd Cir.

[30]*Brady v. Maryland*, 373 U.S. 83 (1963).

1984)." *Stano v. Dugger*, 883 F.2d 900, 905 (11th Cir. 1989). "In addition, the State has no obligation 'to communicate preliminary, challenged, or speculative information.' *United States v. Agurs*, 427 U.S. 97, 109 n.16 (1976)..." *Stano v. Dugger, supra*, at 905.

In Florida, "[w]hile the state cannot withhold material evidence favorable to an accused , it is not the state's duty to actively assist the defense in investigating the case. *State v. Coney*, 294 So. 2d 82 (Fla. 1973)." *Hansbrough v. State*, 509 So. 2d 1081, 1084 (Fla. 1987); *See also, State v. Crawford*, 257 So. 2d 898 (Fla. 1972). "[T]he state is not required to prepare the defense's case. Medina v. State, 466 So. 2d 1046 (Fla. 1985)." *Hansbrough*. "This is especially true when the evidence is as accessbile to the defense as to the state. *See James v. State*, 453 So. 2d 786 (Fla.), *cert, denied*, 469 U.S. 1098 (1984)." *Hansbrough; See also, Provenzano v. State*, 616 So. 2d 428, 430 (Fla.1993).

The trial court [and the prosecutor][31] saw through Jordan's attempt to circumvent the applicable rule concerning discovery, and correctly denied his motion (T.16-17).

There can be no error where Jordan has failed to allege what *Brady* material the State withheld. The trial court's ruling was a

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[31]See T.11-13, 19-21.

proper exercise of its wide discretion, and even if there was error, in the absence of evidence regarding *Brady* material, it is most assuredly harmless beyond a reasonable doubt. *See Provenzano*, at 430. His mere mention of *Brady* without record support is nothing more than smoke and mirrors, and most certainly does not preserve it for future review. His claim is devoid of merit and procedurally barred.

POINT VIII

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN ALLOWING FAIR REBUTTAL BY THE STATE AFTER JORDAN OPENED THE DOOR BY ELICITING TESTIMONY REGARDING ELIGIBILITY FOR PAROLE.

Jordan ***opened the door*** when he called Merle Davis in mitigation to testify as to his receiving consecutive life sentences for the murders of Thelma Reed and Ann Mintner (T.2464-65). *See e.g., Valle v. State*, 581 So. 2d 40,45-46 (Fla. 1991), *cert. denied, Buford v. State*, 403 So. 2d 943 (Fla. 1981), *cert. denied*, 454 U.S. 1163, 1164 (1982); *McCrae v. State*, 395 So. 2d 1145 (Fla. 1980), *cert. denied*, 454 U.S. 1041 (1981).

Valle v. State, supra, at 46, is in fact dispositive of this claim. "Once the defense argues the existence of mitigators, the State has a right to rebut through any means permitted by the rules of evidence [footnote omitted], and the defense will not be heard

to complain otherwise." *Wuornos v. State*, 644 So. 2d 1000, 1009-1010 (Fla. 1994). Similarly, in this cause, after Jordan opened the door, the prosecutor in rebuttal could ask of Mr. Davis:[32]

> Q Sir, would it be fair to say the law and rules you've described are subject to change by the bodies that created those rules and laws?
>
> A That's true. (T.2468)

Further, this claim is waived, as Jordan did not request a cautionary instruction or request a mistrial, demonstrating it was harmless beyond a reasonable doubt as well. *See Wuornos v. State, supra*, at 1010; *Teffeteller v. State*, 439 So. 2d 840, 845 (Fla. 1993); *DiGuilio*.[33]

POINT IX

JORDAN'S SENTENCE OF DEATH IS CONSTITUTIONALLY CORRECT.

A. The Sentencing Order

"A jury recommendation under our trifurcated death penalty statute should be given ***great weight***." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). In this cause, the trial court afforded the

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[32]The prosecutor correctly asked why Mr. Davis' testimony was being given in the first place. "I could not have put this man on to have him predict parole release date, the defense has brought it in." (T.2466-67)

[33]Jordan's cite to *McKendry v. State*, 641 So. 2d 45 (Fla. 1994), which traces various amendments to legislation to determine intent, if anything, supports the question asked by the State in rebuttal.

jury recommendation its due, and correctly sentenced Jordan to death. The trial judge found in its sentencing order: "The Court finds, ***as did the jury***, that the aggravating circumstances outweigh the mitigating circumstances present (R.1941, 1950)." The only other time the trial judge spoke of the jury in its order was at the outset: "On September 28, 1993 the jury returned an 8 to 4 recommendation that the defendant be sentenced to death in the electric chair (R.1941)." The trial court applied the correct standard. Given what Jordan refers to as "the trial court's exhaustive anlaysis of the evidence (p.84)," and its "many months of sober reflection", the State respectfully submits the trial court would not want to reconsider that which it already has "very carefully considered (R.1941, 1950)."

(1) Jordan's Juvenile Disposition

Jordan argues at pages 85-87 that the State failed to prove that Jordan's juvenile adjudication for lewd assault was a crime of violence, and that the trial court and the jury improperly considered it and a burglary adjudication. Subsequent to his argument, this Court decided *Merck v. State*, 20 Fla. L. Weekly (Fla. October 12, 1995). In light of that opinion, and in keeping with Jordan's concession on page 86 "that the State proved other, prior violent felony convictions," any error regarding the lewd

assault and burglary juvenile adjudications was harmless beyond a reasonable doubt.[34]

The trial court found four aggravating factors: 1.) under a sentence of imprisonment or on community control; 2.) prior capital felony or violent felony including: a.) burglary of a dwelling and lewd assault [alleged error], b.) robbery , c.) ***Thelma Reed murder***; 3.) during an attempted robbery; and 4.) pecuniary gain (R.1942-43). The trial court weighed aggravators 3 and 4 together as one (R.1943).

It is the State's position that Jordan's arguments as to the juvenile adjudications are waived. Unlike *Merck*, Jordan never objected on the grounds he now raises for the first time in this appeal. *Id.* at S539. His objection at the time the evidence was introduced through Officer Casslen was to introduction of the petition, and in fact, he stipulated that the State proved the convictions of lewd assault on a child and burglary of a dwelling (T.1673-1683). He neither challenged the lewd assault as a crime of violence, or that it and the burlary were juvenile adjudications as opposed to convictions (T.1680-83). *Id.* His "Motion for

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[34]*See Owen v. State*, 596 So. 2d 985 (Fla. 1992); *Tafero v. State*, 561 So. 2d 557 (Fla. 1990) (The law is well-settled that *Johnson* error is properly the subject of harmles error anlaysis, and that such an error can be harmless).

Reconsideration of Sentence/Objection to Sentencing Order" also failed to raise either of the arguments now raised.

Any error was harmless beyond a reasonable doubt. *DiGuilio*. Again, unlike *Merck*, the testimony of Officer Casslen was not comparable to the "dramatic testimony" regarding a shooting which this Court could not be certain did not "taint the recommedation of the jury." *Id.* The prosecutor simply stated the crimes during closing argument and moved on (T.2699). In short, the juvenile adjudications were not made a feature of Jordan's penalty phase.

The prior violent felony aggravator, even in the absence of the complained of adjudications, was still proven beyond a reasonable doubt by the two remaining adult convictions, rendering any *Merck* error harmless beyond a reasonable doubt because it was proven irregardless and the jury would have recommended death with or without the juvenile adjudications. *See DiGuilio, supra; Peterka v. State*, 640 So. 2d 59 (Fla. 1994); *Preston v. State*, 531 So. 2d 154 (Fla. 1988). First, was the robbery conviction, where he threatened to kill the victim, Ronnie Goodman, ultimately commanding his girlfriend to "get the gun and shoot him (T.1684-90)." Second, there was the murder/rape of Thelma Reed, which he tried to cover up by arson (T.1705-10). The sentencing court's inclusion of the juvenile adjudications is in essence surplusage

because the aggravator exists beyond a reasonable doubt. There is no reason to set aside Henyard's death sentence under those circumstances.[35]

(2) Extreme Mental or Emotional Disturbance.

"Technically, a trial judge ***does not reject*** evidence which is considered in mitigation. Instead, the trial judge finds that its ***weight*** is insufficient to overcome the aggravating factors." *Echols v. State*, 484 So. 2d 568, 576 (Fla. 1986), *cert. denied*, . The decision as to whether a mitigating circumstance has been established is within the trial court's discretion, and the court's decision will not be reversed merely because an appellant reaches a different consclusion. *See Hall v. State*, 614 So. 2d 473 (Fla. 1993); *Preston v.State*, 607 So. 2d 404, 412 (Fla. 1992); *Lucas v. State*, 568 So. 2d 18 (Fla. 1990), *appeal after remand*, 613 So. 2d 408, 410 (Fla. 1992); *Sireci v. State*, 587 So. 2d 450 (1991), *cert. denied*, 112 S.Ct.1500 (1992). "Moreover, whether a mitigator has been established is a question of fact, and a court's findings are presumed correct and will be upheld if supported. *Campbell v. State*, 571 So. 2d 415 (Fla. 1990)." *Lucas, after remand*, at 410.

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[35]There is no Federal constitutional implication to the trial court's consideration of the juvenile adjudications as one component of the prior violent felony aggravator. *See, e.g. Lindsey v. Smith*, 820 F.2d 1137, 1154 (11th Cir. 1987); *Brooks v. Francis*, 716 F.2d 780, 791 (11th Cir. 1983).

"...[Q]ualified experts certainly should be permitted to testify on the question [as to a defendant's lying], but the finder of fact is not necessarily required to accept the testimony." *Wuornos, supra*, at 1010. Further, "even uncontroverted *opinion* [emphasis this Court's] testimony can be rejected, and especially where it is hard to square with the other evidence at hand." *Id., citing Walls v. State*, 641 So. 2d 381, 390-91, n.8 (Fla. 1994). A mitigating factor "...can be deemed 'controverted' if there is any contrary or inconsistent evidence in the guilt or penalty phases, or if evidence of the factor is untrustworthy, improbable, or unbelievable. *Walls*." *Id.*, at 1010, n.6.

Given what Jordan concedes as its "exhaustive anlaysis of the evidence (p.84)," the trial court correctly exercised its discretion in not finding that he was under the influence of ***extreme*** mental or emotional disturbance, in light of the aforementioned authorities, and its extensive findings regarding the same (1943-44).[36] What Jordan "really complains about here is the weight the trial court accorded the evidence [he] presented in mitigation." *Echols, supra*, at 576; *citing Porter v. State*, 429 So. 2d 293, 296 (Fla.), *cert. denied* 464 U.S. 865 (1983).

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[36]*See Lemon v. State*, 456 So. 2d 885, 888 (Fla. 1984).

"However, 'mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence.'" *Id., citing Quince v. State*, 414 So. 2d 185, 187 (Fla. 1982). Even if this Court were to find that the trial court erred, it would be harmless beyond a doubt because what Jordan complains was not considered as a statutory mitigator, was in fact considered as a non-statutory mitigator. *See Wuornos*, at 1011; *Lemon*, at 888.

(3) Abusive Childhood.

The same authorities cited in the State's argument under (2) supra are equally applicable here. *See Echols* at 576; *Hall; Preston* at 412; *Lucas II* at 410; *Sireci; Campbell.* Jordan's argument, as seen on page 89, is: "Even though the trial court stated that he gave 'substantial weight' to these mitigating circumstances, the court did not accord the evidence its **proper** [emphasis Jordan's] weight." Obviously, Jordan is merely disagreeing with the force to be given mitigating evidence, which is an insufficient basis for challenging a sentence. *Echols*, at 576; *Quince*, at 187. The trial court correctly exercised its discretion in finding as it did regarding Jordan's childhood (R.1946-1948). The only thing improper as to this claim, is Jordan's insufficient basis for challenging his sentence. Without conceding as much, any error is harmless beyond a reasonable doubt.

DiGuilio; Wuornos.

(4) Jordan's Courtroom Demeanor.

Again, Jordan is merely disagreeing with the weight the trial court afforded mitigating evidence. *See Echols* at 576; *Hall; Preston* at 412; *Lucas II* at 410; *Sireci; Campbell.* Error, if any, was harmless beyond a reasonable doubt. *DiGuilio; Wuornos.*

B. Alleged Grossman Error.[37]

Jordan's rendition of the circumstances surrounding the 2 sentencing orders is inaccurate, and involved nothing more than an admitted ***clerical error*** made by the trial judge when he was typing up the original order. A correct rendition of the facts follows.

At the conclusion of Jordan's sentencing on July 22, 1994, the prosecutor pointed out to the trial judge regarding his Order assessing the aggravating factor concerning Thelma Reed's murder "you indicated that he [Jordan] had pled to murder, arson and burglary. In fact he only pled to the murder (R.749)." State Attorney Lamar corrected the prosecutor, stating that it was sexual battery and arson, not burgary and arson (R.749). The trial judge responded that the inclusion of the nol prossed sexual battery and arson counts "would not make a difference in my weighing process,

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[37]*Grossman v. State*, 525 So. 2d 833 (Fla. 1988).

but I checked the court file and thought that I saw that as part of the order when I reviewed the file (R.749)." Jordan's counsel indicated that "[i]f the court file says that, it's wrong (R.749)." The trial judge admitted he may have "made an error in checking the records (R.750)." It was clearly understood by all parties concerned that if the trial court made a mistake then everyone would be called back for a hearing "to correct [the] sentencing order (R.750)."

On July 27, 1994, true to his word, the trial judge conducted another hearing in which it reiterated that it had made a "***clerical error***," and ***"[the] reference to those offenses played no part in my weighing process or consideration*** (R.753-54)." Initially, there was no response from the defense, but later Jordan's counsel expressed a concern that "the Court went extra record..." and requested leave to file a pleading expressing his concerns (R.755-56). The trial court granted the defense's request stating unequivocally: "***I have not consulted anything outside the record*** (R.755-56)." Jordan's counsel continued allegations of extra record considerations to which the trial judge reiterated:

> ***what I weighed was the fact that the other murder conviction, the others did not play a part. I was merely attempting to list the names of the offenses and made a clerical error in listing that in my draft***. (R.757)

At the hearing on Jordan's "Motion For Reconsideration of Sentence," conducted on August 18, 1994, the trial judge again stated for the record that what was involved was a ***clerical error*** (R.785-86).

These facts clearly demonstrate that there was no violation of the procedural rule created in *Grossman* that all written orders imposing death be prepared prior to the oral pronouncement of sentence for filing concurrent with said pronouncement. *Id.*, at 841. Rather, the trial court committed a clerical error which it corrected. "[T]here is not even a hint that the judge considered or relied on" the complained of nol prossed counts, and in fact the record is quite clear that he did not. *See Lucas II*, at 411. Error, if any, clearly was harmless beyond a reasonable doubt. *Diguilio; Grossman, supra*, at 845-46.

C. Restriction of Irrelevant Evidence.

In the penalty phase of a capital murder trial, "evidence may be presented as to any matter that the court deems ***relevant*** to the nature of the crime and the character of the defendant." §921.141(1) Fla. Stat. (1991). To be admissible, evidence must be relevant, and its admission is within the trial court's wide discretion. *Chandler v. State, supra*, at 703; *See also, Muehleman*

v. *State*, 503 So. 2d 310, 315 (Fla.), *cert. denied*, 108 S.Ct. 39 (1987). What Jordan complains of as the trial court's restriction of the presentation of mitigation evidence, was simply a matter of the trial court correctly exercising its discretion in disallowing evidence which was ***not relevant*** to the nature of the murder of Ann Mintner or Jordan's character.

First, Jordan never voice a contemporaneous objection to not being allowed to introduce "voodoo" testimony, and this claim is waived (See p. 93). Second, such testimony was placed before the jury anyway when Fitzroy Nugent testified that he sacrificed "a goat for a wedding reception" and sacrificed chickens to "bathe in the blood," as well as "drink" it, prior to the prosecutor's objection on relevancy grounds, arguing that "information... more directed to the character [of] caretakers, rather than the defendant is not relevant (T.1845-47)." *See Hill v. State*, 515 So. 2d 176 (Fla. 1987), *cert. denied*, 485 U.S. 993 (1988). The trial court correctly excluded the evidence because Jordan failed to establish that he "was present or knew about" Nugent's voodoo practices, and "the prejudicial nature of the presentation of this direct testimony in front of the jury outweighs its relevance unless ... [he] was present or knew of these practices (T.1849-51)." The trial court refused to allow "the jury to speculate on

what those influences might be," absent proof that Jordan was in fact influenced by them (T.1852).

Jordan's representation on page 94, as to the "blown-up" mug shot of Joe Evans, is totally inaccurate (T.1917-20). There were *2* photographs, Defense Exhibits D and F, the alleged relevance of which was puportedly to identify what Evans looked like (T.1917-20). Ta-Tanisha Davis identified Evans from Exhibit D, so there was no error (T.1920). Further, this claim is procedurally barred because there was no contemporaneous objection. As to the photograph of an unidentified child, which Jordan's counsel attempted to admit during Detra Michelle's direct, he admitted that the photo represented "no one in [Jordan's] family" (T.1972). Besides being irrelevant, there was no contemporaneous objection from Jordan, this claim is procedurally barred, and harmless beyond a reasonable doubt. *DiGuilio*.

Jordan's representation on page 95 as to Connie Woods Kelley testimony regarding her father, Willie Woods, Jordan's maternal grandfather, is also inaccurate. After hearing extensive argument at sidebar (T.1987-95), the trial court ruled, regarding her abuse at the hands of her father prior to Jordan's birth, as follows:

> THE COURT: ...[B]ecause these events occurred prior to the birth of Keydrick Jordan I'm going to sustain the State's objection to the testimony of

> this witness, although I will allow her having supplied that information to the expert, ***I will allow the expert to consider that if that's something a reasonable expert would take into account***. (T.1992)

In fact, Jordan's "family" expert, Kevin Sullivan, testified to Connie's abuse at the hands of Wille Woods (T.2191-92). Therefore, the information that Jordan sought to elicit from her, that Willie Woods physically and sexually abused his children, was placed before the jury. Error, if any, was harmless because Connie's testimony, if elicited, would have been merely cumulative. *DiGuilio*.

The alleged improper limitation of Jordan's cross-examination of Ronnie Goodman concerned an irrelevant and highly prejudicial question regarding whether he had been "arrested for aggravated battery on a pregnant woman," after defense counsel had already elicited Goodman was on probation (T.1697-98). The trial court correctly sustained the State's relevancy objection and struck defense counsel's gratuitous comment before the jury: "Mr. Goodman thinks it's relevant (T.1698)." No contemporaneous objection was raised,[38] the claim is procedurally barred, and implicit in the failure to object is proof that any error was harmless.

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[38]Jordan's objection 4 months after it occurred is too late (R.422).

Again, on page 96, Jordan fails to provide an accurate representation of Ta-Tanisha's redirect, in which she was asked to speculate on whether her mother, Gloria, loved Jordan (T.1957). The State's objection to "speculation as to what someone's answer would be," was correctly sustained by the trial court (T.1957-58). Earlier she testified that she witnessed her mother tell Jordan "[r]ecently since he been locked up," that she loved him (T.1957). There was no contemporaneous objection, the claim is waived, and harmless beyond a reasonable doubt given the aforementioned testimony by Ta-Tanisha, and the cumulative nature of this testimony in light of Jordan's other siblings testimony regarding this same matter. *DiGuilio*.

Jordan's claims on pages 96-97 regarding alleged restriction of some evidence relating to Keydrick's family background, and exclusion of Sally Wenstrand's testimony about HRS shortcomings, also concerned correct exercise of judicial discretion on relevancy grounds (T.2046-47, 2151-57). The former testimony concerned Jackson Williams, which the trial court found "too remote ... to be relevant because...," it did not have "...any information that, prior to the murder, Jordan knew anything about [him] (T.2157-59)." As regards Ms. Wenstrand's testimony, a review of the record demonstrates that prior to the State's objection, she testified at

length that Jordan did not get the psychiatric treatment he needed, and which she recommended (T.2041-46). But, Jordan's counsel went too far when he sought to elicit a condemnation of HRS, and the trial court properly sustained the objection (T.2046-48). Error, if any, was harmless in light of Ms. Wenstrand's testimony regarding lack of adequate treatment for Jordan when it was called for. *DiGuilio.*

On page 97, Jordan argues the trial court erred in failing to consider his polygraph examination. It is well established law that poylgraph exams are inherently unreliable, and consequently may not be used in judicial proceedings unless both sides agree to their use. *See Davis v. State*, 520 So. 2d 572, 573-574 (Fla. 1988). The State objected, and the trial court correctly exercised its wide discretion in not considering Jordan's polygraph. Error, if any, was harmless beyond a reasonable doubt, given Jordan's confession that he repeatedly shot a fleeing 76-year-old woman. *DiGuilio.*

D. <u>Jordan Opened the Door to Relevant Rebuttal Evidence</u>.

The testimony of Ms. Brown and Dr. Strang was for the purpose, as admitted by Jordan in his brief at least as to Ms. Brown,[39] of

[39]See page 89, n.74.

proving HAC, and did not constitute nonstatutory aggravation as argued on page 98. The State relies on its argument as to Point I on this matter.

Mr. Sullivan, is simply a clinical social worker with only a Masters,[40] and Jordan erroneously refers to him as Dr. on page 98. Jordan opened the door on direct to all that he complains of was elicited on cross (T.2122-2255). *See Wuornos*, at 1009-1010, and n.6. Further, the prosecutor is allowed to cross-examine a defense expert on all he considered in forming his opinion. *See Gore v. State*, 599 So. 2d 978 (Fla. 1992). The trial court did not agree with Jordan's characterization of nonstatutory aggravation(T.2281-82). As regards Jordan's complaints as to his allegedly being portrayed as a sadistice rapist (T.2266-68), and his lack of remorse (T.2289-95), the State would rely on this finding by the trial court regarding Mr. Sullivan's testimony on direct:

> THE COURT: ...This witness on direct examination used his analysis of the family systems to render a laundry list of psychological opinions of the effect of the family systems on all of the people involved, and I'll permit cross-examination on those same subjects. (T.2292)

As regards the Thelma Reed indictment, the trial court correctly exercised its wide discretion in admitting evidence

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[40]Like Ms. Brown.

relevant to Jordan's character (R.1715). Error if any was harmless beyond a doubt in light of the testimony of Dr. Anderson regarding Ms. Reed's demise (T.1704-10). *See DiGuilio; Wuornos.*

The complained of prosecutorial comments constituted fair comment as seen by the trial court's overruling Jordan's objections (T.2724-28). *See Mann v. State, supra,* at 1143. Although Jordan objected to these comments, he did not request a cautionary instruction or move for a mistrial on any of them, rendering this claim procedurally barred. *See United States v. Young,* 105 S.Ct. at 1044-45; *Muehlman v. State, supra,* at 317, *Ferguson v. State, supra,* at 641-42. Error, if any, was harmless beyond a reasonable doubt. *DiGuilio.* "In the penalty phase of a murder trial, ... prosecutorial misconduct must be egregious indeed to warrant" a new penalty phase. *Bertolotti v. State, supra.*[41]

[41]There is no federal constitutional error regarding the alleged improper comments. *See Lindsey v. Smith,* 820 F.2d 1137, 1155 (11th Cir. 1987)(Prosecutor called defendant "scum".)

IN THE SUPREME COURT OF FLORIDA

KEYDRICK JORDAN,

Appellant,

v. CASE NO. **84,252**

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX

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INDEX TO APPENDIX

INSTRUMENT
EXHIBIT

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 92-8408

STATE OF FLORIDA,
Plaintiff,
VS.

KEYDRICK DEON JORDAN,
Defendant,
_____/

FILED IN OPEN COURT
THIS 22 DAY OF July, 1994
Fran Carlton, Clerk
BY _____ D.C.

SENTENCING ORDER

Keydrick Deon Jordan was tried before this court on July 19 - July 27, 1993. The jury found Mr. Jordan guilty on both counts of the indictment, Count I - Murder In The First Degree and Count II - Attempted Armed Robbery With A Firearm. The same jury reconvened on September 21, 1993, and heard evidence in support of aggravating factors and mitigating factors. On September 28, 1993 the jury returned an 8 to 4 recommendation that the defendant be sentenced to death in the electric chair. The defense moved the Court to disallow the death penalty due to alleged racial bias. The Court allowed discovery and, after interlocutory appeals, submission of memoranda by both the state and defense, evidentiary hearing and oral argument on the issue, the Court resolved that issue in favor of the state. On May 9th the court held a further sentencing hearing where both sides submitted further evidence and made further argument.

The Court, having heard the evidence presented in both the guilt phase and penalty phase, having the benefit of legal memoranda and further argument both in favor of and in opposition to the death penalty, having read the entire transcript of both the guilt phase and the penalty phase, and having the benefit of many months of sober reflection on all of facts, legal arguments and appeals for justice and mercy professionally and forcefully presented by highly skilled counsel for both the state and defense, finds as follows:

A. AGGRAVATING FACTORS

1. The crime for which the defendant is to be sentenced was committed while he was under a sentence of imprisonment or placed on community control.

Exhibit "A"

1923

On May 1, 1992 the defendant, Keydrick Deon Jordan, pled guilty and on June 24, 1992 was placed on community control by this Court for a period of two years for the crime of robbery in Case No. CR92-49, in this circuit. The murder of Ann Mintner occurred in August 1992, while the defendant was on community control. This aggravating circumstance was proved beyond a reasonable doubt.

2. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

a) On August 6, 1987, the defendant, Keydrick Deon Jordan, was convicted of Burglary Of A Dwelling and Lewd Assault Upon A Child, in Case No. JU87-1338 in this circuit.

b) On May 1, 1992, the defendant, Keydrick Deon Jordan, pled guilty and was convicted of the crime of Robbery in Case No. CR92-49 before this Court.

c) On June 30, 1993, the defendant, Keydrick Deon Jordan, pled nolo contendre before this Court and was convicted of Murder First Degree, Sexual Battery and Arson First Degree in Case No. CR92-10987. Strick-in Corrected Order

Each of these felonies involved the use or threat of violence to another person. This aggravating circumstance was proved beyond a reasonable doubt.

3. The capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, or escape after committing or attempting to commit a robbery.

The defendant, Keydrick Deon Jordan, was charged with Attempted Robbery With A Firearm in count II of the indictment and convicted of that crime by the jury. The defendant acknowledged in his tape recorded statement, exhibit "P", that at the time of the homicide he was attempting to force Ann Mintner to surrender her car keys at gun point with the intent of stealing the car. This capital felony was committed, therefore, while the defendant was engaged in an attempt to commit the crime of robbery. This aggravating circumstance was proved beyond a reasonable doubt.

4. The capital felony was committed for pecuniary gain.

The defendant was charged with and convicted of

Attempted Armed Robbery With A Firearm, the object of which was pecuniary gain. This aggravating circumstance was proved beyond a reasonable doubt.

Since this circumstance is essentially the same as that outlined above in paragraph 3, the Court instructed the jury as follows: You may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance. For example, the commission of a capital felony during the course of a robbery and done for financial gain relates to the same aspect of the offense and may be considered as being only a single aggravating circumstance.

The Court has weighed the fact that the murder of Ann Mintner was committed while the defendant was attempting to commit the crime of robbery and has therefore not weighed separately the defendant's motivation for pecuniary gain in arriving at its decision. In other words the Court has weighed aggravating factors 3 and 4 as a single factor.

None of the other aggravating factors enumerated by statute are applicable to this case and no others were considered by this court.

Nothing except as previously indicated in paragraphs 1, 2, 3 and 4 above was considered in aggravation.

B. STATUTORY MITIGATING FACTORS

The defense has asked the Court to consider the following statutory mitigating factors:

1. The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

Most of the witnesses called during the sentencing phase testified to matters which have at least some bearing on the defendant's mental or emotional state at the time the offense was committed or as reflecting his capacity generally. The Court has considered the testimony of all of the witnesses taken together in attempting to assess the defendant's mental and emotional state. However only one "fact" witness and two expert witnesses gave competent testimony regarding the defendant's mental or emotional state at or near the time of the

crime.

Michelle Daniels testified that when Mr. Jordan returned home that morning he appeared "upset", but no more so than she thought was consistent with a bad dream. Carol Brown, a Masters level therapist rendered the opinion that Mr. Jordan experienced a euphoric or elevated emotional state at the time of the crime. However, her opinion was based on a conclusion, without clinical examination, that Mr. Jordan suffers from antisocial personality disorder. That diagnosis is possible but inconclusive according to Dr. Robert Phillips. Dr. Phillips was unable to make a conclusive diagnosis but felt that Mr. Jordan suffers from one of the following: antisocial personality disorder, intermittent explosive disorder, self-defeating personality disorder, immature personality disorder, a personality with dependent features, or a not otherwise specified (formerly "mixed") personality disorder, any of which would be exacerbated by substance abuse. Although his diagnosis was inconclusive, Dr. Phillips was clear that Mr. Jordan was not delusional, psychotic, or in a clinical state that should distance him from criminal responsibility for his actions.

The Court allowed the defense to argue this circumstance to the jury, but now finds that neither the totality of the facts, nor the testimony of the experts supports a finding that the defendant was under the influence of <u>extreme</u> mental or emotional disturbance when he murdered Ann Mintner. The defendant suffers from a chronic disorder which should be considered as a non-statutory mitigating factor; this court finds, however, that the defendant's condition was not acute or extreme at the time of the offense. This statutory mitigating circumstance does not exist.

2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

The only competent evidence regarding this mitigating circumstance was that of Dr. Phillips, although it was supported by the testimony of numerous fact witnesses. As discussed in the preceding paragraph, Dr. Phillips concluded that Mr. Jordan suffers from a personality disorder, although he was unable to specify which one. Further, Dr. Phillips was unequivocal in his opinion that although Mr. Jordan's personality disorder does not diminish his capacity to appreciate the criminality

of his conduct or his responsibility for that conduct, the disorder significantly impairs Mr. Jordan's ability as well as his willingness to conform his conduct to the requirements of law.

Although the Court is not convinced that alcohol significantly contributed to the defendant's impairment, the Court is reasonably convinced -- the test for a mitigating factor -- that Mr. Jordan's capacity to conform his conduct to the requirements of law is at least diminished though not obliterated. Accordingly, the Court finds this statutory mitigating circumstance to exist, to the extent that it should be weighed with other factors.

The Court has weighed this factor carefully with the non-statutory mitigating circumstances discussed below since the capacity to conform and the willingness to conform are so inextricably related in Dr. Phillips testimony and since that relationship forms the crux of the defense's case.

3. The chronological and mental age of the defendant at the time of the crime.

At the time he committed this murder Mr. Jordan was 20 years old. Although Dr. Phillips testified that Mr. Jordan is not particularly bright, he is of normal intelligence. Loenda Bussell testified that he was an adequate student, when his behavior was controlled and he was properly motivated. All witnesses agreed that Mr. Jordan is socially and emotionally immature, a fact that the Court attributes, in part, to the amount of time he has spent in custody and, in part, to the effects of physical, emotional, and sexual abuse.

The Court has considered this factor. The amount of mitigation, though slight, should still be weighed.

C. NON-STATUTORY MITIGATING FACTORS

The defense has asked the Court to consider the following non-statutory mitigating factors:

1. The defendant suffered from physical abuse as a child.
2. The defendant suffered from sexual abuse as a child.
3. The defendant suffered from emotional abuse a child.
4. The defendant was exposed to violence as a child.
5. The defendant was deprived of food or shelter or clothing as a child.
6. The defendant lacked positive role models as a child.
7. The defendant suffered from post-traumatic stress

disorder as a child and as an adolescent.

8. The defendant was an unwanted baby.
9. The defendant's mother tried to abort the defendant by ingesting foreign substances.
10. The defendant was the child of a teen-aged mother.
11. The defendant was unwanted and rejected by his mother.
12. The defendant was abandoned by his father at birth.
13. The defendant was neglected and periodically abandoned by his mother.
14. The defendant was malnourished as an infant.
15. The defendant's caretakers failed to provide emotional or financial support.
16. The defendant was not nurtured and shown affection by his caretakers.
17. The defendant was 2 1/2 years old when his mother tried to kill her husband, John Davis.
18. The defendant was traumatized by witnessing the stabbing murder of Clyde Presley by his stepfather Joe Evans when he was six years old.
19. As a young child Keydrick attempted to intervene on behalf of Tonya Willis when she was being sexually abused and he was beaten for it.
20. The defendant was forced to participate in bizarre religious practices.
21. The defendant grieved the loss of Joe Evans
22. The defendant was socially alienated and was not permitted to participate in organized activities as a child.
23. The defendant's caretakers refused to participate in school activities with the defendant or to take any interest in the defendant's education.
24. The defendant's caretakers were emotionally and mentally dysfunctional.
25. The defendant's entire family is emotionally and mentally dysfunctional.
26. The defendant suffered from an impoverished life.
27. Orange Halfway House didn't have the staff or funding to treat Keydrick adequately when he was there.
28. Keydrick was not cold and detached like some of the other children at the halfway house; he tried to connect with Marion Campbell.
29. Keydrick's family was not involved with the staff at the halfway house so as to assist with his rehabilitation.
30. The Dozier School had no meaningful mental health treatment available when Keydrick was there and was an inappropriate placement for an adolescent sex offender in need of treatment.
31. Keydrick had a positive relationship with Michelle Daniels.
32. Keydrick had a good relationship with Nicole Daniels. She considered him a father figure.
33. Nicole Daniels would be devastated by Keydrick's death. She is strongly bonded to him.
34. The defendant did not receive necessary psychiatric treatment or other intervention.

35. According to the state's expert, if Keydrick had received appropriate intervention as a child, the victims' lives and perhaps Keydrick's could have been saved.
36. Keydrick was born and raised in Florida rather than a state that makes children's welfare and safety a priority.
37. The defendant is emotionally and mentally dysfunctional.
38. Keydrick's mental illness and emotional dysfunction are products of his upbringing over which he had no control.
39. The defendant is learning disabled.
40. The defendant suffers from alcoholism.
41. Alcohol affected the defendant's thinking at the time of the murder.
42. The murder of Ann Mintner was not planned.
43. The defendant confessed to the murder of Ann Mintner.
44. Keydrick was willing to plead guilty to consecutive life sentences.
45. Keydrick returned to the Orange Halfway House after his prison release and spoke to the children there about his experiences in prison to deter them from committing more crimes.
46. Keydrick conducted himself appropriately in court during these proceedings.
47. A life sentence imposed consecutively to the life sentence the defendant is currently serving would require that he serve at least fifty years in prison before becoming eligible for release.
48. Any other aspect of the defendant's character or background or any other circumstance of the offense that the jury or the Court finds mitigating.

Taken collectively the non-statutory mitigating factors listed as factors 1 - 36 can be generalized as family background and childhood or adolescent abuse.

> The testimony of Fitz-Roy Nugent, Ta-Tanisha Davis, Detra Michelle Mike, Connie Woods-Kelley, and Tonja Willis and the family systems analysis provided by Kevin Sullivan, a licensed clinical social worker, detail a pattern of abuse and neglect that evokes heart-wrenching sympathy for the child raised in that environment. The Court finds ample evidence for each of these non-statutory mitigating factors. However in weighing these factors the Court notes two points which diminish their impact. First, the violence in this case was not retaliatory, the victim in this case had nothing whatsoever to do with the suffering inflicted on young Keydrick Jordan. Second, the other children raised in that same home, while struggling emotionally, have managed to function without being driven to take the lives of others. Further the failure of the state programs at Orange Halfway House and The Dozier School to compensate for the earlier neglect and

abuse of the defendant sheds some light on the intractability of the defendant's problems, but neither adds to nor diminishes the weight of the other factors in this general category. Nevertheless, the court has given substantial weight to all of these factors and considered them collectively as parts of an interrelated whole as advised by Kevin Sullivan.

Taken collectively the non-statutory mitigating factors listed as factors 37 - 41 can be generalized as statements that the crime for which the defendant is to be sentenced was committed while he was under the influence of a mental or emotional disturbance which, while not extreme enough to be considered as a statutory mitigating circumstance, is still significant enough to warrant consideration.

In discussing the first statutory mitigating circumstance the Court found that, while not conclusively diagnosed, the defendant suffers from a chronic personality disorder, probably as a result of the environment and abuse discussed above. As stated above the Court has given substantial weight to these factors, considered collectively, as non-statutory mitigating circumstances.

The Court here finds some difficulty in assessing non-statutory mitigating factors 37 - 41 separately from the testimony of Dr. Phillips. These factors as submitted for consideration are couched in the vernacular of the popular press in the addictions recovery field. The Court finds some evidence to support the existence of these factors. But it further finds that they are better understood and weighed in the context and language of Dr. Phillips testimony and the language of statutory mitigating circumstances 1 and 2. Accordingly, the Court finds that the crime for which the defendant is to be sentenced was committed while he was under the influence of an unspecified chronic mental or emotional disturbance which, while not extreme enough to be considered as a statutory mitigating circumstance, is still significant enough to warrant consideration as a non-statutory mitigating circumstance.

The Court has given significant weight the defendant's personality disorder in it's consideration of the defendant's sentence.

The defense has requested the Court to consider as non-statutory mitigating circumstance number 42 its contention that the murder of Ann Mintner was not planned even though the

defendant was found guilty of First Degree Murder.

> In discussing statutory mitigating circumstance 2 above the Court stated that it is reasonably convinced -- the test for a mitigating factor -- that Mr. Jordan's capacity to conform his conduct to the requirements of law is at least diminished though not obliterated by the personality disorder discussed above. It is in light of this diminished capacity that the defense's contention in non-statutory mitigating circumstance 42 is best understood.
>
> The evidence supports a finding that, although Mr. Jordan did not plan to kill Ann Mintner, in the sense that he set out to do so, he did set out armed to kill and he did intend to kill her while running after her and shooting her, which is what the jury decided. This lack of planning supports the Court's conclusion as to statutory mitigating circumstance 2, but adds very little to it.
>
> Accordingly, the Court finds this non-statutory mitigating circumstance to exist, but attaches little weight to it aside from the substantial weight already assigned to statutory mitigating circumstance 2 and the personality disorder discussed above.

The defense has requested the Court to consider as non-statutory mitigating circumstances 43 and 44, the defendant's confession to the murder of Ann Mintner and the defendant's willingness to plead guilty to consecutive life sentences.

> Each of these circumstances are recognized mitigating circumstances. They have each been proven by the evidence. They have each been given some weight by the court.

The defense has requested the Court to consider as non-statutory mitigating circumstances 45 and 46, the defendant's good conduct after his release from prison and his good conduct during the course of these proceedings.

> There is no doubt that the defendant's good conduct can be a mitigating factor. Of his good conduct in visiting Orange Halfway House, the evidence is uncontroverted. His appropriate conduct in court is a matter of record and his demeanor has always been pleasant. The Court finds these non-statutory mitigating circumstances to exist. What this shows however is that Mr. Jordan has the capacity to

conform his conduct to societal norms when it suits him. In assessing the weight of these circumstances, it must be noted that their weight, although not great, diminishes the weight of statutory mitigating circumstance 2.

The defense has requested the Court to consider as non-statutory mitigating circumstance 47, that a life sentence imposed consecutively to the life sentence the defendant is currently serving would require that he serve at least fifty years in prison before becoming eligible for release.

This Court recognized this as a possible non-statutory mitigating circumstance. The defense presented to the jury the testimony of Merle Davis of the Division of Parole Services. This circumstance has been established to a reasonable certainty. The defense argued this circumstance to the jury for their consideration as part their recommendation. The Court has given this factor some weight although other factors are due much greater weight.

The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The Court finds, as did the jury, that the aggravating circumstances outweigh the mitigating circumstances present.

Accordingly, it is

ORDERED AND ADJUDGED That the defendant KEYDRICK DEON JORDAN, is hereby sentenced to death for the murder of ANN MINTNER. The Defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

May God have mercy on his soul.

DONE AND ORDERED at Orlando, Orange County, Florida this 22nd day of July, 1994.

John H. Adams, Sr.
Circuit Judge

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 92-8408

STATE OF FLORIDA,
Plaintiff,
VS.

KEYDRICK DEON JORDAN,
Defendant,

FILED IN OPEN COURT
22 DAY OF July 94
Fran Carlton, Clerk
BY _____ D.C.

CORRECTED SENTENCING ORDER

Keydrick Deon Jordan was tried before this court on July 19 - July 27, 1993. The jury found Mr. Jordan guilty on both counts of the indictment, Count I - Murder In The First Degree and Count II - Attempted Armed Robbery With A Firearm. The same jury reconvened on September 21, 1993, and heard evidence in support of aggravating factors and mitigating factors. On September 28, 1993 the jury returned an 8 to 4 recommendation that the defendant be sentenced to death in the electric chair. The defense moved the Court to disallow the death penalty due to alleged racial bias. The Court allowed discovery and, after interlocutory appeals, submission of memoranda by both the state and defense, evidentiary hearing and oral argument on the issue, the Court resolved that issue in favor of the state. On May 9th the court held a further sentencing hearing where both sides submitted further evidence and made further argument.

The Court, having heard the evidence presented in both the guilt phase and penalty phase, having the benefit of legal memoranda and further argument both in favor of and in opposition to the death penalty, having read the entire transcript of both the guilt phase and the penalty phase, and having the benefit of many months of sober reflection on all of facts, legal arguments and appeals for justice and mercy professionally and forcefully presented by highly skilled counsel for both the state and defense, finds as follows:

A. AGGRAVATING FACTORS

1. The crime for which the defendant is to be sentenced was committed while he was under a sentence of imprisonment or placed on community control.

Exhibit "B"

On May 1, 1992 the defendant, Keydrick Deon Jordan, pled guilty and on June 24, 1992 was placed on community control by this Court for a period of two years for the crime of robbery in Case No. CR92-49, in this circuit. The murder of Ann Mintner occurred in August 1992, while the defendant was on community control. This aggravating circumstance was proved beyond a reasonable doubt.

2. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

a) On August 6, 1987, the defendant, Keydrick Deon Jordan, was convicted of Burglary Of A Dwelling and Lewd Assault Upon A Child, in Case No. JU87-1338 in this circuit.

b) On May 1, 1992, the defendant, Keydrick Deon Jordan, pled guilty and was convicted of the crime of Robbery in Case No. CR92-49 before this Court.

c) On June 30, 1993, the defendant, Keydrick Deon Jordan, pled nolo contendre before this Court and was convicted of Murder First Degree in Case No. CR92-10987.

Each of these felonies involved the use or threat of violence to another person. This aggravating circumstance was proved beyond a reasonable doubt.

3. The capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, or escape after committing or attempting to commit a robbery.

The defendant, Keydrick Deon Jordan, was charged with Attempted Robbery With A Firearm in count II of the indictment and convicted of that crime by the jury. The defendant acknowledged in his tape recorded statement, exhibit "P", that at the time of the homicide he was attempting to force Ann Mintner to surrender her car keys at gun point with the intent of stealing the car. This capital felony was committed, therefore, while the defendant was engaged in an attempt to commit the crime of robbery. This aggravating circumstance was proved beyond a reasonable doubt.

4. The capital felony was committed for pecuniary gain.

The defendant was charged with and convicted of

Attempted Armed Robbery With A Firearm, the object of which was pecuniary gain. This aggravating circumstance was proved beyond a reasonable doubt.

Since this circumstance is essentially the same as that outlined above in paragraph 3, the Court instructed the jury as follows: You may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance. For example, the commission of a capital felony during the course of a robbery and done for financial gain relates to the same aspect of the offense and may be considered as being only a single aggravating circumstance.

The Court has weighed the fact that the murder of Ann Mintner was committed while the defendant was attempting to commit the crime of robbery and has therefore not weighed separately the defendant's motivation for pecuniary gain in arriving at its decision. In other words the Court has weighed aggravating factors 3 and 4 as a single factor.

None of the other aggravating factors enumerated by statute are applicable to this case and no others were considered by this court.

Nothing except as previously indicated in paragraphs 1, 2, 3 and 4 above was considered in aggravation.

B. STATUTORY MITIGATING FACTORS

The defense has asked the Court to consider the following statutory mitigating factors:

1. The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

Most of the witnesses called during the sentencing phase testified to matters which have at least some bearing on the defendant's mental or emotional state at the time the offense was committed or as reflecting his capacity generally. The Court has considered the testimony of all of the witnesses taken together in attempting to assess the defendant's mental and emotional state. However only one "fact" witness and two expert witnesses gave competent testimony regarding the defendant's mental or emotional state at or near the time of the

crime.

Michelle Daniels testified that when Mr. Jordan returned home that morning he appeared "upset", but no more so than she thought was consistent with a bad dream. Carol Brown, a Masters level therapist rendered the opinion that Mr. Jordan experienced a euphoric or elevated emotional state at the time of the crime. However, her opinion was based on a conclusion, without clinical examination, that Mr. Jordan suffers from antisocial personality disorder. That diagnosis is possible but inconclusive according to Dr. Robert Phillips. Dr. Phillips was unable to make a conclusive diagnosis but felt that Mr. Jordan suffers from one of the following: antisocial personality disorder, intermittent explosive disorder, self-defeating personality disorder, immature personality disorder, a personality with dependent features, or a not otherwise specified (formerly "mixed") personality disorder, any of which would be exacerbated by substance abuse. Although his diagnosis was inconclusive, Dr. Phillips was clear that Mr. Jordan was not delusional, psychotic, or in a clinical state that should distance him from criminal responsibility for his actions.

The Court allowed the defense to argue this circumstance to the jury, but now finds that neither the totality of the facts, nor the testimony of the experts supports a finding that the defendant was under the influence of <u>extreme</u> mental or emotional disturbance when he murdered Ann Mintner. The defendant suffers from a chronic disorder which should be considered as a non-statutory mitigating factor; this court finds, however, that the defendant's condition was not acute or extreme at the time of the offense. This statutory mitigating circumstance does not exist.

2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

The only competent evidence regarding this mitigating circumstance was that of Dr. Phillips, although it was supported by the testimony of numerous fact witnesses. As discussed in the preceding paragraph, Dr. Phillips concluded that Mr. Jordan suffers from a personality disorder, although he was unable to specify which one. Further, Dr. Phillips was unequivocal in his opinion that although Mr. Jordan's personality disorder does not diminish his capacity to appreciate the criminality

of his conduct or his responsibility for that conduct, the disorder significantly impairs Mr. Jordan's ability as well as his willingness to conform his conduct to the requirements of law.

Although the Court is not convinced that alcohol significantly contributed to the defendant's impairment, the Court is reasonably convinced -- the test for a mitigating factor -- that Mr. Jordan's capacity to conform his conduct to the requirements of law is at least diminished though not obliterated. Accordingly, the Court finds this statutory mitigating circumstance to exist, to the extent that it should be weighed with other factors.

The Court has weighed this factor carefully with the non-statutory mitigating circumstances discussed below since the capacity to conform and the willingness to conform are so inextricably related in Dr. Phillips testimony and since that relationship forms the crux of the defense's case.

3. The chronological and mental age of the defendant at the time of the crime.

At the time he committed this murder Mr. Jordan was 20 years old. Although Dr. Phillips testified that Mr. Jordan is not particularly bright, he is of normal intelligence. Loenda Bussell testified that he was an adequate student, when his behavior was controlled and he was properly motivated. All witnesses agreed that Mr. Jordan is socially and emotionally immature, a fact that the Court attributes, in part, to the amount of time he has spent in custody and, in part, to the effects of physical, emotional, and sexual abuse.

The Court has considered this factor. The amount of mitigation, though slight, should still be weighed.

C. NON-STATUTORY MITIGATING FACTORS

The defense has asked the Court to consider the following non-statutory mitigating factors:

1. The defendant suffered from physical abuse as a child.
2. The defendant suffered from sexual abuse as a child.
3. The defendant suffered from emotional abuse a child.
4. The defendant was exposed to violence as a child.
5. The defendant was deprived of food or shelter or clothing as a child.
6. The defendant lacked positive role models as a child.
7. The defendant suffered from post-traumatic stress

disorder as a child and as an adolescent.

8. The defendant was an unwanted baby.
9. The defendant's mother tried to abort the defendant by ingesting foreign substances.
10. The defendant was the child of a teen-aged mother.
11. The defendant was unwanted and rejected by his mother.
12. The defendant was abandoned by his father at birth.
13. The defendant was neglected and periodically abandoned by his mother.
14. The defendant was malnourished as an infant.
15. The defendant's caretakers failed to provide emotional or financial support.
16. The defendant was not nurtured and shown affection by his caretakers.
17. The defendant was 2 1/2 years old when his mother tried to kill her husband, John Davis.
18. The defendant was traumatized by witnessing the stabbing murder of Clyde Presley by his stepfather Joe Evans when he was six years old.
19. As a young child Keydrick attempted to intervene on behalf of Tonya Willis when she was being sexually abused and he was beaten for it.
20. The defendant was forced to participate in bizarre religious practices.
21. The defendant grieved the loss of Joe Evans
22. The defendant was socially alienated and was not permitted to participate in organized activities as a child.
23. The defendant's caretakers refused to participate in school activities with the defendant or to take any interest in the defendant's education.
24. The defendant's caretakers were emotionally and mentally dysfunctional.
25. The defendant's entire family is emotionally and mentally dysfunctional.
26. The defendant suffered from an impoverished life.
27. Orange Halfway House didn't have the staff or funding to treat Keydrick adequately when he was there.
28. Keydrick was not cold and detached like some of the other children at the halfway house; he tried to connect with Marion Campbell.
29. Keydrick's family was not involved with the staff at the halfway house so as to assist with his rehabilitation.
30. The Dozier School had no meaningful mental health treatment available when Keydrick was there and was an inappropriate placement for an adolescent sex offender in need of treatment.
31. Keydrick had a positive relationship with Michelle Daniels.
32. Keydrick had a good relationship with Nicole Daniels. She considered him a father figure.
33. Nicole Daniels would be devastated by Keydrick's death. She is strongly bonded to him.
34. The defendant did not receive necessary psychiatric treatment or other intervention.

35. According to the state's expert, if Keydrick had received appropriate intervention as a child, the victims' lives and perhaps Keydrick's could have been saved.
36. Keydrick was born and raised in Florida rather than a state that makes children's welfare and safety a priority.
37. The defendant is emotionally and mentally dysfunctional.
38. Keydrick's mental illness and emotional dysfunction are products of his upbringing over which he had no control.
39. The defendant is learning disabled.
40. The defendant suffers from alcoholism.
41. Alcohol affected the defendant's thinking at the time of the murder.
42. The murder of Ann Mintner was not planned.
43. The defendant confessed to the murder of Ann Mintner.
44. Keydrick was willing to plead guilty to consecutive life sentences.
45. Keydrick returned to the Orange Halfway House after his prison release and spoke to the children there about his experiences in prison to deter them from committing more crimes.
46. Keydrick conducted himself appropriately in court during these proceedings.
47. A life sentence imposed consecutively to the life sentence the defendant is currently serving would require that he serve at least fifty years in prison before becoming eligible for release.
48. Any other aspect of the defendant's character or background or any other circumstance of the offense that the jury or the Court finds mitigating.

Taken collectively the non-statutory mitigating factors listed as factors 1 - 36 can be generalized as family background and childhood or adolescent abuse.

> The testimony of Fitz-Roy Nugent, Ta-Tanisha Davis, Detra Michelle Mike, Connie Woods-Kelley, and Tonja Willis and the family systems analysis provided by Kevin Sullivan, a licensed clinical social worker, detail a pattern of abuse and neglect that evokes heart-wrenching sympathy for the child raised in that environment. The Court finds ample evidence for each of these non-statutory mitigating factors. However in weighing these factors the Court notes two points which diminish their impact. First, the violence in this case was not retaliatory, the victim in this case had nothing whatsoever to do with the suffering inflicted on young Keydrick Jordan. Second, the other children raised in that same home, while struggling emotionally, have managed to function without being driven to take the lives of others. Further the failure of the state programs at Orange Halfway House and The Dozier School to compensate for the earlier neglect and

abuse of the defendant sheds some light on the intractability of the defendant's problems, but neither adds to nor diminishes the weight of the other factors in this general category. Nevertheless, the court has given substantial weight to all of these factors and considered them collectively as parts of an interrelated whole as advised by Kevin Sullivan.

Taken collectively the non-statutory mitigating factors listed as factors 37 - 41 can be generalized as statements that the crime for which the defendant is to be sentenced was committed while he was under the influence of a mental or emotional disturbance which, while not extreme enough to be considered as a statutory mitigating circumstance, is still significant enough to warrant consideration.

In discussing the first statutory mitigating circumstance the Court found that, while not conclusively diagnosed, the defendant suffers from a chronic personality disorder, probably as a result of the environment and abuse discussed above. As stated above the Court has given substantial weight to these factors, considered collectively, as non-statutory mitigating circumstances.

The Court here finds some difficulty in assessing non-statutory mitigating factors 37 - 41 separately from the testimony of Dr. Phillips. These factors as submitted for consideration are couched in the vernacular of the popular press in the addictions recovery field. The Court finds some evidence to support the existence of these factors. But it further finds that they are better understood and weighed in the context and language of Dr. Phillips testimony and the language of statutory mitigating circumstances 1 and 2. Accordingly, the Court finds that the crime for which the defendant is to be sentenced was committed while he was under the influence of an unspecified chronic mental or emotional disturbance which, while not extreme enough to be considered as a statutory mitigating circumstance, is still significant enough to warrant consideration as a non-statutory mitigating circumstance.

The Court has given significant weight the defendant's personality disorder in it's consideration of the defendant's sentence.

The defense has requested the Court to consider as non-statutory mitigating circumstance number 42 its contention that the murder of Ann Mintner was not planned even though the

defendant was found guilty of First Degree Murder.

> In discussing statutory mitigating circumstance 2 above the Court stated that it is reasonably convinced -- the test for a mitigating factor -- that Mr. Jordan's capacity to conform his conduct to the requirements of law is at least diminished though not obliterated by the personality disorder discussed above. It is in light of this diminished capacity that the defense's contention in non-statutory mitigating circumstance 42 is best understood.
>
> The evidence supports a finding that, although Mr. Jordan did not plan to kill Ann Mintner, in the sense that he set out to do so, he did set out armed to kill and he did intend to kill her while running after her and shooting her, which is what the jury decided. This lack of planning supports the Court's conclusion as to statutory mitigating circumstance 2, but adds very little to it.
>
> Accordingly, the Court finds this non-statutory mitigating circumstance to exist, but attaches little weight to it aside from the substantial weight already assigned to statutory mitigating circumstance 2 and the personality disorder discussed above.

The defense has requested the Court to consider as non-statutory mitigating circumstances 43 and 44, the defendant's confession to the murder of Ann Mintner and the defendant's willingness to plead guilty to consecutive life sentences.

> Each of these circumstances are recognized mitigating circumstances. They have each been proven by the evidence. They have each been given some weight by the court.

The defense has requested the Court to consider as non-statutory mitigating circumstances 45 and 46, the defendant's good conduct after his release from prison and his good conduct during the course of these proceedings.

> There is no doubt that the defendant's good conduct can be a mitigating factor. Of his good conduct in visiting Orange Halfway House, the evidence is uncontroverted. His appropriate conduct in court is a matter of record and his demeanor has always been pleasant. The Court finds these non-statutory mitigating circumstances to exist. What this shows however is that Mr. Jordan has the capacity to

conform his conduct to societal norms when it suits him. In assessing the weight of these circumstances, it must be noted that their weight, although not great, diminishes the weight of statutory mitigating circumstance 2.

The defense has requested the Court to consider as non-statutory mitigating circumstance 47, that a life sentence imposed consecutively to the life sentence the defendant is currently serving would require that he serve at least fifty years in prison before becoming eligible for release.

This Court recognized this as a possible non-statutory mitigating circumstance. The defense presented to the jury the testimony of Merle Davis of the Division of Parole Services. This circumstance has been established to a reasonable certainty. The defense argued this circumstance to the jury for their consideration as part their recommendation. The Court has given this factor some weight although other factors are due much greater weight.

The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The Court finds, as did the jury, that the aggravating circumstances outweigh the mitigating circumstances present.

Accordingly, it is

ORDERED AND ADJUDGED That the defendant KEYDRICK DEON JORDAN, is hereby sentenced to death for the murder of ANN MINTNER. The Defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

May God have mercy on his soul.

DONE AND ORDERED at Orlando, Orange County, Florida this 22nd day of July, 1994.

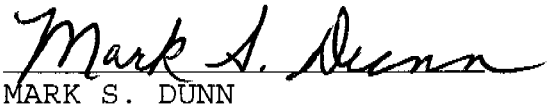
John H. Adams, Sr.
Circuit Judge

CONCLUSION

Based upon the foregoing facts, authorities, and reasoning, the State respectfully requests that Jordan's convictions and sentences be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing ANSWER BRIEF has been hand delivered to CHRISTOPHER S. QUARLES, Assistant Public Defender, Chief of Capital Appeals, Counsel for Appellant, at the Public Defender's basket at the Fifth District Court of Appeal, this 13th day of February, 1996.

MARK S. DUNN
ASSISTANT ATTORNEY GENERAL