IN THE SUPREME COURT OF FLORIDA

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JAMES PATRICK BONIFAY,

Appellant,

v.

CASE NO. 84,918

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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STATUTES AND CONSTITUTIONS

IN THE SUPREME COURT OF FLORIDA

JAMES PATRICK BONIFAY,

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STATE OF FLORIDA,

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_____/

PRELIMINARY STATEMENT

The State accepts Bonifay's preliminary statement.

STATEMENT OF THE CASE AND THE FACTS

The first four paragraphs of Bonifay's statement of the facts are copied almost verbatim from this Court's previous opinion in this case. Bonifay v. State, 626 So.2d 1310, 1311-12 (Fla. 1993). Because essentially the same evidence was introduced by the State at the resentencing proceeding, Bonifay's borrowed factual statement largely suffices as a description of the crime. In light of the additional issues he raises on this appeal, however, some additional factual observations are necessary.

Bonifay testified that Barth had shot the victim once from outside the store. However, Barth testified to the contrary; according to him, only Bonifay shot the victim (TR 194). Moreover, Bonifay's testimony was inconsistent with his own prior statements about the crime. Shortly after the murder, Bonifay

confessed to both Jennifer Tatum and George Wynne that he alone had shot the victim (TR 224, 279). In fact, Bonifay claimed he had tried to make Barth shoot the victim, and Barth had refused (TR 224-25). Based on this evidence, the trial court found as a fact that only Bonifay had shot the victim (R 102).

Bonifay also denied being the leader of the trio that committed the robbery. However, Bonifay admitted that he had obtained the gun and the bolt cutters, that he had told Barth and Fordham about the plan, and that he had told them where to park the car, how to enter and how to exit the store (TR 317). In addition, Bonifay was the one who had carried the gun, cut the locks, and murdered the victim.

As nonstatutory mitigation, Bonifay contended that he had shown remorse and had cooperated with the police -- leading them to evidence, admitting guilt, and testifying against his codefendant, Robin Archer. As to remorse, however, the record shows that Bonifay cursed the victim and his family as he was inflicting the fatal wounds (TR 193-94), laughed about the crime afterwards (TR 210-11), and bragged about it the next day (TR 279, 281-82). There in no indication in the record that Bonifay demonstrated any remorse until after he was arrested. Moreover, although Bonifay cooperated to some extent with the prosecution, the record shows that he did not testify consistently about whether or not employees at Trout were drug dealers (TR 301, 306), nor about whether or not his father had abused him (TR 304, 307-309). Furthermore, he gave testimony that was inconsistent with that of other witnesses concerning whether or not the crime

had been aborted Friday night because the intended victim had heard Bonifay cock his gun (TR 311), and he tried to persuade Barth to testify that he (Bonifay) had been high during the commission of the crime (TR 196). The trial court found that Bonifay's stories about the crime have been varied, incomplete and self-serving, and that his primary remorse was for his own predicament (R 111, 112-13).

Bonifay refers in his statement of the facts to Dr. Larson's testimony, but, except to mention Bonifay's potential for rehabilitation, omits to describe that testimony. Dr. Larson's testimony merits further discussion.

Dr. Larson testified that Bonifay's IQ is average to above average, although a discrepancy between his verbal IQ and his performance IQ indicates a "cognitive problem" which in Bonifay's case is attention deficit disorder (TR 359-60). This attention deficit disorder is "organic," and affects Bonifay's ability "to attend and concentrate" which is "very important for learning in an academic setting" (TR 363). He explained:

> The, my impression is that, yes, there is organic damage. The attention deficit disorder means that the brain isn't really functioning quite right in a fairly significant kind of way and the person is not able to attend and concentrate. Maybe I should explain that there are really three systems in terms of brain functioning that are very vulnerable to brain insult or to chemicals or even genetic factors. One is memory process, another is high order functioning, another is an ability to attend and concentrate. And this system, this ability to attend and concentrate is very important for learning in an academic setting. [TR 363].
>
> [P]robably people get [attention deficit disorder] for different reasons. The literature isn't entirely clear on that. There's some indication that it can come from brain injury, insult to the head, a lack of oxygen at

> birth is another very common source. There also may be a genetic component. We tend to see it also in certain families and so I think different individuals may have it for different reasons. [TR 368].

However, while Bonifay has "some areas of impairment," he also has "areas of talent." He is "better than the average college freshman in terms of problem solving when he can look at things and try to put things together, good judgment in that area," and he reads "at an advanced level actually" (TR 367).

Bonifay knows the difference between right and wrong (TR 374), and suffers "no psychosis, no major mental illness" (TR 361). However, a "dysthymic disorder" showed up in Dr. Larson's testing (TR 361). This disorder refers to depression, and is a "very common disorder seen in the general population" (TR 362). In addition, Bonifay demonstrates "borderline personality characteristics and antisocial characteristics" (TR 361). Dr. Larson characterized Bonifay as "an angry person," with a "pervasive" anger that is manifested by conflicts with peers and authority figures, and by "violent outbursts" (TR 365).

Asked if Bonifay was "worthy of being rehabilitated," Dr. Larson answered:

> Well, that's I think really the province of the jury. I can speak to it from a psychological point of view in the sense that I think he has abilities that, he has some good intellectual abilities. He's a pretty compulsive individual. He likes to have things organized and work on deficiencies, try to improve himself and so forth so if you look at it from that point of view, he certainly has a lot of characteristics that would indicate that he has potential for that. [TR 370-71]

Dr. Larson acknowledged on cross examination that a psychological evaluation conducted in 1985 indicates that Bonifay

appeared to take pleasure in his outbursts of physical aggression (among these outbursts was an incident in which resulted in Bonifay being expelled from high school for breaking another student's jaw) (TR 373). Dr. Larson further acknowledged that another psychologist had concluded that Bonifay has "fairly good insight and judgment" (TR 373).

It is not accurate to say, as Bonifay does in his statement of the facts (appellant's brief at p. 3), that the trial court "accepted Larson's testimony as establishing five statutory and six nonstatutory mitigators." In fact, the trial court found only two statutory mitigators -- age and no significant history of prior criminal activity. Not only did Dr. Larson's testimony fail to establish all of these mitigators, it was not even relevant to many of them.

The only relevant portion of the prosecutor's closing argument that was objected to at trial concerns the prosecutor's response to Dr. Larson's testimony that Bonifay had some capacity for rehabilitation. After discussing Bonifay's actions in this case, the prosecutor argued: "Well, [Bonifay] doesn't need education, he doesn't need rehabilitation. He needs extermination, ladies and gentlemen." (TR 441). Bonifay's trial attorney objected, without stating any grounds. The prosecutor responded, "I can argue for the death penalty, the law says so" (TR 442). The trial court overruled the objection. The defense made no further issue about this argument; specifically, the defense did not move for a mistrial.

Bonifay raises no issue on appeal concerning the three aggravators found by the court. However, he does contest the court's mitigation findings. He mentions these findings in his statement of facts, but does not reproduce them. Moreover, he incorrectly reports (appellant's brief at p. 5) that the trial judge found every statutory and nonstatutory mitigator addressed in the sentencing order, when it is clear from the order itself that several of these mitigating factors were not found. Bonifay's statement of facts in this respect is both incorrect and utterly insufficient. Because the trial court's mitigation findings are at issue in this case, and because the sentencing order itself serves as an accurate statement of this case and its facts, the State will set forth the court's sentencing order in its entirety, beginning on the next page. (In deference to the order's length, it will be double-spaced for readability).

SENTENCING ORDER

The defendant, James Patrick Bonifay, was tried and found guilty by a jury of all three (3) counts of the indictment, which charged him with murder in the first degree, robbery with a firearm, and grand theft. The same jury reconvened, heard evidence in support of aggravating and mitigating factors and returned a 10 to 2 recommendation that the defendant be sentenced to death for the capital murder. On September 20, 1991, the Honorable Lacey A. Collier, Circuit Judge, found four (4) statutory aggravating circumstances, namely:

(1) The murder was committed while the defendant was engaged, or was an accomplice, in the commission of a robbery;

(2) The murder was committed for financial gain;

(3) The murder was especially heinous, atrocious, or cruel; and

(4) The murder was committed in a cold, calculated, and premeditated manner, without any pretense of legal or moral justification.

Judge Collier found only one (1) statutory mitigating circumstance existed, namely, the age of the defendant (17) at the time of the murder. Judge Collier found only one (1) non-statutory mitigating circumstance existed, namely, that the defendant demonstrated good attitude and conduct while incarcerated awaiting trial. Finally Judge Collier determined the aggravating circumstances substantially outweighed the mitigating circumstances and, therefore, imposed the death penalty upon the defendant for the capital murder.

On appeal, the Supreme Court of Florida affirmed the defendant's convictions, but vacated his sentence and remanded for resentencing, because it agreed with the defendant that the jury should not have been instructed on the heinous, atrocious, or cruel aggravator. The Court said, '[W]e find that this murder, though vile and senseless, did not rise to one that is especially cruel, atrocious, and heinous as contemplated in our discussion of this factor in State v. Dixon, 283 So.2d 1 (Fla. 1973), Cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).' Bonifay v. State, 626 So.2d 1310 (Fla. 1993). Upon remand, this Court convened a new jury and conducted a new sentencing hearing. This jury heard evidence in support of aggravating and mitigating circumstances and then returned a 10 to 2 recommendation that the defendant be sentenced to death. This Court requested, received and reviewed a pre-sentence investigation from the State of Florida, Department of Corrections, Probation and Parole Services, as well as a predisposition report from the State of Florida, Department of Health and Rehabilitative Services. On November 29, 1994, the Court held a further sentencing hearing where both sides made further legal argument and the Court was presented with correspondence on behalf of the defendant and the victim, Billy Wayne Coker. The Court set final sentencing for this date, December 6, 1994.

According to the evidence presented in this case, in March 1990, Robin Archer was fired from his job at an auto parts store. The following January, he convinced his 17 year old cousin, James

Patrick Bonifay, the defendant in this case, to kill the clerk he blamed for having him fired. According to Bonifay, Archer offered him a briefcase full of money, which Archer claimed was $500,000, to kill the clerk. Archer told Bonifay to rob the store to cover up the motive for the killing and told him to wear a ski mask and gloves. Archer also told him how to gain entry to the auto parts store, where the cash boxes were kept, how to gain access to those cash boxes, and where an emergency exit was located.

Bonifay asked a friend, Kelly Bland, if he could borrow a handgun. Bonifay was not home when Bland brought the gun, so Bland gave it to Archer, who, in turn, gave it to Bonifay. Bonifay enlisted two other friends, Cliff Barth and Eddie Fordham, to help him, after another friend, George Wynne, refused to participate.

Bonifay, Barth and Fordham went to the parts store just before midnight on Friday, January 25, 1991. Bonifay approached the night parts window and asked the clerk for some parts. Bonifay could not go through with the plan, and they left. It is unclear whether Bonifay's abandonment occurred because the clerk, whose suspicions were aroused by Bonifay's actions, made it difficult or because Bonifay had second thoughts.

The following morning, Archer got upset with Bonifay about not killing the clerk, and the trio returned to the parts store that night. A different clerk was working, and Bonifay shot him once in the body from outside the store and then shot him again as he and Barth crawled into the store through the parts window.

They broke open the cash boxes that Archer had told Bonifay about. Barth was unable to cut through the lock with the bolt cutters Bonifay had obtained from Kelly Bland, and so Bonifay handed the gun to Barth, took the bolt cutters, cut through the lock, returned the bolt cutters to Barth and retrieved the gun.

During this time, the victim, Billy Wayne Coker, was lying on the floor with a nonfatal wound to his chest area and a potentially fatal wound from the bullet which entered his back and pierced both his lungs. Coker was begging for his life and talking about his wife and children. Bonifay told him to 'shut the fuck up' and 'to fuck his kids' and shot him twice in the head, at point blank range, inflicting fatal injuries.

Bonifay and Barth then left the building and split the stolen cash with Fordham. The next day, Archer refused to pay Bonifay, because he killed the wrong person. Billy Wayne Coker, of similar weight and height to the clerk who was the object of Archer's plan, had come to relieve the other clerk, who had taken ill.

Bonifay later confessed at different times to Bland and to Bland's friend, Jennifer Tatum. Tatum informed the authorities, which led to the arrests of Bonifay, Archer, Barth and Fordham. The defendants were tried separately. The juries convicted each of them of first degree murder. Archer and Bonifay were sentenced to death. Their appeals resulted in an affirmance of the convictions, but their death sentences were overturned and the cases remanded for resentencing, because the Supreme Court of Florida found the jury should not have been instructed on the

heinous, atrocious, and cruel factor. Subsequently, this Court conducted a new sentencing on Robin Lee Archer, and the jury returned a 7 to 5 recommendation that he be sentenced to death. On January 19, 1994, this Court sentenced Robin Lee Archer to death for the capital murder of Billy Wayne Coker. That sentence is now on appeal [Case no. 83,258].

This Court, having reviewed the transcript of the trial as to the defendant's guilt and heard the evidence presented in the new penalty phase proceeding, and having had the benefit of further argument and evidence, both in favor of and in opposition to the death penalty, makes the following findings:

(A)Aggravating circumstances:

> 1. The capital felony was committed while the defendant was engaged, or was an accomplice in the commission of the crime of robbery. (Section 921.141(5)(d), Florida Statutes)

By his own admission and the testimony of Clifford Barth, James Patrick Bonifay murdered Billy Wayne Coker while engaged in the robbery of Coker at the Trout Auto Parts store.

> 2. The capital felony was committed for financial gain. (Section 921.141(5)(f), Florida Statutes)

This is not the ordinary felony murder case. Instead, it was a contract murder. Even though Archer later refused to pay Bonifay, Bonifay expected to receive payment over and above the proceeds of the robbery. Pecuniary gain, therefore, has been established independent of the robbery.

> 3. The capital felony was a homicide and was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (Section 921.141(5)(i), Florida Statutes)

The Supreme Court of Florida uses the phrase "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of first degree murder. The evidence must show that the defendant planned to kill or arranged to commit the murder before the crime began. This aggravating circumstance is reserved primarily for execution-style murders, contract killings, or witness elimination killings, but is also applicable to homicides evincing a careful plan or prearranged design. Rutherford v. State, 545 So.2d 853 (Fla. 1989).

The merciless killing of Billy Wayne Coker is the classic case of "murder for hire" -- a contract murder. James Patrick Bonifay was a willing and able instrument of death for Robin Archer's evil plan of revenge. Whether payment was to be the money taken in the robbery or a suitcase of money, Bonifay was willing to pursue and to carry out Archer's plan to coldly and mercilessly murder a stranger for hire. Bonifay procured the handgun, he enlisted Fordham and Barth to assist him he procured ammunition, he obtained ski masks to conceal their identities from the surveillance camera and bolt cutters to open the cash box, and he instructed Barth and Fordham as they carried out the deadly plan. Even after the first attempt was abandoned, Bonifay was willing and did try again the following night. Bonifay fired two bullets into Billy Wayne Coker without warning. While Coker was disabled on the floor by the initial wounds, Bonifay completed the robbery. Then, while the dying man pleaded for his life and for compassion for his wife and children, Bonifay placed the gun to Coker's head and coldly fired two more bullets into his head at point blank range -- execution style.

The plan proceeded over a period of several days -- ample time for reflection. When the first attempt was abandoned, Bonifay tried again the next night and succeeded. He shot to death Billy Wayne Coker, believing him to be the clerk Archer had commissioned him to kill. This crime, most assuredly, exhibits a degree of cold, calculated cunning and planning over time and a murder ruthlessly and mercilessly committed sufficient to illustrate the 'heightened premeditation' necessary to establish beyond any reasonable doubt this aggravating circumstance.

4. The other statutory aggravating circumstances are inapplicable in this case.

(B) Statutory Mitigating Circumstances:

1. The defendant has no significant history of prior criminal activity. (Section 921.141(6)(a), Florida Statutes)

While the defendant's history of prior criminal activities is not extraordinary, he admitted prior violent criminal activity. The defendant admitted involvement in a burglary in Mississippi in which someone was stabbed six or seven months before the murder. Additionally, he committed burglary and grand theft in Escambia County, Florida, although his convictions occurred after the murder. This statutory mitigating circumstance is entitled to very little weight.

2. The crime was committed while the defendant was under the influence of extreme mental or emotional disturbance. (Section 921.141(6)(b), Florida Statutes)

Clifford Barth testified at the penalty phase proceedings that Bonifay did not appear to him to be high on drugs, but that he could have been under the influence of alcohol or drugs. Bonifay testified he smoked a joint of pot laced with cocaine

before he went to the auto parts store on Saturday night. However, the defendant's masterful execution of the murderous plan and his clear recollection of the events surrounding the robbery and murder belie any claim that he was under the influence of extreme mental or emotional disturbance.

> 3. The defendant acted under extreme duress or under the substantial domination of another person. (Section 921.141(6)(e), Florida Statutes)

The evidence that Bonifay acted in response to the threats of Robin Archer comes primarily from the self-serving statements of the defendant. Certainly, Robin Archer concocted the scheme with revenge in mind, and he procured the defendant to carry it out. However, Bonifay admits he was willing to kill this man for whatever money was in the suitcase. He got Barth and Fordham involved; he got the gun, the ski masks, the bullets, and the bolt cutters; and he told the others where to park the car, how to gain entry, where the cash boxes were located, and how to exit the store.

Bonifay testified that when Archer learned he had not carried out the plan the first night, Archer became angry and told him he was going to kill Bonifay's mom and girlfriend if he did not do it. Upon further questioning, he testified that Archer actually said, "Do you like your mom and Ray?' When Bonifay asked what he meant, Archer said 'to take it like you want to." Bonifay says he interpreted this to mean that he was going to have them killed.

However, no such threat was present the first night when Bonifay recruited Fordham and Barth and gathered the tools to

carry out the plan. His actions in preparing for and carrying out the murderous scheme reflect a clear, cool, and crafty mind, singularly dedicated to the diabolical plan. No credible evidence exists to support his claim that he fired four lethal shots into the body of Billy Wayne Coker in response to the substantial domination of Robin Archer.

> 4. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (Section 921.141(6)(f), Florida Statutes)

Patrick Bonifay's mother testified he had problems in school, he was extremely overactive and disruptive, and he had a lot of behavior problems. He took Ritalin in one of his ninth grade years and was expelled once. He admitted to Dr. Gilgun he was expelled for breaking another student's jaw in a fight at Escambia High School.

Dr. James Larson, a Psychologist, evaluated Bonifay prior to the new penalty phase proceeding and administered a number of psychological tests on him. He determined Bonifay's verbal IQ was 98 -- which is in the average range -- and his performance IQ was 117. This 19 point difference indicated to Dr. Larson that Bonifay has some cognitive disorder, such as attention deficit disorder. He confirmed that the school identified in about the fifth grade that Bonifay had an attention deficit disorder and placed him in an emotionally handicapped classroom for a number of years. This disorder means Bonifay's ability to attend and concentrate is impaired. Also, Dr. Larson found Bonifay to exhibit impulsive behavior as a part of his attention deficit disorder.

Additionally, Dr. Larson testified Bonifay had a dysthymic disorder, referring to depression. He said it is at a level which is chronic, but not present every day and it is "a very common disorder seen in the general population." Dr. Larson also said Bonifay exhibited a personality disorder, referring to a personality functioning that is unstable, exhibiting mood swings, possible irrationality, difficulty maintaining good relationships, and susceptibility to being easily guided by another. According to Dr. Larson, Bonifay has a negative self-image as a result of his disruptive home environment, which included his biologic father's abuse of him and his mother. In turn, Bonifay feels rejected and is an angry person, in conflicts with peers and with authority figures.

Finally, Dr. Larson noted Bonifay had a history of suicidal ideation and perhaps two or three attempts or gestures. Yet, he acknowledged some of Bonifay's medical records reveal he denied suicidal ideations.

In terms of talents, Dr. Larson said of Bonifay: 'He's better than the average college freshman in terms of problem solving when he can look at things and try to put things together, good judgment in that area. He was able to read quite early on and at an advanced level actually and he reads at an excess of the 12th grade level.'

Dr. Larson acknowledged that another psychologist, Dr. Gilgun, indicated the defendant had fairly good insight and judgment. Bonifay knows the difference between right and wrong, according to Dr. Larson, and he has no psychosis or major mental illness.

Clearly proof of this mitigating circumstance does not require proof of insanity. However, the evidence must reveal some mental problems that limit the defendant's capacity to conform his conduct to the requirements of the law. In this case, Patrick Bonifay deliberated coolly and calmly and carefully composed a plan to effect Archer's scheme for revenge. He methodically carried out the plan and deliberately executed Billy Wayne Coker at the conclusion of the robbery. The evidence does not appear to support this mitigator. Nevertheless, if it is established it is entitled to little weight.

5. The age of the defendant at the time of the crime. (Section 921.141(6)(g), Florida Statutes)

Patrick Bonifay was 17 when he carried out this capital murder. This is a mitigating factor which is entitled to some weight. However, age, standing alone, is simply another fact which, if it is to be accorded significant weight, must be linked with some other characteristic of the defendant, such as immaturity. No such linkage is found in this case. In fact, as Dr. Larson said, the defendant is better that the average college freshman at problem solving. The evidence and this Court's observations reveal the defendant is independent and reasonably mature. Dr. Larson's evaluations did not contradict the observations.

The evidence did not establish the existence of any other statutory mitigating circumstance.

(C) Non-Statutory Mitigating Circumstances

As required, this Court has considered evidence concerning the defendant's background, including testimony relative to the

defendant's upbringing, employment, family and social ties, mental health, intellect, personality, education, emotional development, and potential for rehabilitation.

1. The defendant experienced a less than ideal family background.

The defendant had a difficult childhood. His father was abusive to him and to his mother. They were divorced when he was quite young and he lived with other relatives off and on. He was shuffled from home to home, and his relationship with his father was one of severe rejection. His negative self-image was very much influenced by the disruptive home environment, and, as a result, he has a need to prove himself and to accentuate his masculinity, and he has a lot of anger. Dr. Larson said, '[I]f you stop and look about the examples he had when he was growing up, what was demonstrated was drunkenness and reckless use of power and abuse, physical abuse and violence, and I think those are the things that brought him here today.' Further, there is conflicting evidence that the defendant suffered an episode of sexual abuse by his father. However, the defendant has, at times, denied this ever occurred. While the evidence does not establish that this family background prevented the defendant from conforming his conduct to the norms of society or the requirements of the law, this mitigating circumstance is entitled to some weight.

2. The defendant has exhibited good behavior while incarcerated.

Little weight is given this mitigating circumstance. It is easy, and expected, to behave in jail, especially when a substantial portion of the time is spent on death row.

3. The defendant cooperated with law enforcement.

While it is true the defendant confessed to the crime following his arrest, testified at trial, and led law enforcement officers to the location of some property taken in the robbery, his stories have been varied, incomplete, and self-serving. Certainly, there was no exceptional cooperation of defendant's part.

4. The defendant has a potential for rehabilitation.

The defendant had a difficult time in school. Some of his problems apparently resulted from his attention deficit disorder. However, he was in night school at the time of his arrest on these charges. Also, Dr. Larson said he is better than the average college freshman in terms of problem solving, he reads in excess of the 12th grade level, and he has some good intellectual abilities. Larson testified specifically regarding Bonifay's rehabilitative potential: "He likes to have things organized and work on deficiencies, try to improve himself and so forth so if you look at it from that point of view, he certainly has a lot of characteristics that would indicate that he has potential for that." The defendant's rehabilitative potential is entitled to some weight. However, the expert did not express an opinion about the impact of Bonifay's cognitive disorder and personality disorder upon his rehabilitative potential, and this Court notes that the evidence reveals Bonifay had the benefit of significant therapeutic intervention prior to this capital murder.

5. The defendant is remorseful about the death of Billy Wayne Coker.

The evidence suggests some remorse by Bonifay. While in jail he reported having nightmares in which he saw the face of his victim, and he reportedly sought out a psychologist to talk to about his guilt regarding the victim's family. Sandra Coker, the victim's widow, said Bonifay is trying to cooperate in a civil lawsuit she has filed against a third party arising out of the criminal episode. This Court finds that the defendant's primary remorse is for the predicament in which he finds himself. While his haunting image of the victim may indicate a potential for a conscience, the defendant's statements of concern are primarily self-serving. Nevertheless, considering the defendant's written comments to the Court and his cooperation with the victim's widow in her civil suit, this non-statutory mitigating circumstance is entitled to some weight.

6. The disparate sentences of codefendants.

The codefendants, Eddie Fordham and Clifford Barth, received sentences of life in prison, without possibility of parole for 25 years. Juries recommended death for Robin Archer and Patrick Bonifay. The mitigating factor of disparate sentences for codefendants applies only to disparate treatment of equally culpable defendants. This Court has found, as did the juries, that Archer conceived the plan and procured Bonifay to commit the murder. Bonifay and Archer obtained the gun, and Archer directed Bonifay to kill the clerk, which he did, mercilessly. Bonifay enlisted the aid of Fordham to drive and Barth to assist. Clearly, the preeminent culpability for the capital murder rests with Archer -- who has been sentenced to death -- and Bonifay.

This Court agrees wholeheartedly with what Judge Collier said: "The Court understands and concurs in the assessment of the legal culpability of these two codefendants made by the State and distinctions recognized in their cases. In not seeking the death penalty, the state fulfilled its responsibility to seek justice in all cases." This mitigating circumstance is entitled to no weight.

No other non-statutory mitigating circumstances were reasonably established by the evidence.

Conclusion

As the law requires, this Court has given great weight to the death recommendation of the jury in making the ultimate decision whether the death penalty should be imposed and takes particular note that ten members of the jury voted for the death penalty. In addition, sufficient statutorily defined aggravating factors exist to justify the death penalty in this case, and the mitigating circumstances -- both statutory and nonstatutory -- do not outweigh the aggravating factors. The facts of this case clearly place it within the class of capital murders for which the death penalty is appropriate.

It is therefore, ordered that the defendant, James Patrick Bonifay, is adjudicated guilty of the crime of murder in the first degree, and is committed to the custody of the Department of Corrections of the State of Florida to be punished by death by electrocution or as otherwise provided by law. (R 100-114)

SUMMARY OF ARGUMENT

There are eight issues on appeal: (1) The trial court fully addressed Bonifay's attention deficit disorder, even if the court did not use the phrase "organic brain damage" to describe that common disorder. There was no testimony to indicate that attention deficit disorder is a substantial impairment; on the contrary, Bonifay's own expert testified that Bonifay was intelligent and suffered no major mental illness; (2) The trial court's thoughtful and judicious 16-page sentencing order fully satisfied the requirements of Florida sentencing law; (3) Contrary to Bonifay's contention, the trial court did find that Bonifay has some rehabilitation potential, and gave this nonstatutory mitigator some weight; (4) Any issue of the prosecutor's use of biblical references in his closing argument has been procedurally defaulted by the lack of any objection to such argument at trial; (5) The prosecutor was entitled to urge that death is the appropriate penalty, and his choice of word to describe the imposition of a death penalty does not rise to the level of reversible error; (6) The fact that Bonifay ruthlessly shot the victim in the head as the latter begged for his life on behalf of his wife and children was a relevant circumstance of the offense that Bonifay himself committed; (7) No improper victim-impact evidence was admitted; (8) There was no cumulative error.

ARGUMENT

ISSUE ONE

THE TRIAL JUDGE PROPERLY CONSIDERED AND MADE SPECIFIC FINDINGS CONCERNING THE ALLEGED STATUTORY MITIGATOR THAT 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

In his first issue, Bonifay contends that Dr. Larson's "uncontradicted" testimony of organic brain damage "established" the statutory mitigator of substantial impairment in Bonifay's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and that the trial judge erred by failing to consider the impact of Bonifay's organic brain damage, or at least by failing to address it in his sentencing order, and also erred by failing to find the substantial impairment mitigator and to give it substantial weight.

Bonifay's argument rests on a number of questionable assumptions. First of all, Dr. Larson himself waffled on the question of whether Bonifay has organic brain damage. Organic brain damage was not his conclusion, it was only his "impression." Moreover, his "impression" that such damage exists was premised entirely on a diagnosis (deduced from a discrepancy between Bonifay's verbal and performance IQ and from an earlier diagnosis) that Bonifay has attention deficit disorder. Dr. Larson conceded, however, that people get attention deficit disorder for reasons that are not entirely clear, and that different individuals might have it for different reasons,

including, but not limited to organic brain damage (TR 368). In any event, Bonifay's organic brain damage, if it exists, manifests itself only as an attention deficit disorder and only affects Bonifay's ability to "attend and concentrate" (TR 363). Neither his memory process nor his high order functioning are affected (TR 363). Nor does Bonifay suffer from any psychosis or from any major mental illness. Furthermore, Dr. Larson never linked Bonifay's impaired ability to attend and concentrate to any substantial impairment in Bonifay's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Dr. Larson said only that the ability to attend and concentrate is important "for learning in an academic setting;" he did not say that it was important to an appreciation of criminal conduct or to an ability to obey the law. Moreover, Dr. Larson's testimony that Bonifay has rehabilitation potential is not consistent with any theory that Bonifay is substantially impaired in his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Thus, Dr. Larson's testimony was "uncontradicted" only in the sense that he was the only expert mental-health witness to testify. There was no testimony in this case, much less uncontradicted testimony, that Bonifay has a mental disorder severe enough to satisfy the substantial-impairment statutory mitigator. Compare Larkins v. State, 655 So.2d 95, 100 (Fla. 1995) (defense expert witness testified without contradiction that defendant was under the influence of extreme emotional disturbance). In any event, expert opinion

testimony is not necessarily binding even if uncontroverted. Walls v. State, 641 So.2d 381, 390-91 (Fla. 1994). Here, as in Walls, "[r]easonable persons could conclude that the facts of the murder are inconsistent with the presence of" the substantial-impairment mitigator. Id. at 391 (n. 8).

The trial judge expressly evaluated the substantial impairment mitigator, and discussed Dr. Larson's testimony at length, in compliance with Campbell v. State, 571 So.2d 415, 419 (Fla. 1990). The trial judge's express evaluation of this mitigator alone fills two full pages of the trial record (R 108-110). This was no summary rejection of a defendant's proposed mitigator, in strong contrast to the orders involved in the cases cited in Bonifay's brief, e.g.: Larkins v. State, supra; Crump v. State, 654 So.2d 545 (Fla. 1995); and Ferrell v. State, 653 So.2d 367 (Fla. 1995).

Bonifay contends, however, that while the trial judge considered "several psychological factors" relative to the defendant's mental condition, the trial judge failed to consider Bonifay's "organic brain damage" (Appellant's brief at 8). However, although the trial judge did not use the phrase "organic brain damage" in his order, he addressed Bonifay's "attention deficit disorder," which he described as a "cognitive disorder" (R 108). In addition, the judge described the kind of impairment this disorder causes. As noted above, Bonifay's "organic brain damage," if that is a proper description of his condition, is no more and no less than his attention deficit disorder; Bonifay suffers no other kind of "brain damage." Therefore, when the

trial judge addressed Bonifay's attention deficit disorder, his discussion implicitly and necessarily encompassed whatever "organic brain damage" existed. The trial court properly considered all evidence relevant to the substantial-impairment mitigator. Mungin v. State, 20 Fla. L. Weekly S459, 460 (Fla. September 7, 1995) ("the sentencing order's reference to the fact that Mungin was rehabilitable encompasses his prison record and the reference to Dr. Krop's findings on Mungin's mental state encompasses drug and alcohol abuse"); Thompson v. State, 648 So.2d 692, 697 (Fla. 1994) (order addressing mental issues adequate); Atwater v. State, 626 So.2d 1325 (Fla. 1993) (same); Valle v. State, 581 So.2d 40, 49 (Fla. 1991) (same).

Finally, the trial court recognized that proof of the substantial-impairment mitigator does not require proof of insanity (R 109). Ferguson v. State, 417 So.2d 639, 645 (Fla. 1982). However, the evidence must show some substantial impairment in the defendant's ability to appreciate the criminality of his acts or to conform his conduct to the requirements of the law. Here, the defendant's own expert testified that Bonifay has no major mental illness, reads well, has good problem-solving judgment, and has "a lot of characteristics" that indicate that he has potential for rehabilitation. The trial court surely was justified in concluding that the "evidence does not appear to support [the substantial-impairment] mitigator" (R 109-110). Nor is it at all ironic, as Bonifay contends, that the trial judge ruled, in the alternative, that "[n]evertheless, if it is established, it is

entitled to little weight" (R 110). It is proper for a trial judge to conclude that the evidence does not support a mitigator, but that even if it does, it is weak. "[T]his Court has repeatedly held that it is within the purview of the trial court to determine whether a particular mitigating circumstance was proven and the weight to be given it. [Cit.]." Foster v. State, 654 So.2d 112, 114 (Fla. 1995). The trial court's conclusions concerning the substantial-impairment mitigator are supported by the record, for the reasons described in the court's thoughtful and judicious order. Bonifay's first issue is without merit.

In any event, in light of the presence of three strong aggravators (which Bonifay does not contest), and the trial court's conclusion that the "facts of this case clearly place it within the class of capital murders for which the death penalty is appropriate," any possible deficiency in the trial court's 16-page sentencing order and its 8-page mitigation findings are harmless beyond a reasonable doubt. Wickham v. State, 593 So.2d 191 (Fla. 1991); Cook v. State, 581 So.2d 141 (Fla. 1991); Rogers v. State, 511 So.2d 526 (Fla. 1987).

ISSUE II

THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS IN ALL RESPECTS

Bonifay's argument as to this issue is premised in large part upon Issue I. However, as argued above, the trial judge properly considered the substantial-impairment statutory mitigator. As for the non-statutory mitigators considered by the trial court, since Bonifay failed to identify any of them at

trial (R 47-50), he has procedurally defaulted any issue of the sufficiency of the trial judge's explication of non-statutory mitigators. Lucas v. State, 568 So.2d 18, 24 (Fla. 1990) (defendant has burden at sentencing to "identify for the court the specific nonstatutory mitigating circumstances" he contends are established). Even if this issue is preserved, however, it is clear that the trial judge properly reviewed and weighed the evidence.

The State agrees with Bonifay's factual assertion that the trial court found three aggravators: murder during the course of a robbery, murder committed for pecuniary gain, and CCP. Appellant's Brief at 11. However, Bonifay's assertion that the trial court found five statutory mitigators and six nonstatutory mitigators is belied by the plain language of the trial court's order. The trial court addressed five statutory and six nonstatutory mitigators, but did not find all of them.

As for the statutory mitigators, the evidence shows that Bonifay was involved in two other burglaries and a stabbing. The trial judge concluded this prior criminal activity was not a significant history of prior criminal activity; however because Bonifay had been involved in prior violent criminal activity, this statutory mitigator was given very little weight (R 106).

The statutory mitigator of extreme mental or emotional disturbance was not given any weight for the very simple reason that it was not found, as the trial court's order plainly shows (R 106-107). Likewise, the extreme duress or substantial domination mitigator also was not found and therefore was given no weight (R 107-08).

The substantial impairment mitigator was discussed in connection with Issue I. As for the age mitigator, the trial court concluded that, although the evidence and the court's observations revealed Bonifay to be independent, above average in intelligence, and mature, his age of 17 was nevertheless a statutory mitigating factor which was entitled to some weight. (R 110). This finding was consistent with the record and with Florida law. Ellis v. State, 622 So.2d 991, 1001 (Fla. 1993).

As for the nonstatutory mitigators, the trial court gave "some weight" to Bonifay's difficult childhood (R 111), little weight to his good behavior while incarcerated (R 111), some weight to his rehabilitation potential (R 112), some weight to his remorse (R 113), and no weight to the fact that Barth and Fordham received life sentences (because of their lesser culpability to Bonifay and Archer, who did receive death sentences) (R 113).

As for Bonifay's cooperation with law enforcement, the trial court noted that Bonifay had confessed to the crime, testified at trial, and led police to some of the property taken in the robbery. However, Bonifay's "stories have been varied, incomplete, and self-serving." The trial court concluded: "Certainly, there was no exceptional cooperation on defendant's part." (R 111).

Bonifay contends that the trial judge did not fully evaluate each mitigating factor. The length of the order alone would tend to belie this claim. The trial court's 16-page sentencing order is more than one-half as long as Bonifay's entire appellate

brief. The trial court devoted four and one-half pages to a discussion of potential statutory mitigators, and another three and one-half pages to a discussion of potential nonstatutory mitigators. The trial judge expressly evaluated each potential mitigator, determined whether it was established by the evidence, determined whether it actually mitigated the offense, and, if so, assigned weight to it. The trial court followed the dictates of Campbell v. State, supra; Rogers v. State, 511 So.2d 526 (Fla. 1987); and Santos v. State, 591 So.2d 160 (Fla. 1993).

Except for the "organic brain damage" discussed in Issue I, and the rehabilitation mitigator discussed in Issue III, Bonifay has not even attempted to identify any significant evidence overlooked by the trial court in its evaluation of potential mitigating circumstances, nor to argue that any specific alleged mitigator was improperly rejected as mitigating. Furthermore, there are "no hard and fast rules about what must be found in mitigation in any particular case.... Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain with the trial court's discretion." Lucas v. State, 568 So.2d 18 (Fla. 1990). Accord, Burger v. Kemp, 483 U.S. 776, 794, 107 S.C. 3114, 97 L.Ed.2d 638 (1987) (defendant's alleged mitigation evidence is "by no means uniformly helpful" to the defense; quoting with approval 11th Circuit's observation that "mitigation may be in the eye of the beholder"). So long as the trial court considers the evidence, the trial court's findings as to mitigation will stand absent a palpable abuse of discretion. E.g., Cook v. State, 542 So.2d

964, 971 (Fla. 1984); Hudson v. State, 538 So.2d 829 (Fla. 1989); Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983). There was no abuse of discretion in this case.

In any event, in light of the presence of three strong aggravators (which Bonifay does not contest), and the trial court's conclusion that the "facts of this case clearly place it within the class of capital murders for which the death penalty is appropriate," any possible deficiency in the trial court's 16-page sentencing order and its 8-page mitigation findings are harmless beyond a reasonable doubt. Wickham v. State, 593 So.2d 191 (Fla. 1991); Cook v. State, 581 So.2d 141 (Fla. 1991); Rogers v. State, 511 So.2d 526 (Fla. 1987).

ISSUE III

THE TRIAL COURT DID NOT CONCLUDE THAT BONIFAY IS INCAPABLE OF REHABILITATION, AND THE WEIGHT GIVEN TO THIS NONSTATUTORY MITIGATOR WAS WITHIN THE PURVIEW OF THE TRIAL COURT

Bonifay's argument here is confusing. He contends that the trial court did not find that Bonifay is capable of rehabilitation, but then he complains that the trial court only gave "some weight" to this nonstatutory mitigator. But he also implicitly concedes that his own evidence does not justify giving any more than "some weight" to this alleged mitigator when he admits that the testimony of his own witness is not "comprehensive" on this issue. Finally, without raising any claim of ineffective assistance of counsel, he suggests that trial counsel or the court should have pursued further questioning of the witness concerning Bonifay's rehabilitation potential.

As discussed previously, Bonifay did not specifically identify this alleged nonstatutory mitigator as a matter that the court should address in its order, and has procedurally defaulted whatever issue he is now raising relative to the trial court's findings here. Lucas v. State, supra. But even if his claims are addressable on the merits, he has shown no error. The trial court did not, as Bonifay contends, reject this nonstatutory mitigator; the court found that Bonifay does have rehabilitative potential and that this potential "is entitled to some weight" (R 112). As noted previously, "this Court has repeatedly recognized that it is within the purview of the trial court to determine whether a particular mitigating circumstance was proven and the weight to be given it." Foster v. State, supra, 654 So.2d at 114.

To the extent that Bonifay is now suggesting that trial counsel should have solicited further elaboration from Dr. Larson, in the hopes of having additional weight assigned to this nonstatutory mitigator, the State would respond that questions of trial counsel's performance generally are not cognizable on direct appeal. Ventura v. State, 560 So.2d 217 (Fla. 1990). Furthermore, it is probable that any such exploration of the impact of Bonifay's antisocial personality disorder and attention deficit disorder on his rehabilitation potential would reduce, not increase, the weight assigned to this mitigator. As matters stand, Dr. Larson testified that while Bonifay had some "impairment," he also has areas of "talent." He supported his opinion that Bonifay had rehabilitation potential by mentioning

only Bonifay's talents. It is difficult to see how emphasizing Bonifay's social impairments (especially his anger, violent outbursts, and antisocial outlook) could have buttressed Dr. Larson's opinion of Bonifay's rehabilitation potential.

In any event, in light of the presence of three strong aggravators (which Bonifay does not contest), and the trial court's conclusion that the "facts of this case clearly place it within the class of capital murders for which the death penalty is appropriate," any possible deficiency in the trial court's sentencing order and its mitigation findings are harmless beyond a reasonable doubt. Wickham v. State, 593 So.2d 191 (Fla. 1991); Cook v. State, 581 So.2d 141 (Fla. 1991); Rogers v. State, 511 So.2d 526 (Fla. 1987).

Furthermore, although Bonifay does not raise any issue of proportionality, the State would note that Bonifay was the triggerman in this case and that codefendant Archer (who hired Bonifay) also received the death penalty. (Archer's appeal is presently pending in this Court, Case no. 83,258). Although Bonifay was only 17 at the time of the crime, he was above average in intelligence, reads at an advanced level, is mature and is independent enough to have been involved in prior violent criminal activity in another state. The evidence establishes three aggravators: (1) the murder was cold, calculated, and premeditated, and committed without any pretense of moral or legal justification; (2) the murder was committed while Bonifay was engaged in the commission of a robbery; and (3) the murder was committed for financial gain in addition to whatever Bonifay

expected to obtain from the robbery. These three aggravators are not even contested on appeal. Bonifay's death sentence is proportional to LeCroy v. State, 533 So.2d 750 (Fla. 1988) (17-year-old defendant shot campers during robbery, aggravating circumstances of prior violent felony, during a robbery and avoid arrest; mitigating circumstances of age, no significant criminal history and various nonstatutory mitigating factors); Remeta v. State, 522 So.2d 825 (Fla. 1988) (convenience store clerk shot during robbery, aggravating circumstances of prior violent felony, during a robbery, avoid arrest and cold, calculated and premeditated; mitigating circumstances of mental age of 13, deprived childhood and raised in poverty-stricken home by alcoholic parents who abused him, low average to average intelligence, subject to discrimination because of Indian heritage and speech impairment, and long-term substance abuser institutionalized since age 13); Preston v. State, 607 So.2d 404 (Fla. 1991) (19-year-old defendant murdered convenience store clerk, aggravating circumstances of during kidnap, heinous, atrocious and cruel, avoid arrest, pecuniary gain; mitigating circumstances of age and minimal nonstatutory mitigators); Scott v. State, 494 So.2d 1134 (Fla. 1986) (18-year-old defendant with aggravating circumstances of heinous, atrocious and cruel, cold, calculated and premeditated, prior violent felony, during kidnap and pecuniary gain; mitigating circumstances of age, substantially impaired capacity, mental problems, drug problems, family problems); Deaton v. State, 480 So.2d 1279 (Fla. 1985) (18-year-old defendant killed victim during robbery, aggravating

circumstances of during robbery, heinous, atrocious and cruel and cold, calculated and premeditated; mitigating circumstances of age, troubled childhood and no significant criminal history rejected; sentence not disparate to codefendant). See also, Woods v. State, 490 So.2d 24 (Fla. 1986); Shere v. State, 579 So.2d 86 (Fla. 1991); Gunsby v. State, 574 So.2d 1085 (Fla. 1991); Herring v. State, 446 So.2d 1049 (Fla. 1984); Johnson v. State, 442 So.2d 193 (Fla. 1983); Medina v. State, 466 So.2d 1051 (Fla. 1985).

ISSUE IV

THERE WAS NO OBJECTION AT TRIAL TO THE PROSECUTOR'S USE OF A BIBLICAL ANALOGY DURING CLOSING ARGUMENT; SINCE THE ARGUMENT WAS NOT FUNDAMENTALLY UNFAIR, THIS ISSUE IS PROCEDURALLY BARRED

Except for the "extermination" comment discussed in Issue V, infra, none of the prosecutor's arguments at issue here were objected to at trial. It is well settled that, except in cases of fundamental error, issues cannot be raised for the first time on appeal. See, e.g., Finney v. State, 20 Fla. L. Weekly S 401, S404 (Fla. July 20, 1995); Sochor v. State, 580 So.2d 595, 602-603 (Fla. 1982); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). This contemporaneous objection requirement applies to prosecutorial argument. E.g., Pangburn v. State, 20 Fla. L. Weekly S323, S324 (Fla. July 6, 1995); Suggs v. State, 644 So.2d 64, 68 (Fla. 1994); Wyatt v. State, 641 So.2d 355, 359 (Fla. 1994). Acknowledging the lack of objection, Bonifay argues that fundamental error occurred. The state would contend that if there was error, it was not fundamental, and that this issue is procedurally barred.

The prosecutor began his argument by reviewing the jury's duties under Florida law, correctly informing the jury that it must weigh aggravating circumstances against mitigating circumstances. Then he explained the concept of weighing, using the example of Belshazzar in Babylon, who saw handwriting on the wall during a party. Daniel translated the handwriting, informing Belshazzar that he had been weighed in the balance and found wanting (TR 411-13). The weighing process, the prosecutor explained, was nothing new, but has been used throughout history (TR 413).

Later in his argument, the prosecutor made a reference to "old Biblical times," stating: "Isaiah talked about how God was [so] big that he could hold the waters in the hollow in his hand and how he measures the hills and mountains and weighed them in the balance and nation[s] were as a drop of a bucket and were counted as the small dust of the balance" (TR 431-32). Thereafter, the prosecutor argued to the jury that the mitigating evidence urged by the defense "is nothing more than the small dust of the balance when you weigh it against the aggravating factors in this case" (TR 432).

In addition, in his argument concerning the financial gain aggravating factor, the prosecutor argued (TR 435):

> So that brings us to another aggravating factor, financial gain. He's willing to kill a man for whatever is in that suitcase, whatever is in that suitcase, it's money, and he will kill a man, a man that he doesn't even know for whatever is in that suitcase. With Bonifay it's a simple weighing process itself. It's a process in which he weighs so many ounces of silver against so many ounces of blood.

Bonifay now complains (for the first time) about the prosecutor's "repeated biblical alliterations, references, analogies, comparisons," etc. Appellant's Brief at 15. Actually, the prosecutor made an explicit biblical reference only on one occasion, when he mentioned "Biblical times" and "God" in reference to the "dust in the balance" (TR 431-32). Neither the Belshazzar-handwriting-on-the-wall narration nor the "ounces of silver" reference explicitly mentioned either God or the Bible, although most persons familiar with the Bible would recognize the biblical connection. However, biblical allusions and analogies are not per se problematic. This Court has held that trial counsel "should not be so restricted in argument as to prevent references by way of illustration to principles of divine law relating to transactions of men as may by appropriate to the case." Paramore v. State, 229 So.2d 855, 861 (Fla. 1969). Here, it is questionable whether the prosecutor even invoked any principles of divine law; he simply was explaining the weighing process in terms that lay jurors could relate to. "Wide latitude is permitted in arguing to a jury. Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982). Explaining the weighing process is certainly within the legitimate scope of argument at the penalty phase, and the prosecutor is entitled to argue that the defendant's proffered mitigating evidence is entitled to little weight.

Bonifay argues, however, that the prosecutor in effect threatened the jury itself with divine wrath unless it recommended a death sentence for the defendant (Appellant's brief at 16-17), and goes so far as to claim: "Here, the prosecutor winds the jury up with the implication that unless the defendant is put to death, God will be set free on the jury later" (Appellant's brief at 17, fn. 5).

Such an argument would, of course, be highly improper. The prosecutor, however, said no such thing, either explicitly or by any remotely reasonable implication. And the fact that trial counsel did not object to any of these portions of the prosecutor's closing argument is a strong indication that he, at least, did not see any threat of divine retribution to the jury in the prosecutor's argument. See, Williams v. Kemp, 846 F.2d 1276, 1288 (11th Cir. 1988) (fact that no objection was made at trial is relevant indication that argument was not fundamentally unfair); Donnelly v. De Christoforo, 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed.2d 1868 (1974) ("a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations").

Because the prosecutor's argument was not fundamentally unfair, Bonifay is procedurally barred from raising any issue of biblical references in the prosecutor's closing argument. Crump v. State, 622 So.2d 963, 972 (Fla. 1993). Further, even if he were not procedurally barred, he has not shown error under

Paramore v. State, supra. And, finally, even if there is some error, there is no error that in reasonable possibility affected the sentence. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986).

ISSUE V

NO PROPER OBJECTION WAS MADE TO THE PROSECUTOR'S USE OF THE WORD "EXTERMINATION" IN HIS ARGUMENT; MOREOVER, THE PROSECUTOR HAS THE RIGHT TO ARGUE FOR A DEATH SENTENCE, AND THERE WAS NO ERROR

After discussing Bonifay's actions in this case, the prosecutor addressed Dr. Larson's testimony that Bonifay had some potential for rehabilitation:

> Dr. Larson said that in his opinion Bonifay has the capacity or ability to learn and the ability to be rehabilitated. Well, he doesn't need education, he doesn't need rehabilitation. He needs extermination, ladies and gentlemen.

Bonifay's trial attorney objected "to that comment," without stating any grounds. The prosecutor responded: "I can argue for the death penalty, the law says so." The trial court overruled the objection (TR 441-42). The defense made no further objection and did not move for a mistrial.

The State acknowledges this Court's cases holding that when an objection is overruled, a motion for mistrial is not necessary to preserve the objection for appeal. E.g., Holton v. State, 573 So.2d 284 (Fla. 1990). However, a specific objection is necessary. A bare objection which states no grounds is not sufficient to preserve an issue for appeal. Johnston v. State, 497 So.2d 863, 869 (Fla. 1986); Craig v. State, 510 So.2d 857, 864 (Fla. 1987); Kujawa v. State, 405 So.2d 251, 252 (fn. 3) (3rd DCA 1981).

Bonifay argues, however, that the prosecutor's argument was "plain error," citing two cases in which the prosecutor had made "vituperative personal attacks" (Darden, infra at 293) upon the defendant at the guilt phase of the trial. Darden v. State, 329 So.2d 287 (Fla. 1976); Stewart v. State, 51 So. 2d 494 (Fla. 1951). Darden itself does not especially support Bonifay's argument, since the majority found the prosecutor's argument to be "fair comment." Nevertheless, it certainly is true as a general proposition that at the guilt phase of the trial a "prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law...." United States v. Young, 470 U.S. 1, 7, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (fn. 3). However, at the penalty phase, a jury has already decided the guilt or innocence of the defendant, and guilt is no longer an issue. At the penalty phase, the jury must not only evaluate the evidence and decide which aggravating and mitigating factors, if any, have been proved, but also must weigh those factors and determine what sentence to recommend. Assigning weight to these factors necessarily entails exercising a moral judgment: "[T]he procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the

totality of the circumstances present." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). Furthermore, in contrast to the guilt phase of the trial, in which the defendant's character is irrelevant, "the purpose for 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 case." Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977).

Just as evidence that would not be admissible at the guilt phase may properly be admitted at the penalty phase, Alvord v. State, 322 So.2d 533, 538 (Fla. 1975), "limitations on argument entirely appropriate to the guilt phase of a trial cannot be applied mechanistically to the sentencing phase." Walker v. State, 327 S.E.2d 475, 484 (Ga. 1985) The prosecutor logically should have more leeway to speak about the character of the defendant at the penalty phase than at the guilt phase.

Bonifay complains of "the State's attempted dehumanization of the defendant" and the fact that "after the defendant has been convicted, ... the State has only one unfulfilled goal left: the defendant's death." Appellant's brief at 19. However, the prosecutor is entitled to argue that the defendant by his conduct has forfeited his right to live, i.e., to remain a human being; under the United States Constitution and the law of Florida, death is a goal the State may properly seek for a defendant who commits a highly aggravated murder.

Bonifay presented evidence that he had at least some potential for rehabilitation. This potentially mitigating

evidence was offered as a reason (among others) for imposing less than a death sentence. The prosecutor was entitled to address this evidence and to argue against a life recommendation and for a death sentence. The fact that the prosecutor said "extermination" rather than "electrocution" or "death penalty" cannot be a matter of any real significance. Essentially, all these phrases mean the same thing. This procedurally-barred issue is without merit. Should this court disagree, however, the State would contend that any error in the use of this one word was harmless beyond a reasonable doubt. State v. Diguilio, supra.

ISSUE VI

EVIDENCE THAT BONIFAY SHOT THE VICTIM TWICE IN THE HEAD AS THE LATTER BEGGED FOR HIS LIFE WAS RELEVANT TO THE CCP AGGRAVATOR

Before the presentation of the evidence commenced, Bonifay's trial counsel moved to exclude any evidence that the victim was begging for his life just before Bonifay shot him twice in the head, on the ground that such evidence was relevant only to the heinous, atrocious and cruel factor that this Court had eliminated on appeal. The prosecutor responded that the victim's begging was a circumstance of the offense that the jury was entitled to hear, and further, that it was relevant to the cold, calculated and premeditated aggravator. The trial court overruled the motion to exclude, agreeing with the State that the evidence "is relevant, it is not unduly prejudicial, it would not be misleading in terms of what [the jurors] are going to be allowed to consider, it is something

which I fully expect that the State will argue in support of one of the still existing aggravators and that you'll argue against" (TR 117).

Evidence was thereafter presented that after shooting the victim twice, Bonifay gave the gun to Barth, used the bolt cutters to cut the locks off the safes, got the money, retrieved the gun from Barth, and then turned to the victim, who was begging for his life. The victim told Bonifay that he had a wife and kids. Bonifay said "shut the fuck up" and told the victim "to fuck his kids" (TR 193-94). Then he shot the victim twice more, in the head.

This evidence clearly was relevant to the CCP aggravator; if nothing else, it demonstrates the kind of "deliberate ruthlessness" that supports the element of "heightened premeditation" over and above what is required for unaggravated first-degree murder. Wuornos v. State, 644 So.2d 1000, 1008 (Fla. 1994); Walls v. State, 641 So.2d 381, 388 (Fla. 1994).

In any event, the circumstances of the offense are relevant evidence, and the prosecutor is under no obligation to sanitize the defendant's own behavior in committing the crime. There was no error in the admission of this evidence. However, should this Court disagree and find the admission of any portion of this evidence to have been error, the State would contend that it would be harmless beyond a reasonable doubt. State v. Diguilio, supra.

ISSUE VII

THERE WAS NO IMPROPER VICTIM IMPACT TESTIMONY

The victim's widow, Sandra Faye Coker, testified. Bonifay's trial attorney did not object to her testimony until she was asked what impact her husband's death has had on her and she answered: "Crucial. It's done severe damage to my health, especially in the past year. I've nearly hemorrhaged to death, back in January. I've had to be put on high blood pressure pills, my thyroid is all messed up because of stress and just worry from all of this, how he was murdered." (TR 329). The defense objected, and asked for a corrective instruction. Asked by the court what the defense would suggest, Bonifay's trial attorney responded : "that they are to disregard the testimony that they've just heard due to the fact that it does not fit within the perimeters of the statute on victim impact evidence because it doesn't relate to the uniqueness of the individual as that individual relates to the community" (TR 331). The court declined to strike the testimony, but instructed the jury that it "may consider the previous testimony of Mrs. Coker only so far as it demonstrates the victim's, Mr. Coker's, uniqueness as an individual human being and the resultant loss to the community's members by Mr. Coker's death" (TR 333).

The defense did not object to this instruction, and the prosecutor proceeded to ask one further question on direct examination, soliciting Mrs. Coker's testimony about the victim's "unique characteristics." She answered:

> Well, Wayne was a good husband, he was a real good father. He tried to support us in every thing that we did and he certainly tried to meet our needs the best that he could as a provider. He worked hard. He didn't -- he really never got a lot of rest and especially since he worked for Trout because he was always filling in for someone and trying to make extra money for the family. (TR 333)

On cross-examination, Bonifay's trial attorney solicited testimony from Mrs. Coker that Bonifay had been assisting her in a lawsuit she had filed against Wal-Mart concerning the purchase of the bullets (TR 334). Bonifay's attorney pursued this line of questioning, eliciting testimony that Bonifay's assistance would be "helpful" not only to her, but to others. Then he asked if Bonifay was "trying to make amends to you...?" She answered:

> Yes, sir, I think in that regard but I don't know if I'm allowed to say this or not because I don't want to be hurtful but when I lost my husband, it hurt so much that no matter what may come or may not come, nothing is going to help that area because you can't replace a human life, you know.

At the conclusion of Mrs. Coker's testimony, Bonifay's trial attorney informed the court that over recess he was "thinking over" his victim-impact objection and was not sure that the court's limiting instruction was sufficient; therefore he moved for a mistrial. This motion was denied (TR 339).

Bonifay now contends that all of the above was improper victim-impact testimony. Initially, the State would note that Bonifay objected only to that portion of Mrs. Coker's testimony about the impact of the crime on her. Bonifay did not object to her subsequent testimony about the victim's "uniqueness," nor did he object to her answer to his own question about

Bonifay's effort to make amends. Thus, no issue of the admissibility of these portions of Mrs. Coker's testimony has been preserved for appeal. Furthermore, although he belatedly moved for a mistrial, Bonifay did not register any objection to the trial court's instruction limiting the use of Mrs. Coker's testimony. A motion for mistrial standing alone is not enough to preserve an issue for appeal, absent a proper objection. Nixon v. State, 572 So.2d 1336, 1341 (Fla. 1990).

Even if preserved, there was no error. This Court recently affirmed the constitutionality of Section 921.141 (7), Florida Statutes. Ch. 92-81, §1, Laws of Fla. Maxwell v. State, 20 Fla.L.Weekly S427 (Fla. July 20, 1995); Windom v. State, 20 Fla.L.Weekly S200 (Fla. April 27, 1995). This statute allows the kind of victim-impact evidence introduced in this case. Under the statute, "the prosecution may introduce, and subsequently argue, victim impact evidence ... to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." Sandra was a member of the community, and she was entitled, under the statute, to testify about the impact Bonifay's crime had on her, and also to tell the jury about the kind of person her deceased husband was, so that he could be considered as the unique individual that he was, not as a "faceless stranger." Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720, 735 (1991).

Bonifay also complains about the prosecutor's closing argument that the victim's last dying thoughts were for his

wife and children, and that in response, "Bonifay cursed him and cursed them and then blasted him out into eternity, a man willing to kill for whatever was in that suitcase." (TR 449). The State previously has argued (Issue VI) that is was proper to admit testimony that as the victim begged for his life on his behalf and on behalf of his wife and two children, Bonifay cursed him and his family and shot him twice in the head. Since this evidence was properly admitted, the prosecutor was entitled to call it to the jury's attention in his closing argument. In contrast to Taylor v. State, 640 So.2d 1127, 1135 (Fla. 1st DCA 1994), on which Bonifay relies, there was no conjecture here about what the victim's dying words were; the testimony in this case shows what they were. And, as previously argued, those words were relevant to the CCP aggravator. Furthermore, because Bonifay failed to object to this portion of the prosecutor's argument, he cannot now claim that it was improper victim-impact argument (or any other kind of improper argument). Daugherty v. State, 533 So.2d 287, 289 (Fla. 1988) (defendant's Booth issue fails because he did not object to prosecutor's argument at trial). However, should this Court disagree and find the admission of any portion of this evidence or argument to have been error, the State would contend that it would be harmless beyond a reasonable doubt. State v. Diguilio, supra.

ISSUE VIII

NO REVERSAL IS REQUIRED

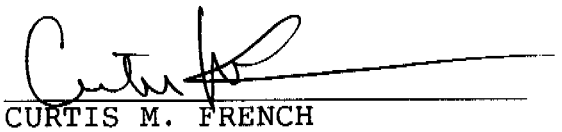
Since appellant has failed to demonstrate error, there is no cumulative error. Even if there is, it is insufficient to warrant reversal.

CONCLUSION

For all of the foregoing reasons, the judgment below should be affirmed in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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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 Mr. Michael R. Rollo, Esq., 3 West Garden Street, Suite 380, Pensacola, Florida 32501, this 11th day of December, 1995.

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Assistant Attorney General