IN THE SUPREME COURT OF FLORIDA

EDDIE WAYNE DAVIS,

Appellant,

vs.

CASE NO. 86,135

STATE OF FLORIDA,

Appellee,

ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CANDANCE M SABELLA
Assistant Attorney General
Florida Bar No. 0445071
Westwood center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR APPELLEE

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Summary of Argument

Appellant's first claim is that his statements should have been suppressed because he was questioned without Miranda and he was questioned after invoking his right to counsel. It is the state's position that the motion was properly denied as the law does not require that a defendant be told about the existence of a warrant, no inculpatory statements were made as a result of questioning, and that Davis initiated contact with police, waiving his right to have counsel present and voluntarily confessed to the crime.

Appellant's second claim is that the content of the 911 call the victim's mother made upon discovering her child missing was hearsay and not relevant to any question at issue. He contends that although he had originally claimed that Schultz hired him to commit the murder, since he subsequently retracted that claim, Schultz' state of mind was no longer relevant.

It is the state's contention that Schultz' state of mind was relevant and, furthermore, that tape was admissible under the excited utterance exception to the hearsay rule and that it was relevant to establish circumstances of the crime.

Davis' third claim urges prosecutorial error and prejudice resulting from emotional displays from two witnesses. A review of these minor references in context establishes that no harmful error was created.

Davis' third claim urges prosecutorial error and prejudice resulting from emotional displays from two witnesses. A review of these minor references in context establishes that no harmful error was created.

Appellant alleges that the standard jury instruction on reasonable doubt unconstitutionally dilutes the due process requirement of proof beyond a reasonable doubt. Although Appellant concedes that this Court in Esty, supra. has considered this claim and rejected it, he urges this Court to reconsider the issue in light of the arguments presented. It is the state's position that appellant has not presented anything new for this Court's consideration and since the basis for the decision in Esty and its progeny remains unchanged, this Court should reaffirm its prior holding,

Appellant alleges that his constitutional rights against self-incrimination and cruel and/or unusual punishment, as well as his right to effective assistance of counsel were violated when the trial court ordered him to submit to a mental health examination after the guilt phase. It is the state's position that the court's ruling was proper and in accordance with this Court's decision in Dillbeck v. State, 643 So.2d 1027 (Fla. 1994), and the subsequently

adopted Florida Rule of Criminal Procedure 3.202 Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial.

Appellant alleges that he was prejudiced during the course of the penalty phase by various comments and questions from the prosecutor and evidentiary rulings by the trial court. It is the state's position that no reversible error has been shown; that the denial of appellant's challenges to the prosecutor's examination of witnesses and the introduction of evidence was within the trial court's discretion and appellant has failed to show an abuse of that discretion. Further, in the context of this case, error, if any, was harmless beyond a reasonable doubt.

Davis' claim that the jury should have been instructed on nonstatory mitigating has been repeatedly rejected by this Court.

Appellant contends that the court below erred in instructing the jury on the avoid arrest aggravating factor and that there was insufficient evidence to support the factor. It is the state's position that the evidence supported both the instruction and the finding of the factor as Davis admitted that he killed her because she recognized him and he didn't want anyone to know he had molested her.

Appellant contends that since he was on controlled release and not incarcerated or on parole that the trial court should not have instructed the jury to consider the aggravating factor of under sentence of imprisonment and that the trial court erred in finding same. It is the state's position that the aggravating factor was appropriately applied in the instant case as control release is the functional equivalent of parole.

Appellant contends that Florida Statute 921.141(5)(h) is unconstitutional and that the jury instruction given in the instant case was improper. As this claim has been repeatedly rejected by this Court, appellant is not entitled to relief.

ISSUE I

APPELLANT'S MOTION TO SUPPRESS STATEMENTS WAS PROPERLY DENIED AS THE STATEMENTS WERE NOT OBTAINED IN VIOLATION OF ANY CONSTITUTIONAL RIGHT.

Appellant, Eddie Wayne Davis, contends that his confession to law enforcement should have been suppressed because it was obtained in violation of his fifth and sixth amendment rights. It is the state's position that Davis' constitutional rights were not violated and that the motion to suppress was properly denied.

The principle is well settled that a trial court's order denying a defendant's motion to suppress comes to the appellate court clothed with a presumption of correctness. Henry v. State, 586 So.2d 1033 (Fla. 1991); DeConingh v. State, 433 So.2d 501, 504 (Fla. 1983), cert. denied, 465 U.S. 1005 (1984); Stone v. State, 378 So.2d 765, 769 (Fla. 1979), cert. denied, 449 U.S. 986 (1980); McNamara v. State, 357 So.2d 410 (Fla. 1978). While the burden is upon the state to prove by a preponderance of evidence that the confession was freely and voluntarily given, a reviewing court must interpret the evidence in the light most favorable to sustaining the trial court's ruling. State v. Riehl, 504 So.2d 798 (Fla. 2nd DCA), review denied, 513 So.2d 1063 (1987); Williams v. State, 441

So.2d 653 (Fla. 3d DCA 1983). The trial court's ruling on this issue cannot be reversed unless it is clearly erroneous. The clearly erroneous standard applies with "full force" where the trial court's determination turns upon live testimony as opposed to transcripts, depositions or other documents, Thompson v. State, 548 So.2d 198, 204, n. 5 (Fla. 1989).

An evidentiary was held in the instant **case** on the first motion to suppress on January 6, 1995 before the Honorable Daniel True Andrews. (R 14) The state presented the testimony of five officers concerning the investigation, arrest **and** confession of Davis. (R 18-121) The defense did not present any evidence in support of the motion. (R 122) Detectives McWaters and Smith testified that during the course of investigating the rape, kidnapping and murder of eleven-year-old Kimberly Waters, they interviewed several people, including Davis, who were familiar with the victim and her family. (R 18-20, 34-46) On March 18, 1994, an arrest warrant for Davis was obtained based on DNA evidence. Without mentioning the warrant, Detectives McWaters and Smith asked Davis to come to the station voluntarily for questioning a third

time.[1] Davis was not placed under arrest nor was he given Miranda warnings. Davis came to the station voluntarily and, once again, claimed to have an alibi for the time of the murder. (R 22-23) After Davis was told that there was a **DNA** match, he asked if he was being arrested and they said yes. At that point before the Miranda warnings could be read to him, Davis asked if he could tell his mom to get him a lawyer. McWaters and Smith testified that in an abundance of caution they immediately ceased talking to Davis and had him put in a holding cell. (R 24, 25, 55) Shortly thereafter, the major in charge of the substation, Major Grady Judd, went back to the holding cell, looked at Davis, said, "I'm disappointed in you," then turned and started to walk away. (R 81-2, 111-14) Davis said something to the Major. Major Judd turned around and walked back to Davis' cell and told Davis that he couldn't understand him. Davis told Judd that they should look at Beverly (the victim's mother). (R 82) Major Judd informed Davis that he couldn't talk to him unless Davis reinitiated the contact. Davis then said, 'Mr. Grubb [sic] I want to talk to you and Mrs. Shreiber." (R 82-3, 113-14) After being assured that a lawyer

[1]Davis was interviewed twice prior to March **18, 1994** and allowed to leave after questioning. (R 20)

would be provided for him if he didn't have the funds, Davis nevertheless reaffirmed his desire to talk to the major. (R 84) Davis then admitted to Major Judd and Lieutenant Schreiber that he had killed Kimberly Waters. (R 84) After Davis told them several times how the murder happened, Major Judd asked him if he would be willing to talk to the detectives because Judd did not have a tape recorder or notepaper. (R 86) Davis told him he'd be glad to talk to them. (R 86) Davis was then given Miranda warnings and, after signing a waiver of rights form, gave a taped statement admitting that he had kidnapped and murdered young Kimberly. (R 28, 46, 60-62)

Davis did not testify at the suppression hearing, but a transcript of the first tape recorded statement confirms that Davis initiated the conversation with Major Judd, that he waived his right to counsel and that he voluntarily confessed to the murder of Kimberly Waters. (R 63-64)

Subsequently, on May 26, 1994, Lt. Schreiber received a message from the jail that Davis was requesting to talk to detectives. Detectives Hamilton and Harkins spoke to Davis after he was advised of his right to counsel and waived the presence of his lawyer. (R 119) Davis again confessed to the murder, but this

time he admitted that the victim's mother was not involved. (R 120)

A second motion to suppress challenging the May 26 statements was filed and a hearing on that claim was held on April 21, 1995. (R 420) The state presented three witnesses, Sergeant Jimmy Ellis Smith, Detective Rebecca Schreiber, and Detective Deborah Hamilton, in opposition to the motion and once again the defense did not present any evidence in support of the motion.

Sergeant Jimmy Smith testified that he received an inmate request for interview form on May 25, 1994, from Davis requesting an interview with Detectives Gilbert and McWaters of the sheriff's office to discuss 'information concerning the Waters case." (R 424-27, 440) Detective Schreiber testified that she passed the information to Detective Hamilton.

Detectives Hamilton and Harkins interviewed Davis. Detective Hamilton testified that she was aware that Davis had an attorney, that he had been indicted and that he had been in jail for a couple of months on the charges. (R 437, 456) Before she spoke to Davis, Detective Hamilton contacted prosecutor John Aguero who advised her that although it was not necessary to give Miranda warnings again, she should ask Davis if he was willing to speak to them without his

attorney present and record the conversation. (R 438, 452) Detective Hamilton testified that they went to the jail, identified themselves and confirmed that Davis wanted to speak with them without his lawyer present. The statement was then tape recorded. (R 444) Relevant portions of the taped statement were played for the court and transcribed. (R 446-49) Detective Hamilton testified that the entire visit lasted approximately twenty-five to thirty minutes. (R 454)

Defense counsel argued to the court that the statements should be suppressed because the state failed to show the contact **was** imitated by Davis and because Davis was not reinstructed on his rights. (R 464-65)

Based on the foregoing evidence the trial court denied both motions and made specific findings of fact in support of each denial. (R 478-79; SR 2-8) The trial court's order denying Davis' motion to suppress comes to this Court clothed with a presumption of correctness and the evidence must be viewed in the light most favorable to sustaining the trial court's ruling. Henry v. State, 586 So.2d 1033 (Fla. 1991); DeConingh v. State, 433 So.2d 501, 504 (Fla. 1983), cert. denied, 465 U.S. 1005 (1984); Stone v. State, 378 So.2d 765, 769 (Fla. 1979), cert. denied, 449 U.S. 986 (1980);

McNamara v. State, 357 So.2d 410 (Fla. 1978). A review of Davis' specific claims and the court's findings in denial of those claims reveals that Davis has failed to show reversible error.

The statements challenged on appeal include: 1) the exculpatory statements made prior to his arrest, 2) his statements to his Major Judd admitting that he had kidnapped, sexually battered and murdered Kimberly Waters, but claiming that he did so at the urging of Beverly Schultz, 3) the taped statement given to Detectives McWaters and Smith and, 4) the statements subsequently made to Detectives Hamilton and Harkins where Davis admitted that he had committed the crime and that Beverly Shultz was not involved. Davis urges that all of the foregoing statements to law enforcement should have been suppressed because they were taken in violation of his fifth and sixth amendment rights.

1) Prearrest statements

With regard to Davis' statements to Detectives McWaters and Smith prior to his arrest that he had nothing to do with the crime and claiming that he had an alibi for the night of the murder, the trial court found that there was "no issue at bar concerning the initial interview" because Davis "made no incriminating statements therefore, the fact that he wasn't given Miranda warnings is moot."

(SR 3) The court also found that the officers were not required to disclose the existence of the warrant and that Davis went voluntarily to the station. (SR 3)

The trial court's ruling is well supported by the record and the law. In Roman v. State, 475 So.2d 1228, 1231 (Fla. 1985), this Court addressed a similar claim and stated,

> Appellant's arguments on this issue presuppose that he was in custody during the time he was interrogated. In deter-d whether a suspect is in custody, "the ultimate inquiry is simply 'whether there is a 'formal arrest or restraint on freedom of movement' of the dearee associated with a formal arrest." California v. Beheler 463 U.S. 1121, 103 S.Ct. 3517, 3520, 77' L.Ed.2d 1275 (1983) (quoting Oreaon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct 711, 714, 50 L.Ed.2d 714 (1977)). This inquiry is approached from the perspective of how a reasonable person would have perceived the situation. Drake v. State, 441 So.2d 1079 (Fla.1983), cert denied, --- U.S. ----, 104 S.Ct. 2361, 80 L.Ed.2d 832 (1984). "A policeman's unarticulated plan has no bearing on the question of whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position woul have understood his situation." Berkemer V. McCarty, --- U.S. ----, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (footnote omitted). Appellant's situation was that he was being questioned in an investigation room at the sheriff's department, having voluntarily complied with a deputy's request to go there. That an interrogation takes place at a station house does not by itself transform an

> otherwise noncustodial interrogation into a custodial one. Mathiason. The defendant in Drake was aware that he had furnished the police with probable cause for his arrest. This knowledge, coupled with the fact that his request to discontinue further interrogation without counsel went unheeded, afforded a reasonable basis for Drake to believe he was not free to leave. Appellant here **has shown** no similar basis for a reasonable belief that there was a restraint on his freedom of movement of the degree associated with a formal arrest.

Similarly, in State v. Manning, 506 So.2d 1094, 1096 (Fla. 3DCA 1987), the court held **that a defendant's waiver** of his rights was valid even though the officers had not informed him of an outstanding arrest warrant.

> Manning, a 33-year-old college graduate **and former school teacher,** was interviewed twice in noncustodial circumstances by Detective Osborn. Osborn informed Manning at the first interview that he was a suspect, and, at both interviews, Osborn informed Manning of his Miranda rights. Manning made no inculpatory statements at these two interviews but did give his written authorization to check his medical records. At the conclusion of his investigation, Osborn **secured** an arrest warrant for Manning for the offense of sexual battery. On the morning of November 15, 1984, at 10:00 a.m., Osborn located Manning **at** his place of employment and told Manning that he needed to question him further. He did not tell Manning that he had a warrant for his arrest or that he was under arrest.

At the police station at 10:40 a.m., Manning was advised of his rights, and he signed a waiver of rights form. The interview began. Initially, Manning denied everything, including having a venereal disease. Osborn told him that there **was** evidence in his medical records that he had had a venereal disease. Including occasional rest breaks, approximately an hour and a half of questioning by Osborn occurred before Manning admitted that he had previously had **a** venereal disease and that he **was** currently taking ampicillin for gonorrhea. In fact, there was no definite evidence of venereal disease in his medical records. According to one of the records, Manning had been treated for urinary frequency the year before. The problem was tentatively diagnosed as a kidney infection. A question mark was written next to the initials V.D., and a form of penicillin was prescribed.

At approximately 11:30 a.m., Detective Osborn informed Manning that he was under arrest and showed him the arrest warrant. Following a break for lunch, the interview continued at 12:50 p.m. Manning was again advised of his rights by a new investigator, Lieutenant Brooks. Manning once again signed a waiver of rights form.

* * *

The fact that Manning was not immediately informed that he was under arrest is insufficient to find that his waiver was not voluntary. When a defendant has not been placed under arrest, determining whether he is constructively under arrest or in custody is necessary for the purpose of determining whether a defendant must be read his rights. See New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984); Oroxco v. Texas, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969). There is no question that Manning

> was read his rights many times. The trial court confused Manning's custodial status with the timing of the officer's acknowledgment to Manning that a warrant for his arrest had been procured.
>
> Just as an undercover investigation may continue, notwithstanding the fact that a search warrant has been issued, United States v. Alvarez, 812 F.2d 668 (11th Cir.1987), if all other criteria have been satisfied, an interrogation may take place notwithstanding the fact that an arrest warrant has been issued.
>
> State v. Manning, 506 So.2d at 1095 - 1097

Although Davis was not given the Miranda warnings as Roman and Manning were, the underlying fact remains that the existence of an arrest warrant or an intent to affect an arrest does not automatically convert an otherwise noncustodial interrogation into a custodial interrogation requiring an officer to advise the suspect of his rights.

In the instant case, the record clearly shows that Davis, like Roman and Manning, had no reason to think he was not free to leave at any time, as he had during the first two interviews. This conclusion is further supported by Appellant's subsequent question as to whether he was under arrest. Similarly, the fact that the officers had no intention of releasing Davis has no bearing on

whether the interview constituted a custodial interrogation as the determination of whether the defendant was in custody is viewed from the perspective of the defendant, not the perspective of the investigating officers. Traylor v. State, 596 So.2d at 966 (Fla. 1990) (A person is in custody if a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest). Under these circumstances, there was no custodial interrogation and no need to advise Davis of his Miranda rights. See, also, Wallace, 21 Fla. Law Weekly D1141 (Fla. 3DCA 1996)

More importantly, as the trial court noted, the point is moot because prior to his arrest, Davis made no inculpatory statements. Davis contends that this finding is erroneous because Davis made no incriminating statements, is undermined by the fact that "there was testimony, albeit brief, about [Davis'] initial statements of March 18 at [his] trial." (Initial brief of appellant, page 49) Davis contends that even though the statements were inculpatory the introduction of his denial of guilt along with his admissions of guilt implicitly demonstrates that Davis had to be lying and therefore, the"exculpatory statements Appellant made did tend to incriminate him by the mere fact that they were inconsistent with

his other, inculpatory ones." (Initial brief of Appellant, page 49)

In other words Davis would rather be thought of as a rapist and murderer than a liar. Clearly, in the context of this case, there is no prejudice Davis. If the exculpatory statements established that he was a liar because he initially denied guilt, it is equally as plausible that the jury could have thought he was lying when he confessed instead of being presented only statements of guilt without any challenge to his credibility. Further, even absent the initial denials of guilt Appellant's ultimate retraction of the charges against Betty Schultz establishes that Davis lied at some point.

2) Statements to Major Judd

After Davis was informed that he was under arrest, he told the officers he wanted to call his mother to get him a lawyer. Detectives McWaters and Smith testified that although Davis had not specifically invoked his right to counsel, in an abundance of caution, they immediately ceased any communication with Davis. (R 24, 36, 55) At the hearing on the motion to suppress the state maintained that Davis' statement was at best an equivocal request for counsel which would have allowed the officers to then inform

Davis of his rights and inquire as to whether he was invoking his right to counsel. The state further maintained that since Davis' request was equivocal, Major Judd could also have inquired of Davis as to whether he would like to speak to him without counsel and, therefore, it was unnecessary to determine whether Davis had reinitiated contact with law enforcement officers after having invoked his right to counsel.

The trial court, relying on Edwards v. Arizona, 451 U.S. 477 (1981) found, however, that Davis had invoked his right to counsel when he told the officers he wanted to call his mother to get him a lawyer but that he subsequently waived that right after reiniating contact with law enforcement. Although the state disagrees with the trial court's determination that this statement by Davis was an unequivocal invocation of his right to counsel, the state notes that under either theory the statements were not taken in violation of any constitutional right.[2] Even if this Court

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[2]Prior to the Court's decision in Davis v. United States, __ U.S. , 114 S. Ct. 2350, 129 L. Ed.2d 362 (1994), an officer faced with an equivocal request for counsel or invocation of the right to remain silent was required to cease questioning until the request was clarified. Coleman v. Singletary, 30 F.3d 1420 (11th Cir. 1994). However, in Davis, the Court rejected that standard and held that a suspect must unambiguously invoke his rights. The Court further noted that, "[a]lthough a suspect need not 'speak

should agree that Davis' request to call his mother was an unequivocal request for counsel, the trial court properly found that Davis' statements to Major Judd were not a result of a custodial interrogation, that Davis reinitiated contact with law enforcement and that the resulting confession was voluntary.

Appellant contends, nevertheless, that Major Judd should have known his initial statement to Davis would evoke a response and therefore, it violated the holding in Rhode Island v. Innis, 446 U.S. 291 (1980) and the resulting confession was the result of an interrogation. This assumption is not supported by the law or the facts of this case. At the hearing on the motion to suppress, Detective Smith and Major Judd testified that there was no plan or attempt to get Davis to talk after he was put in the cell. (R 56, 87, 91, 92, 98) Major Judd merely walked up to the glass cell door, looked at Davis, told him he was disappointed in him and then

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with the discrimination of an Oxford don, . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Id. 129 L. Ed.2d at 371. If the suspect's statement is ambiguous, the officers are not required to cease questioning. Thus, in the instant case, where Davis merely requested the opportunity to call his mother to get him an attorney, Major Judd was free to talk to Davis to clarify his equivocal request for counsel.

turned to walk away. (R 111) The trial court specifically found that Major Judd's statement 'was in form, an aside." 'The statement was in no way a question, and did not invite a response." (SR 4). This is a factual finding by the trial court that is entitled to a presumption of correctness.

The trial court, relying on Christmas v. State, 632 So.2d 1368 (Fla. 1994) also rejected Davis claim that his confession to Major Judd was the result of an interrogation in violation of Edwards v. Arizona, 451 U.S. 477 (1980). The trial judge found, in the instant case, that Davis initiated the contact and that the confession was not the result of any interrogation by Major Judd. In Christmas v. State, 632 So.2d 1368 (Fla. 1994) this Court held:

> Christmas raises only one issue as to his convictions, claiming that the trial judge erred in denying his motion to suppress. In support of that contention, Christmas asserts that the bailiffs were law enforcement agents who wrongfully elicited the statements made by Christmas without first giving him Miranda warnings. The State, however, argues that the bailiffs were unsworn civilians who had no arrest powers and that Christmas initiated contact with the bailiffs, without prompting, by stating that the testimony was "bullshit." The State additionally notes that the trial judge specifically found that Christmas was not interrogated in any manner, that Christmas initiated the conversation, and that the statements were freely and voluntarily made.

Consequently, according to the State, Miranda warnings were unnecessary because such warnings must be given only in situations where a defendant is interrogated or coerced. In making this argument, the State cites Illinois v. Perkins, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990), in which the United States Supreme Court held that Miranda warnings are not always required in custody situations where a defendant converses with a government agent.

First, we find that the trial judge erred in ruling that the bailiffs were not law enforcement officers for the purpose of determining whether Miranda warnings must be given before questioning. The bailiffs were paid employees of the Jacksonville Sheriff's Department; they were hired to maintain security in the courtroom and to maintain security over prisoners who were brought to and from the detention center to appear in court; and they wore identification badges labeled "Jacksonville Sheriff's Office." The simple fact that the bailiffs were not sworn deputies and lacked arrest powers is insufficient to negate their status as "officers of the state."

Whether Miranda warnings were required under the circumstances of this case is a much closer question given the evidence that Christmas initiated the conversation with the bailiffs. It is undisputed that the question regarding who did the shooting in this case was initiated by one of the bailiffs as a result of Christmas's previous statements. Miranda and its progeny require that Miranda warnings be given whenever custodial interrogation takes place. This is because of the coercive conditions that are inherent when suspects are questioned by "captors, who appear to control the suspect's fate, [and

> who] may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will." Perkins, 496 U.S. at 297, 110 S.Ct. at 2397. ***When, however, a defendant voluntarily initiates a conversation with*** law ***enforcement officers in which*** a ***defendant provides information about that defendant's*** case, ***Miranda warnings are not required.*** Although the bailiff's question was probably improper, under the circumstances we cannot say that Miranda warnings were required. Christmas voluntarily initiated the conversation at issue and the bailiff's question was not asked as the result of circumstances in which mutually reinforcing pressures were present so as to weaken Christmas's will. In any event, we find that the admission of Christmas's statements constituted harmless error beyond a reasonable doubt given the significant amount of other incriminating evidence in this case. &a- DiGuilio, 491 So.2d 1129 (Fla.1986). Consequently, we affirm his convictions.
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> Christmas v. State, 632 So.2d at 1371 (emphasis added)

The evidence presented at the hearing showed that after Davis called out to Judd that he needed to look at Beverly Schultz, Major Judd made it clear to him that since he had requested his mother get him a lawyer, Judd could not speak to him without a lawyer unless Davis reinitiated the contact. Davis said he wanted to talk to him and Mrs. [Lieutenant] Schreiber. (R 83, 111-14) When Davis said he couldn't afford a lawyer anyway, Major Judd told him that even if he could not afford an attorney one would be provided to

him. (R 115) Davis waived his right to counsel and began to tell Judd about the murder of Kimberly Waters. (R 83) As the trial court found, the confession was given in the form of a narrative and was not the result of any interrogation by Judd. (SR 6; R 83-85, 87, 94, 106)

In Johnson v. State, 660 So.2d 648 (Fla. 1995), Johnson also urged error in the failure to suppress a statement made to an officer while he was being escorted to jail. In the statement, Johnson asked if he could get a "shot." The officer, like Major Judd in the instant case, asked Johnson what he meant. Johnson answered that he would rather receive a shot than die in the electric chair. This Court, in finding that Johnson made the statement voluntarily and spontaneously, and not as part of custodial interrogation, stated, "The fact that the officer asked an innocuous question does not in itself constitute interrogation because the question here was not intended to elicit an incriminating response. The fact that Johnson incriminated himself was a complete surprise in light of the obvious ambiguity of his initial unsolicited remark." This Court further noted that any error would be harmless because Johnson, like Davis in the instant

case, gave other confessions. Johnson v. State, 660 So.2d 648 (Fla. 1995).

Similarly, in Morgan v. State, 639 So.2d 6 (Fla. 1994) this Court rejected Morgan's contention that statements he made to an officer were erroneously introduced at trial because the statements were obtained in violation of his right to counsel and right to remain silent. This Court found that since Morgan voluntarily initiated communication with the officer, his prior invocation of the right to counsel had been waived. Minnick v. Mississippi, 498 U.S. 146 (1990)(Fifth Amendment right to counsel may be waived through defendant's voluntarily initiation of communication). Additionally, this Court found as it did in Johnson, that since Morgan provided this same version of events to a psychiatrist and what he told that psychiatrist was also admitted at trial, any error in admitting those statements was harmless.

Similarly, in Peterka v. State, 640 So.2d 59, 67 (Fla. 1994), this Court rejected Perterka's claim that a detective had violated Peterka's right to remain silent, as Peterka himself initiated this contact with the police.

Quoting Florida Rule of Criminal Procedure 3.111 (c) (2) (3), appellant also urges that this confession should have been

suppressed because the rule places an affirmative duty upon police to assist a defendant who expresses his desire for a lawyer and he contends that the sheriff's deputies here did nothing to help Appellant fulfill his expressed desire for counsel. This argument is barred as it was not argued to the court below. (R 6-8, 122-32) Furthermore, an examination of the rule in its entirety shows that no error was committed by the officers with regard to obtaining Davis counsel. In addition to the limited portion of the rule quoted by Davis, Florida Rule of Criminal Procedure 3.111 also states:

> (a) When Counsel Provided. [An indigent person] shall have counsel appointed when he is formally charged with an offense, or as soon as feasible after custodial restraint or upon his first appearance before **a** committing magistrate, whichever occurs earliest.

'In other words, a defendant is entitled to counsel at the earliest of the following points: when he or she is formally charged with a crime **via** the filing of an indictment or information, or **as soon as feasible after custodial restraint, or** at first appearance." Traylor v State, 596 So.2d 957, 969-970 (Fla. 1992). The record shows that as soon as Davis asked to speak to his mother and was placed under **arrest, questioning** immediately

ceased and the booking process was initiated. Clearly the rule recognizes that such procedural requirements need to be accomplished before counsel can be appointed. Major Judd's conversation with Davis took place within a matter of minutes after he was arrested and placed in the holding cell. There is no evidence that the officers were dilatory in completing the booking process. Accordingly, even if this claim was not procedurally barred, it is without merit.

3) Confession after Miranda

After Davis finished talking to Major Judd and Lieutenant Schreiber, he agreed to give a taped statement to Detectives McWaters and Smith. (R 86) Davis was brought into the interview room, given Miranda warnings and, after signing a waiver of rights form, gave a taped statement admitting that he had kidnapped and murdered young Kimberly. (R 28, 46, 60-62) In denying the motion to suppress this statement, the trial court found that Davis voluntarily made the taped confession after receiving his Miranda warnings. (SR 7) The trial court further found that there was no improper police conduct or allegations of coercion and that the record does not support any. (SR 7) It is the state's position that the trial court properly denied the motion.

As noted by the trial court, this Court in Perry v. State, 522 So.2d 817, 819 (Fla. 1988), adopted the holding in Oregon v. Elstad, 470 U.S. 298 (1985) holding that a suspect who 'responded to unwarned yet uncoercive questioning" is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." Specifically, with regard to this claim, this Court held:

> Perry first raises three points relating to the guilt phase of his trial. Most worthy of discussion is the defense claim that because Perry initially confessed without benefit of Miranda warnings, subsequent statements made after he was given proper warnings were tainted and should have been suppressed. We disagree.
>
> There is nothing in the record to indicate that Perry's initial remarks to police were involuntary. He voluntarily went to the police station. His statements to the detectives were not made under duress, nor under prolonged or unreasonable interrogation. He was neither threatened nor coerced nor promised anything in return for his statements. Although a previous voluntary disclosure may give a certain psychological impetus for confession not otherwise present, we decline to find that this rises to the level of state compulsion. The failure to give proper warnings makes the initial statements inadmissible, not because they were compelled, but as an indication that there may not have been a knowing and intelligent waiver of the right against self-incrimination. This defect is cured by subsequent warnings. We

> agree with the United States Supreme Court finding in Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), that "[w]hen neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." 470 U.S. at 312, 105 S.Ct. at 1294.
>
> Perry v. State, 522 So.2d 817, 819 (Fla. 1988) (emphasis added)

Although Davis did not testify at the suppression hearing, a transcript of the first tape recorded statement confirms that Davis initiated the conversation with Major Judd, that he waived his right to counsel and that he voluntarily confessed to the murder of Kimberly Waters. (R 63-64, 1840) Thus, his reliance on McNeil v. Wisconsin, 501 U.S. 171 (1991), is misplaced. Unlike Davis in the instant case, McNeil did not reinitiate contact with law enforcement. Similarly, appellant's reliance on Craig v. Singletary, 9 Fla. L. Weekly Fed. C1041 (11th Cir. April 19, 1996) is misplaced. In Craig the court specifically found that Craig's arrest was illegal and that the officers, not Craig, reinitiated contact after Craig invoked his right to counsel. Neither finding is present in the instant case. There has never been a suggestion that Davis' arrest was illegal and the trial court specifically

found that Davis, not law enforcement, reinitiated contact. Since this finding is well supported by the record it should be afforded a presumption of correctness. Accordingly, the state urges this Honorable Court to affirm the holding of the lower court.

4) May 26 statements

With regard to the taped statement given two months after his arrest and arraignment, appellant urges that the statement should have been suppressed as it was "tainted" by the earlier statements. Further, he contends that his earlier execution of a written notification of exercise of rights put law enforcement on notice that he did not consent to be interviewed. He contends that the state must prove an intentional relinquishment or abandonment of a known right or privilege. In particular Davis expresses concern over the fact that he was not given Miranda warnings once again based on the advice of Assistant State Attorney John Aguero and the "wide-ranging nature of the interview." He contends that 'if he did initiate contact with the police, it was for the obvious and limited purpose of absolving Beverly Schultz of any responsibility for what happened to Kimberly Waters."

As previously noted, a hearing was held on Davis' second motion to suppress which challenged statements made on May 26,

1994. (R 420) At the hearing, Sergeant Jimmy Smith testified that he received an inmate request form from Davis requesting an interview with detectives to discuss 'information concerning the Waters case." (R 424-27, 440) Detectives Hamilton and Harkins interviewed Davis. Before she spoke to Davis, Detective Hamilton contacted prosecutor John Aguero who advised her that although it was not necessary to give Miranda warnings again, she should ask Davis if he was willing to speak to them without his attorney present and record the conversation. (R 438, 452) Detective Hamilton testified that they went to the jail, identified themselves and confirmed that Davis wanted to speak with them without his lawyer present. The statement was then tape recorded. (R 444) Based on this testimony, the trial court denied the mot ion, finding that Davis voluntarily initiated the conversation with law enforcement and that he waived his right to counsel. The court further found that since Davis initiated the interview that the detectives were well within the law when they spoke to him without giving him Miranda warnings. (R 478)

Appellant's argument as to the scope of the interview was not presented below and is, therefore, barred. (R 463-65) Further,

there is no support for his argument that the defendant in any way expressed a desire to limit the conversation to Beverly Schultz.

There is also no support for his argument that he did not initiate the contact. Sergeant Jimmy Smith's testimony establishes, and the trial court made a factual finding that, Davis sent the request for interview form and that the interview was a result of this request. Additionally, Davis confirmed at the start of the interview that he asked to see them and that he wanted to speak to them without his lawyer.

Furthermore, as the court also found, Miranda warnings are not required when a defendant voluntarily initiates conversation with law enforcement. Christmas v. State, 632 So.2d 1368 (Fla. 1994). That the prosecutor gave the officers legally correct advice and in fact told them to go a step further than necessary and make sure the defendant waived his right to have his lawyer present does not make the taking of the statement constitutionally infirm.

Finally, it should be noted that even if any of the earlier statements were in violation of Davis' constitutional rights, the passage of two months as well as the appointment and representation by counsel was a sufficient intervening factor so as to remove any "taint' from the May confession. Sanchez-Velasco v. State, 570

So.2d 908 (Fla. 1990)("Given that the police removed his handcuffs and left him alone for ten minutes or so, we believe that such a break is sufficient to hold that the invalid arrest did not taint the subsequent voluntary statements made by Sanchez-Velasco"). As such, error, if any, in the admission of the statements was harmless beyond a reasonable doubt. Johnson, Peterka.

Based on the foregoing the state urges this Honorable Court to affirm the rulings of the lower court denying the motions to suppress and admitting Davis' statements.

ISSUE II

WHETHER THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE AT THE GUILT PHASE OF APPELLANT'S TRIAL, A TRANSCRIPT OF THE 911 CALL MADE BY BEVERLY SCHULTZ AFTER DISCOVERING HER DAUGHTER MISSING.

Upon discovering her child was gone and could not be found, Beverly Schultz called 911. Over a defense objection, the state sought to play the tape for the jury. (T 1943) Davis objected that the tape was hearsay and a denial of his confrontation rights. (T 1831, 1927- 1938) The state responded that it was not being offered to prove the truth of the matter asserted, but rather to rebut Davis' suggestion that Schultz was involved in the murder. (T 1831, 1927-38) The state also argued that the tape was admissible under the excited utterance exception to the hearsay rule. (T 1937) The trial court overruled the objection finding that the tape was admissible. (T 1942) Prior to playing the tape, Judge Andrews instructed the jury the tape was not being offered to prove the matters asserted in the tape but only to show Beverly Schultz' state of mind at the time of the call. (T 1943)

On appeal, Davis is contending that the content of the 911 call was hearsay and not relevant to any question at issue. He contends that although he had originally claimed that Schultz hired

him to commit the murder, since he subsequently retracted that claim, Schultz' state of mind was no longer relevant.

It is the state's contention that Schultz' state of mind was relevant and, furthermore, that tape was admissible under the excited utterance exception to the hearsay rule and that it was relevant to establish circumstances of the crime.

It is the state's position that this tape was admissible **as** it **was** relevant to prove or disprove a material fact. §§90.401 and 90.402, Fla. Stat. As the tape was not being offered to prove the truth of the matters asserted therein, but, rather, to establish Beverly Schultz' state of mind, it was admissible in spite of the hearsay challenge. During his first taped confession, Davis claimed that Beverly Schultz came to him and asked him if he wanted to make some serious money. (T 1842) He claimed that later after he'd been drinking, she came back and told him she wanted Kimberly beat up and molested real bad, so that she could be found the next day and that she would give him $500 to do it, no questions asked. He claimed that she had some kind of scam and she would get a lot of money for doing it. Davis also claimed that she gave him some money and that she told him the front door would be unlocked and that Kimberly would be in her [Beverly's] bed. (R 1843-45) The tape of the 911 call was, therefore, relevant to refute this

portion of the statement, as it showed Schultz' panic upon discovering her child missing.

Furthermore, even if the evidence was hearsay, it was admissible under the spontaneous statement and excited utterance exceptions to the hearsay rule. 590.803 (1) (2), Fla. Stat. In Ware v. State, 596 So.2d 1200 (3d DCA 1992), the court reviewed a similar claim and held that a tape of a 911 call was admissible as excited utterances and spontaneous statements pursuant to 90.803(1) and 90.803(2), Florida Statutes (1989). The court stated:

> "The allegations by the appellant that the trial court erred in admitting the tape of the 911 call into evidence on the ground that the tape was almost completely irrelevant and had no real probative value, that the only value of the tape was to prove Valerie's state of mind immediately after the crime and tended to lend credence to Valerie's testimony, prejudicing appellant in the eyes of the jury when as in this case, Valerie's testimony is the only evidence against appellant, are without merit. The appellant does admit that portions of the tape are admissible as an excited witness exception to the hearsay rule pursuant to 90.803(2), Florida Statutes (1989), but certainly the whole tape was not admissible.
>
> The trial court was correct. The information contained on the tape was admissible as excited utterances and spontaneous statements pursuant to 90.803 (1) and 90.803(2), Florida Statutes (1989). [cites omitted]
>
> Id. at 1201.

The holding in Ware was followed by the Second District in a Allison v. State, 661 So.2d 889, a94 (Fla. App. 2 Dist. 1995), wherein the court held:

> The trial court allowed the state to play an audiotape of a 911 call wherein the ten-year-old son frantically called authorities when he discovered that his mother was dead in her bed on the morning following her death. The defense objected, and the court ruled that it was admissible under the excited utterance exception to the hearsay rule. An out-of-court statement is admissible if it is made in response to a startling event during the trauma or stress of the event. Sec. 90.803(2), Fla.Stat. (1991). The state laid the predicate that the child was under stress and crying at the time he made the call. In Ware v. State, 596 So.2d 1200 (Fla. 3d DCA 1992), the Third District held that a 911 recording was admissible under the excited utterance exception to the hearsay rule. Thus, the trial court did not err in admitting the 911 tape into evidence.
>
> Allison v. State, 661 So.2d 889, a94 (Fla. 2 DCA 1995)

In Power v. State, 605 So.2d 856 (Fla. 1992), -this Honorable Court upheld the trial court's ruling allowing a deputy to testify concerning hearsay statements made to him by the victim's father. See also Garcia v. State, 492 So.2d 360 (Fla. 1986) (surviving victims' statements made while still at the scene of the crime which were consistent with her later testimony, admissible as excited utterance).

A review of the 911 call shows the circumstances under which Schultz made the call were spontaneous and that the statements sprang from the stress and excitement of discovering her child missing. Davis' assertion that the tape was not admissible as an excited utterance because Schultz had already searched the neighborhood for her child is preposterous. A fruitless search of the neighborhood for a missing child could hardly result in time for 'reflection." To the contrary, the search would more likely increase rather than decrease the sense of panic and fear. As such, it was admissible under the excited utterance exception to the hearsay rule. Ware v. State, 596 So.2d 1200 (3d DCA 1992).

The evidence was also relevant to establish circumstances of the crime, including when Kimberly was discovered missing. In this sense the admission of the 911 call is analogous to those cases where this Court has upheld the admission of allegedly gruesome photographs which were relevant to establish the circumstances and the manner of the crime.

> "Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Those whose work products are murder of human beings should expect to be confronted by photographs of their accomplishments. The photographs are relevant to show the location of the victims' bodies, the amount of time that had passed

from when the victims were murdered to when the bodies were found, and the manner in which they were clothed, bound and gagged."

Henderson v. State, 463 So.2d 196, 200 (Fla. 1985)

Additionally, even if this trial court had erred in admitting the 911 call, the error was harmless in that Beverly Schultz testified consistent with the 911 call and the Court gave a limiting instruction to the jury. See, Power v. State, at 862.

Appellant also contends that the admission of the tape was error because the state failed to establish an adequate foundation for it to be admitted. This claim is procedurally barred. As appellant concedes the state presented additional evidence to establish a foundation for admitting the tape ***after*** the only challenge made by the defense on the basis of insufficient predicate. (T 1830-33) The next day when the state offered the tape into evidence, defense counsel did not renew his previous objection to the foundation. As such the claim has been waived.

ISSUE III

WHETHER THE APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL BY ADMISSION OF IRRELEVANT MATTERS, IMPROPER ARGUMENTS AND EMOTIONAL DISPLAYS.

A determination as to whether substantial justice warrants the granting of a mistrial is within the sound discretion of the trial court. Sireci v. State, 587 So.2d 450 (Fla. 1991). A mistrial is appropriate only when the error committed is so prejudicial as to vitiate the entire trial. King v. State, 623 So.2d 486 (Fla. 1993). A review of the alleged improper arguments and testimony reveals that the trial court properly denied the motions for mistrial.

In general, 'wide latitude is permitted in arguing to a jury." Thomas v. State, 326 So.2d 413 (Fla. 1975); Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962), cert. denied, 372 U.S. 904, 83 S.Ct. 742, 9 L.Ed.2d 730 (1963). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. Spencer. The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. Thomas; Paramore v. State, 229 So.2d 855 (Fla.1969), modified, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751

(1972). A new trial should be granted when it is 'reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done.' Darden v. State, 329 So.2d 287, 289 (Fla.1976), cert. denied, 430 U.S. 704, 97 S.Ct. 308, 50 L.Ed.2d 282 (1977). Each case must be considered on its own merits, however, and within the circumstances surrounding the complained of remarks. Id. Compare, Paramore with Wilson v. State, 294 So.2d 327 (Fla. 1974). Breedlove v. State, 413 So.2d 1, 8 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982)." Bonifay v. State, 1996 WL 385504 (Fla. 1996).

First, Davis challenges two references made by the prosecutor, once during voir dire and once during closing arguments, to the fact that Kimberly Waters had a learning disability. A review of these minor references in context establishes that no harmful error was created. With regard to the juror question the record shows that prospective juror Skinner stated that she worked with children with learning disabilities. As Aguero anticipated establishing knowledge of Kimberly's learning disability as part of his motive in selecting her as his victim, he asked if it would cause her more concern if he told her the case involved a child with learning disabilities. He did not say that the child was the victim or if

it was some other child that was involved, for example Kimberly's sister Crystal. (T 614-616) Upon objection of defense counsel, Aguero explained his intent to establish the motive and the court allowed inquiry. Nevertheless, Aguero told the court he would just stay away from it for the time being.[3] (T 617) Shortly thereafter defense counsel moved for a mistrial or, in the alternative, individual voir dire.[4] The request was denied and the court agreed that general inquiry could be made into any feelings prospective jurors may have on the issue. (T 616) This broad statement made to a juror that was excused for cause was not error and, even if it was, was not harmful.

As to the comment made during closing argument that Davis was taking an eleven-year-old emotionally handicapped child out for a midnight stroll, this claim is waived as there was no objection to the prosecutor's comment. (T 2098)

Even if this claim was not barred, it is without merit. In Spencer v. State, 645 So.2d 377, 383 (Fla. 1994), this Court held that 'although comments on matters outside the evidence are clearly

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[3]Prospective juror Skinner was excused for cause. (T 844-45)

[4]In the Initial Brief of Appellant page 75, Davis claims defense counsel asked to have the panel struck. Undersigned counsel can find no such request beyond the general request for a mistrial. (T 621-22)

improper," such comments do not warrant a mistrial. 'In order for the prosecutor's comments to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." Id. at 383.

Similarly, in Esty v. State, 642 So.2d 1074, (Fla. 1994) this Court found no merit to Esty's claim that was entitled to a new trial because the trial court failed to grant a mistrial after the prosecutor made improper comments during closing argument describing Esty as a "dangerous, vicious, cold-blooded murderer" and warning the jury that neither the police nor the judicial system can "protect us from people like that" as the challenged comments were not so prejudicial as to vitiate the entire trial. Esty v. State, citing, Duest v. State, 462 So.2d 446, 448 (Fla. 1985). This Court further noted that the control of the prosecutor's comments is within a trial court's discretion, and a court's ruling will not be overturned unless an abuse of discretion is shown. Esty v. State, citing, Durocher v. State, 596 So.2d 997, 1000 (Fla. 1992).

In light of the fact that Davis' victim was an eleven-year-old girl who was sleeping in her own home when she was abducted and savagely destroyed by Davis, the prosecutor's unchallenged and unrefuted comment that she was emotionally handicapped did not 'either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." Esty v. State, 642 So.2d 1074, (Fla. 1994).

Davis also claims reversible error based on an allegation that two emotional displays occurred during the trial and that the prosecutor improperly commented on one of them. The record shows that during closing argument prosecutor Aguero made the following statement:

> "Why did Mr. Davis throw this girl's body in a garbage dumpster right after he committed the crime? If his mind was so befuddled, why didn't he leave her there? He threw her in a garbage dumpster so that he hopefully would never get caught. Had Terry Storie -- Terry Storie, the guy that got upset thinking about this little girl -- not seen this tiny little hand ---" (T 2093)

Defense counsel objected and argued to the court as follows:

> "Your Honor, we have been very patient as far as dealing with issues designed to inflame the jurors' passions. That's something we've been very sensitive to, we've tried to avoid.
>
> There have been and that there have been things that happened that I don't think in an isolated incident an appellate court would say that rises to the level of requiring a mistrial, but at this point, given the chain of events that have occurred, I'm going to move for a mistrial." (T 2094)

Counsel claimed that the victim's mother became somewhat upset during her testimony and that a deputy became upset during his testimony. He contended that the prosecutor's argument was essentially a golden rule argument. The trial court overruled the objection and denied the motion for mistrial. (T 2094-96)

First, any challenge as to the emotional impact of Detective Storie and/or Beverly Schultz was waived as there was no contemporaneous objection. Allen v. State, 662 So.2d 323, (Fla. 1995). Significantly, the trial court noted at the close of the penalty phase that Mrs. Schultz had behaved rather well throughout the whole trial, guilt and penalty phase, he had not noticed any problems. Defense counsel agreed. (T 2960-61) Further, the mere fact that a witness became upset during the trial does not mandate reversal of a conviction. Burns v. State, 609 So.2d 600, 604-05, (Fla. 1992) (victim's wife crying during trial did not require new trial).

As for the prosecutor's reference to Detective Storie, it is not improper to comment on a witness's demeanor. Contrary to appellant's contention, the prosecutor's argument was relevant to the issue before the jury. The defense claimed that Davis had not known anyone would be home and that he had killed Kimberly out of fright and panic and, therefore, he was only guilty of second degree murder. (T 2069-70) The prosecutor's closing argument focused on the level of intent and planning shown by Davis' confession and the evidence produced at trial. The reference to Detective Storie was to illustrate that Davis had the presence of mind to cover up the evidence of his crime. While the very nature of Davis' crime against Kimberly is an atrocity, the prosecutors argument was not improper and did not result in the jury returning a more severe verdict than that it would have otherwise. Esty v. State, 642 So.2d 1074 (Fla. 1994).

Similarly, Aguero's argument that Davis' claim that he only put his fingers in Kimberly's vagina was a "bald-faced lie" is also a proper comment on the evidence. Craig v. State, 510 So.2d 857, 865 (Fla. 1987). Medical examiner Dr. Alexander Melamud's testimony that Kimberly's bikini was soaked with blood and that her vagina and perineum were lacerated or torn up to the anus was clearly irreconcilable with Davis' version of events. (T 1733-34)

Unlike those cases relied on by appellant the prosecutor was not asking the jury to choose between the defendant and another witness as to who is the more credible. Rather, the argument focused on the level of intent involved in the crime.

Finally, Aguero's reference to Davis as a vicious brutal person is a proper comment on the evidence, as it went to Davis' claim that the murder was not premeditated. Burr, 466 So.2d 1051, 1054 (Fla.) (prosecutor's statements that people were afraid and that defendant "executes" people were fair comment on evidence and were not so inflammatory or prejudicial as to warrant a mistrial), cert. denied, 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985). Even if it were not, use of the term was not so prejudicial as to warrant a mistrial. Jones v. State, 652 So.2d 346, 352 (Fla. 1995)(prosecutor's reference to the collateral crime as "disgusting" not so egregious as to warrant reversal).

Furthermore, error if any was harmless. In Esty v. State, 642 So.2d 1074, (Fla. 1994), this Court considered a similar statement and found it harmless:

> We also find no merit to Esty's claim that he is entitled to a new trial because the trial court failed to grant a mistrial after the prosecutor made improper comments during closing argument in the guilt phase. The control of the prosecutor's comments is within a trial court's discretion, and that court's

> ruling will not be overturned unless an abuse of discretion is shown. Durocher v. State, 596 So.2d 997, 1000 (Fla.1992). In the instant case, the prosecutor described Esty as a ***"dangerous, vicious, cold-blooded murderer"*** and warned the jury that neither the police nor the judicial system can "protect us from people like that." Defense counsel immediately objected to these comments, requested a curative instruction, and moved for a mistrial. Although the trial court sustained the objection, it refused to grant a mistrial and instead instructed the jury to "disregard the last comments of the State attorney. You shall not consider that in any way whatsoever in your deliberations." We find no abuse of discretion by the trial court in denying Esty's motion for a mistrial as these comments were not so prejudicial as to vitiate the entire trial. See Duest v. State, 462 So.2d 446, 448 (Fla.1985).
>
> Esty v. State, 642 So.2d 1074,(Fla. 1994)

Appellant recognizes that this Court found the comments in Esty harmless but contends that they can not be harmless in the instant case because there was no curative instruction and because of the cumulative effect of the previously challenged comments. First, the statement in the instant case was simply a comment on the evidence, it did not include as the statement in Esty did a warning that the police could not protect us from people like the defendant. Further, although the defendant's request for a curative instruction at that time was denied, the court did agree to give the instruction after closing. (T 2114) The jury was

instructed that the case must not be decided for or against anyone because you feel sorry for anyone, or you are angry at anyone. The jury was also instructed that feelings of prejudice, bias or sympathy should not be discussed or play any role in the verdict. (T 2144)

In conclusion, assuming, arguendo, that any of the foregoing does constitute error, in light of the overwhelming evidence against Davis including his own confessions as to this heinous crime, error, if any, was harmless beyond a reasonable doubt.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS TO FLORIDA'S STANDARD JURY INSTRUCTION ON REASONABLE DOUBT.

Appellant alleges that the standard jury instruction on reasonable doubt unconstitutionally dilutes the due process requirement of proof beyond a reasonable doubt. Although Appellant concedes that this Court in Esty, supra. has considered this claim and rejected it, he urges this Court to reconsider the issue in light of the arguments presented. It is the state's position that appellant has not presented anything new for this Court's consideration and since the basis for the decision in Esty and its progeny remains unchanged, this Court should reaffirm its prior holding.

The jury in the instant case was instructed as follows:

> "A reasonable doubt is not a possible doubt, it is not a speculative doubt, it is not an imaginary doubt, it is not a forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt.
>
> On the other hand, if, after carefully considering, comparing and weighing the evidence there is not an abiding conviction of guilt, or if, having a conviction, it is one which is not stable, but one which waivers and vacillates, then the charge is not proven beyond every reasonable doubt and you must

> find the defendant not guilty because the doubt is reasonable." (T 2140)

This instruction as given to the jury was from the Florida Standard Jury Instructions. This Court has previously approved use of this standard instruction. In re Standard Jury Instructions (Criminal), 431 So.2d 594 (Fla.), as modified on other grounds, 431 So.2d 599 (Fla. 1981); Rotenberry v. State, 468 So.2d 971 (Fla. 1985), receded from on other grounds, Carawan v. State, 515 So.2d 161 (Fla. 1987); Williams v. State, 437 So.2d 133 (Fla. 1983), cert.. denied, 466 U.S. 909 (1984). In Brown v. State, 565 So.2d 304 (Fla. 1990), this Court again reviewed the Standard Jury Instruction on reasonable doubt and held that when the Standard Jury Instruction is read in its totality it adequately defines "reasonable doubt."

As previously noted, this Court in Esty v. State, 642 So.2d 1074 (Fla. 1994), considered this claim and rejected same, holding:

> As his final guilt-phase issue, Esty argues that the court erred in giving the standard jury instruction on reasonable doubt.
>
> * * *
>
> Moreover, even if properly preserved, we would find no merit to this issue. "'[T]aken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury. There is no reasonable likelihood that the jurors who determined [Esty's] guilt

> applied the instructions in a way that violated the Constitution." Victor v. Nebraska, --- U.S. ----, ----, 114 S.Ct. 1239, 1251, 127 L.Ed.2d 583 (1994) (citation omitted) (quoting Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 138, 99 L.Ed. 150 (1954)); accord Brown v. State, 565 So.2d 304, 307 (Fla.), cert. denied, 498 U.S. 992, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990), abrogated on other grounds, Jackson v. State, --- So.2d ---- **19** Fla.L.Weekly S215 (Fla. Apr. 21, 1994;.
>
> Esty v. State, 642 So.2d 1074 (Fla. 1994)

Most recently, in Archer v. State, 673 So.2d 17, 20 (Fla. 1996), citing, Esty v. State, 642 So.2d 1074 (Fla.1994), cert. denied, --- U.S. ----, **115** S.Ct. 1380, 131 L.Ed.2d 234 (1995), this Court rejected Archer's claim that the trial judge erred in failing to provide a definition of reasonable doubt to the resentencing jury and reaffirmed that the standard guilt phase jury instructions provide a constitutionally proper definition of reasonable doubt. See, also, Henry v. State, 649 So.2d 1361, 1365 (Fla. 1994).

When the instruction is considered as a whole, it becomes clear that no reasonable juror could have interpreted the instruction to allow a finding of guilt based on the degree of proof below that required by the due process clause. Accordingly, appellant is not entitled to relief on this claim.

Appellant next contends that the trial court should have granted his request to have the jury instructed on the definition of premeditation in accordance with McCutchen v. State, 96 So.2d 152, 153 (Fla. 1957), rather than the standard jury instruction. This Court has expressly upheld the standard jury instruction, finding that it "addresses all of the points discussed in McCutchen, and thus properly instructs the jury about the element of premeditated design." Spencer, 645 So.2d at 382.

It is well settled that the correctness of a jury charge should be determined by the consideration of the whole charge. Barkley v. State, 152 Fla. 147, 10 So.2d 922 (Fla. 1942); Anderson v. State, 133 Fla. 63, 182 So. 643 (Fla. 1938). The denial of a requested jury instruction cannot be deemed error where the substance of the charge was adequately covered by the instructions as a whole, and the charges as given are clear, comprehensive, and correct. Bolin v. State, 297 So.2d 317, 319 (Fla. 3d DCA), cert. denied, 304 So.2d 452 (1974); Roker v. State, 284 So.2d 454, 455 (Fla. 3d DCA 1973). In this case, the jury was completely and thoroughly instructed on the definition of premeditation. (T. 2130-31) Therefore, there was no abuse of discretion committed when the trial court refused to give the special instruction on premeditation requested in this case.

The appellant also claims that the definition from McCutcheon was required because it is more thorough and sets forth a higher standard for premeditation than the standard instruction. This claim was rejected in Spencer. In addition, this is not a relevant consideration in reviewing the denial of a requested instruction. Every instruction could be expounded upon, but the focus must be on whether the instruction, as given, was sufficient to advise the jury of the law. Case decisions may offer additional definitions or explanations of the law, but a trial judge is not required to embody such decisions into his charge to the jury. This Court has recognized that not every judicial construction must be incorporated into a jury instruction. Jackson v. State, 648 So.2d 85, 90 (Fla. 1994). "Passages from appellate opinions, taken out of context, do not always make for good jury instructions." Sarduy v. State, 540 So.2d 203, 205 (Fla. 3d DCA 1989).

The giving of a requested instruction is within the trial court's discretion. Kramer v. State, 619 So.2d 274, 277 (Fla. 1993). The appellant has failed to establish any abuse of discretion in this case, and is not entitled to a new trial on this issue.

Furthermore, in light of the facts of this case, error, if any, in the instruction is harmless beyond a reasonable doubt.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN SUBJECTING APPELLANT TO A COMPELLED MENTAL HEALTH EXAMINATION BY A PROSECUTOR EXPERT.

Appellant alleges that his constitutional rights against self-incrimination and cruel and/or unusual punishment, as well as his right to effective assistance of counsel were violated when the trial court ordered him to submit to a mental health examination after the guilt phase. It is the state's position that the court's ruling was proper and in accordance with this Court's decision in Dillbeck v. State, 643 So.2d 1027 (Fla. 1994), and the subsequently adopted Florida Rule of Criminal Procedure 3.202 Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial.

In Dillbeck v. State, this Court rejected the same claim now urged by Davis and directed the proposal of a corresponding rule.

> Dillbeck claims as his third point that the trial court erred in requiring him to submit to an examination by the State's mental health expert prior to the penalty phase. In arguing before the trial court in favor of the exam, the State claimed it was seeking only to make the match equal, that without the exam the State was hog-tied in trying to rebut Dillbeck's experts, who had interviewed him. Dillbeck, on the other hand, claimed that requiring him to submit to the State's expert would constitute a violation of the Fifth Amendment's proscription against compelled self-incrimination.

> At the time of sentencing in the present case, Nibert had been decided, thus obligating the State to either rebut the defendant's mitigating evidence or run the risk of having the court accept that evidence as establishing one or more mitigating circumstances. We note that Dillbeck planned to, and ultimately did, present extensive mitigating evidence in the penalty phase through defense mental health experts who had interviewed him. Under these circumstances, we cannot say that the trial court abused its discretion in striving to level the playing field by ordering Dillbeck to submit to a prepenalty phase interview with the State's expert. See Burns. No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved.
>
> Dillbeck v. State, 643 So.2d 1027, 1031 (Fla. 1994) cert. denied, ___ U.S. ___, 115 S.Ct. 1371, 131 L.Ed.2d 226

Upon consideration of the proposed rule this Court reiterated the necessity for a rule that "'levels the playing field' in a capital case simply by providing a procedure whereby a State expert can examine a defendant who intends to present expert testimony of mental mitigation [was] preferable." Amendments to Florida Rule of Criminal Procedure 3.220 Discovery (3.202 Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial), 674 So.2d 83,86 (Fla. 1995).

The new rule reads as follows:

RULE 3,202. EXPERT TESTIMONY OF MENTAL MITIGATION DURING PENALTY PHASE OF CAPITAL TRIAL: NOTICE AND EXAMINATION BY STATE EXPERT

(a) Notice of Intent to Seek Death Penalty. The provisions of this rule apply only in those capital cases in which the state gives written notice of its intent to seek the death penalty within 45 days from the date of arraignment. Failure to give timely written notice under this subdivision does not preclude the state from seeking the death penalty.

(b) Notice of Intent to Present Expert Testimony of Mental Mitigation. When in any capital case, in which the state has given notice of intent to seek the death penalty under subdivision (a) of this rule, it shall be the intention of the defendant to present, during the penalty phase of the trial, expert testimony of a mental health professional, who has tested, evaluated, or examined the defendant, in order to establish statutory or nonstatutory mental mitigating circumstances, the defendant shall give written notice of intent to present such testimony.

(c) Time for Filing Notice; Contents. The defendant shall give notice of intent to present expert testimony of mental mitigation not less than 20 days before trial. The notice shall contain a statement of particulars listing the statutory and nonstatutory mental mitigating circumstances the defendant expects to establish through expert testimony and the names and addresses of the mental health experts by whom the defendant expects to establish mental mitigation, insofar as is possible.

> (d) Appointment of State Expert; Time of Examination. After the filing of such notice and on the motion of the state indicating its desire to seek the death penalty, the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the state. Attorneys for the state and defendant may be present at the examination. The examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony.
>
> (e) Defendant's Refusal to Cooperate. If the defendant refuses to be examined by or fully cooperate with the state's mental health expert, the court may, in its discretion:
>
> (1) order the defense to allow the state's expert to review all mental health reports, tests, and evaluations by the defendant's mental health expert; or
>
> (2) prohibit defense mental health experts from testifying concerning mental health tests, evaluations, or examinations of the defendant.

While the trial court below did not have the benefit of the new rule, the court relied on Dillbeck in determining that the state should be allowed to examine Davis in light of his intent to present the testimony of mental health experts who had interviewed the defendant. (R 531-33) In light of this Court's subsequent adoption of the rule, the state maintains that this holding by the

trial court was correct and should be affirmed by this Honorable Court.

Appellant's constitutional arguments are without import in light of the fact that the rule allows the defendant the option of declining to present such evidence. In this sense it is similar to the defendant's right to testify--he doesn't have to do it, but, if he does, he is subject to cross-examination.

Appellant also contends that since the rule allows the court another sanction beyond the exclusion of said evidence, that the state is not prejudiced to such an extent that a case in opposition to the mitigation cannot be presented where the state's expert is unable to examine the defendant. Clearly, this is not the import of the rule or this particular sanction. Otherwise, there would be no need for such a rule. Rather, the provision simply allows for the trial court to make such determinations on a case by case basis.

Based on the foregoing, the state urges this Court to deny Davis' claim.

ISSUE VI

WHETHER THE PENALTY RECOMMENDATION WAS IMPROPERLY TAINTED BY THE PROSECUTOR'S COMMENT, CROSS-EXAMINATION OF WITNESSES, AND INTRODUCTION OF IRRELEVANT EVIDENCE, AND BY THE TRIAL COURT'S EXCLUSION OF CERTAIN DEFENSE TESTIMONY.

Appellant alleges that he was prejudiced during the course of the penalty phase by various comments and questions from the prosecutor and evidentiary rulings by the trial court. It is the state's position that no reversible error has been shown; that the denial of appellant's challenges to the prosecutor's examination of witnesses and the introduction of evidence was within the trial court's discretion and appellant has failed to show an abuse of that discretion. Further, in the context of this case, error, if any, was harmless beyond a reasonable doubt.

First, Davis complains that improper hearsay evidence was admitted through defense expert Dr. Dee. Davis contends that Aguero's reference to the 1979 HRS report was improper because it contained hearsay evidence and was not relied upon by Dr. Dee in formulating his opinion. He contends therefore, that its admission was not authorized under Muehleman v. State, 503 So.2d 310 (Fla. 1987). This argument is not supported by the facts or the law. During direct examination Dr. Dee testified as follows

Q. Now, subsequent to being contacted by our office initially, did you receive materials to review about the case?

A. I did. I believe --

Q. Could you tell the jury, in general, what materials you have reviewed from the very first time we contacted you up until this time?

A. Presentence investigation on three cases from 1987; presentence investigation on three cases in 1984; discovery materials for this case, which includes statements by witnesses, statements by the accused, objects of the accused, search and seizure; reports of experts, specifically the medical examiner; multiple interview notes from the sheriff's department; and interviews with most of the primary participants in the proceedings, including polygraph examination results, notes reflecting what various witnesses had said and how they had identified the perpetrator, interview notes from Mrs. Schultz, Mr. Davis -

Q. Just to shortcut that just for a moment, Dr. Dee, what you're talking about is the police report and all the materials that would have been gathered by the police and the state attorney in their investigation.

A. That's correct.

Q. Did you also review depositions that were taken of many of the witnesses in the case?

A. I did.

Q. Would that have included, say, the police officers and civilian witnesses, as well as witnesses that might be called in penalty phase as well?

A. That's correct.

Q. Now, did you also examine records pertaining to Mr. Davis?

A. Yes, both -- I had several kinds of records: I had Polk County Jail records; I had the Department of Corrections records dating

back to the mid-'80s; I had records from HRS dating back till sometime around 1979; discovery materials for this particular case; school records from early in school through the seventh grade, letters, reports, individual educational plans; reports from various facilities Mr. Davis was placed in.

Q. Did you happen to listen to the actual tape-recorded statements that Mr. Davis gave to the police?

A. I did.

Q. Did you also review photographs pertaining to the crime scene and pictures of the deceased in this case?

A. I did.

Q. Have you reviewed some of the depositions of the other doctors in this case as well?

A. I believe I've reviewed all of them.

Q. In general, you reviewed records that pertained to basically Mr. Davis' entire life, as far as you know.

A. That's correct.

Q. Now, one of the first things you mentioned was a presentence investigation, and that would have been a record of Mr. Davis' criminal history, when he's been in trouble?

(R 2545-2547)

* * *

Q. Starting first with his juvenile criminal history, based -- what king of things did you look at to review that?

A. Well, it's a combination of HRS records and court proceedings. I don't think I actually saw any -- I don't remember what they're called, but in adult court you have a presentence investigation, and juvenile court you have a --

Q. Predisposition report.

A. -- predisposition. I don't think I ever saw that, but I did see a list of

juvenile offenses and a description of them, extremely lengthy and numerous, and every one that I saw was a property crime, some sort of petty theft.

Q. You may not remember it -- you may not remember it, but that long list of things was in the predispositional report that was in the HRS records?

A. Was it? Okay.

Q. Now, in that thing it summarized the different kinds of crimes he was involved in.

(R 2568)

* * *

Q. Now, moving on to his criminal history as -- when actually was a teenager, how would you characterize those crimes?

A. Basically the same, except they grew in magnitude in the sense that the quantity, the value of the merchandise that he was stealing was greater.

Q. And, again, there was no violent crimes of any type.

A. None.

Q. And even with the burglary charges, he never had any confrontations with any victims of the burglary.

A. Nothing that I was able to discover.

(R 2569-2570)

On cross-examination, Aguero inquired as follows:

Q. And, in fact, Dr. Krop thinks that Mr. Davis is an antisocial personality, doesn't he?

A. I think --

Q. Well, that's what he testified to, let me tell you that.

A. Okay. Okay, fine.

Q. And really all that an antisocial personality is, I mean that's a fancy name for a crook.

A. Well, really, I think historically speaking it speaks more to the idea of being a psychopath in the classic terms of psychopathy.

(R 2580-2581)

* * *

Q. And that's not some kind of really mental disease or defect, that is just the way he is. I mean, that's not -- let me rephrase that. That's not organic necessarily.

A. No, but it may be, and that is why under those same criteria you're precluded from making that diagnosis if you find evidence of any kind of organic irregularity.

Q. Now, you're also not telling this jury that you could have examined Mr. Davis in February of 1994, given him all of these tests, and in any way predicted he would have done this crime, could you?

A. No.

Q. Even though you've got 25 years' experience. You look at these people and you try to understand them. You do not understand this crime, do you, Doctor?

A. Absolutely not.

(R 2582)

* * *

Q. Now, with regard to the brain damage, I asked you about that. I only had an opportunity to talk to you after the conviction; is that right?

A. Correct.

Q. That was like last Friday?

A. Very recently.

Q. And up until that time I was not allowed to take your deposition, correct?

A. That's what I understand the new rules are.

Q. And you had been essentially hired by the defense to do just what you're doing now, to look at Mr. Davis for the sole purpose of testifying at this stage of a trial.

A. Correct.

Q. And when I asked you about that brain damage, I think what you told me was that the test scores on the verbal memory quotient and the nonverbal memory quotient, the difference in those was the only evidence that began to look like cerebral damage, but there was nothing to confirm it. Isn't that what you told me?

A. Not the only evidence. I don't recall precisely my wording, but, as I recall, I said to you that that in conjunction with the hyperactivity were the indicators that made me aware of it.

(R 2584-2585)

* * *

Q. Now, when you evaluated Mr. Davis, the first time you talked to him you just got a history from him.

A. Correct.

Q. And then at a later time you got an opportunity to review a lot of these records that we've been talking about.

A. Correct.

Q. Among these records, especially in the HRS records, the mother complains that Mr. Davis was frequently a liar; he lied to her all the time, right?

A. Yeah.

(R 2589)

* * *

Q. Well, let's talk about this abuse when he was a child. You believe, as a result

of your evaluation, that he was, in fact, physically abused as a child, don't you?

A. Not just as a result of my evaluation. Of course, you have to have corroborating information, and there is considerable corroboration. There's the testimony of his grandmother, testimony of his mother, testimony of an aunt, HRS records.

Q. Well, let's talk about the HRS records, Dr. Dee. Did you find any evidence in any HRS record that they went out first and investigated abuse reports?

A. Yes, and they're confusing, because in my reading of Stevie Buck's deposition, she says that there were investigations both confirming and not confirming abuse.

Q. Well, I'll tell you that Ms Buck doesn't have as good a -- doesn't have any memory of Mr. Davis and --

A. She was relying on her records.

Q. -- said she has to rely on her reports, and they were all unfounded. There was never a single founded report of abuse on Eddie Wayne Davis in any HRS record that you have, that you were provided, was there? Other than, as you say, Ms. Buck said that --

A. Ms. Buck said there was.

Q. -- but I'm telling you she changed her mind now.

A. Ms. Buck said there was.

Q. Now, you work with the Child Protection Team, and in doing so work with probably thousands of children.

A. Yes.

Q. If a person is severely physically abused, don't you, Dr. Dee, expect to see some outward physical sign at some point over the course of 13 or 14 years of that abuse?

A. Sometimes.

Q. And yet in this case nobody says they saw bruises. In fact, the HRS reports are -- even when they went out and asked Mr. Davis, he said, well I said I got hit with a

hose, but really I was only hit twice on the butt with a belt, and I didn't get any bruises.

A. Urn-hum.

Q. Isn't that what he tells them?

A. As I recall. And I'm -- I'm rather confused about this, because Stevie Buck says that there was evidence of bruising at the time in the records.

Q. But you didn't see it in the records.

A. No, I didn't see it.

Q. And, in fact, in the PDR that I was just discussing, they -- or in one of the PDRs they go through it. I'll get to it in a minute here. They go through the specific allegations of abuse.

This April 4,1984, indicating, 'Child states stepfather does not hit him with a water hose, but whips him with a belt, and there were no bruises on the child.

'Mother states child beyond her control. Takes the child to school, leaves him, and he's not there when she goes to pick him up. Closed, closed, closed, closed. Worker found report to be invalid. Feels there will be continued reports of abuse by the grandmother, because she doesn't like the stepfather."

Those are the things that we were going on, weren't they?

A. I don't know what was going on. I only know what I've read there.

Q. Mr. Maslanik also ----

A. It's probably some mixture of those things, really.

Q. Well, what I'm getting at here is just this, although there are reports of this abuse, there's simply not a report of an observable physical injury to this child.

A. Not that I can recall, except that which Ms. Buck testified to in her deposition.

(R 2589-2592)

* * *

Q. I think the last predisposition report I have to ask you about here is the one on March 24, 1981. And the portion of this report that I'm interested in is that the HRS has gone out and investigated a physical abuse -- or two physical abuse reports in 1979, and they're talking about those.

And I want you to read for the jury the portion that I have underlined there in red as far as what the investigation found with regard to observable injuries on this child, and the person reporting that; not the HRS worker, but the person reporting, what did they tell them?

A. "The investigation revealed no bruises on the child, and the reporter stated she had not seen bruises for five years."

Q. Five years.

MR. NORGARD: Your Honor, can we approach the Bench?

THE COURT: Come on on over here.

(The following was had and taken at the Bench:)

MR. NORGARD: Your Honor, at this point I'm going to object and move for a mistrial. What the State has done is present the reports of an anonymous reporter that we can't cross-examine; that we have no idea who it is; that we have no fair opportunity to rebut what the reporter stated. We can't cross-examine this person and see what opportunity they had to ----

THE COURT: Did this doctor rely that report, did he read it?

MR. NORGARD: There's no statement that he relied on it.

THE COURT: Did he read it?

MR. NORGARD: Just because he read it doesn't mean it's relevant. It does

mean that it violates our right to cross-examine the witness.

THE COURT: That's not what I asked. Did he read it?

MR. NORGARD: Obviously, he didn't have recall of it, because it had to be read to him.

THE COURT: State?

MR. AGUERO: Judge, he testified he read all of these reports, and he has clearly been examined on direct examination about all of these reports in general. All I'm doing is picking out specifics, not generalities, that he was an abused child. But, you looked at these reports and drew those conclusions; well, what about this, how does this affect your opinion.

Furthermore, if Mr. Norgard wants to read the report, the reporter is the grandmother, and it's indicated in the report, so it's not anonymous. He knows who the reporter is.

MR. NORGARD: I don't know who it is. There's information that they interviewed the grandmother, but it didn't say she was the reporter. There's also, in that same context, the reference to having seen belt marks on him that he didn't read on that particular occasion.

THE COURT: I'm denying your motion for mistrial. You're overruled.

MR. AGUERO: Thank you.

(Bench conference concluded.)

Q. (By Mr. Aguero) Dr. Dee, I'm going to conclude with these HRS records and go on to ask you a little bit about the prison records that you examined with regard to Mr. Davis. You did get a complete copy -- does this look pretty similar to what you got of all the prison records?

A. Yeah, it does.

(R 2602-2604)

On redirect, defense counsel continued the inquiry concerning the HRS records as follows:

> Q. Now, you could go through all the records that you had, and for everything that Mr. Aguero points out that he considers a negative factor, probably find other things that are very positive about Mr. Davis; is that correct?
>
> A. Probably.
>
> Q. Now, here's one of the predispositional reports which indicates a report of abuse, and there's one sentence that's underlined there under the abuse section. Can you read that to the jury? It says, "Reporter" ----
>
> A. "Reporter has seen belt marks on the child in the past."
>
> Q. So, even in all these reports, there was some indication of physical signs of abuse.
>
> A. Yes.
>
> Q. Now, Mr. Aguero didn't choose to pick that particular sentence out.
>
> MR. AGUERO: Objection to the characterization. He doesn't need to argue with me.
>
> THE COURT: I'll sustain that part.
>
> Q. (By Mr. Maslanik) Now, Dr. Dee, as part of your involvement and investigation into child abuse with the Child Protection Team, has it been your experience that HRS always correctly investigated these cases?
>
> A. No, no.
>
> (R 2618-2619)

Clearly, this report **was** utilized by Dr. Dee in making his assessment of Davis and, therefore, was proper fodder for the prosecutor's cross examination. Even if wasn't, under Muehleman

the evidence was admissible to rebut Davis' claim of abuse. In Muehleman, this Court held:

> Muehleman next argues that the trial court erred in allowing three police officers to testify as to previous crimes he had committed in Illinois. He contends that the jury should not have heard of these crimes--involving an assault on his mother, burglary, theft, and possession of drugs--when the defense had waived the mitigating factor of "no significant history of prior criminal activity." Sec. 921.141(6)(a), Fla.Stat. (1985); Maggard v. State, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598 (1981). Muehleman points to Maggard as requiring reversal and a new sentencing hearing.
>
> We find this case controlled by Parker, in which the evidence was properly admitted in response to the extensive exploration by the defense of "appellant's past personal and social developmental history, including a prior criminal history." 476 So.2d at 139. The presentation of the previous crimes in Parker through cross-examination is functionally equivalent to the evidence here presented in rebuttal. In the instant case, unlike in Maggard, the trial court exercised its discretion in admitting the testimony not to rebut a phantom, waived mitigating factor, but to expose the jury. to a more complete picture of those aspects of the defendant's history which had been put in issue. The testimony of Muehleman's assault on his mother, first, served to properly rebut, or at least supplement, extensive evidence presented by the defense focusing on the mother/son relationship and implying that his mother had indirectly caused the murder through lapses in Muehleman's upbringing. The trial court

> admitted the testimony concerning the other crimes in rebuttal to the defense's expert testimony, presented in mitigation, that Muehleman lacked substantial capacity to plan in advance and execute crimes.
>
> Parker made clear that the mere existence of a strategical waiver by the defense of the mitigating factor does not end the analysis. In order to evaluate the alleged error, we must consider the evidence admitted, any prejudice accruing to the defendant therefrom, and the purpose for its admission. See Jennings v. State, 453 So.2d 1109, 1114 (Fla.1984), cert. granted and judgment vacated on other grounds, 470 U.S. 1002, 105 S.Ct. 1351, 84 L.Ed.2d 374 (1985). In light of the relevance of this evidence in rebutting specific evidence presented by the defense, we find no abuse of discretion in this case.
>
> Muehleman v. State, 503 So.2d at 315-16

This report was presented through cross-examination to rebut the claim of extensive abuse. Further, in light of Dr. Dee's *unchallenged* admissions that other claims of abuse were unsubstantiated, error, if any, was harmless beyond a reasonable doubt. (T 2589-92)

Appellant also claims as error the introduction of Davis' photopak picture in rebuttal to defense photographs of the defendant as a small child. To support his claim of error Davis relies on Proctor v. State, 447 So.2d 449 (Fla. 3DCA 1984), wherein the court held it was error to admit an arrest photo to depict how

the defendant looked at the time of the crime. The simple response to this is, the evidence in Proctor was introduced in a guilt determination, whereas in the instant case, the photo was introduced during the penalty phase and was in rebuttal to the defense's introduction of other photos. Davis also claims the photo prejudiced him as it suggested to the jury that he might be guilty or suspected of other crimes. As the defense presented evidence that the defendant had committed numerous other crimes during Dr. Dee's testimony, the jury did not have to speculate about such a possibility, the jury knew that Davis had committed other crimes. (T 2545-47, 2569-70)

Davis also claims that the trial court erred in permitting the prosecutor to question defense expert Dr. McClane concerning the fact that the defense had not allowed him to ask Davis about the crimes when he was initially hired, and therefore, he was handicapped to some degree in formulating his opinions and that the court erred in denying defense to testify in order to explain the defense's strategy in limiting the initial inquiry. This claim is also without merit.

During the defense's presentation of evidence in the penalty phase of Davis' trial, the defense presented Dr. Thomas McClane, who testified that he was a physician specializing in psychiatry.

(T 2818) Dr. McClane testified that he got involved in the case of State of Florida v. Eddie Wayne Davis when he was requested to serve as an expert advisor for the defense and to review voluminous records and interview Mr. Davis. He testified that his overall function as far as the examination was to examine Davis' alcohol use or abuse and to determine the extent of the alcohol abuse throughout his life. (R 2823) Dr. McClane testified that eventually his inquiries expanded into essentially Mr. Davis' entire life. (T 2823) Dr. McClane testified that in addition to reviewing voluminous records he interviewed Mr. Davis twice, once on April 27, 1995 at his office and subsequently on June 3 at the jail just a few days prior to the trial. (T 2826) Dr. McClane testified that he spent approximately one and a quarter hours with the defendant on the first interview and on the second interview it was a little over forty-five minutes. (T 2827) He also noted that he had consulted briefly by telephone with Dr. Dee and Dr. Krop. Dr. McClane then gave his opinion as to Mr. Davis' developmental history, finding that apparently Mr. Davis had a very dysfunctional family with a strong family history of alcohol abuse. (T 2828) Dr. McClane then testified about Davis' alcoholic problems. (T 2838) Dr. McClane testified that he interviewed Davis twice five or so weeks apart. Initially when he asked him about the sexual

abuse in prison, he denied that it occurred, then when he was questioned further he said he didn't want to talk about it. At the time of the second interview the doctor had read notes in the prison health record referring to both sexual abuse by the stepfather and homosexual rape in prison. He testified that it was like pulling teeth to get any information out of him; he was so ashamed by the experience. (T 2846) Dr. McClane was then questioned about his opinions related to legal criteria, independent of, for example, diagnostic criteria psychologically or psychiatrically with respect to Mr. Davis at the time of the offense. Dr. McClane was asked whether it was his opinion he was under the influence of mental or emotional disturbance. Dr. McClane testified that in his opinion, if you take into account the conglomeration of several illnesses, several mental problems he would term his posttraumatic stress order severe but not extreme, he was term his alcoholism as severe but not extreme, in other words he was not lying in a gutter every day drunk but he was drinking every time he could get alcohol and drunk a fair portion of time. The doctor testified that he would not term Davis' chronic depression as severe but moderate but it and his personality disorders moderate to severe and not extreme. Dr. McClane testified that when taken all together, however, he

considered that a good case could be made that he was under the influence of extreme disturbance. (T 2860) Dr. McClane also testified that he felt that Davis' ability to conform his conduct to the requirements of the law was impaired. Even more so than his ability to know what he was doing was his ability to control what he was doing. The doctor would rate him as substantially impaired not obliterated. He had some control of what he was doing but he was substantially impaired. (T 2861) Dr. McClane then testified about how, these psychological problems, the circumstances of the offense, all interacted to result in what happened in this case. (R 2862) Dr. McClane then gave an extensive opinion as to why in his opinion a man who has never had any personal sexual difficulty, has never had pedophilia, any attraction to young girls, has never been violent sexually, has rarely been violent at all, would commit an act like this. It was his opinion that it was based on posttraumatic stress disorder coupled with suppressed repressed rage and anger and resentment because of all the oppression and abuse. He also concluded that to some degree he was intoxicated at the time of the offense. (T 2863-64) He opined that when you put all these factors together with the suppressed rage they come to affect the whole brain and the rage was somehow triggered. Dr. McClane testified that Davis told him he didn't understand why he

did it particularly the sexual part, he denies any attempt to try to kill her but he doesn't understand the sexual part because this was a girl that he liked not in a sexual way in a father brotherly sort of way. Davis told him that when he got hex in the trailer he suddenly felt angry and a desire to hurt her and he has no way of understanding why he would want to hurt her. (T 2869) It was his opinion that early rage was triggered by sexualized situation and a scantily clad young girl, unfortunately Kimberly, which liberated this, and he blasted out in violent sexual acts that he has no idea why or what was going on. It was Dr. McClane's opinion that it was much more of a violent act than a sexual act in terms of motivation. Dr. McClane testified that Davis had told him that when they left the trailer and were near the wall area in the vicinity of the Moose Lodge that Kimberly started yelling at Davis and screaming at him not just screaming for help but yelling at him. In his compromised state for these various reasons he became angry/panicked; again wanted to stop that noise any way he could; grabbed a randomly available piece of plastic and puts it over hex to stop the yelling and tragically she died. This is the way Dr. McClane saw the rage, the lack of control and the panic coalescing to cause the second violent act. (T 2870)

On cross-examination prosecutor John Aguero questioned Dr. McClane with regard to his reliance on Davis' reporting as to the prior sexual abuse. Aguero then asked Dr. McClane whether when he was initially hired by the defense was he specifically told not to talk to the defendant about the crimes. (T 2881) At that point defense counsel Mr. Norgard objected. Mr. Norgard stated that Aguero was questioning the doctor on a legal decision made by the attorneys as far as making legal decisions, protecting a client's rights such as self-incrimination and that their purpose in limiting Dr. McClane's initial inquiry was that they felt that under this Court's decision in Dillbeck that if they simply had him render an opinion but not have them examine the defendant then that does not trigger the state's being able to have an expert. Mr. Norgard stated that it was their decision as to whether or not they wanted, in effect, to trigger the Dillbeck reciprocal of compelled examination. Accordingly, Mr. Norgard claimed that it was all tied into his client's right against self-incrimination and whether they wanted to expose them to compelled examination and therefore he objected and moved for a mistrial.

In response, John Aguero stated that the issue was not why they told him that but rather that the doctor had been limited in his analysis. Aguero stated that the doctor has been on the stand

for the last two hours giving an opinion about what he thinks about this crime, about why this crime was committed and all the information he got from the defendant. It was Aguero's purpose in asking the question to determine how adequate the information that Dr. McClane had in formulating this opinion. Defense counsel Norgard then asked the court for the opportunity to put one of the lawyers on the stand to explain exactly why they had made this limitation upon Dr. McClane. The state again pointed out that it didn't matter, that the only purpose in eliciting this information from the doctor was the doctor was trying to make a diagnosis in the absence of information and then obtain the information he needed after the conviction. That's the whole point, it didn't have anything to do with the rationale behind why the doctor was so instructed. The trial court noted that during redirect examination defense lawyer could ask the doctor didn't I tell you I didn't want you to talk to him and state that the law is such that that's what I'm supposed to do. (T 2886) The court further noted that the state is entitled to go into this under the totality of circumstances, what we have right here, right now, from what I've heard from this doctor they are entitled to go into it. My ruling stands, you have a standing objection and you can tell him that's the law when you cross-examine him, but they are entitled to go

into it. The court further noted that he did not mind telling the jury that that's what you are supposed to do. (T 2888) The state then inquired of Dr. McClane as follows:

> Q. (By Mr. Aguero) Once more, Dr. McClane. You were told not to ask him about the offense, right?
>
> A. That's correct.
>
> Q. And his lawyers were the people that were advising you that they didn't want you to do that. For whatever legal reason they had, they told you don't do it.
>
> A. That's right.
>
> Q. Be that as it may, what that did to you was put you in a very unusual and unique position, didn't it?
>
> A. Yea.
>
> Q. You were being asked to now evaluate a man, talk to a man, be a clinician, but not ask him anything about what he did. And that handicapped you, didn't it, Doctor?
>
> A. To some degree, yes. However, I was asked -- 1 was given a focal task to review his alcohol history and make some assessment of that.
>
> Q. Well, you couldn't ask him about the alcohol at the time of the offense, though. You couldn't ask him --
>
> A. That's right.
>
> Q. -- anything about that.
>
> A. That's right. I could -- I could get a pretty good picture of his alcoholism, but not of his state of intoxication, or not at the time of the offense.
>
> Q. So this diagram you couldn't have drawn before last Saturday, could you?
>
> A. I would have had to have put a question mark on the intoxication part perhaps.
>
> Q. Perhaps the sexual part.
>
> A. Oh, certainly the sexual part, yes.

Q. So really this whole diagram would certainly look an awful lot different until Mr. Davis got convicted of first-degree murder.

A. Of course, I was supplied the complete data before I was asked to see him the second time, so I would have seen the reference to the sexual part from April.

Q. Okay. You felt, when I took your deposition, before you talked to Mr. Davis again --

A. Yes.

Q. -- that you were impaired in your ability to reach your final diagnosis until you were going to be able to talk to Mr. Davis. Isn't that what you told me --

A. That's correct.

Q. -- last Friday? A week ago today, when I finally had the opportunity to depose youI at the end of the deposition, after I asked you everything, you told me, but, Mr. Aguero, I've never been able to talk to the guyI so I can't really give you an opinion until I'm able to talk to him fully. And so then yesterday at noon, when you came down here, is when you first were able to relate to me --

A. Yes.

Q. -- any of this stuff, right?

A. Yes, that's right.

Q. And that's when you first made me aware -- even though I'd fully taken your deposition last Friday -- when you first made me aware of any of these allegations of sexual abuse, or the defendant's own accounting of the night of the event.

(R 2889-2891)

This ruling by the trial court was entirely within the court's discretion and appellate has failed to show an abuse of that discretion. Furthermore, error, if any, was harmless beyond a

reasonable doubt as the "evidence" sought to be presented was not relevant to any issue and in no way altered or explained any of the facts before the jury. Furthermore, the trial court offered to give a curative instruction to the jury or to allow defense counsel to frame his questions as such to get the explanation before the jury. Under these circumstances, appellant has failed to show reversible error.

Similarly, with regard to appellant's challenge to the prosecutor's urging of the jury not to let feelings of sympathy play a part in their decision it is entirely appropriate and the trial court's overruling of the objection was within the court's discretion. These remarks in no way resulted in a more severe verdict than it otherwise would have. Esty v. State, 642 So.2d 1074 (Fla. 1994).

Accordingly, as appellant has failed to show reversible or harmful error this claim should be denied.

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY ON SPECIFIC NONSTATUTORY MITIGATING CIRCUMSTANCES AND THAT UNANIMOUS AGREEMENT WAS NOT REQUIRED FOR THE CONSIDERATION OF MITIGATING FACTORS.

As appellant concedes, this Court has consistently rejected this claim. Ferrell v. State, 653 So.2d 367, 370 (Fla. 1995); Walls v. State, 641 So.2d 381 (Fla. 1994); Robinson v. State, 574 So.2d 108 (Fla.) cert. denied, 112 S. Ct. 131(1991). Accordingly, this claim should be denied as it is without merit.

Furthermore, in the context of this case, error, if any, is harmless beyond a reasonable doubt.

ISSUE VIII

WHETHER THE JURY WAS PROPERLY INSTRUCTED ON AND THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE OF AVOID ARREST.

In his written order imposing the death sentence the trial court found four aggravating circumstances: 1) under sentence of imprisonment, 2) during the commission of a burglary, kidnapping and/or sexual battery, 3) avoid arrest and, 4) heinous, atrocious or cruel. (R 700-06, 740-44) In contrast the court found the statutory mental mitigator of extreme mental or emotional disturbance and several nonstatutory mitigating circumstances.

Appellant contends that the court below erred in instructing the jury on the avoid arrest aggravating factor and that there was insufficient evidence to support the factor. It is the state's position that the evidence supported both the instruction and the finding of the factor.

As Davis correctly notes, to establish this aggravating circumstance when the victim is not a law enforcement officer, the requisite intent must be proven beyond a reasonable doubt. Bogle v. State, 655 So.2d 1103, 1108-09 (Fla. 1995); Bates v. State, 465 So.2d 490 (Fla. 1985). The aggravating circumstance focuses on a defendant's motivation for a crime. Stein v. State, 632 So.2d 1361, 1366 (Fla. 1994). Proof of the avoid arrest aggravator may

be presented by circumstantial evidence, from which the motive for the murder may be inferred. Preston v. State, 607 So.2d 404, 409 (Fla. 1992), cert. denied, ___ U.S. , 123 L. Ed. 2d 178 (1993).

In the instant case, Davis claimed that he killed Kimberly because after she recognized him he became scared and panicked. (T 1566, 1847-48,1566-67, 1848, 1854, 1957-58, 1975 -76) In Derrick; v. State, 641 So.2d 378, 380 (Fla. 1994), this Court held that the avoid arrest factor was established by Derrick's statement that he had to kill the victim because he recognized him. Accord, Walls v. State, 641 So.2d 381 (Fla. 1994). As in Thompson v. State, 648 So.2d 692, 695 (Fla. 1994), "there was little reason to kill [Kimberly] other than to eliminate the sole [witness] to his actions." Davis also admitted that after he had molested Kimberly at the trailer and she recognized him, he walked her to the Moose Lodge where he eventually beat and strangled her. Where a victim is transported from one area to another, and no other reasonable motive is suggested, a trial court may properly find that the murder was committed to avoid a lawful arrest. Hall, 614 So.2d 473 (Fla. 1993); Swafford v. State, 533 So.2d 270 (Fla. 1988). The evidence also shows that Davis hid Kimberly's body hoping that it would give him enough time to earn some money to leave town.

Under these circumstances the trial court properly found the aggravating circumstance.

Assuming, arguendo, that the evidence was insufficient to support the factor, the court did not error in giving the requested instruction as there was evidence presented to support it. Bowden v. State, 588 So.2d 225 (Fla. 1991). Furthermore, in light of the three remaining aggravating factors, error, if any, was harmless beyond a reasonable doubt.

Finally, Davis argues that the instruction itself is inadequate. In Whitton v. State, 649 So.2d 861, 864 (Fla. 1994), this Court rejected this argument finding that the "avoiding arrest factor, unlike the heinous, atrocious, or cruel factor, does not contain terms so vague as to leave the jury without sufficient guidance for determining the absence or presence of the factor." Accordingly, Espinosa v. Florida, --- U.S. ----, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), and its progeny does not require a limiting instruction in order to make this aggravator constitutionally sound." Id. at 864. See, also, Parker v. State, 641 So.2d 369 (Fla. 1994). Even if the instructions were found to be invalid, their use would constitute harmless error given that the record in this case supports a finding, beyond a reasonable doubt, of each aggravating circumstance argued before the jury. Remeta v. Dugger,

622 So.2d 452, 456 (Fla. 1993); Melendez v. State, 498 So.2d 1258 (Fla. 1986); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE IX

WHETHER THE JURY WAS PROPERLY INSTRUCTED ON AND THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE OF UNDER **SENTENCE OF IMPRISONMENT.**

Appellant contends that since he was on controlled release and not incarcerated or on parole that the trial court should not have instructed the jury to consider the aggravating factor of under sentence of imprisonment and that the trial court erred in finding same. It is the state's position that the aggravating factor was appropriately applied in the instant case.

In Haliburton v. State, 561 So.2d 240, 252 (Fla. 1990) rejected Haliburton's argument that at the time of his crime he was not under sentence of imprisonment as intended in section 921.141(5)(a), Florida Statutes (1987) because he was on mandatory conditional release (MCR) pursuant to section 944.291, Florida Statutes (1979). This Court held that mandatory conditional release was the functional equivalent to parole and thus subject to the aggravating factor provided by section 921.141(5)(a). Delap v. State, 440 So.2d 1242 (Fla.1983), cert. denied, 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984); Jones, 411 So.2d 165 (Fla.), cert. denied, 459 U.S. 891, 103 S.Ct. 189, 74 L.Ed.2d 153 (1982); Straight v. State, 397 So.2d 903 (Fla.), cert. denied, 454

U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). Based on the foregoing, the trial court in the instant case found that Davis' control release status satisfied the criteria for the aggravating circumstance of under sentence of imprisonment.

Appellant maintains that while conditional release may be equal to parole, control release is not because the statute provides that control release is for prisoners who are not otherwise eligible for parole to alleviate overcrowding. The state suggests that this definition alone is sufficient to equate control release with parole or conditional release.

Furthermore, control release is provided for in Florida Statutes Chapter 947, which solely encompasses the parole commission and its powers and duties. One of these duties is the release and supervision of inmates under control release status. 8947.146 (Fla. Stat). Unlike probation which is not covered by Ch. 947 and requires a judicial determination in cases of alleged violations, under the provisions of Ch. 947 an inmate on control release who violates its provisions is subject to reincarceration for the duration of his sentence by the parole commission. 8947.146 (9) (10) (11), (Fla. Stat).

Accordingly, the state maintains the trial court properly found the aggravating factor.

ISSUE X

WHETHER THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS OR CRUEL IS UNCONSTITUTIONALLY VAGUE, ARBITRARY AND CAPRICIOUS AND DOES NOT NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND WHETHER THE JURY WAS PROPERLY INSTRUCTED ON THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS OR CRUEL.

Appellant contends that Florida Statute 921.141(5) (h) is unconstitutional and that the jury instruction given in the instant case was improper. As this claim has been repeatedly rejected by this Court, appellant is not entitled to relief.

The jury was given the full instruction on heinous, atrocious, or cruel now contained in Florida Standard Jury Instructions in criminal cases. (T 3039) This Court has consistently rejected claims that the statute or the new jury instructions are unconstitutionally vague.

> "Because of this court's narrowing construction, the United States Supreme Court upheld the aggravating circumstance of heinous, atrocious, or cruel against the vagueness challenge in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 1976). Unlike the jury instruction found wanting in Espinosa v. Florida, U.S. , 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), the full instruction on heinous, atrocious and cruel now contained in the Florida Standard Jury Instruction in Criminal Cases, which is consistent with Proffitt was given in Preston's case.

Preston v. State, 607 So.2d 404 (Fla. 1992). Accord, Stein v. State, 632 So.2d 1361 (Fla. 1994); Hall v. State, 614 So.2d 473 (Fla. 1993).

To paraphrase this Court's holding in Whitton v. State, 649 So.2d 861,867 (Fla. 1994) this instruction was approved in Hall v. State, 614 So.2d 473 (Fla.), cert. denied, --- U.S. ----, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993), and [Davis] has not presented an adequate reason to recede from that decision.

The instruction given in the instant case and the statute are constitutional and, therefore, Davis is not entitled to relief on this claim. Further, in light of the particular facts of this case, error, if any, is harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CANDANCE M. SABELLA
Assistant Attorney General
Florida Bar ID#: 0445071
2002 N. Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert F. Moeller, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P. 0. Box 9000 -- Drawer PD, Bartow, Florida 33831-9000, this 14 day of October, 1996.

COUNSEL FOR APPELLEE