IN THE SUPREME COURT OF FLORIDA

JAMES W. HAZEN,

Appellant,

v.

Case #: 84,645

STATE OF FLORIDA,

Appellee.

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

ANSWFR BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the lower court, will be referred to in this brief as the state. Appellant, JAMES W. HAZEN, the defendant in the lower court, will be referred to in this brief as Hazen. references to the instant record on appeal will be noted by the symbol "R"; references to the transcripts, by the symbol "T"; and references to the supplemental transcripts, by the symbol "ST." All references will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

The state accepts Hazen's statement of the case and facts as reasonably supported by the record.

SUMMARY OF THE ARGUMENT

Issue I: The trial court did not abuse its discretion in considering, but not finding as mitigation, evidence of Hazen's nonviolent criminal history prior to July 19, 1993. Although the court gave this evidence full consideration, it did not abuse its discretion in giving this factor no weight based on the severity of the instant crimes, Hazen's active participation therein, and Hazen's own guilt phase testimony.

Issue 11: The trial court properly sentenced Hazen to death, despite codefendant Buffkin's life sentence, based on Hazen's level of participation in the instant crimes. Case law from this Court supports the imposition of different sentences on capital defendants whose levels of culpability and participation differ.

Issue III: Hazen's claim that the trial court did not instruct the jury properly in response to a question delivered to the court during deliberations is not preserved for appellate review, because defense counsel essentially agreed to the trial court's course of action. In any event, the court's instruction was legally correct and proper: All jurors had to cast a vote and return a sentencing recommendation.

Issue IV: Hazen's claim that the trial court erred in permitting Mrs. McAdams to testify that Hazen glared at her during

his arraignment is not preserved for this Court's review for two reasons: (1) Defense counsel failed to object in the trial court; and (2) defense counsel pursued this line of questioning most thoroughly with Mrs. McAdams and Hazen himself. In any event, the trial court did not abuse its discretion in permitting Mrs. McAdams's testimony on this point, because it rebutted Hazen's theory that he was not at the McAdams' home while the instant crimes were committed.

Issue V: Hazen's claim that the state's cross examination of mitigation witness Sam Kasl deprived him of due process is not preserved for appellate review. Although defense counsel made several objections below, he never objected that the state's alleged misbehavior served to deprive Hazen of due process. In any event, the trial court did not abuse its discretion in ruling on Hazen's various objections to the state's cross examination, because the state engaged in proper cross examination and impeachment.

ARGUMENT

Issue I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN CONSIDERING, BUT NOT FINDING, NONSTATUTORY MITIGATING CIRCUMSTANCES.[1]

It is within a trial court's discretion to determine whether a mitigating circumstance has been established, and the court's decision in this regard will not be reversed merely because an appellant reaches a different conclusion. Lucas v. State, 613 So. 2d 408 (Fla. 1992). Moreover, whether a mitigating factor has been established is a question of fact, and a trial court's findings are presumed correct and will be upheld if supported by the record. Campbell v. State, **517 *So.*** 2d 415 (Fla. 1990). In this case, the trial court did not abuse its discretion in fully considering and weighing all evidence of mitigation, and finding some evidence and rejecting other. Hazen's arguments on appeal constitute nothing more than his disagreement with these findings, and accordingly, should be rejected by this Court.

The trial court's written sentencing order reflects that defense counsel made no argument and offered no testimony in

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Because Bazen states that his claim of error regarding the trial court's rejection of the mitigating circumstance that a codefendant with greater involvement received a life sentence will be addressed fully under Issue II, the state presents its argument regarding this factor under Issue II.

support of the statutory mitigating factor that Hazen had no significant history of prior criminal activity (R 246). As a nonstatutory mitigating factor, however, defense counsel argued that Hazen had committed no violent crimes prior to July 19, 1993. The trial court fully considered and addressed this factor:

> The evidence establishes that (prior to the instant criminal episode) Hazen had no involvement in crimes of violence. His prior criminal record consists of a burglary for which he was initially placed on probation. His supervision, was, however, terminated for failure to pay court costs and fines. As a result of that violation he was sentenced to state prison. While in state prison he escaped and was apprehended in New Mexico where he was returned to prison and sentenced to additional time for escape.
>
> Although, on its face, Hazen's lack of record for violent crimes appears to be a viable mitigating factor the Court considers Hazen's own testimony to be the more accurate barometer of his propensity for violence. Although he denied participating in the events of that evening he, nonetheless, testified that if he had been present neither Mr. or Mrs. McAdams would have been left alive. This testimony clearly belies any inference of non-violence which might otherwise be drawn from a lack of documented prior violent behavior.
>
> The Court, therefore, finds that this non-statutory mitigating factor has not been reasonably established and gives it no weight.

(R **250-51**).

In Hill v. State, 643 So. 2d 1071 (Fla. 1994), and Downs v. State, 572 So. 2d 895 (Fla. 1990), this Court held that evidence of a defendant's nonviolent nature or behavior should be considered as nonstatutory mitigation. As the record excerpt above clearly shows, the trial court fully considered Hazen's claim that, prior to July 1993, he had no involvement in crimes of violence.

However, the trial court was eminently justified in discounting this factor in light of the severity of the instant crimes, the jury's finding that Hazen was present and actively involved in the horrible crimes committed against Mr. and Mrs. McAdams, and Hazen's own testimony during the guilt phase, which related evidence of a violent nature. See (T 1103-04) ("If I was gonna have something to do with that situation, it would have been done a lot different . . . ." When the prosecutor asked if Hazen meant he would have killed Ms. McAdams, Hazen answered: 'If I would have been there, that's what would have happened, yes."). See Lightbourne v. State, 438 So. 2d 380 (Fla. 1983).

Issue II

WHETHER THE TRIAL COURT PROPERLY SENTENCED HAZEN TO DEATH IN LIGHT OF CODEFENDANT BUFFKIN'S LIFE SENTENCE.

The trial court properly sentenced Hazen to death, despite codefendant Buffkin's life sentence, based on his degree of participation in the instant crimes. This Court's case law makes clear that it is permissible to impose different sentences on capital codefendants whose various levels of culpability and participation are different from one another.

In explaining its decision to seek the death penalty against Kormondy and Hazen, and not against Buffkin, the prosecutor stated:

> [T]he State's position in this case from the beginning . . . has been that all three of these defendants should receive the death penalty.
>
> . . . .
>
> The Court never really got to hear all of the mitigation on Mr. Buffkin, so we really can't weigh who had the most mitigation of any in these cases.
>
> The Court did hear that Mr. Buffkin had an I.Q. of 65, that he was an alcoholic. The Court would have heard a lot of other things. Who's to say that Mr. Buffkin's childhood wasn't as disturbed as the others, his alcoholism wasn't his worst disease as the others? Certainly his mental abilities were far short of all of the others.

Your Honor, this man was so ignorant and ill-equipped, he forgot the gun the night they were leaving to do this. He didn't even wear a mask like this defendant. He didn't wear gloves like this defendant.

What I am suggesting with this, Your Honor, is that I recognize there is always going to be some mitigation in any proceeding where the Court is asked [to] impose the ultimate sentence. There may be just as much mitigation for Mr. Buffkin as any of the others.

Well, we weigh the actions of these men and what they did. While one may have done more than the others, one man was the triggerman, two were not. All three equally deserve the death penalty because none of the mitigating circumstances, when added together for each of these defendants, could possibly outweigh the aggravating circumstances in this case.

And in that regard, I would like to point out that the Florida Supreme Court has ruled that in a proportionality . . . argument, a plea bargain is a permissible distinguishing factor.

In other words, the case for the State was basically this. We had eyewitness identification and scientific testing to put Mr. Buffkin at the scene in addition to the other evidence. We had a confession and fiber evidence that would put Mr. Kormondy at the scene. We had, basically, the circumstantial evidence and the testimony of Mr. Buffkin to put Mr. Hazen at the scene.

Without the testimony of Mr. Buffkin, we had circumstantial evidence. Maybe the State would have proved this case, likely we could

have, but to be sure, the State realized to be sure with Mr. Buffkin, it was necessary to testify. Somebody would have to testify.

Now, who was it going to be? Would the State bargain the triggerman away? The State was firmly convinced, the jury was firmly convinced, and any reasonable person was firmly convinced that Mr. Kormondy was the triggerman.

There was Supreme Court case, I think it was Slater v. State, if I recall. The State in that case bargained the triggerman for life and the nontriggerman got death, and they said you can't do that. But they said you can bargain two nontriggerman, one for life and one for death and one to testify against the other, and there's case that says you can do that. There are many cases in Florida that say[] the triggerman can qualify for the death penalty.

So in dealing with this pretreatment, which is really the issue and not proportionality here, I only argue the case of proportionality for the analogous proposition. But dealing with this pretreatment, I submit that two people, if you assume they are equally culpable, they come before the Court and one is here as a result of a plea bargain, that that is a factor that should be foremost in the Court's consideration.

Because, you see, that's not two juries recommending two different sentences. That's not a judge imposing two different sentences because he might be overriding the jury to reach that or confirming the jury reach that. That is a matter that the State, in effect, has taken away from this Court by the plea bargain.

> The State wished to get the death sentence for all three men, because the aggravators outweigh the mitigators in each and every case. But the State could not do so and the State made a bargain, not because the State felt that a nontriggerman in this case -- in this circumstance didn't deserve the death penalty, but because the State felt that if somebody was going to testify against Mr. Hazen, it would not be as a matter of judgment on my part the triggerman. The lesser of two evils would be the nontriggerman.
>
> In that case, we see that there [are] really only two mitigating circumstances here and neither one of those are statutory. One is the defendant's childhood and background, and the other is the fact that, yes, a person who may have been only as culpable as he was received a life sentence.
>
> Now, Judge, in that respect, I submit to you that you must remember what the purpose of a mitigating circumstance is. The purpose is that it's thought to be something that will establish to this Court in your judgment and in any other reasonable person's judgment to be something that truly lessens the moral culpability for the defendant's acts. Does the State's plea bargain lessen the moral culpability of this defendant for what he did? No.

(ST 102-07).

The argument that Hazen was at least an equally culpable codefendant in the instant rob/rape/kill scheme is fully borne out by the record. In fact, the record shows that Hazen was more culpable and involved than Buffkin. Specifically, Mrs. McAdams

testified that, when her husband opened the door, Buffkin stood there with a gun pointed at them (T 585-86). Buffkin told them to lie on the floor and put their heads down, or he would shoot them (T 585). Mrs. McAdams heard other people come into the house, and saw two more sets of feet (T 588).[2] These two other individuals closed the blinds and ripped out the telephone cords (T 588). The victims were told to give the perpetrators their money and car keys (T 588). Mrs. McAdams heard the other individuals pulling out drawers in another part of the house (T 589). One perpetrator found a gun and brought it to the kitchen to ask Mr. McAdams who he thought he was going to hurt with it (T 589); when Mr. McAdams said no, this perpetrator rubbed the gun on Mrs. McAdams's hip and told her to come with him (T 590).

Due to threats upon her life and her husband's, Mrs. McAdams tried not to look at the faces of the perpetrators (T 590). Despite her pleas, and her husband's, two of the perpetrators took Mrs. McAdams to her bedroom, where they sexually assaulted her (T 590). One perpetrator put his penis in Mrs. McAdams's mouth and threatened to kill her if she let it out of her mouth (T 591).[3]

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[2] Mrs. McAdams had "no doubt" that there were three perpetrators, "[n]o more" and "[n]o less" (T 620).

[3] This perpetrator ejaculated in Mrs. McAdams's mouth, made her sit up, and said, "[L]et me see you swallow it, bitch." (T 601)

While this perpetrator assaulted her orally, another perpetrator placed his penis in Mrs. McAdams's vagina (T 591). While these perpetrators sexually assaulted Mrs. McAdams, they bragged about what they were doing to her (T 592). One perpetrator had stringy, dishwater blond hair and "had something pulled up over his head, not covering his face completely, but it was . . . down over his face" (T 592); this perpetrator was not Curtis Buffkin (T 593). Both perpetrators had socks on their hands (T 593).

Prior to sexually assaulting Mrs. McAdams, the perpetrators made her take off her green silk dress; one of the perpetrators then forcibly removed a tampon from Mrs. McAdams's vagina (T 595). After the assaults, Mrs. McAdams was taken back to the kitchen naked (T 596). Another perpetrator then took Mrs. McAdams back to the bedroom, where he told her: "I don't know what the other two did to you, but you're going to like what I'm going to do" (T 597). He then placed his penis in her vagina (T 597). While this assault occurred, Mrs. McAdams heard a gunshot from the kitchen (T 597) The two perpetrators in the kitchen called for the perpetrator in the bedroom; he threw a towel over Mrs. McAdams's head and she heard a gunshot in the bedroom (T 598). Mrs. McAdams ran to the kitchen and saw blood about Mr. McAdams's head (T 598). She

wrapped up in a towel and ran to get help; she did not see the perpetrators at this time (T 598-99).

Mrs. McAdams testified that she was present when the three defendants appeared in court, and that she immediately recognized Buffkin (T 602). Mrs. McAdams also recognized "the individual . . . with the long scraggly hair" (T 603). Mrs. McAdams recalled seeing Hazen, a person she did not recognize at the time, looking at her: "[H]e appeared uncomfortable. He was unwilling to make eye contact with me. Whenever I looked at him because I could see that he was looking at me, he would look away. I would look away and then I would catch him looking at me again and it was a worried, uncomfortable look." (T 606).

Magda Clanton, FDLE crime lab analyst, testified that Buffkin, Kormondy, and Hazen were all secretors, and the two victims were not, and that four of the five shared the same blood type: Mr. McAdams was ABO blood type A; Mrs. McAdams, ABO blood type A; Kormondy, ABO blood type A; Hazen, ABO blood type A; and Buffkin, ABO blood type B (T 651-52). On the vaginal swab samples, Clanton detected types A, B, and H (T 652).

Valerie "Kay" Kormondy testified that Hazen stayed with them in July 1993. On the day in question, Kormondy, Buffkin, and Hazen left around 5:00 p.m. and returned around 7:00 p.m. (T 700). These

three left again around 9:00 p.m. in Kormondy's Camaro (T 701-02). Mrs. Kormondy went to bed around 1:00 a.m., and did not hear Hazen, Kormondy and Buffkin enter the home until 5:00 a.m. (T 702). When she entered the room, she noticed that they were all awake and dressed, and became quiet (T 703).

The next day, when Mrs. Kormondy entered the Camaro to take Hazen to the store, she saw a bag of jewelry (T 706). Mrs. Kormondy asked Hazen if they had robbed someone the night before, and he said yes (T 706). When she asked more questions, Hazen said he did not remember anything because he was drunk (T 706). Hazen appeared nervous to her (T 707). Mrs. Kormondy called Crime Stoppers after hearing about the crimes (T 708).

Kenneth Hoag, FDLE latent fingerprint examiner, testified that he developed fingerprints made by Kormondy and Hazen from articles found in Kormondy's Camaro (T 791). Lt. Fred Kennedy testified that, although he processed the interior of the victims' home for fingerprints, he identified prints belonging only to Kormondy and Buffkin (T 801). Paula Ann Sauer, FDLE fiber analyst, testified that she examined silk fibers from Mrs. McAdams's dress and found eight such fibers in Kormondy's car (T 815) -- two near the driver's seat, four near the front passenger's seat, and two in the rear seat area (T 817). Sauer also found in the vacuumings from

Mrs. McAdams's bathroom "two fibers that were microscopically consistent with . . . the gray wool fibers composing the fabric of the vehicle seat" (T 817).

Former North Carolina policeman Stephen Huth testified that he found a pistol near Buffkin when he arrested Buffkin (T 841). James Chaney testified that, during a burglary of his home, a handgun and wedding ring were taken (T 846).[4] Deputy Sheriff Tim Scherer testified that, upon arriving at Buffkin's sister's residence in North Carolina, he recovered an unloaded, five-shot pistol with expended shells and a wedding band (T 850-51). Office Al Taylor testified that he recovered two Smith & Wesson handgun grips from a dresser in the McAdams's master bedroom (T 854). Lynn Hart testified that he and Mr. McAdams traded guns: Hart traded a Smith & Wesson .38 caliber special, model 10, four inch revolver, with standard, wooden Smith & Wesson model 10 grips (T 855). As part of the trade, Mr. McAdams requested black Packmeyer grips, which he and Hart put on the gun (T 856).

FDLE firearms examiner Edward Love testified that the .38 Smith & Wesson model 10 could have fired the bullet found in Mr.

This burglary occurred in July 1993 (T 846), the same month as the instant crimes (T 576). Buffkin was staying with the Kormondys during this same month (T 695), and **admitted that he and Kormondy broke into a house near Nine Mile** Road and **stole jewelry, money and** a **gun (T 193).** ~~**See also**~~ (T 983).

McAdams's brain (T 860). Love also stated that the pistol found in Buffkin's possession, a .44 special Charter Arms bulldog model, did not fire the bullet found in Mr. McAdams's brain (T 860). The bullet found on the floor of the McAdams's bedroom was consistent with being a .44 caliber, and could have been fired from the .44 found on Buffkin (T 861). Love testified that the Smith & Wesson could be fired with three to five pounds of pressure, if cocked; if not cocked, it would take nine to twelve pounds (T 866). Love also stated that two safeties on the gun would prevent it from being fired accidentally (T 867).

Buffkin testified that he had been staying at Kormondy's home during July 1993 (T 912). He admitted to burglarizing a home with Kormondy, and stealing money, a gun, and jewelry (T 913). Kormondy and Buffkin discussed breaking into a house and robbing the people inside (T 914). When Kormondy, Hazen, and Buffkin left Kormondy's home the second time on the night in question, they drove around looking for a place to break into and rob (T 917). Buffkin initially forgot the gun and had to run back inside the Kormondy house to retrieve it (T 918).[5] When they left, Kormondy sat in the driver's seat, Buffkin in the front passenger seat, and Hazen in

[5] **Kormondy went with Buffkin, while Hazen got in the car (T 992).**

the rear seat (T 921). They discussed burglarizing a house with people in it; although Buffkin said he would go in with the gun, he was not sure whether Hazen heard this because the radio was playing (T 1008).

When Kormondy parked the car, all three got out and Kormondy and Hazen began putting socks on their hands (T 924). Kormondy and Hazen pulled t-shirts around their heads (T 926-27). Buffkin knocked on the McAdams's door, and when it opened, Buffkin pointed the gun at the McAdams and told them to put their heads down (T 928).[6] Kormondy closed the blinds and pulled the telephone card, and Kormondy and Hazen went toward the bedroom in the back of the house (T 929). Kormondy came back to the kitchen with the gun he found in the McAdams's bedroom (T 930). Kormondy rubbed the gun on Mrs. McAdams's rear and told her to come with him and Hazen (T 930). When Hazen and Kormondy brought Mrs. McAdams back to the kitchen, she was naked, and Buffkin "figured well, they must have done raped the woman back there." (T 932).

Buffkin handed his gun, a .44, to Hazen and told Mrs. McAdams to come with him as he intended to rape her too; Buffkin told Mrs. McAdams that she would like what he was going to do to her (T 933).

Buffkin entered the house first, followed by Kormondy, followed by Hazen (T 999).

Kormondy followed him to the bedroom and forced Mrs. McAdams to perform oral sex on him while Buffkin engaged in vaginal intercourse (T 934). Kormondy threw a towel over Mrs. McAdams's head as he left the area, but Buffkin "was still messing with the woman" (T 935). Hazen came to the bedroom and tried to give Buffkin the .44, but Buffkin told Hazen to keep it with him (T 935). Buffkin finished with Mrs. McAdams and returned to the kitchen, leaving Hazen with Mrs. McAdams (T 935).

While Buffkin went through Mrs. McAdams's purse, Kormondy kept "bumping" Mr. McAdams on the head; Buffkin heard the hammer being pulled back and told Kormondy no, but Kormondy shot Mr. McAdams anyway (T 936). Kormondy left the home, but reentered (T 937); Buffkin then heard a shot in the bedroom and thought Hazen had killed Mrs. McAdams (T 937). Buffkin ran from the house, and all three ended up in Kormondy's car (T 937). Hazen never tried to leave or discourage Buffkin or Kormondy; "[h]e went right along with [them]." (T 1009).

It is important to note that the state did not accept a plea from Kormondy, the triggerman with a significant criminal history.[7]

[7] Kormondy's case is pending before this Court: in case number 84,709. The PSI prepared in 84,709 reveals Kormondy's extensive criminal history (R 460-62).

Instead, it accepted a plea from Buffkin,[8] who admitted his involvement in the burglary and rape, but had a smaller role[9] and significant mitigation -- alcoholism and low IQ of 65.[10] Although Hazen did not kill Mr. McAdams, he willingly donned articles of clothing to conceal his appearance and fingerprints, actively participated in the instant crimes, and fired a weapon near Mrs. McAdams in the bedroom. The trial court specifically found that

> the trial testimony established that immediately following the "execution style" murder of Gary McAdams Hazen fired a forty-four caliber bullet in the floor of the master bedroom where he was sexually battering Mrs. McAdams. Expert testimony established that the forty-four caliber bullet was fired at contact or near contact with the bedroom floor and that the discharge of that weapon was most likely intentional and not accidental. The firing of that second shot could have been for no purpose other than to create the appearance (for the benefit of his co-defendants) that Hazen had, in fact, completed his part in what

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[8] Buffkin appealed to the First District court of Appeal in Buffkin v. State, 21 Fla. L. Weekly D356a (Fla. 1st DCA Feb. 6, 1996), which affirmed his sentences for armed burglary, armed robbery, and armed sexual battery, but reversed and remanded the sentence for first degree murder because it included a three year minimum mandatory for use of a firearm, which was to be served consecutively to the 25 year minimum mandatory sentence imposed for the capital felony.

[9] Buffkin did not conceal his face or put socks on his hands like Kormondy and Hazen.

[10] Hazen's mitigation was not the caliber of Buffkin's, i.e., age of 21 (moderate weight; Buffkin was 23, Kormondy, 21); unstable childhood (little weight); obtained GED in prison/obtained early release/made efforts at rehabilitation (moderate weight) ; and acceptable trial behavior (little weight) (T 248-53).

> the evidence establishes to have been a prearranged plan for the elimination of both Mr. and Mrs. McAdams. Although Hazen declined (for whatever reason) to eliminate Mrs. McAdams he was, nonetheless, a significant and major participant in the entire criminal episode.

(R 247-48). Compare Coleman v. State, 610 So. 2d 1283, 1287 (Fla. 1992); Bush v. State, 461 So. 2d 936, 941 (Fla. 1984).

This Court has approved death sentences in other cases in which a trial court has accepted a plea from a less culpable accomplice. In Hoffman v. State, 474 So. 2d 1178 (Fla. 1985), this Court made "clear that it is permissible to impose different sentences on capital codefendants whose various degrees of participation and culpability are different from one another. Moreover, the exercise of prosecutorial discretion in granting immunity to a less culpable accomplice, co-conspirator, or aider and abettor does not render invalid the imposition of an otherwise appropriate death sentence." Id. at 1182 (citations omitted). See also Williamson v. State, 511 So. 2d 289, 292 (Fla. 1987); Brown v. State, 473 So. 2d 1260, 1268 (Fla. 1985).

The cases relied upon by Hazen are easily distinguished. In Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), this Court vacated Scott's death sentence and imposed a life sentence because Robinson's life sentence was "newly discovered evidence" which

probably would have resulted in a life sentence had the sentence been known on direct appeal. Id. at 469. Significant to this Court's decision were the facts that Scott and Robinson had similar records, were the same age, had comparably low IQS, and were equally culpable. In Slater v. State, 316 So. 2d 539 (Fla. 1975), this Court vacated Slater's death sentence and imposed a life sentence based on the trial court's improper override of the jury's recommendation for life. This Court found the override improper because "Slater[] was an accomplice and did not have the murder weapon in his hand. Eleven members of the jury recognized the circumstances surrounding this offense and recommended life imprisonment." Id. at 542. These circumstances included the facts that Slater had no prior history and was 24 years old. Witt v. State, 342 So. 2d 497 (Fla. 1977), is actually more supportive of the state's position. There, this Court upheld the life sentence for Tillman and the death sentence for Witt, based on Tillman's severe mental or emotional disturbance and age of 18 years, which subjected him to domination by Witt, who was 30 years of age.

Finally, this Court has affirmed other death sentences based upon similar circumstances and a similar balance of aggravating and mitigating circumstances, See Sinclair v. State, 657 So. 2d 1138 (Fla. 1995). In this case, the trial court found three aggravating

circumstances applicable -- prior conviction of a violent felony (three contemporaneous convictions for sexual battery with force); committed during the course of a burglary; and committed for pecuniary gain. The trial court also found one statutory mitigating circumstance -- age (21) -- and three nonstatutory mitigating circumstances -- unstable childhood, obtained GED in prison/obtained early release/efforts to rehabilitate, and acceptable trial behavior. Compare Watts v. State, 593 So. 2d 198 (Fla. 1992) (Watts forced victim into home, robbed her and her husband, sexually assaulted the wife and shot the husband; four aggravating circumstances -- prior violent felony conviction, committed during a sexual battery, committed for financial gain, and committed in a heinous, atrocious, or cruel manner; two mitigating factors -- low IQ and age of 22 years); LeCroy v. State, 533 So. 2d 750 (Fla. 1988) (LeCroy shot husband once in head, shot wife three times, evidence that wife was sexually molested; three aggravating circumstances -- prior violent felony conviction, committed during a robbery, and witness elimination; two mitigating circumstances -- no significant criminal history and age of 17 years); Hudson v. State, 538 So. 2d 829 (Fla. 1989) (Hudson broke into ex-girlfriend's home and stabbed roommate; two aggravating circumstances -- prior violent felony conviction and committed

during the course of a burglary; three mitigating factors -- age of 22 years, extreme mental or emotional condition, and impaired capacity); Tompkins v. State, 502 So. 2d 415 (Fla. 1986) (Tompkins strangled 15 year old victim after he tried to force her to have sex and she kicked him in groin; three aggravating circumstances -- prior violent felony conviction, committed during an attempted sexual battery, and committed in a heinous, atrocious, or cruel manner; one mitigating circumstance -- age).

Issue III

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY IN RESPONDING TO A QUESTION DELIVERED TO THE COURT DURING DELIBERATIONS.

Along with the standard penalty phase instructions provided to the jury, the trial instructed the jury:

> If a majority of the jury determines that James Wayne Hazen should be sentenced to death, your advisory sentence will be as follows, and this tracks the language of the verdict form which will be provided [to] you. It would say in that case, a majority of the jury by a vote, of and then stating what that vote is, advise and recommend to the Court that it impose the death penalty upon James Wayne Hazen. On the other hand, if by six or more votes the jury determines that James Wayne Hazen should not be sentenced to death, your advisory opinion will be as follows. Again, tracking the language of your . . . recommendation form. And it would say in that case, the jury advises and recommends to the Court that it impose a sentence of life imprisonment upon James Wayne Hazen without the possibility of parole for 25 years.

(T 1457-58).

After the jury retired to deliberate in the penalty phase, the following dialogue occurred in court:

> [Court]: Okay. We're back on the record again. The defendant is present represented by counsel. The State is present through counsel. The jury has a question which they have propounded to the Court in writing. The question says, 'sir, may a juror abstain from voting? Example: Six favor death, five are

opposed, one abstains. Do we then have a simple majority?" Signed by the foreman.[11]

Counsel, do you agree with the Court that the answer to this question should simply be that a juror may not abstain from voting, period?

[Defense] : Judge, I don't know whether or not that is a correct statement of the law. I've never run across it. I don't know of any case law to support one position one way or the other, and I'm kind of reluctant to agree to anything. I'm going to leave it to the judgment of the Court.

[Court] : Well, the judgment of the Court is that you have what is tantamount to a hung jury if you have juror abstain. They are required by their oath and by their instructions by the Court that they are to return a recommendation that is in some form either by a majority or otherwise. If they are not in a position to vote, then that should have been made known at jury selection. They were given amply opportunity to make that known if they were not in a position to vote on this issue. Since the inception they were told that this was a potential death penalty case.

[Defense]: Of course, your see what my concern is, Judge. If the example is that six have voted for death and five have not, that even though the other one did not vote, that six does not constitute a majority.

[Court] : Right.

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[11] See also (R 172).

[Defense]: And, therefore, death would not be an option.

[Court]: Their vote does not say that this is what we have come to so far. It says example. Now, whether that example coincides with where they are in their deliberations, I have no way of knowing, and I don't think it would be proper for the Court to inquire.

[State] : I should point out for the record, and I think this should be clear, this question apparently was brought or they wrote out the question within minutes, probably no more than five or ten minutes after retiring. So I can only infer that this was something that somebody wanted to know right off and somebody else probably balanced that with the idea, well, if it's really not necessary, then we can just get on with it giving deference to your position. I don't seriously think -- I hope they did not seriously -- I don't think the evidence would suggest they seriously have fully deliberated on this, on a man's life in ten minutes.

[Court] : I would hope they would not do that.

[Defense]: For the sake of the record, I cannot offer any objections to what the Court proposed to do. However, I cannot acquiesce in that.

[Court] : Right, I understand. I'm simply going to answer the question that it is not permissible for a juror to abstain from voting, period.

[State] : No objection to that, Your Honor.

[Court] : All right. Bring them in.

(Jury present.)

[Court]: I'm sorry to interrupt your lunch.

[Juror] : We're almost finished.

[Court]: Well, you eat quickly then. All right. Be seated then. The Court recognizes for the record that the entire jury panel is present in the courtroom. I have read your question and the answer to the question is that it is not legally permissible for a juror to abstain from voting. Does that answer the question?

[Juror]: Yes, sir, it does.

(T 1459-63). The jury subsequently recommended death by a vote of seven to five (T 1465) .

Initially, this issue does not appear to be preserved for appellate review. As the record shows, while defense counsel stated he could not acquiesce in the trial court's action, he very clearly did not object and in fact stated that he was "going to leave [the decision] to the judgment of the Court." (T 1459) . Thus, any error on this point was invited by counsel, and this Court should decline to address it. White v. State, 446 So. 2d 1031, 1035 (Fla. 1984); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983); Jackson v. State, 359 so. 2d 1190, 1194 (Fla. 1978); Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974). See Derrick v. State, 641 So. 2d 378 (Fla. 1994) (involving a similar issue, this

Court found that, because Derrick's counsel had agreed to the judge's reinstruction, Derrick had waived his right to appeal); Cave v. State, 476 So. 2d 180 (Fla. 1985) (the judge's response to the jury's query, "with the positive approval and without objection of the defense counsel, was the correct response.").[12]

In the event this Court reaches the merits of this point, Hazen contends the trial court's response was erroneous, because implicit in this response was the instruction 'that no intervening event or change of heart had occurred which made that particular juror feel they could not render an impartial and fair verdict. Without any inquiry, this **was** an assumption without basis in fact. Thus, the jury's subsequent recommendation of death **was a** nullity." Initial Brief at 96. Hazen's position is both untenable and unsupported.

It is clear that the trial court's instruction was legally correct. In Pangburn v. State, 661 So. 2d 1182, 1188 (Fla. 1995), this Court recounted: "Section 921.141, Florida Statutes (1991), which governs the penalty phase proceeding in a capital case, provides that **a** jury is to render to the court an advisory sentence

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[12] **Furthermore, any error on this point is not fundamental in nature and thus requires an objection for appellate review. See Armstrong v. State, 364 So. 2d 1238 (Fla. 1st DCA 1977) (not fundamental error to give standard jury deadlock instruction in absence of deadlocked jury; objection required).**

of either life imprisonment or death." See also Fla. Stat. § 921.141(1), (2) (1993) ("Upon conviction or adjudication of guilt of a defendant of a capital felony . . . the jury shall . . . render an advisory sentence.") (emphasis added). Similarly, at the close of the penalty phase, the trial court instructed the jurors that it was their duty to advise the court as to punishment (T 1453-54).[13]

Furthermore, the jury's question did not indicate a deadlock or impasse, but simply indicated a preliminary vote. Cases from this Court support the trial court's response in this matter. In Rose v. State, 425 So. 2d 521 (Fla. 1982), the trial court gave the standard jury deadlock instruction to the jury during the penalty phase after the jury sent out a note during deliberations: "We are tied six to six, and no one will change their mind at the moment." Id. at 525. This Court held that the trial court should not have read the deadlock instruction, but should have advised the jury that it was not necessary to have a majority and that, if seven jurors did not vote to recommend death, the recommendation was life imprisonment. See also Rose v. State, 461 So. 2d 84 (Fla. 1984). Implicit in this decision was that all twelve jurors would vote.

[13] As noted by the trial court in ruling on the jury question, the topic of rendering an advisory sentence was explored extensively during voir dire (T 230-430).

In **Cave,** the jury delivered a note to the court during deliberations: 'We are at a split decision. We would like it stated and published to the Court of this advisory sentence. The current form does not **allow** for this revelation. Please advise." 476 So. 2d at 186. With the agreement of defense counsel and the prosecutor, the trial court reinstructed the jury that a vote of 6 to 6 was an advisory sentence of life imprisonment. Id. Eight minutes after this reinstruction, the jury returned a vote of 7 to 5 in favor of a death sentence.

On appeal to this Court, Cave argued that the jury's initial request constituted a 6 to 6 vote for life. This Court disagreed, noting that "the query referred to a split decision, not a 6-6 vote. Neither the judge nor the parties could know whether the 'split decision' referred to an 11-1, 6-6, or 1-11 vote on the death penalty. Thus, the judge's response, with the positive approval and without objection of the defense counsel, was the correct response." Id.

In Derrick, the jury sent the following note to the judge during deliberations: "Upon voting on such case, the jury has ended with **a** vote count of equal amount, six votes for death and six votes for life." 641 So. 2d at 379. The judge, with consent from counsel, reinstructed the jury that the advisory verdict did

not have to be unanimous, that a death recommendation must be made by a majority, and that a life recommendation may be made by either a majority or a tie vote of six to six. The jury returned a death recommendation by a vote of seven to five.

On appeal, Derrick argued that instead of reinstructing the jury and sending it back for further deliberation, the judge should have instructed the jury to sign the life sentence recommendation, and relied on Rose and Patten v. State, 467 So. 2d 975 (Fla.), cert. denied, 474 U.S. 876 (1985). This Court found first that, because Derrick's counsel had agreed to the judge's action, Derrick had waived his right to appeal. This Court then found that, if the issue were not barred, the reinstruction was proper:

> In Rose and Patten, the instruction which we deemed improper was an Allen charge. In the instant case, the court did not given an Allen charge in response to the jury inquiry. Instead, the court followed our directive in Rose and reinstructed the jury that, if seven jurors do not vote to recommend death, then the recommendation is life imprisonment. This instruction is not, as Derrick contends, coercive. The fact that the jury subsequently returned with a seven to five death recommendation merely indicates that their original vote was a preliminary one and that a juror changed his or her mind.

Id. at 380.

Hazen's contention that the trial court should have conducted an inquiry into the circumstances surrounding the jury's question is unfounded. Any such testimony would have "essentially inhered" in the sentencing recommendation as it would have related what occurred in the jury room during the jury's deliberations. See **Fla. Stat.** § 90.607(2)(b) (1993). See **also** Johnson v. State, 593 so. 2d 206, **210** (Fla. 1992); Songer v. State, 463 So. 2d 229 (Fla.), cert. denied, 472 U.S. 1012 (1985).

Issue IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING MRS. McADAMS TO TESTIFY ABOUT HAZEN'S STARING AT HER AT HIS ARRAIGNMENT.

The decision to admit evidence is committed to the sound discretion of the trial court, and such a decision should not be disturbed on appeal absent a showing of abuse of discretion. Muehleman v. State, 503 So. 2d 310, 315 (Fla. 1987); Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). The trial court did not abuse its discretion in permitting Mrs. McAdams to testify that she saw Hazen staring at her during his arraignment, because this testimony was relevant to rebut Hazen's theory of innocence that he was not at the McAdams' home during the commission of the instant crimes.

Before Mrs. McAdams took the stand, defense counsel moved in limine at the bench to preclude her from 'making any statements in regards to identifying my client based upon having seen him in court previously." (T 572). The following dialogue ensued:

> [Court]: She's going to be able to say that she has seen him before and she's seen him in court before and recognizes him from being in court?
>
> [State]: But not at the house.
>
> [Court]: But not at the house. I don't know that that's particularly harmful.

[Defense]: I don't know whether it's relevant, The jury may conclude that that is some type of identification. I think in abundance of caution, there's no need for it.

[Court] : I'm not going to preclude the State from doing that provided it's absolutely clear in your questioning that the identification was such that it was, that she recognizes him from other court appearances pertaining to this case.

[State]: Right. Right.

[Court] : As long as it's clear. If it [] come[s] across as being clear, I think that's legitimate inquiry.

[State] : You're objecting to her identifying him?

[Defense] : Okay.

[State] : I'll make it real clear.

[Defense] : All right.

(T 572-03).

During direct examination, the state asked Mrs. McAdams about Hazen's staring at her during his arraignment (T 602-07);[14] defense counsel made no objection (T 608). During cross examination, defense counsel pursued this line of questioning (T 610-18). The state asked a few more questions about this incident during

[14] **Mrs. McAdams did not know at the time that "this person" was Hazen, one of the perpetrators (T 607). She simply noticed "this person" staring at her and glancing away every time she made eye contact with him (T 606, 614).**

redirect examination with no defense objection (T 618). When the trial moved to the courtroom where Hazen's arraignment occurred, defense counsel continued cross examination of Mrs. McAdams about this incident (T 627-30); the state, redirect examination (T 631-33); defense, recross examination (T 634-35); the state, more redirect examination (T 635-36); and defense, more recross examination (T 636-37).[15]

Hazen claims that the relevance of this testimony was minimal and the prejudice was overwhelming. Initial Brief at 98. Hazen, however, acquiesced to the state's agreement to 'make it clear" that Mrs. McAdams could not identify Hazen from the scene of the crimes, and did not object to her testimony at the time it was introduced into evidence. Defense counsel then vigorously pursued this line of questioning with Mrs. McAdams, and rebutted her testimony with that of Hazen. Hazen explained that, during his arraignment, he looked at Mrs. McAdams, whom he did not know at the time, because he saw her sitting in the venire and thought she was

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[15] **The state later recalled Mrs. McAdams, but did not pursue its questioning about Hazen's staring at her during his arraignment. Instead, the state asked Mrs. McAdams to describe the builds of the perpetrators she observed on the night in question; Mrs. McAdams did so, naming Kormondy, Buffkin, and Hazen (T 1030). Defense counsel moved for a mistrial and asked for a curative instruction, which the trial court gave (T 1031-35). All jurors indicated that they understood (T 1036). Defense counsel renewed his motion for a mistrial, which the trial court denied (T 1036).**

the victim and that the state had placed her there to identify him (T 1071).

This Court should decline to address the merits of this issue for two distinct reasons. First, the issue is procedurally barred, because defense counsel failed to object when Mrs. McAdams testified on this point. Correll v. State, 523 So. 2d 562, 566 (Fla.), cert. denied, 488 U. S. 871 (1988); Phillips v. State, 476 so. 2d 194 (Fla. 1985); Bonham v. State, 450 So. 2d 269 (Fla. 3d DCA 1984); German v. State, 379 So. 2d 1013 (Fla. 4th DCA 1980); Crespo v. State, 379 So. 2d 191 (Fla. 4th DCA 1980); Jones v. State, 360 So. 2d 1293 (Fla. 3d DCA 1978). Second, for defense counsel to acquiesce to the state's agreement to "make it clear" that Mrs. McAdams could identify Hazen only from his appearance at arraignment, pursue this line of questioning so vigorously with both the victim and Hazen, and then claim error on appeal is nothing less than inviting error, a tactic which has been disapproved soundly by this Court on numerous occasions. White v. State, 446 So. 2d 1031, 1035 (Fla. 1984); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983); Jackson v. State, 359 So. 2d 1190, 1194 (Fla. 1978); Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974).

In the event this Court reaches the merits of this claim, it is clear that the state introduced this evidence for the purpose of

adding one more piece to the puzzle of evidence against Hazen, and to rebut Hazen's theory of innocence. Although the state had Valerie Kormondy and Buffkin's testimony, which fully implicated Hazen in the charged offenses, the state also sought to prove Hazen's guilt through circumstantial evidence, i.e., Hazen's fingerprints found in Kormondy's vehicle and threads from the victim's dress found on the seats where each of the co-defendants sat in Kormondy's vehicle. The staring incident was just one more piece of circumstantial evidence. See Larzelere v. State, Case No. 81,793, slip op. at 21 (Fla. Mar. 28, 1996); Anderson v. State, 574 so. 2d 87, 93 (Fla.), cert. denied, 502 U. S. 834 (1991); Straight v. State, 397 So. 2d 903, 908 (Fla. 1981); State v. Young, 217 So. 2d 567, 571 (Fla. 1968).

Additionally, Hazen's theory of innocence was that he was not at the McAdams' house while the crimes were committed, but was at Kormondy's home waiting for Kormondy and Buffkin to return. However, through introduction of Hazen's staring at Mrs. McAdams at arraignment, the state offered legitimate, relevant rebuttal of this theory, i.e., Hazen was at the scene, participated in the crimes of burglary, sexual battery, and murder, and recognized the surviving victim at his arraignment:

> Now, he's from Ponca City, Oklahoma and he sees a woman who's from Pensacola. He sees a woman who he's never met before supposedly, a woman whose house he's never been in supposedly, whose picture has never been in the paper, whose picture has never been on television. And what does he do? He stares back at her. And when she sees him she stares back. He looks away. He stares back. She sees him, he looks away. He identified Mrs. McAdams.

(T 1221-22).

In any event, if error occurred on this point, it was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Beyond a reasonable doubt, Mrs. McAdams's testimony did not affect the jury's verdict, because this line of questioning was limited; defense counsel agreed to the questioning; defense counsel fully explored this testimony on cross examination of Mrs. McAdams and through direct examination of Hazen; and the state presented other evidence of Hazen's guilt through the compelling testimony from Buffkin and Valerie Kormondy.

Issue V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN RULING ON HAZEN'S OBJECTIONS TO THE STATE'S CROSS EXAMINATION OF HAZEN'S MITIGATION WITNESS SAM KASL.

The trial court has discretion in controlling the conduct of counsel during the course of a trial, and its rulings in this regard will not be overturned on appeal absent a showing of clear abuse of discretion. Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988), cert. denied, 112 S. Ct. 131 (1992). The trial court did not abuse its discretion in ruling on defense counsel's six objections during the state's cross examination, as it sustained objections to argumentative questions and overruled objections to proper questions.

During direct examination, Sam Kasl testified that she had taken care of Hazen since he was nine years old because his adoptive parents would not allow him to eat unless he had earned money each day (T 1390-91); his adoptive parents would pay for their four natural children to swim in a pool, but would make Hazen and his brother walk 10 miles to the free pool if they wanted to swim (T 1392-93); that, even though Hazen has a biological mother and adoptive mother, he calls Kasl 'mom" (T 1395) ; that Hazen's adoptive mother had called him an illegitimate little bastard, no

good, and a liar (T 1397-98); that, at around age 17, Hazen was adopted by a gay man, who made sexual advances toward him (T 1399); that, shortly after this adoption, Hazen was arrested for burglary (T 1399); that, as a result of punching his new adoptive father in the nose for making a sexual advance, Hazen's probation was violated and sentenced to seven years in prison (T 1400); that, during this incarceration, Hazen escaped; and that Hazen tried to straighten out his life by getting his GED, working two jobs, paying his fines, and getting engaged (T 1402).

During cross examination, the state pursued these various areas with Kasl, most without objection. Kasl testified that she reported the abuse by Hazen's adoptive parents to the police, but "they [didn't] care." (T 1408). Kasl stated that Hazen gave her his money after he got out of prison so that she could get money orders to pay off his fines (T 1409). Kasl denied that Hazen stayed with her because she provided no discipline and let him do whatever he wanted (T 1413). Kasl did not remember whether she got state aid for allowing Hazen to stay with her (T 1413). Kasl stated that she did not adopt Hazen because Oklahoma law prevented foster parents from adopting the foster children (T 1415).

When the state asked Kasl about her background, however, namely, whether she had 'some kind of problem with contributing to

delinquency problems" (T 1415), the defense registered an objection at the bench:

> [Defense] : Judge, my objection is that . . . even in the penalty phase that is an improper way to attempt to impeach a witness as relates to prior record.
>
> [Court] : Well, that's what my question was. If it's an attempt to impeach by prior record, it's an improper way to do it. If it's something else, I need to know what the something else is.
>
> [State]: I think her background in the reason I suspect that she wasn't allowed to adopt this man and her background belies her direct that I'm a giving, loving person. She just ran a place for kids to abscond to, undisciplined like Pleasure Island in the movie.
>
> [Defense] : Judge . . . you certainly don't impeach by a fishing expedition, and this is certainly a fishing expedition.
>
> [Court]: He has to have a good faith basis for asking the question.
>
> [State] : I know she was convicted of contributing to the delinquency with some juvenile.
>
> [Defense] : Judge, if Mr. Edgar knows that . . . Mr. Edgar knows that's not the proper way to impeach.
>
> [State] : I'm not trying to do that.
>
> [Defense] : And whether or not she could adopt[] or not is not relevant to what she's testified to here, and it's not going to her

credibility as to what she testified, but it is certainly collateral. . . . I asked Mr. Edgar before she got on the stand, Russ, do you have any evidence of any felonies or crimes of dishonesty? If so, disclose them to me.

[Court] : There's no question that this is not proper impeachment by prior conviction. There's no question about that. The only question I have is what else is it then being used for? Is it probative and is it . . . substantial enough in a 90.403 evaluation to be allowed to be presented, and as I understand it, you're questioning her credibility and her motives.

[State]: For taking this man in.

[Court] : For taking this man in.

[State] : Which also undermines her entire story of crazy fabrication -- I talked to some people on the phone this morning. They said he was violated not for battery, but failure to perform community service. That made me think this woman is making all this up.

[Defense]: Judge, the way you do that is you bring evidence in to show that what she says is not correct. You don't go on collateral fishing expeditions.

[Court]: Well, I don't think that this is impeachment on collateral issues. I think it goes to her credibility, and I think under 90.403 weighing, it is sufficiently probative to outweigh any unfair prejudice to the defendant.

[State] : I'll just abandon it.

[Defense]: This isn't fair.

[State] : I'll just abandon it and if you want an instruction given to the jury, fine. I have a good faith basis for proceeding, I would like to develop it, but this is a minor matter.

[Defense] : That's my point.

[State]: Well, then do you want him to instruct the jury?

[Court] : I'm satisfied. The objection is overruled. If you wish to proceed, fine. If you wish not, that's up to you.

[State] : Thank you.

(T 1416-19). The state did not pursue this line of questioning (T 1419-26).

As the record readily reveals, the state properly utilized cross examination to explore Kasl's bias based on her answers provided during direct examination. See e.g., Pompa v. State, 635 So. 2d 114 (Fla. 5th DCA 1994); Mendez v. State, 412 So. 2d 965 (Fla. 2d DCA 1982). Notably, defense counsel objected only six times during the entirety of the state's cross examination: (1) twice for the rephrasing of a question (T 1409), which was rephrased; (2) twice to the argumentative nature of questions (T 1411), one of which was sustained (T 1411); (3) the instant issue (T 1415); and (4) as to a comment, which was sustained (T 1425).

Despite these objections, defense counsel made no oral objection or written motion that the state's alleged misbehavior in this regard deprived Hazen of due process. Thus, this issue as phrased in this appeal is not preserved for appellate review. Peterka v. State, 640 So. 2d 59, 70 (Fla. 1994).

Furthermore, Hazen's claim that the state engaged in an "undocumented attack" on Kasl is rank exaggeration. The entirety of the state's cross examination constitutes approximately 20 pages of the transcript, and was comprised of proper impeachment questions. Any improper questions were harmless beyond a reasonable doubt, because they did not affect the jury's verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The trial court properly overruled and sustained objections, and permitted the rephrasing of questions. Regarding Kasl's alleged contributing to the delinquency of a minor, there is no error, because the state voluntarily agreed to abandon this line of questioning, asked defense counsel if he wanted a curative instruction (of which defense counsel did not avail himself), and did not pursue this line of questioning.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to LYNN WILLIAMS, ESQ., 902-A North Gadsden Street, Tallahassee, FL 32303, this 29th day of May, 1996.

GYPSY BAILEY
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

JAMES W. HAZEN,

Appellant,

v. Case #: 84,645

STATE OF FLORIDA,

Appellee.

APPENDIX

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. 93-1302
DIVISION "E"

JAMES WAYNE HAZEN,

Defendant.

SENTENCING ORDER

The guilt phase of this proceeding was tried before this Court commencing August 24, 1994 and concluding August 27, 1994. The jury found Defendant Hazen guilty of first degree murder, three counts of sexual battery with the use of a deadly weapon or physical force, burglary of a dwelling with an assault or while armed, and robbery while armed, as charged in the indictment.

The same jury reconvened on August 29, 1994 for the penalty phase and after having considered evidence in support of and opposition to aggravating and mitigating factors, recommended to this Court (by a vote of 7/5) that the death penalty be imposed.

The Court requested sentencing memoranda from counsel for both the State and defense. After having received and considered same, a sentencing hearing was held on September 23, 1994 at which time counsel for both the State and defendant made further argument (the defendant presenting additional testimony). Sentencing was thereupon set for October 7, 1994.

This Court, having heard the evidence presented in both the guilt and penalty phases, having had the benefit of sentencing memoranda and further argument both in favor of and

in opposition to imposition of the death penalty finds as follows:

A. **AGGRAVATING FACTORS:**

1. **The Defendant has been previously convicted of a felony involving the use or threat of violence to the person. F.S. § 921.141(5)(b).**

Through the testimony of Cecilia McAdams, admissions made by defendant Kormondy and his accomplice Buffkin, the evidence establishes beyond a reasonable doubt that defendant Hazen and his accomplices entered the McAdams' home forcibly and at gunpoint with the premeditated intent to commit robbery and burglary and to avoid detection and arrest by witness elimination. Mrs. McAdams testified that during the course of these events (but prior to the killing of her husband Gary McAdams) she was sexually battered both orally and vaginally by three individuals. The totality of circumstances further establishes beyond a reasonable doubt that Hazen and his co-defendants Kormondy and Buffkin were, in fact, the individuals who perpetrated those acts of sexual battery. Upon the evidence presented the jury found defendant Hazen guilty of three counts of sexual battery with the use of a deadly weapon or with physical force as charged in the indictment.

Contemporaneous with the capital felony conviction and adjudication of this defendant he was additionally adjudicated guilty of three counts of sexual battery upon Cecilia McAdams with the use of a deadly weapon or with physical force as charged in the indictment.

During the penalty phase the State introduced a certified copy of defendant's prior convictions of those crimes.

The Court finds (and defense counsel concedes in his September 20, 1994 sentencing memorandum) that this aggravating factor has been proven beyond a reasonable doubt.

2. **The capital felony was committed while the defendant was engaged,** or **was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit a burglary.** F.S. **§ 921.141(5)(d).**

As indicated above, the centerpiece of the criminal episode culminating in the killing of Gary McAdams consisted of the armed home invasion, burglary and robbery of Mr. and Mrs. McAdams. The testimony of Mrs. McAdams together with admissions made by co-defendants Kormondy and Buffkin establish beyond a reasonable doubt that entry into the McAdams home was forcibly gained at gunpoint. Thereafter (but prior to the killing of Mr. McAdams) the home was ransacked and numerous items of property were taken either for the personal use of defendant and his accomplices or to acquire funds with which to purchase illegal drugs. It was during the perpetration of this burglary that Mrs. McAdams was sexually battered and Mr. McAdams was murdered,

Upon the totality of the evidence presented the jury found defendant Hazen guilty of burglary of the home of Mr. and Mrs. McAdams with an assault or while armed as charged in the indictment.

Contemporaneous with the capital felony conviction and adjudication of this defendant he was additionally adjudicated guilty of burglary of the home of Mr. and Mrs. McAdams with an assault or while armed as charged in the indictment. During the penalty phase the State introduced a certified copy of defendant's prior conviction of that

crime.

The Court finds (and defense counsel concedes in his September 20, 1994 sentencing memorandum) that this aggravating factor has been proven beyond a reasonable doubt.

3. The capital felony was committed for pecuniary gain. F.S. § 921.141(5)(f).

The evidence establishes beyond a reasonable doubt that pecuniary gain was the intended purpose for invasion of the McAdams home. The testimony of Mrs. McAdams together with admissions made by co-defendants Kormondy and Buffkin established beyond a reasonable doubt that numerous items of personal property were taken for either the personal use of defendant Hazen and his accomplices or to obtain funds for the purchase of illegal drugs. Upon the totality of evidence presented the jury convicted this defendant of robbery while armed as charged in the indictment.

Contemporaneous with the capital felony conviction and adjudication of this defendant he was additionally adjudicated guilty of robbery while armed as charged in the indictment. Evidence introduced by the State during the penalty phase included a certified copy of defendant's prior conviction of that charge.

The Court finds (and defense counsel concedes in his September 20, 1994 sentencing memorandum) that this aggravating factor has been proved beyond a reasonable doubt.

No statutory aggravating factors other than those referred to above apply to this case and none have been considered by this Court. Further, no matters or

evidence of any nature whatsoever except as presented in paragraphs **A 1-3** above were considered in support of aggravation.

B. **MITIGATING FACTORS:**

1. **Statutory Mitigating Factors:**

(a) The **defendant had no significant history of prior criminal activity.** F.S. **§ 921.141(6)(a)**

Defense counsel offered no testimony or argument regarding this statutory mitigating factory. The Court, therefore, finds that this factor has not been reasonably established and gives it no weight.

(b) **The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. F.S. § 921.141(6)(b).**

Defense counsel offered no evidence or argument regarding this statutory mitigating factor. The Court, therefore, finds that this factor has not been reasonably established and gives it no weight.

(c) The victim was a participant in defendant's conduct or consented to the act. ES. § 921.141(6)(c).

Defense counsel offered no evidence or argument regarding this statutory mitigating factor. The Court, therefore, finds that this factor has not been reasonably established and gives it no weight.

(d) **The defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's**

participation was relatively minor. F.S. § 921.141(6)(d).

The evidence fails to establish that defendant Hazen actively participated in the planning of the criminal episode or that he had any detailed knowledge of the manner in which it was to be consummated until shortly before the events occurred. Through admissions made by defendant Kormondy and the testimony at trial of co-defendant Buffkin it is established beyond a reasonable doubt that once Hazen became aware of the plan, he fully embraced it and became a major participant. He prepared for forced entry into the McAdams' home by placing a shirt over his face to conceal his identity and by covering his hands with socks to conceal his fingerprints. After entry was gained he and co-defendant Kormondy disconnected or cut the telephone lines, closed the blinds and ransacked various rooms searching for valuable items of property. This was accomplished while co-defendant Buffkin held Mr. and Mrs. McAdams at gunpoint face down on the kitchen floor. After completion of the burglary and robbery he committed sexual battery upon Cecilia McAdams.

Further, the trial testimony established that immediately following the "execution style" murder of Gary McAdams Hazen fired a forty-four caliber bullet into the floor of the master bedroom where he was sexually battering Mrs. McAdams. Expert testimony established that the forty-four caliber bullet was fired at contact or near contact with the bedroom floor and that the discharge of that weapon was most likely intentional and not accidental. The firing of that second shot could have been for no purpose other than to create the appearance (for the benefit of his co-defendants) that Hazen had, in fact, completed his part in what the evidence establishes to have been a

prearranged plan for the elimination of both Mr. and Mrs. McAdams. Although Hazen declined (for whatever reason) to eliminate Mrs. McAdams he was, nonetheless, a significant and major participant in the entire criminal episode. As such he was equally culpable with his co-defendants in the perpetration of the crimes of burglary, robbery, sexual battery and felony murder. The Court, therefore, finds that this mitigating circumstance has not been reasonably proven and gives it no weight.

(e) The defendant acted under extreme duress or under the substantial domination of another person. F.S. 921.141(6)(e).

Defense counsel offered no evidence or argument in support of this statutory mitigating factor. This taken together with the evidence referred to in the immediately preceding subparagraph leads the Court to conclude that this factor has not been reasonably established and it is, therefore, given no weight.

(f) The capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired. F.S. 921.141(6)(f).

Defense counsel offered no evidence or argument in support of this statutory mitigating factor. The Court, therefore, finds that this factor has not been reasonably established and gives it no weight.

(g) The age of the defendant at the time of the crime. F.S. 921.141(6)(g).

The evidence establishes that this. defendant was twenty-one years of age at the time of the offense, Nonetheless, the evidence further establishes that

his developmental, mental and emotional maturity were significantly impaired or delayed in many respects. The testimony of Sam Kasl, Hazen's "foster mother", established that he was emotionally dependent, a follower, unable to manage his own financial affairs and generally inept in meaningful decision making.

The Court, therefore finds that this statutory mitigating factor has been reasonably established and gives it moderate weight.

2. Non-Statutory Mitigating Factors:

At the September 23, 1994 sentencing hearing (and in his September 20, 1994 sentencing memorandum) defense counsel requested that the Court consider the following non-statutory mitigating factors:

(a) **That defendant had an unstable childhood.**

Through the testimony of Sam Kasl Hazen's "foster mother" and natural aunt of defendant Kormondy it was established that Hazen was abandoned by his biological parents and lived in various foster care placements from the time he was eighteen months of age. At approximately age twelve both Hazen and his biological brother lived with the McKissick family in Oklahoma during which time both were physical and emotionally mistreated. Hazen eventually ran from the McKissicks and was placed in yet another foster care shelter. At approximately age thirteen he was adopted by Jerry Hazen a single, homosexual man who provided Hazen with alcohol and drugs to gain his favor. At approximately age fifteen Hazen left the home of his adoptive father as a result of continued homosexual advances. Thereafter he was placed in the foster home of Sam Kasl who Hazen considered to be his surrogate mother.

Although there is no question that Hazen was the product of a series of broken and dysfunctional environments there is nothing in the evidence to suggest that he was either emotionally or intellectually impacted to the point that he was rendered incapable of making positive choices by which to extricate himself from the depravation and neglect of his youth. The evidence fails to establish that his unfortunate childhood either predisposed him to commit the cruel, random and violent crimes perpetrated against Mr. and Mrs. McAdams or rendered him less capable of appreciating the consequences of his actions.

The Court finds that this non-statutory mitigating factor has been reasonable established but gives it little weight.

(b) No prior crimes of violence prior to July 19, 1993.

The evidence establishes that (prior to the instant criminal episode) Hazen had no involvement in crimes of violence. His prior criminal record consists of a burglary for which he was initially placed on probation. His supervision was, however, terminated for failure to pay court costs and fines. As a result of that violation he was sentenced to state prison. While in state prison he escaped and was apprehended in New Mexico where he was returned to prison and sentenced to additional time for the escape.

Although, on its face, Hazen's lack of record for violent crimes appears to be a viable mitigating factor the Court considers Hazen's own testimony to be the more accurate barometer of his propensity for violence. Although he denied participating in the events of that evening he, nonetheless, testified that if he had been present neither Mr. or Mrs. McAdams would have been left alive. This testimony clearly

belies any inference of non-violence which might otherwise be drawn from a lack of documented prior violent behavior.

The Court, therefore, finds that this non-statutory mitigating factor has not been reasonably established and gives it no weight.

(c) Defendant obtained his GED while in prison; obtained early release and made efforts to rehabilitate his life.

It is established by the evidence that while Hazen was in an Oklahoma prison he worked toward and obtained his GED. He was released prior to the completion of his sentence and attempted to rehabilitate his life. He obtained employment thereby providing money to his foster mother for the purpose of paying the fines and costs that had been imposed in his prior cases.

Sam Kasl testified that Hazen had reestablished a positive relationship with his high school girlfriend and that the two had plans for marriage.

The Court finds that these circumstances constitute evidence of potential rehabilitation and productivity in the prison system and are reasonably established as non-statutory mitigating factors. The Court gives the moderate weight.

(d) A **co-defendant with greater involvement sentenced to life imprisonment.**

It is established by the evidence that co-defendant Buffkin while facing possible conviction and exposure to death penalty recommendation agreed (during jury deliberation) to plead guilty as charged in the indictment and to identify the trigger-man and third accomplice (Hazen) in exchange for a sentence of life imprisonment. Although

the evidence fails to establish that Hazen participated in the planning of the criminal episode, it is clear from the testimony of co-defendant Buffkin and admissions made by co-defendant Kormondy that once the plan was made known to Hazen he fully and willing embraced it. The extent of his involvement was critical to the cruel and methodical manner in which the plan was executed. It is clear from the evidence that after forcible entry of the McAdams' home was accomplished, the participation and culpability of Hazen was equal to or greater than that of Buffkin. As indicated above, the evidence establishes beyond a reasonable doubt that there existed a prearranged plan of witness elimination and further that Hazen was to carry out the execution of Mrs. McAdams.

The rule of law precluding disparate treatment of equally culpable non-triggerman co-defendants is inapplicable when (as in this case) the state elects not to pursue the death penalty against one co-defendant in exchange for testimony establishing the identity and participation of the other. Under these circumstances any resulting difference in the severity of sentence arises from a tactical choice made by the prosecuting authority and not by the exercise of independent discretion by either the jury or sentencing judge.

The Court, therefore, finds that this non-statutory mitigating factor has not been reasonably established and gives it no weight.

(e) Defendant did not exercise the opportunity to eliminate a witness.

It is established by the evidence that immediately following the shot which took the life of Mr. McAdams Hazen fired a forty-four caliber bullet into the floor of the master bedroom where Mrs. McAdams had been sexually battered by him. The fact that he elected not to eliminate Mrs. McAdams does not constitute a non-statutory

mitigating factor in the felony murder of Mr. McAdams. The Court, therefore, gives it no weight.

(f) **That defendant's behavior was acceptable at trial.**

The Court observed the defendant's conduct during the guilt and penalty phases of these proceedings and finds his conduct to have been acceptable. The Court finds that this mitigating factor is reasonably established but gives it little weight.

Other than those stated above defense counsel has not requested that the Court consider any other non-statutory mitigating factors.

The Court has carefully considered and weighed the aggravating and mitigating factors found to exists in this case, being ever mindful that human life lies in the balance. The Court finds, as did the jury, that the aggravating factors present in this case outweigh the mitigating factors. Accordingly, it is;

ORDERED AND ADJUDGED that defendant James Wayne Hazen is hereby sentenced to death for the murder of Gary McAdams. The defendant is committed to the custody of the Department of Corrections, State of Florida for execution of this sentence as provided by law.

DONE AND ORDERED in Pensacola, Escambia County, Florida this the 7th day of October, 1994.

JOHN P. KUDER, CIRCUIT JUDGE

Conformed copies to:
Russell G. Edgar, Jr., Assistant State Attorney
John L. Allbritton, Esquire
James W. Hazen, Defendant