IN THE SUPREME COURT OF FLORIDA

WARFIELD RAYMOND WIKE,

Appellant/Cross-appellee,

vs. Case No. 86,537

STATE OF FLORIDA,

Appellee/Cross-appellant.
_____/

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

ANSWER BRIEF OF APPELLEE/INITIAL BRIEF OF CROSS-APPELLANT

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PRELIMINARY STATEMENT

Appellant, WARFIELD RAYMOND WIKE, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to any supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Although reasonably accurate, the State cannot accept Appellant's woefully incomplete statement of the case and facts. Therefore, the State will offer its own as follows:

Appellant was indicted on November 12, 1988, for the first-degree murder and kidnaping of Sara Rivazfar, and for the kidnaping, capital sexual battery, and attempted first-degree murder of Sayeh Rivazfar, allegedly committed on September 22, 1988. (R 29-32). He was convicted as charged and sentenced to death, following the jury's recommendation of death by a vote of nine to three. On appeal, this Court affirmed the convictions, but vacated his sentence, because the trial court erred in refusing to grant a one-week continuance for Appellant to obtain the presence of his mother, his cousin, and his ex-wife at the penalty-phase proceeding. Wike v. State, 596 So. 2d 1020, 1021-22 (Fla. 1992).

At his resentencing, the jury unanimously recommended a sentence of death. The trial court followed the recommendation and sentenced Appellant to death, but this Court again vacated the sentence because defense counsel was not afforded the terminal closing argument. Wike v. State, 648 So. 2d 683, 684-87 (Fla. 1994).

Prior to his second resentencing, which is the subject of this appeal, defense counsel filed numerous motions attacking the

constitutionality of the death penalty, the aggravating circumstances, and their attendant instructions. (R 41-44, 47-50, 51-53, 54-59, 60-73, 87-88, 97-103, 104-22, 123-41, 163-69, 170-76, 177-87). He sought to prohibit the State from admitting evidence relating to injuries sustained by the surviving victim, Sayeh Rivazfar, and he sought to prohibit the State from admitting victim-impact evidence. (R 142-62, 197-201, 212-30). On his own behalf, Appellant filed a motion to participate as co-counsel. (R 210-11).

At the hearing on these motions, the trial court denied Appellant's pro se motion to act as co-counsel, and asked Appellant if he wanted to represent himself. Appellant responded that he wanted "a little time to ponder" the idea. (R 603-08). The trial court took under advisement defense counsel's motion to prohibit evidence of injuries to Sayeh Rivazfar, and counsel's motion to prohibit victim-impact evidence. (R 615-23, 653-56). It denied all of Appellant's constitutional challenges. (R 648-52).

A week before the scheduled resentencing, Appellant filed pro se motions to dismiss his attorneys and to disqualify the trial judge. (R 269-72, 278-83). At a hearing on these motions, the court mentioned that Appellant had sent him a letter in which he claimed to be mentally incompetent. As a result, the trial judge held the motions in abeyance until Appellant could be examined for

competency. It then appointed Drs. Larson and Bingham for that purpose. (R 285-86, 287).

At a hearing on the Friday before the Monday trial, the trial court found Appellant competent to stand trial based on the doctors' reports. (R 450-52, 453-57, 580). It then inquired into Appellant's motion to dismiss his attorneys, which alleged that his attorneys had visited him only four times since his return from prison, that they refused to subpoena witnesses requested by Appellant, that they refused to provide him with "everything in the case," and that Jim Martin had told unnamed witnesses that "'he was going to put the defendant in the electric chair.'" (R 269-71). When asked if he wanted to discuss the bases for his motion, Appellant declined. (R 582). When asked to respond to the motion, Henry Barksdale indicated that he had tried twenty-five murder cases, eight of which were capital cases, and two of which had gone to a penalty phase. (R 588-89). He and B.B. Boles had represented Appellant at the first resentencing. They had the benefit of the transcripts and the briefs from the appeals. During their investigation, they relocated the original witnesses, and located new ones. They visited Appellant numerous times in the jail and obtained a witness list from him, which they pursued as best they could. They have completed discovery and prepared a trial strategy which is somewhat different from the previous resentencing. They

decided that the expert witness from California referenced by Appellant in his motion would not be helpful, so they did not waste county funds to procure her testimony. They and Appellant simply disagreed about what witnesses to call. They were prepared for trial on Monday. (R 583-88). B.B. Boles added that they had interviewed mitigation witnesses that morning, and had filed approximately 30 pretrial motions. (R 589-90).

The trial court specifically found that counsel had been rendering effective assistance and denied Appellant's motion to dismiss them. It then informed Appellant that if he persisted in firing his attorneys the trial court would not appoint new ones, and that his only option was to represent himself. Appellant ultimately, but unequivocally, stated that he did not want to represent himself. (R 590-93). Therefore, Mr. Barksdale and Mr. Boles remained as his counsel.

Following jury selection and opening statements on August 14, 1995, the State called its first witness. Lieutenant Larry Bryant of the Santa Rosa County Sheriff's Department testified that, as the lead investigator, he was dispatched to Santa Rosa Hospital around 6:45 a.m. on September 22, 1988. (T 419-20). He spoke with Sayeh Rivazfar. (T 420). He learned that the scene of the crime was in a pine grove just south of Jay, Florida. (T 421). Ronald and Teresa Wright found Sayeh walking down the road that morning.

(T 423). Over defense counsel's hearsay objection, Lieutenant Bryant testified that the girls lived with their mother, Patricia Rivazfar, in Pensacola. According to the mother, the girls were supposed to be at home in bed. (T 423-25). She discovered that someone had forced their way into their apartment, and surmised that she had not heard them because she had had a fan on in her bedroom. (T 426). Ms. Rivazfar told him that "Ray," whom Sayeh had identified as the suspect, was her ex-boyfriend, and she gave the officer possible addresses for him. (T 426). She described Appellant's car, as Sayeh had done, as an older model, big green car. (T 427).

At 9:47 a.m., Lieutenant Bryant went to Appellant's parents' house and saw a big green car parked out front which matched the Rivazfars' description, including the dents in the side. (T 427, 429). On the rear bumper of the car, the police found a set of car keys with an American flag, which Patricia Rivazfar identified as belonging to one of her daughters. (T 431). Appellant was arrested that day and spent several hours with Lieutenant Bryant, who described him as coherent and sober. (T 433). The lieutenant read Appellant his rights, which Appellant waived, and Appellant admitted that he knew the Rivazfars, but otherwise denied any involvement in the crimes. (T 434-36, 444). Appellant stated that he had only had two beers during the previous afternoon and

evening, but Lieutenant Bryant could not remember if Appellant mentioned smoking marijuana. (T 436, 447). Over defense counsel's relevancy objection, Lieutenant Bryant further testified that Moes Bauldree, who indicated that he had contact with an individual near the scene during the early morning hours of September 22, 1988, identified Appellant from a photo-lineup as the person with whom he had had contact. (T 438-42). Lieutenant Bryant then identified an indictment against Appellant from Pennsylvania dated March 11, 1974, for armed robbery. Appellant was 18 years old at the time of the conviction. (T 437, 444).

Captain Collier, who interviewed Appellant with Lieutenant Bryant, testified that Appellant said he had known Patricia Rivazfar for approximately one year. (T 450). Appellant also said he had several knives, including a folding knife that he kept in the trunk of his car, an old, green Dodge. (T 451). The Florida Department of Law Enforcement recovered the knife. (T 454). Appellant related that he had gone to several bars the night before the offenses, but had only two or three beers. (T 453).

Next, Moes Bauldree testified that he worked for George Coffey's Well Service and had left for work around 5:00 a.m. on September 22, 1988. It was still dark outside. (T 456, 458). He took a shortcut through the woods just south of Jay, Florida, and came upon a car stopped in the fire line which he was driving down.

(T 458). He drove up on the car and saw someone leaning down into the backseat. (T 459). When that person stood up and walked toward him, he saw blood on the man's shorts. (T 460). The man walked up to his window, asked him for jumper cables, then asked him for the time, said he had been broken down since about 2:30 a.m., and then walked back to his car. (T 461). The man got in the car, cranked it on the second try, and eased around Mr. Bauldree. (T 462). Mr. Bauldree saw footprints in the sand where the car had been "like somebody was scuffling." (T 462). After lunch that day, the police came and got him. He identified Appellant from a photo lineup as the man he had seen in the woods. (T 463, 467).

Teresa Wright then testified that she took her husband to work between 5:30 and 6:00 a.m. on September 22. She stopped to get some peanuts and saw a young girl walking toward the truck. (T 471-72). The girl had her hand up to her neck, and there was blood on her shirt and hand. When she removed her hand, they saw a big gash on her neck. (T 472-73). On their way to the nearest convenience store where they called 911, the girl told them that her sister was dead, that a man named "Ray" had cut her, and that he drove a green car with a dent on the driver's side. (T 473-74). The girl told them her address and telephone number, so Mrs. Wright called and spoke to her mother. (T 474-75). Defense counsel

objected to Mrs. Wright's testimony and moved for a mistrial because it was irrelevant to Sara's murder and was more prejudicial than probative, but the trial court overruled the objection and denied the motion. (T 477-79).

Thereafter, defense counsel indicated that Appellant wanted to address the court. He was also concerned that Appellant would "engage in a courtroom demonstration." (T 479). Upon inquiry by the court, Appellant complained that he had submitted questions to his attorneys for each witness, but they would not cooperate. (T 480-81). Defense counsel responded that they were trying to limit cross-examination of witnesses because of their continuing objection to the testimony concerning Sayeh. They did not want to appear disingenuous or open the door to further testimony; Appellant, however, wanted to retry the guilt phase. (T 482-83). The trial court made a finding that counsel had been rendering effective assistance. (T 483-84). Appellant continued to complain, however, that if the State could retry the guilt phase, then he should be allowed to as well. (T 484-85). Again, the trial court made a finding of effective assistance. (T 488). Appellant then complained that he had not had sufficient time to confer with counsel. (T 488). Defense counsel responded that Appellant had given him the questions for the witnesses either that morning or as the testimony progressed. Some of the questions were

simply not appropriate. (T 489). Finally, the trial court informed Appellant that it would not replace his attorneys, and asked him if he wanted to represent himself. (T 489-90). Appellant declined, stating "there is no way that I am prepared to represent myself." (T 490). The trial court then cautioned Appellant against any outburst. (T 491).

The State's next witness was Janice Johnson, an FDLE lab analyst. She testified that she responded to the scene where Sara's body was found in a pine thicket just south of Jay, Florida. (T 498-99). Sara was lying face up with her hands taped together behind her back. (T 499, 501). Found near the body were several pieces of material from a shirt. (T 499). At another nearby scene, they found a disturbed area in the sand, blood in the sand, and some cigarette packages. (T 513). Later, at Appellant's parents' house, they found two palm prints in blood on the trunk of Appellant's car, blood on the front and back seats, blood on two Marlboro cigarette packages in the front seat, blood on an empty cigarette package in the rear floor board, and a child's bathing suit in the front floor board of Appellant's car. (T 521-25). They also recovered a jump suit, a blue T-shirt with blood on it, and a knife from the trunk, but Sayeh later said that the knife was not the one used on her and her sister. (T 546-47).

Next, over defense counsel's relevancy and prejudice

objections (T 551-53), Dr. Robert Althar testified that he examined Sayeh when she was brought to the emergency room. She had a transverse laceration to the neck which extended to the layer covering the thyroid gland and the windpipe, and she had a stab wound to the neck between the windpipe and the carotid artery which missed the artery by one millimeter. The knife stopped when it hit the cervical vertebrae. (T 554-57). She survived only by the grace of God. (T 558).

Dr. Leila Montes, a pediatrician for the Child Protection Team, testified over defense counsel's objection that the cut to Sayeh's neck was eight centimeters long. (T 591, 594). Sayeh also had an irregular cut from her urethra to her rectum, and one to the right and to the middle of her rectal area. (T 595). Dr. Montes stated that she has not seen any worse damage in her career. (T 597). Sayeh was "actively bleeding" from her vaginal and rectal area. (T 597). Sayeh told her that "Ray cut her throat," and that "Ray put his thing in mine." Sayeh described his penis as his "thing," and her vagina as "mine." (T 596-97).

Paul Norkus, an FDLE print examiner, testified that he made a plaster mold of tire tracks found on the dirt road where Appellant stopped to rape Sayeh. One of the tracks matched the left rear tire on Appellant's car. (T 561, 565). Over objection, Mr. Norkus also testified that two palm prints made in blood on the trunk of

Appellant's car matched Sayeh. (T 573). They also recovered from the carport of Appellant's parents' house a pair of Trax shoes and a blue blanket. (T 576-77).

Kevin Noppinger, an FDLE serologist, testified over objection that blood found on pine needles near Sayeh's body matched Sayeh's blood type, as did stains on two pieces of fabric, including a shirt collar, found at the scene, and stains on a Trax shoe and a blue blanket found in Appellant's parents' carport. (T 607-09, 612, 614-15). Sara had type "B" blood, Sayeh had type "O" blood, and Appellant had type "A" blood. (T 610). Appellant was also a secretor. (T 617). Stains on the front passenger seat back of Appellant's car matched Sayeh's blood and Appellant's semen, and stains on the front passenger seat belt matched Sayeh's blood. (T 618-20). Stains on a white sock matched Sayeh's blood and Appellant's semen (T 617), and stains in the crotch of Sayeh's panties and on a pink bathing suit found in Appellant's car matched Appellant's semen (T 621-22). Finally, blood found in the dirt where Appellant stopped to rape Sayeh matched Sayeh's blood. (T 620). Appellant had blood on his hands, but it could not be typed. (T 623).

After the lunch recess, defense counsel indicated that Appellant wanted to review the Faretta case and address the court. (T 629-30). The trial continued while Appellant reviewed the case,

but Appellant made no renewed request to address the court.

Linda Hensley, an FDLE hair analyst, testified that two Caucasian head hairs removed from a piece of material found near Sara's body were characteristically similar to Appellant's hair. (T 641-44). Two pubic hairs recovered from the blue blanket in Appellant's parents' carport were consistent with Appellant's hair, one head hair was consistent with Sara's hair, and one head hair was consistent with Sayeh's hair. (T 646-48). A pubic hair consistent with Appellant's hair was found on one of Sayeh's white socks. (T 648-49). A Caucasian head hair from Sayeh's panties was consistent with Appellant's hair. (T 649-50). Two Caucasian head hairs from Sara's panties were consistent with Appellant's and Sara's hair. (T 651-52).

Next, Dr. Nicholson, the medical examiner, testified that at least six separate cuts were made to Sara's neck. (T 664). The cuts removed Sara's larynx from her throat, which obstructed her respiration. Large veins and arteries were cut. Air leaked into the vein to the heart, and the blood supply to her brain was cut off. (T 663). He opined that it took "probably a minute" to die. (T 664). She would have lost consciousness within seconds. (T 666). She also would have suffered a lot of pain because of the sensitive area in which she was injured. (T 666).

The State's next witness was Special Agent Dwight Adams, a DNA

analyst with the FBI. Special Agent Adams testified that blood stains from the blue blanket matched Sayeh's DNA. According to his calculations, there was a one in seven million chance that the blood belonged to someone else. (T 673-76).

Finally, Sayeh Rivazfar testified that she was eight years old at the time of the offenses, and that she lived in Pensacola with her mother; her six-year-old sister, Sara; and her four-year-old brother, Arash. (T 687). The night she and her sister were kidnaped, they had gone to bed in their clothes for school the next day so they would not be late for the bus. She wore jeans, a T-shirt, and shoes. Sara wore a skirt and shirt. (T 688-89). She woke up in front of her apartment in a "very large green car" with a dented fender where Ray, a friend of her mother, had carried her and her sister. She asked where her mother was, and Appellant told her she was on her way. (T 689-91). She fell back asleep, then woke up sometime later while Appellant was driving.

Appellant turned onto a dirt road and stopped. (T 691-92). She and Sara got out and urinated, then he tied Sara's hands and legs and left her in the car. (T 692-93). He put Sayeh on the trunk of the car, took off her pants and underwear, and penetrated her vagina with his penis. (T 693, 695). After awhile, he put her clothes back on and put her in the front seat with Sara, then changed into white shorts. (T 696-97). An "electrical-type truck"

drove up, and Appellant talked to the driver. (T 697). He then drove further down the dirt road, took them out of the car, walked them "way back into the woods," and put Sara down by a tree. (T 698-99). He came to her with a knife, told her to say her prayers, then cut her throat. She dropped to the ground, and Sara started screaming. (T 700). She heard him cut Sara's throat, then he "ran off." (T 701, 704-05). After awhile, she got up and checked on her sister, who was not breathing, and thought she was dead. (T 701). She walked to the dirt road and flagged down a truck. (T 701). Later, she picked Appellant out of a photo lineup. (T 702). She also identified him in court. (T 703).

Following Sayeh's testimony, the State admitted into evidence the certified copies of judgment and sentence from Appellant's guilt phase. (T 705). It also proffered the transcripts of three witnesses who testified at the previous resentencing regarding victim impact. (T 705-06). It then rested its case. (T 707).

At that point, the defense made a motion for a life sentence because there was insufficient evidence to support any aggravating factors other than "prior violent felony" and "felony murder." (T 710-11). That motion was denied. (T 711). Similarly, defense counsel's objection to instructions on any aggravators other than "prior violent felony" and "felony murder" was overruled. (T 711).

At the beginning of the following day's proceedings, defense

counsel objected on Appellant's behalf to any filming of the proceedings by a law enforcement officer who had walked in with recording equipment. The trial court explained that the officer would only be filming in the event Appellant acted out. Defense counsel assured the court that he would warn Appellant not to do so. (T 723-24).

Thereafter, defense counsel called James Martin, the investigator assigned to Appellant's case, as a witness. Mr. Martin testified that he obtained blood and urine samples from Appellant the day after his arrest. (T 726). Test results indicated the presence of cannabinoids. (T 730). He admitted on cross-examination, however, that the test results did not indicate the level of cannabinoids, or when they had been ingested. (T 731).

Next, the defense presented the prior testimony of Dallas Ober, Appellant's stepfather, who had since died. Mr. Ober testified that he worked for Appellant's father fixing school buses. (T 733). Appellant's father sold elderberries to wine companies, drove school buses, and did other things for a living. (T 734). Appellant and his father were very close. (T 735). His dad took him fishing, skating, to the park, and on his bus route. (T 735). After Appellant's father died, Mr. Ober moved to Kansas for awhile, then moved back to Pennsylvania and married Appellant's

mother in 1976. (T 735-36). All three of them moved to Florida in 1987. (T 736-37). He knew that Appellant drank alcohol and smoked marijuana, but he did not see Appellant drunk because Appellant would stay away until he sobered up. (T 737). It seemed to take very little for Appellant to become intoxicated. (T 738).

Appellant was a machinist. (T 738). He would help out around the house, but only when he wanted to, not when it was needed. (T 739). Appellant would not contribute financially, so Mr. Ober asked him to leave the house. (T 739). At the time of his arrest, Appellant was living out of his car. (T 740). Mr. Ober and his wife had been supporting Appellant's son ever since he was born. (T 741).

Next, the defense called Dr. Michael Radelet, a professor of Sociology at the University of Florida who had spent the last ten years researching capital punishment and the concept of future dangerousness. (T 747-65). Dr. Radelet testified that he was asked three years ago to predict Appellant's future dangerousness. (T 766). Pursuant to this request, he reviewed the transcripts of Appellant's prior trial, the police reports, and prison and jail records back to 1974, which included medical and disciplinary records. (T 766). In his opinion, Appellant would adjust well to prison and not be a danger to anyone there. He based his opinion on the fact that Appellant would never get out of prison,

Appellant's previous criminal history which was "not particularly lengthy," a history of stable employment, no attempt to justify the crime, close family ties, no history of psychosis, no evidence of a high degree of preplanning, and a "very good if not excellent record of adjustment to prison" which included only one disciplinary report in prison in five to six years, verbal altercations in the Santa Rosa County Jail, and the discovery of a contraband handcuff key. (T 767-72). He discounted the discovery of the handcuff key which was fashioned from a pair of eyeglasses because of the sheer improbability of Appellant being able to escape from his cell. (T 773).

Dr. Radelet also testified that only three capital defendants have ever had their sentence commuted, and no one has ever been paroled since capital punishment was reinstated in Florida in 1974. (T 775). Maximum security inmates are locked down in single cells at night and allowed into a community room with a television during the day. There is no air conditioning, and they are fed only three meals a day. (T 778-79). They work at prison industries making clothes or furniture, or doing maintenance on state vehicles. (T 777).

On cross-examination, Dr. Radelet admitted that he was opposed to the death penalty. (T 781). Moreover, the actuarial tables used to calculate a defendant's probability of future dangerousness

are not foolproof. (T 783). Regarding Appellant's work history, Dr. Radelet admitted that his information was based on Appellant's self-report. At the time of the murder, Appellant was living in his car, his parents were caring for his son, and he was spending $400-$500 on the weekends for drugs and alcohol. (T 788-89).

Immediately following Dr. Radelet's testimony, Appellant pushed and twice slapped one of his attorneys, B.B. Boles, for which he was held in contempt. (T 809-14). As a result, Mr. Boles moved to withdraw and moved for a mistrial, both of which were denied. (T 814-23). Appellant also moved to discharge counsel and represent himself. (T 823). After the lunch recess, the trial court conducted a Nelson inquiry and found no reasonable basis to discharge counsel. Appellant unequivocally withdrew his request to represent himself. (T 826-39). Upon request by the State, the trial court gave a curative instruction to the jury and determined that no one was prejudiced by Appellant's outburst. (T 847-48).

Thereafter, Randall Etheridge testified that he was one of Appellant's original guilt-phase attorneys. During that trial, despite being deposed by Mr. Etheridge, Moes Bauldree identified him in the courtroom as the person he had spoken to in the woods the morning of the murder. (T 849-51). On cross-examination, Mr. Etheridge admitted that the trial was three to six months after the deposition, that Mr. Bauldree took a long time to make an

identification, and that the courtroom was packed. (T 852). He also admitted that Appellant's appearance had changed dramatically since the murders. He had gained fifteen to twenty pounds, cut his hair short, shaved his beard, and wore reading glasses, and a suit and tie. (T 852-54). Mr. Bauldree had also picked Appellant out of a lineup just after the murder. The photo in the lineup was taken the day of Appellant's arrest. (T 854-55).

Next, Rosemary Key testified that Appellant worked with, and was friends with, her husband. Appellant often came over to their house on the weekends. He would drink and smoke marijuana, but she could not say how much. (T 858-59).

Frank Freeman testified that he worked with Appellant at Strader Manufacturing in 1987 and 1988. He also saw Appellant during the evenings and on weekends. Appellant drank and smoked marijuana, but he could not say how much. (T 861-62). On the evening before the murder, Appellant was at his house. Appellant drank two or three beers, but he did not see Appellant ingest drugs. Appellant left around 10:00 or 10:30 p.m. (T 863-64). He saw Appellant the following day around 9:00 a.m. Appellant told him that he had called in sick to work. Appellant showed no signs of being intoxicated or high. (T 864-66).

On his own behalf, Appellant testified that he was wrongly convicted. (T 866). He knew the Rivazfar family, but had never

"molested them in any manner" prior to September 22, 1988. (T 869). He could not say how much he drank or smoked marijuana. (T 869). On the evening of the murder, he smoked some marijuana after getting cleaned up from work, went to a friend's house and "drank some beers," went to a bar and drank "a few" and smoked "a couple of joints," went to another bar and "drank some in there," smoked more marijuana on his way to a bar in Pensacola, and then "[d]rank down there." (T 870-71). Because he was on probation for driving under the influence in Santa Rosa County, and had a driving under the influence charge pending in Escambia County, he called a friend named "Angie" to pick him up at the Scenic Hills Lounge, where he left his car for the evening. (T 871).

Appellant also testified that he was thirty-nine years old. (T 868). His father died the day after Christmas when he was between eight and ten years old. (T 872). They often went skating, fishing, boating, camping, and picnicking together. (T 872). His father drove a school bus and would take Appellant with him. (T 872). He was "lost" when his father died, and his mother went into the hospital shortly after his father's death. He stayed with numerous relatives during that time, then went to a school for boys. (T 873-74). He ran away often. One day, he made a cake for his mother's birthday and ran away to try to give it to her. (T 875).

At seventeen, he signed up with the military, but served only 29 days because he was diagnosed with scoliosis of the spine. (T 876). He then went to Idaho with the Job Corps for six months, then to Pennsylvania for six months, then to Cleveland for four and a half years, then to Houston for eleven to twelve years. (T 877). When his stepfather fell ill, he moved his parents to Florida, then moved there too. (T 877). In Texas, he drank and smoked marijuana "all the time." (T 878). He started when he was sixteen or seventeen. (T 878). He made $800 a month at his job, but had to do odd jobs to support his marijuana habit. (T 881).

He attacked his attorney because he believed that he had been unfairly convicted and had not been represented well. He wanted his public defenders off the case and new attorneys appointed who would challenge his conviction. (T 882-84). He is currently serving a life sentence with a mandatory minimum of twenty-five years. If given a consecutive life sentence, he would adjust well to prison. (T 884). Someone set him up by putting the handcuff key in his cell. (T 886). He has no reason to escape because one day someone will discover his innocence or the real killer will confess. (T 887).

On cross-examination, Appellant admitted that he knew the Rivazfars and was familiar with their apartment. (T 888). He also kept a blue blanket in his car. (T 889). At his previous trial,

he testified that he could not remember what he did the night before. (T 891-92). He has a felony conviction in every state in which he has lived. (T 906). His father spoiled him rotten. (T 904). Neither of the victims, nor their mother, had ever done anything to Appellant. (T 908).

Next, Opel Hagen, Appellant's 71-year-old second cousin from Strongstown, Pennsylvania, testified that Appellant and his father were very close. Appellant was devastated by his father's death when he was eleven or twelve. (T 911-14). His mother had a nervous breakdown and went into a hospital twenty miles away for two or three months. (T 915). Appellant went to live with his grandfather. (T 915). He returned to live with his mother when she got out of the hospital, but she sent him to the Hershey School which was three hours away. She went with Appellant's mother often to visit him. (T 916-17). Appellant did not like the school and ran away often. He was overweight and the other kids would tease him. (T 918). His mother tried to get him psychiatric help but should could not afford it. (T 918-19). Ms. Hagen lost touch with Appellant when he and his family moved to Ohio, but she loves Appellant and wants the jury to spare his life. (T 919-20). On cross-examination, Ms. Hagen admitted that Appellant did not have it any tougher than any other kids in school, and that his mother and father were "very devoted" to him. (T 921).

Appellant's aunt, Linda Zahurony, testified that she used to babysit Appellant and his brother. Appellant was a "happy child." He and his father were very close. (T 925-26). His mother drove a van for special education children. He was devastated by his father's death and gave his mother a hard time. (T 927). Appellant stayed with his grandparents while his mother was in the hospital. (T 928-29).

On cross-examination, Ms. Zahurony admitted that Appellant's father spoiled him rotten. Appellant did not like the Hershey School because he did not like discipline. Appellant married twice and had a child. (T 936-37).

Appellant's 34-year-old stepsister, Ramona Frazier, testified that she lived with her father and Appellant's mother in Texas. When she was sixteen, Appellant would visit daily. (T 939-41). He drank and smoked marijuana "quite often." He was violent when he drank, but mellow when he smoked. In fact, he was violent with his wife, but she drank and smoked and was violent too. (T 942, 944-45). She lost touch with him in 1979 when she moved to Arkansas. (T 943).

Finally, Appellant's mother, Alice Ober, testified that Appellant was born on March 7, 1956 in Colver, Pennsylvania. She was 24 and his father was 49. (T 946-49). She had trouble with the pregnancy, and Appellant had to stay in the hospital for a

month after his birth because he only weighed four pounds and was sick. (T 948). Appellant's father spoiled him "[d]esparately." (T 950). She was in the hospital when his father fell ill and died in December 1966. Appellant was devastated and never mourned his death. She had a nervous breakdown and was hospitalized for three months. (T 950-54). When she got out, she and Appellant lived with relatives for awhile, then went back to their house, but had no heat or electricity. They lived off of potatoes and bread for a long time. (T 956-57). They borrowed money from neighbors for kerosene. (T 957). She sent Appellant to the Hershey School, and she visited often, but Appellant hated it and would run away. (T 957-58). She took him out after three years and they moved to Ohio. (T 959). She tried to get psychiatric help for Appellant, but she could not afford it. (T 959).

She further testified that Appellant started drinking when he was eleven and has continued throughout his life. He smoked marijuana too and maybe ingested cocaine. He was mean when he drank. (T 960-62). He got drunk at her wedding and ruined her reception, then wrecked her car, but does not remember it. (T 962-63). He followed her everywhere. After being discharged from the service, Appellant moved with her to Texas, then moved with her to Florida in 1987. (T 965-67). Appellant got married a week after she did. His marriage lasted a year or two. Then he had a live-in

relationship with another woman for seven years. (T 964). They had a son together. (T 965). At the time of the murder, he would not contribute toward their living expenses, so he lived out of his car. (T 967). She told the police when he was arrested that he was not drunk, but she had lied to protect him. (T 967-70).

Following the charge conference, closing arguments, and jury instructions, the jury returned a recommendation of death by a vote of twelve to zero on August 18, 1995. (T 1150-53). At the allocution hearing on September 8, Appellant disputed numerous allegations in the presentence investigation. He also stated that he was sure Sayeh would have told the truth and exonerated him, but the police and the prosecutors had brainwashed her. When Sayeh finally tells the truth, his life will get better. He believed that Mr. Rivazfar should look into his ex-wife's past for the perpetrator, unless he was responsible for the murder. The former prosecutor should also be tried for perjury based on his representations to the grand jury. Finally, he insisted that Jim Martin had failed to investigate his case, and that Joe Ibrear would corroborate that Martin said he would put Appellant in the chair. (T 981-97).

At the final sentencing hearing on September 18, 1995, Appellant complained that Teresa Wright's testimony differed from her deposition testimony, that there was no DNA evidence as the

newspaper reported, and that the PSI was a smear campaign. (T 706-13). Thereafter, the trial court read its sentencing order into the record. It found the existence of four aggravating factors: "prior violent felony," "avoid arrest," HAC, and CCP. (R 503-07). In mitigation, it gave little weight to Appellant's age, his traumatic childhood, his history of alcohol and drug use, his history of gainful employment, his successful adaptation to prison, his health problems, and his professed innocence. It gave some weight to its ability to sentence Appellant to a consecutive life sentence. (R 507-12). Ultimately, it found that "the aggravating circumstances present in this case far outweigh the mitigating circumstances present." (T 512). Moreover, it found that "[t]he evidence of mitigation although present is minor in comparison to the enormity and magnitude of the crime committed." (R 512-13). As a result, it sentenced Appellant to death. This appeal follows.

SUMMARY OF ARGUMENT

Issue I - By striking his attorney in front of the jury, for the admitted purpose of trying to get his attorneys discharged, Appellant created any "conflict" that existed between himself and counsel. Moreover, he invited any prejudice that may have resulted. Although counsel moved to withdraw, they were both willing and able to continue their representation. The jury was given a curative instruction, and no one indicated that they could not be fair and impartial. Therefore, the trial court did not abuse its discretion in refusing to discharge counsel in the middle of Appellant's trial.

Issue II - This Court has previously held that the State may introduce evidence relating to the circumstances of the crime, even if it relates to another victim, in order to aid the jury in understanding the case. Not only was the complained-of evidence properly admitted to put the murder into context, but it was relevant and admissible to prove several of the aggravating factors. It would have been virtually impossible for the State to present the facts of this murder without reference to Sayeh's injuries. Thus, the trial court did not abuse its discretion in admitting such evidence. Even if it did, such error was harmless beyond a reasonable doubt.

Issue III - Appellant did not preserve his challenges to the

aggravating factor instructions. Regardless, the instructions were not erroneous. Even if they were, they were harmless beyond a reasonable doubt since the factors would have existed under any definition. Moreover, even if one or more of the instructions were fundamentally erroneous, there is no reasonable possibility that the recommendation or the sentence would have been different.

Issue IV - The record supports the "avoid arrest" aggravating factor. Marching the girls deep into a pine thicket after kidnaping them and raping one of them clearly shows that the dominant or only motive for the murder was to eliminate her as a witness to antecedent crimes and to avoid arrest therefor. Because the "avoid arrest" and CCP factors were based on different facts, they were not improperly given double consideration. Finally, the trial court adequately detailed Appellant's mitigation and articulated its reasons for accepting or rejecting them, and any weight it accorded them.

Issue on cross-appeal - The trial court abused its discretion in refusing to allow victim-impact evidence before the jury. The proffered testimony was brief, was within the statutory requirement, was relevant, and was not overly prejudicial. Thus, the trial court should not have excluded it simply because it believed that the jury could not "set aside the sympathy and emotional testimony."

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENSE COUNSEL'S MOTION TO WITHDRAW MADE ON THE THIRD DAY OF TRIAL AFTER APPELLANT STRUCK AND PUSHED COUNSEL IN FRONT OF THE JURY (Restated).

Prior to trial, Appellant filed a pro se motion to participate as co-counsel. (R 210-11). At a hearing on several motions, the trial court denied the motion, but asked Appellant if he wanted to represent himself. Appellant responded that he wanted "a little time to ponder" the idea. (R 603-08). Six weeks later, and a week before the scheduled resentencing, Appellant filed a pro se motion to dismiss his attorneys. (R 269-72). At a hearing on other motions, the court mentioned that Appellant had sent him a letter in which he claimed to be mentally incompetent. As a result, the trial judge held the motion in abeyance until Appellant could be examined for competency. (R 285-86, 287). Pursuant to the reports of Doctors Larson and Bingham, the trial court found Appellant competent to stand trial. (R 450-52, 453-57, 580).

At a hearing on the Friday before the Monday trial, the trial court conducted a Nelson inquiry, and ultimately found that counsel had been rendering effective assistance. Thus, it denied Appellant's motion to dismiss. (R 581-90). It then informed Appellant that if he persisted in firing his attorneys the trial

court would not appoint new ones, and that his only option was to represent himself. Appellant ultimately, but unequivocally, stated that he did not want to represent himself. (R 590-93). Therefore, Mr. Barksdale and Mr. Boles remained as his counsel.

Following the testimony of the State's fourth witness on the first day of trial, defense counsel indicated that Appellant wanted to address the court. Counsel also noted his concern that Appellant would "engage in a courtroom demonstration." (T 479). Upon inquiry, the trial court learned that Appellant was frustrated with his attorneys because they were not asking questions that Appellant wanted them to ask--questions which defense counsel believed were inappropriate. (T 480-83). The trial court again found that counsel was rendering effective assistance. (T 483-84, 488). When Appellant persisted in his complaints, the trial court informed him that it would not replace his attorneys, and asked him if he wanted to represent himself. (T 489-90). Appellant declined: "[T]here is no way that I am prepared to represent myself." (T 490). The trial court then cautioned Appellant against any outburst. (T 491).

After the lunch recess on the following day, defense counsel indicated that Appellant wanted to review the Faretta case and address the court. (T 629-30). The trial continued while Appellant reviewed the case, but Appellant made no renewed request

to address the court.

At the beginning of the following day's proceedings, defense counsel objected on Appellant's behalf to any filming of the proceedings by a law enforcement officer who had walked in with recording equipment. The trial court explained that the officer would only be filming in the event Appellant "acted out." Defense counsel assured the court that he would warn Appellant not to do so. (T 723-24).

Appellant's third witness was Dr. Michael Radelet, a Professor of Sociology at the University of Florida, who opined that Appellant would adjust well in prison and would not be a danger to others in prison. (T 746-80). Following this testimony, Appellant pushed and twice slapped one of his attorneys, B.B. Boles, in front of the jury. (T 809). After removing the jury from the courtroom, the trial court held Appellant in direct criminal contempt and admonished him for physically attacking his attorney. (T 809-14). At that point, Mr. Boles moved for a mistrial and moved to withdraw, citing a loss of credibility with the jury and the obvious breakdown in the attorney/client relationship. (T 814-18). The trial court noted that Appellant had been warned twice not to disrupt the proceedings. (T 819-21). Ultimately, the trial court made the following ruling:

The Court is of the opinion that it would

> be a manifest miscarriage of justice to the victims and the citizens of this community to declare a mistrial under the circumstances herein when the circumstances have been created by the defendant himself.
>
> The motion for mistrial is denied. The motion to withdraw is denied. He needs counsel. He can't do it by himself.

(T 823). Appellant immediately asked to represent himself, but the trial court recessed for lunch to give everyone time to consider the matter. (T 823-24).

Following the recess, defense counsel renewed their motion to withdraw. (T 825-26). Appellant agreed that a conflict of interest existed, but did not renew his request to represent himself. (T 826-27). The trial court related its understanding of Florida Rule of Professional Conduct 4-1.16, regarding an attorney's request to withdraw, and made the following findings:

> And that's what this Court is finding is that to allow the public defender's offence to withdraw on their own motion at this point in time would materially adverse or have an adverse material affect on the rights of the defendant when we are this late in the proceeding.
>
> Now, therefore the motion of the public defender to withdraw from further representation of the defendant is going to be denied.

(T 827-28). The trial court also found that Appellant's attorneys had rendered effective assistance, and asked Appellant if he wanted

to represent himself. (T 828-29). Appellant took the opportunity to complain about his attorneys, to which the trial court made extensive inquiry, but it again found that counsel were not ineffective. (T 829-40). When asked again, Appellant responded, "I want to discharge them but I don't want to represent myself because I am not prepared to represent myself." (T 840). Finding no unequivocal request for self-representation, the trial court refused to dismiss defense counsel. (T 840).

Mr. Boles then suggested that the court question the jurors individually about the incident. (T 841). Counsel also indicated that he was "both physically and psychologically prepared to continue to represent [Appellant] if the Court should so order." (T 840-41). The State, however, suggested a curative instruction rather than individual questioning so as not to overemphasize the event. (T 842-43). The trial court adopted the State's suggestion, to which the defense did not object, and instructed the jury as follows:

> Ladies and gentlemen of the jury, you've heard me instruct you previously and I'll read this instruction to you again. That this penalty phase of the proceeding must be tried by you based solely upon the evidence that you have seen coming from the witness stand. In other words the testimony of the witnesses, the exhibits that may be introduced into the evidence, and the instructions of the law that I will give to you at the conclusion of this penalty phase proceedings.

> Is there anybody on the jury panel -- and you don't need to tell me what if anything the situation is -- but is there anyone in the jury panel at this time that does not believe that they can follow that instruction that I have given to you and decide this case solely upon the evidence as it comes to you in the form of testimony, exhibits, and the law as I will instruct you on it?
>
> All of the jurors -- I don't see any hands up so I presume what you are telling me is that everybody can abide by the law of the Court? Is that right -- They are all nodding their heads.
>
> Anybody that cannot abide by the law and the instructions that I have given to you?
>
> All right. A negative indication from the jury.

(T 847-48).

During Appellant's subsequent testimony, Mr. Barksdale asked Appellant why he attacked Mr. Boles. Appellant responded that he was under a lot of stress and was "lashing out because [he's] not being . . . represented." (T 882). He stated that he is as much a victim in this case because he is innocent and the rules will not allow him to contest his guilty verdict. (T 883). When asked what he hoped to accomplish by his actions, Appellant responded, "I wasn't trying to accomplish anything except to get rid of the public defender's office. And get somebody . . . that would be willing to ask the questions even if it is against their own codes of ethics that needs to be asked so [the jury] can hear all of the

truth . . . ." (T 883-84).

In this appeal, Appellant claims that the trial court abused its discretion in refusing to allow defense counsel to withdraw after Appellant's outburst. (Initial brief at 11-36). The pith of Appellant's argument seems to be that he was presumptively prejudiced by defense counsels' continued representation after counsel claimed a conflict of interest. (Id. at 21-23). According to Appellant, once a conflict develops between counsel and client, such as it did in this case, it is absolutely incumbent on the trial court to allow counsel to withdraw; its failure to do so is per se reversible error. (Id. at 23-36). He cites numerous federal cases to support his claim, but none are even remotely similar to the facts of this case.

It is well-settled that "a party may not make or invite error at trial and then take advantage of the error on appeal." Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990). See also Ellison v. State, 349 So. 2d 731, 732 (Fla. 3d DCA 1977) ("Florida courts follow the 'invited error' rule, which stands for the proposition that an appellant may not take advantage of an error which he has induced."), cert. denied, 357 So. 2d 185 (Fla. 1978). Moreover, "neither the exercise of the right to self-representation nor to appointed counsel may be used as a device to abuse the dignity of the court or to frustrate orderly proceedings." Jones v. State,

449 So. 2d 253, 257 (Fla.), cert. denied, 469 U.S. 893 (1984).

Here, Appellant created the "conflict" about which he now complains. He had been a troublesome and uncooperative defendant from the beginning. In his first trial, he had to be shackled during the penalty phase because of threats he made against the prosecutor. Wike v. State, 596 So. 2d 1020, 1023 (Fla. 1992). In his first resentencing, Appellant repeatedly tried to discharge counsel, and even challenged counsels' effectiveness on appeal. Wike v. State, 648 So. 2d 683, 684 n.2 (Fla. 1994). In this proceeding, he continued to complain about his attorneys, and twice moved for their discharge.[1] His complaints centered around trial strategy. It is clear from the record that Appellant wanted to relitigate his guilt or innocence, and counsel refused to do so. Thus, any "conflict" that developed was premised on their disagreements about strategy. When the trial court would not discharge counsel, Appellant decided to attack one of his attorneys for the admitted purpose of getting both of them removed from his case:

> I wasn't trying to accomplish anything except to get rid of the public defender's office. And get somebody . . . that would be willing to ask the questions even if it is against their own codes of ethics that needs

[1] Appellant does not challenge the adequacy of the Nelson inquiries or the trial court's rulings prior to Appellant's outburst.

> to be asked so [the jury] can hear all of the truth; not just one-sided for sentencing because they don't allow [the jury] to hear anything that has to do with the possibility of being innocent. Because this is a resentencing. And this is not fair to me; it is not fair to anybody else. And I am very frustrated over it.

(T 883-84).

In Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992), cert. denied, 113 S. Ct. 418, 121 L. Ed. 2d 341 (1993), the defendant insisted that his attorney present a lingering doubt defense during the resentencing, and counsel refused. Counsel moved to withdraw, but the trial court denied the motion. Waterhouse complained about counsel repeatedly during the proceeding, but the trial court found no reason to discharge him. Eventually, the court agreed to allow Waterhouse to present his own closing argument, but Waterhouse reneged at the last possible moment. When defense counsel refused to argue lingering doubt, Appellant expressly declined counsel's offer to present a proper closing argument. Id. at 1011-14.

On appeal, Waterhouse claimed, among other things, that he was deprived of his right to counsel because of his counsel's conflict of interest. This Court rejected the argument:

> The alleged conflict arose from the difficulties between Waterhouse and his counsel. This claim is not supported by the record. Although a conflict of interest may be present where counsel's interests are inconsistent with those of his client, there

> was no such conflict here. It is apparent from the record that counsel's interest was in presenting the best possible case for Waterhouse. Any conflict between them was attributable solely to Waterhouse's own contumacious behavior and not to any competing interest of his counsel.

Id. at 1015 (emphasis added).

As in Waterhouse, any conflict between Appellant and his counsel is attributable solely to Appellant's uncooperative attitude and disruptive conduct. Similarly, any prejudice suffered by Appellant was of his own doing. Consequently, this Court should not permit "an intransigent defendant to completely thwart the orderly processes of justice." Id. at 1014. The trial court considered all of the circumstances and decided not to reward Appellant for his disruptive behavior. Appellant had been explicitly warned not to act out. (T 491, 723). The trial was in its third of four days, and defense counsel assured the court that he could physically and mentally represent Appellant if necessary. Moreover, when the trial court questioned the jury members about their ability to be fair and impartial, no one indicated that they could not do so.

As this Court has previously stated, "both the state and the defendant are entitled to orderly and timely proceedings." Jones, 449 So. 2d at 258. By granting defense counsels' motion to withdraw, which would have precipitated a mistrial were Appellant

not competent to represent himself, the trial court would have allowed Appellant to manipulate the proceedings through purposefully disruptive conduct. As it were, the trial court offered Appellant the opportunity to represent himself, which Appellant declined, and it cautioned the jury to consider only the evidence presented. Given that counsel was physically and mentally prepared to proceed on Appellant's behalf, the trial court did not abuse its discretion in denying counsels' motion to withdraw. See Waterhouse, 596 So. 2d at 1015; cf. Sanchez-Velasco v. State, 570 So. 2d 908, 916 (Fla. 1990) (finding no abuse of discretion in trial court's denial of motion for mistrial where defendant disrupted capital trial by repeatedly accusing state witness of lying), cert. denied, 500 U.S. 929 (1991); Arbelaez v. State, 626 So. 2d 169, 175-76 (Fla. 1993) (finding no abuse of discretion in trial court's denial of motion for mistrial where victim's mother called defendant a "murderer" and "son of a bitch" while testifying in capital trial), cert. denied, 114 S. Ct. 2123, 128 L. Ed. 2d 678 (1994).

Appellant also claims in passing that the trial court should have questioned the jurors individually about his outburst. (Initial brief at 34-35). Although defense counsel sought individual questioning, they requested, as an alternative, that a cautionary instruction be given. (T 841-45). The trial court

agreed that a cautionary instruction would suffice, and questioned the jury collectively about their ability to render an impartial recommendation. When no juror professed an inability to do so, there was no need to conduct individual voir dire. Under the circumstances, the trial court did not abuse its discretion in refusing to question the jurors individually. See Thompson v. State, 619 So. 2d 261, 265 (Fla. 1993) (finding no abuse of discretion in refusing to strike panel or question individually where defense agreed instruction would remedy problem), cert. denied, 114 S. Ct. 445, 126 L. Ed. 2d 378 (1994); cf. Pietri v. State, 644 So. 2d 1347, 1351 (Fla. 1994) (finding that trial court's failure to conduct individual voir dire did not render trial fundamentally unfair), cert. denied, 115 S. Ct. 2588 (1995).

In addition, Appellant claims, without argument or authority, that the trial court "should have closely monitored defense counsels' behavior, making express inquiries and findings as to whether their actions comported in every respect with their legal, ethical, and constitutional duties, and as to whether [Appellant] had observed any further acts or omissions of counsel that were prejudicial to him." (Initial brief at 35). Appellant points to nothing in the record, however, to show that the trial court did not closely monitor everyone's behavior for legal, ethical, or constitutional violations. Nor has Appellant explained why

"express inquiries and findings" are necessary. Appellant agreed to behave, and defense counsel indicated he was prepared to proceed. Had the need arisen for "express inquires and findings," the trial court surely would have made them.

In an equally conclusory fashion, Appellant also claims that the trial court should have ordered a continuance beyond the recess for lunch to give counsel time to talk to Appellant, and "to gather their thoughts and calm their emotions." (Initial brief at 35). First, defense counsel did not request additional time, so Appellant cannot claim that counsel was denied something he never sought. Second, defense counsel returned from the lunch recess prepared to continue if the trial court denied the motion to withdraw. Finally, defense counsel indicated after the recess that they had spoken to Appellant. Again, they did not request additional time. Thus, Appellant's conclusory claim is without merit.

Finally, Appellant claims that he was prejudiced by defense counsel's failure to raise or renew objections to unnamed aggravating factor instructions. (Initial brief at 35-36). To the extent Appellant raises the substance of that claim in a separate issue, the State will rely on its arguments thereto. Ultimately, Appellant suffered no prejudice because the instructions were proper as given. See Issue III, infra. Therefore, this Court

should affirm Appellant's sentence of death for the first-degree murder of Sara Rivazfar.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO PRESENT THE FACTS SURROUNDING THE MURDER WHICH INCLUDED CRIMINAL ACTS AGAINST A SURVIVING VICTIM (Restated).

Prior to trial, defense counsel filed a Motion in Limine, seeking to prohibit the introduction of any evidence relating to the injuries sustained by the surviving victim, Sayeh Rivazfar. He claimed that such evidence, which did not relate to the murder victim, was far more prejudicial than probative. (R 197-201). At the hearing on the motion, the State responded that such evidence was relevant and admissible to prove the "prior violent felony," "avoid arrest," CCP, and HAC aggravating factors, and was not unduly prejudicial. (R 618-19, 620, 622). The trial court took the motion under advisement. (R 622).[2] Throughout the trial, defense counsel objected to the evidence relating to Sayeh's involvement in the criminal episode and to her injuries on relevance and prejudice grounds.[3]

In this appeal, Appellant claims that the evidence relating to

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[2] Although a written order denying the motion exists, it was never filed with the clerk and never made a part of the record.

[3] Specifically, defense counsel objected during the State's opening statement (T 392-93), after Teresa Wright's testimony (T 477-79), during Janice Johnson's testimony (T 516), during Dr. Althar's testimony (T 551-53), during Paul Norkus' testimony (T 573), during Dr. Montes testimony (T 591), and during Kevin Noppinger's testimony (T 606, 609), at which point counsel was granted a standing objection to all such testimony (T 609).

the kidnaping, sexual battery, and attempted murder of Sayeh became a feature of the trial, and that its probative value was far outweighed by its prejudicial effect. (Initial brief at 36-45). Appellant believes that evidence relating to any collateral crimes which support the "prior violent felony" aggravating factor should be limited, and should not include the testimony of the victim. (Id. at 37-39). While he concedes that "some evidence about the criminal episode was admissible to prove aggravating factors other than the prior violent felony," he claims that "the judge permitted the State to go way beyond the bounds of propriety." (Id. at 44).

What Appellant fails to appreciate is this was a resentencing. This jury new nothing about the facts of the case. It would have been impossible, not to mention confusing, to present Sara's murder in a vacuum. The fact is Appellant committed this murder during the commission of other felonies, and there were two victims involved. Had the offenses against Sayeh been committed at some other time, in some other place, perhaps the evidence relating to her would properly have been limited. But section 921.141(1), Fla. Stat. (1993), specifically provides that "evidence may be presented as to any matter that the court deems relevant to the nature of the crime." As this Court has previously held,

> it is within the sound discretion of the trial court during resentencing proceedings to allow the jury to hear or see probative evidence

> which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence. We cannot expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum.

Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986), cert denied, 465 U.S. 1074 (1987). See also Preston v. State, 607 So. 2d 404, 410 (Fla. 1992) (same), cert. denied, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993); Valle v. State, 581 So. 2d 40, 45 (Fla. 1991) (finding no abuse of discretion in allowing state "to retry its entire case as to guilt"), cert. denied, 502 U.S. 986 (1992); King v. State, 514 So. 2d 354, 357-58 (Fla. 1987) (no abuse of discretion in allowing several witnesses to testify "as to the circumstances of the crimes and the injuries to the victims" (emphasis added)), cert. denied, 487 U.S. 1241 (1988).

Not only was the State trying to put the crimes into context, but it also had to prove the aggravating factors beyond a reasonable doubt. Besides the "prior violent felony" aggravator, the State was also trying to prove that Appellant committed the murder to avoid arrest, and that he committed it in a cold, calculated, and premeditated manner. In Espinosa v. State, 589 So. 2d 887, 894 (Fla. 1991), cert. granted, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), aff'd on remand, 626 So. 2d 165 (Fla. 1993), Espinosa and his codefendant went to the victims' home, shot and

stabbed Bernardo Rodriguez to death, dragged Teresa Rodriguez to the bedroom where they suffocated and stabbed her to death, then lured Odanis Rodriguez from her bedroom and stabbed her without killing her. In upholding the "avoid arrest" aggravator as to Teresa's murder, this Court held that the attempted murder of Odanis was properly considered in support of the factor "since it was relevant to the defendants' intent during the same criminal episode." Id. at 894.

As noted, it would have been impossible for the State to establish all of these aggravating factors, and put the crime into context, without showing what happened to Sayeh. Were this Court to find, however, that the trial court erred in admitting some or all of the evidence relating to Sayeh's involvement and injuries, Appellant's sentence should nevertheless be affirmed. Other permissible evidence established the aggravating factors beyond a reasonable doubt.[4] In light of the unavailing evidence in mitigation, there is no reasonable possibility that the recommendation or the ultimate sentence would have been different absent the erroneous evidence relating to Sayeh. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020

[4] Appellant does not even challenge the trial court's finding of the "prior violent felony," CCP or HAC aggravating factors. As discussed in Issue IV, the record supports the "avoid arrest" factor.

(1988); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S. Ct. 955, 117 L. Ed. 2d 122 (1992). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Sara Rivazfar.

ISSUE III

WHETHER APPELLANT'S CHALLENGES TO THE AGGRAVATING FACTOR INSTRUCTIONS WERE PRESERVED FOR REVIEW AND WHETHER THE INSTRUCTIONS WERE, IN FACT, CONSTITUTIONAL (Restated).

A. CCP

Prior to trial, Appellant challenged the constitutionality of the CCP aggravator, and the instruction found wanting in Jackson v. State, 648 So. 2d 85 (Fla. 1994). (R 104-22). At the hearing on the motion, defense counsel made the following argument:

> There is a motion and attached memorandum dealing with the issue on the cold, calculated, and premeditated aggravator. And I'll add to the motion set forth in the motion. And the Court is certainly aware that there has been considerable recent litigation in regard to this particular aggravator.
>
> At one point there was an amended jury instruction. And I think that we would be proceeding now on an amended jury instruction that attempted to provide some greater degree in certainty by defining the terms cold, calculated, and premeditated.
>
> And I suggest to the Court that the effort to do that has fallen short of constitutional muster. But even if the Court should allow or determine that this particular aggravating circumstance is constitutional we urge the Court not to do that. But even if the Court feels it is constitutional I suggest to the Court there needs to be close examination of the jury instruction to try to word one which will pass constitutional muster and somehow give the jury a chance to determine what is required to narrow the class of death eligible defendants.

(R 648-49). The trial court denied the motion without comment. (R 649).

Several days later at the charge conference, the following colloquy occurred regarding the CCP instruction:

> THE COURT: The next aggravator is what; cold, calculated and premeditated?
>
> This one I also took out of the June, '94 [jury instruction book]. And this is the one that deals with the calm and cool reflection. And defines cold meaning the murder was a product of calm, cool reflection. And defines calculated, defines premeditated. And the pretense of moral or legal justification.
>
> [DEFENSE COUNSEL]: Judge, we have another instruction. And we would like to instruct the jury -- and this is requested instruction No. 3.[5]
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: More or less the fact that the premeditation, the premeditation over and above the normal premeditation for a person convicted of first degree murder. And it is a heightened premeditation. And I think that, at least in some respects maintains the constitutionality of it.
>
> THE COURT: The new standard instruction says, quote, premeditated, unquote, means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder.
>
> [DEFENSE COUNSEL]: That's what I wanted -- is that the '94?

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[5] Proposed instruction #3 related to nonstatutory mitigators. (R 462-64). It did not relate in any way to the CCP instruction.

THE COURT: Yes.

(T 1022-23) (emphasis added).

On appeal, Appellant claims that the CCP instruction given in his case was fundamentally erroneous because the trial court failed to define premeditation although it defined heightened premeditation. (Initial brief at 46-50). This Court has consistently held, however, that challenges to the constitutionality of this aggravating factor instruction are procedurally barred absent a specific objection or a proposed alternative instruction. E.g., Archer v. State, 673 So. 2d 17, 19 (Fla. 1996). As the record reveals, not only did defense counsel abandon his previous objection and accept the amended instruction, but his previous objection did not include the argument made on appeal. Thus, Appellant has failed to preserve this issue for review. Id.

Implicitly conceding as much, Appellant claims fundamental error. In Archer, the defendant claimed that the trial court committed fundamental error by failing to instruct the resentencing jury on reasonable doubt. This Court rejected Archer's claim, finding that the standard instructions appropriately held the state to its burden of proof, and finding no requirement that the jury be given a definition of the term "reasonable doubt." Id. at 20.

As in Archer, the trial court's failure to define

"premeditation" in this resentencing proceeding did not constitute fundamental error. The jury was instructed that the CCP aggravator required more premeditation than that for a premeditated murder conviction. Appellant having been convicted of first-degree murder, the jury knew that the fact of conviction was not enough, by itself, to support the factor; more was required. Thus, the failure to define premeditation does not mandate reversal.

Were this Court to find, however, that the trial court erred, perhaps fundamentally so, this aggravating factor should nevertheless be upheld. "[T]he record supports a finding that, beyond a reasonable doubt, the murder could only have been cold, calculated, and premeditated without any pretense of moral or legal justification even if the proper instruction had been given." Id. at 19. Appellant drove to the Rivazfar's home in Pensacola with a blanket, tape, and a knife. In the early morning hours, he kidnaped Sara and Sayeh from their own beds, drove them to a remote area, taped Sara's hands behind her back, raped Sayeh, conversed calmly with Moes Bauldree when he came upon them, then drove them deeper into the woods, marched them into a pine thicket, told Sayeh to kneel down and "say a prayer," slit Sayeh's throat execution style in front of Sara, then slit Sara's throat, leaving them to die in the woods. Beyond any reasonable doubt, these facts support the CCP factor. Cf. Foster v. State, 654 So. 2d 112, 115 (Fla.

1995); Hall v. State, 614 So. 2d 473, 478 (Fla. 1993), cert. denied, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1994); Parker v. State, 476 So. 2d 134, 140 (Fla. 1985).

Even do they not, Appellant's sentence of death should nevertheless be affirmed. Three valid aggravating factors remain--"prior violent felony," "avoid arrest," and HAC. Given the circumstances of the murder and the unavailing nature of Appellant's mitigation, there is no reasonable possibility that the recommendation or the sentence would have been different absent the CCP aggravating factor. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S. Ct. 955, 117 L. Ed. 2d 122 (1992). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Sara Rivazfar.

B. HAC

Prior to trial, Appellant challenged the constitutionality of the HAC aggravator, and the newly amended instruction. (R 123-41). At the hearing on the motion, defense counsel argued:

> I suggest to the Court that it is not going to be possible to sufficiently define the terms so that this aggravator will ever be constitutional. But even if there is a hope in the future that it will happen it has not been done yet. And this Court should declare the present aggravator unconstitutional.

(R 650). The trial court denied the motion without comment. (R

650).

Later, at the charge conference, defense counsel did not object to the language of the instruction, but merely requested that the following language be added to the instruction: "You are instructed that acts committed after the death of the victim are not relevant in considering whether the homicide was "especially heinous, atrocious or cruel" and that premeditation does not make a killing especially heinous, atrocious or cruel." (R 461; T 1018-22). The trial court denied the special instruction and asked if there were any other special instructions requested for the HAC factor. (T 1022). Defense counsel responded, "Judge, you know we requested a standard instruction and that's the law." (T 1022).

In this appeal, Appellant acknowledges that defense counsel ultimately requested the standard instruction, but claims that this Court should nevertheless address the merits of this issue "in the interests of justice." (Initial brief at 56). Moreover, Appellant acknowledges that this Court has previously rejected his vagueness argument to the amended instruction; yet, he urges this Court to reconsider. (Id.). In Whitton v. State, 649 So. 2d 861, 867 n.9 (Fla. 1994), cert. denied, 116 S. Ct. 106, 133 L. Ed. 2d 59 (1995), this Court reaffirmed the constitutionality of the amended HAC instruction and rejected Whitton's request to reconsider. As in Whitton, Appellant has not presented an adequate reason for this

Court to recede from its prior decisions.

In addition, Appellant claims that the trial court fundamentally erred by orally substituting "or" for "and" in the last sentence of the instruction. (Initial brief at 56-58). First, defense counsel did not object to the instructions as read, thereby precluding review of this issue. See Archer v. State, 673 So. 2d 17, 19 (Fla. 1996). Second, the jury was provided an accurate copy of the written instructions. Any error in the trial court's oral instruction (or the court reporter's transcription of the oral instructions) was cured by the written instructions. See Rhodes v. State, 638 So. 2d 920, 926 (Fla. 1994), cert. denied, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1995); Parker v. Dugger, 537 So. 2d 969, 970-71 (Fla. 1988). Therefore, Appellant's argument has no merit.

Were this Court to find, however, that the HAC instruction in toto, or as read, was erroneous, this aggravating factor should nevertheless be affirmed. This murder, under any definition of the terms, was heinous, atrocious, or cruel beyond a reasonable doubt. Sara Rivazfar was kidnaped from her bed, driven to a remote location, tied up, made a witness to her sister's sexual battery, driven deeper into the woods, taken into a pine thicket, made a witness to her sister's attempted murder, then nearly decapitated with a knife. Beyond any reasonable doubt, these facts support the

HAC aggravating factor. Preston v. State, 607 So. 2d 404, 409-10 (Fla. 1992), cert. denied, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993); Rivera v. State, 561 So. 2d 536, 540 (Fla. 1990).

Were it not properly found, however, Appellant's sentence of death should still be affirmed. Three valid aggravating factors remain--"prior violent felony," "avoid arrest," and CCP. Given the circumstances of the murder and the unavailing nature of Appellant's mitigation, there is no reasonable possibility that the recommendation or the sentence would have been different absent the HAC aggravating factor. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S. Ct. 955, 117 L. Ed. 2d 122 (1992). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Sara Rivazfar.

C. Prior violent felony

Appellant made no pretrial challenge to the "prior violent felony" aggravator or instruction. At the charge conference, defense counsel merely requested a doubling instruction so that the jury would not consider Appellant's four prior convictions as separate aggravating factors.[6] Based on counsel's proposed

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[6] Defense counsel's requested instruction, however, read as follows:

> If you find beyond a reasonable doubt that the aggravating circumstance that the murder was committed during kidnaping,

instruction, the trial court agreed not to instruct on the "felony murder" aggravator, thereby preventing the need for a doubling instruction. (T 1008-17, 1020).

At the beginning of the following day's proceedings, defense counsel renewed his request for a doubling instruction as it related to the "prior violent felony" instruction and objected to its exclusion. (T 1058-59). With the exception of that objection, defense counsel indicated that he was otherwise satisfied with the instructions as a whole. (T 1059, 1064).

In this appeal, Appellant claims error in the trial court's refusal to give a doubling instruction because the "prior violent felony" instruction, as given, failed to limit "the jury's discretion as to separately finding and weighing each of the four crimes as four heavy aggravating circumstances." (Initial brief at 59). Appellant's requested doubling instruction, however, related to the "felony murder" aggravating factor, which was not instructed on. Moreover, the standard instructions--as read and as written--clearly indicated that the "prior violent felony" aggravator was

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> attempted murder or sexual battery, this relates to a single aspect of the evidence. You may only consider this aspect as a single aggravating circumstance.
>
> You are instructed that you are not to find two aggravating circumstances supported by the same factual matter or matters.

(R 460).

one factor which was proven by four prior felonies. There was no need, and certainly no requirement, that the trial court give a doubling instruction. Such an instruction typically cautions the jury not to find two separate factors based on the same facts. See Castro v. State, 597 So. 2d 259, 261 (Fla. 1992). Thus, since the standard instructions accurately and adequately limited the "prior violent felony" aggravator to one factor based on four prior felonies, the trial court properly refused Appellant's doubling instruction.

Next, Appellant complains that the "prior violent felony" instruction as given improperly commented on the evidence, invaded the province of the jury, and relieved the state of its burden because it told the jury that Appellant's convictions for sexual battery, robbery, kidnaping, and attempted first-degree murder were capital or violent felonies. (Initial brief at 61-63). However, Appellant did not make this argument to the trial court; thus, he has not preserved it for review. Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Regardless, it is without merit. The instruction does not tell the jury that the factor has been proven, it merely lists the offenses already established by the state which are legally considered a capital or a violent felony. The jury must still determine whether the State has proven that Appellant was

previously convicted of these offenses. Thus, the instruction is not erroneous, much less fundamentally so.

Were this Court to find the instruction wanting, however, Appellant's sentence should nevertheless be upheld. Three valid aggravating factors remain--"avoid arrest," CCP, and HAC. Given the circumstances of the murder and the unavailing nature of Appellant's mitigation, there is no reasonable possibility that the recommendation or the sentence would have been different absent the "prior violent felony" aggravating factor. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S. Ct. 955, 117 L. Ed. 2d 122 (1992). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Sara Rivazfar.

D. Avoid arrest

Prior to trial, Appellant challenged the constitutionality of the "avoid arrest" aggravating factor on several grounds, including vagueness. (R 177-87). Regarding the standard instruction, Appellant alleged that it "merely tracks the unconstitutionally vague language of the statute, and is therefore itself unconstitutional." (R 187). No further argument was made at the hearing on the motion. (R 652). The trial court denied the motion without comment. (R 652). At the charge conference, the trial

court asked defense counsel if he had any complaints about the instruction. (T 1018). Defense counsel responded, "The proposed instructions. Judge, I don't think that I have a problem." (T 1018).

In this appeal, Appellant claims that the "avoid arrest" instruction "merely mirrors the statute and provides no guidance." Specifically, he complains that

> the instruction fails to tell jurors that the aggravating circumstance can be applied only where the sole or dominant motive for the murder was elimination of the witness; that strong proof beyond a reasonable doubt also must be inconsistent with any other reasonable hypothesis; and that it cannot be inferred from speculation, proof of a plan to commit, or the actual commission of, another felony.

(Initial brief at 65). He concedes that he failed to object to this instruction at the charge conference, and that this Court has previously rejected this claim. (Id. at 66). He contends that this Court's decision in Jackson v. State, 648 So. 2d 85 (Fla. 1994), compels reconsideration "in the interests of justice." (Initial brief at 66). However, he does not explain the compelling justification for reconsideration beyond his reference to Jackson. In Jackson, this Court held that the terms of the CCP instruction were vague. Thus, it defined the terms based on interpretation of them in case law. Here, as in Whitton v. State, 649 So. 2d 861, 864 n.10 (Fla. 1994), cert. denied, 116 S. Ct. 106, 133 L. Ed. 2d

59 (1995), the "avoid arrest" aggravator, unlike the CCP aggravator "does not contain terms so vague as to leave the jury without sufficient guidance for determining the absence or presence of the factor." Thus, as Espinosa v. Florida, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), did not require a limiting instruction in order to make the "avoid arrest" aggravator constitutionally sound, neither does Jackson. Appellant has not established a compelling reason to reconsider Whitton, this Court should affirm his sentence of death.

Were this Court to find, however, that the "avoid arrest" instruction was erroneous, this aggravating factor should nevertheless be affirmed. Beyond a reasonable doubt, this murder, under any definition of the terms, was committed to eliminate a witness to avoid or prevent a lawful arrest. See Issue II, supra. Were the evidence insufficient, however, three valid aggravating factors remain--"prior violent felony," CCP, and HAC. Given the circumstances of the murder and the unavailing nature of Appellant's mitigation, there is no reasonable possibility that the recommendation or the sentence would have been different absent the "avoid arrest" aggravating factor. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S. Ct. 955, 117 L. Ed. 2d 122 (1992). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Sara

Rivazfar.

E. Doubling instruction for CCP and "avoid arrest"

Appellant claims that the trial court fundamentally erred by not *sua sponte* giving a doubling instruction relating to the CCP and "avoid arrest" aggravators. (Initial brief at 67). Since Appellant neither requested a doubling instruction nor challenged the doubling of these factors in the trial court, he has failed to preserve this issue for review. See Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990), cert. denied, 500 U.S. 938 (1991). Regardless, as explained in Issue IV, infra, these two aggravating factors were based on different facts. Thus, no doubling instruction was needed or required.

F. Cumulative error

Appellant claims that the cumulative effect of all of the erroneous instructions in this case fundamentally deprived him of a fair trial. (Initial brief at 67-68). The State submits, however, that no erroneous instructions were given. Even if there were, they were harmless beyond a reasonable doubt individually and cumulatively. Therefore, Appellant's sentence of death should be affirmed.

ISSUE IV

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE "AVOID ARREST" AGGRAVATING FACTOR; WHETHER THE "AVOID ARREST" AND CCP FACTORS WERE IMPROPERLY DOUBLED; AND WHETHER THE TRIAL COURT SUFFICIENTLY ARTICULATED APPELLANT'S MITIGATING CIRCUMSTANCES IN ITS SENTENCING ORDER (Restated).

A. The "avoid arrest" aggravating factor

In its written sentencing order, the trial court noted that this aggravating factor can only be sustained when the victim is not a law enforcement officer where the dominant or only motive for the murder was to eliminate a witness or to avoid arrest. (R 504). It then made the following findings:

> In the instant case, the evidence presented to the new jury was that the victims knew the Defendant as a friend of their mother, could identify him by his name, Ray. The evidence clearly established that the Defendant kidnaped both girls from their home, transported them to a remote, rural area of Santa Rosa County, sexually battered Sayeh Rivazfar, attempted to kill her and that Sara Rivazfar while bound by tape witnessed the Defendant's attempt to kill her sister. The Defendant slashed both of the girls [sic] throats several times in an attempt to eliminate Sayeh Rivazfar as a witness to the kidnaping and sexual battery and Sara Rivazfar as a witness to the kidnaping, sexual battery and attempted murder of her sister. The girls [sic] throats were not slashed in the same location where the sexual battery took place, but they were walked into a thick pine forest where the murder and attempted murder took place and where the Defendant left them for dead. All of these circumstances taken

> together clearly establish that the motive of the Defendant was witness elimination for the purpose of avoiding or preventing his lawful arrest. Preston v. State, 607 So. 2d 404, 409 (Fla. 1992).

(R 504-05).

In this appeal, Appellant claims that the trial court "invoked an erroneous standard of law and misapplied the facts to the law." (Initial brief at 70). Specifically, Appellant takes issue with the trial court's statement that "[e]vidence that a victim knew the Defendant and could later identify him is sufficient to prove this aggravating factor." (Id.). Such evidence alone, however, was not relied upon by the trial court to support this aggravating factor. Rather, the fact that Sara and Sayeh knew Appellant and could identify him was only one fact upon which the trial court based its decision. The other facts, as detailed above, included each girl's witness to an antecedent crime,[7] their nonconsensual presence in Appellant's company, and their transportation to an even more remote wooded area after the initial sexual battery, where their throats were slit, and they were left for dead.

Appellant claims, however, that these facts did not prove beyond a reasonable doubt that his dominant or only motive for Sara's murder was to eliminate her as a witness or to avoid arrest.

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[7] Sara witnessed not only the sexual battery of Sayeh, but also her attempted murder.

Rather, Appellant claims that the trial court's findings "are both conclusory and speculative." (Initial brief at 71). He states that his motive for these crimes are "a mystery," and that there is "no evidence as to his motivation." (Id.) Then, he presents what he considers to be "reasonable hypotheses consistent with other motives for the killing" which the trial court failed to consider. (Id. at 72). These include Appellant's desire to seek vengeance against their mother, shear cruelty, and "some other unexplained reason." (Id. at 72-73).

These hypotheses are not "reasonable." Appellant testified during the trial that neither Sara, nor Sayeh, nor their mother had ever done anything to Appellant: "They had never did anything to me. Pat had never did anything to me. We was close; there was no problems so there was no reason for no, there was no motive." (T 908). "Shear cruelty," while obviously applicable to the manner of the murder, was hardly a "reasonable" motive for the murder. Similarly, "some other unexplained reason" could not possibly constitute a "reasonable hypothesis" in this case given the fact that Appellant was not in a drug-induced state and had committed antecedent crimes against victims who could identify him.[8]

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[8] Appellant's citation to Knowles v. State, 632 So. 2d 62, 66 (Fla. 1993), is misplaced since Knowles had been drinking and huffing Toluene, and had committed no antecedent crime, immediately prior to the murder of Carrie Woods. There was, in fact, no distinguishable motive for the murder in that case. Here, however,

Appellant attempted to execute these two little girls, but by the grace of God he succeeded in killing only Sara. There was no other reason, but to eliminate her (them) as a witness, for Appellant to drive these children to a remote area, bind Sara's hands, march them into a pine thicket in the middle of nowhere, order Sayeh to kneel down and say her prayers, slit her throat in front of Sara, slit Sara's throat, and then leave them to rot in the forest. Hall v. State, 614 So. 2d 473, 477-78 (Fla. 1993) (pregnant woman kidnaped from parking lot, taken to remote location, raped, beaten, and stabbed to death), cert. denied, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1994); Preston v. State, 607 So. 2d 404, 409 (Fla. 1992) (convenience store clerk robbed, then taken to remote location and stabbed to death), cert. denied, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993); Swafford v. State, 533 So. 2d 270, 276 (Fla. 1988) (gas station attendant kidnaped, taken to remote location, raped, then shot repeatedly); Correll v. State, 523 So. 2d 562, 567-68 (Fla. 1988) (given cordial relationship between victim and defendant, logical inference is that defendant killed victim to eliminate her as a witness to other murders), cert.

Appellant kidnaped the two girls and raped Sayeh Rivazfar. They knew him, and could identify him, so he attempted to kill them, and did kill Sara, to eliminate them as witnesses.

denied, 488 U.S. 871 (1989).[9]

Were this Court to find, however, that this aggravating factor was not supported by the record, Appellant's sentence should nevertheless be affirmed. There remain three aggravating factors, which Appellant does not challenge, and very little in mitigation. Under the circumstances of this case, there is no reasonable possibility that the recommendation or the ultimate sentence would have been different absent the "avoid arrest" aggravating factor. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S. Ct. 955, 117 L. Ed. 2d 122 (1992). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Sara Rivazfar.

B. Doubling of "avoid arrest" and CCP

In this appeal, Appellant claims that the trial court improperly merged the "avoid arrest" and CCP aggravating factors.

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[9] Appellant's reliance upon Jackson v. State, 599 So. 2d 103 (Fla.), cert. denied, 506 U.S. 1004 (1992), and Dailey v. State, 594 So. 2d 254 (Fla. 1991), are unavailing. After Jackson shot the adult victims, he did not shoot the children, but set fire to the car, which killed the children by smoke inhalation. Unlike in the present case, there was no evidence--direct or circumstantial--that Jackson killed the children to eliminate them as witnesses. Similarly, in Dailey, there was no proven antecedent crime to which Daily needed to eliminate a witness. The victim voluntarily left the bar with Dailey and his codefendant, and there was insufficient evidence to prove a sexual battery. Thus, there was insufficient circumstantial evidence to support the "avoid arrest" aggravator.

(Initial brief at 75-77). However, he neither requested a doubling instruction nor challenged the doubling of these factors in the trial court. Thus, he has failed to preserve this issue for review. See Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990), cert. denied, 500 U.S. 938 (1991).

Regardless, there was no error. The "avoid arrest" aggravating factor focuses on the motive for the murder of Sara Rivazfar. The CCP factor, on the other hand, focuses on the manner in which she was killed. See Stein v. State, 632 So. 2d 1361, 1366 (Fla. 1994) (rejecting doubling claim because CCP and "avoid arrest" focus on different aspects of crime), cert. denied, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1995). As discussed in Issue II, Sara Rivazfar was killed to eliminate her as a witness to the kidnaping, sexual battery, and attempted murder of Sayeh. The facts also demonstrate that her execution was carried out in a cold, calculated and premeditated manner. Thus, there was no improper doubling of aggravating circumstances in the instant case. See Stein, 632 So. 2d at 1366; Hodges v. State, 595 So. 2d 929, 934 (Fla. 1992) (finding no improper doubling of "hinder law enforcement" and CCP aggravators), cert. granted, 113 S. Ct. 33, 121 L. Ed. 2d 6 (1993), aff'd on remand, 619 So. 2d 272 (Fla. 1993); Fotopoulos v. State, 608 So. 2d 784, 793 (Fla. 1992) (finding no improper doubling of "avoid arrest" and CCP

aggravators), cert. denied, 113 S. Ct. 2377, 124 L. Ed. 2d 282 (1993); cf. Larzelere v. State, 21 Fla. L. Weekly S147 (Fla. March 28, 1996) (finding no improper doubling of "pecuniary gain" and CCP aggravators).

Were this Court to find, however, that the trial court should have merged these two factors, Appellant's sentence should nevertheless be affirmed. Merging these two factors still leaves three weighty aggravators. In light of the facts of this case, and the minimal mitigating evidence, there is no reasonable possibility that the sentence would have been different had the "avoid arrest" and CCP factors been considered as one. Armstrong v. State, 642 So. 2d 730, 739 (Fla. 1994), cert. denied, 115 S. Ct. 1799, 131 L. Ed. 2d 726 (1995); Durocher v. State, 596 So. 2d 997, 1001 (Fla. 1992), cert. denied, 114 So. 2d 23, 125 L. Ed. 2d 774 (1993). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Sara Rivazfar.

C. Articulating mitigating circumstances

Appellant claims that the trial court's sentencing order fails to establish clearly whether the court found, and if so how much weight it accorded to, certain mitigating factors, in violation of Campbell v. State, 571 So. 2d 415 (Fla. 1990). In its written sentencing order, the trial court enumerated and discussed three statutory mitigating factors. It specifically rejected the two

mental mitigators. As for "age," the trial court stated, "The Defendant was approximately 32 years of age at the time he murdered Sara Rivazfar and accordingly, this mitigating circumstance is entitled to little if any weight." (R 509).

It then listed the following twenty nonstatutory mitigating factors suggested by Appellant:

> 1. At a very early age Warfield Raymond Wike exhibited signs of mental and/or emotional disturbance that went untreated.
>
> 2. The Defendant's mental and/or emotional disturbances were caused in part by the emotional instability of his family members during his early developmental stages.
>
> 3. The Defendant never felt apart of his family and was deprived of the family nurturing necessary to properly develop.
>
> 4. The Defendant had a close, personal and family relationship with his father.
>
> 5. The sudden death of the Defendant's father in 1966 when the Defendant was ten years of age had an adverse emotional and mental impact on the Defendant.
>
> 6. The mental and emotional disturbance that developed when his father died continued through the date of his crime for which he is to be sentenced.
>
> 7. The Defendant has lead [sic] a troubled and emotionally unstable life.
>
> 8. The Defendant has a history of alcohol and drug abuse.

9. The Defendant's use and/or abuse of drugs and alcohol was a result of his mental and/or emotional disturbances.

10. The Defendant was under the influence of drugs and/or alcohol when the crime for which he is to be sentenced was committed.

11. The Defendant suffered a deprived childhood.

12. Prior to his arrest the Defendant maintained gainful employment.

13. The Defendant is presently serving a life sentence without possibility of parole for twenty five (25) years for the sexual battery of Sayeh Rivazfar.

14. The Court has the authority to sentence the Defendant in this case for the murder of Sara Rivazfar to a consecutive sentence or another life sentence without possibility of parole for another twenty five (25) years.

15. The Defendant has adapted well to prison life.

16. The Defendant has received only one disciplinary report while in prison.

17. The Defendant can make a satisfactory adjustment to prison life.

18. The Defendant is not likely to be dangerous in the future.

19. The Defendant suffers from a serious and deteriorating physical condition.

20. The Defendant has steadfastly maintained his innocence.

(R 509-10).

Regarding factors one through five and eleven,[10] the trial court stated that

> [t]hese unfortunate events of the Defendant's early years . . . do not appear to have followed the Defendant through his adult life. He apparently was able to adjust to these circumstances and there is not evidence of any long term affect of his traumatic childhood or that said events contributed in any way to the murder of Sara Rivazfar. Thus, while the Court finds that the Defendant did in fact have a traumatic childhood for the reasons set forth in numbers 1 through 5 and 11 above, and that said reasons do support mitigating circumstances, the Court gave them little weight in the weighing process.

(R 510-11). Regarding factors six and seven, which relate to Appellant's continued mental and emotional problems through adulthood, the trial court stated that

> [t]here is no evidence that any mental and/or emotional disturbance developed by the Defendant as a result of his father's death continued through the date of this crime for which Defendant is to be sentenced or that the Defendant has led a troubled and emotionally unstable life in recent years. Although the Court recognizes these issues to be mitigating circumstances when established, the Court does not believe that they have been established and places little, if any, weight on these mitigators.

(R 511) (emphasis added).

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[10] Appellant does not challenge these findings, but they are instructive regarding the rejection of factors six and seven.

Finally, regarding factors fifteen through eighteen, the trial court stated as follows:

> The Court does find that the Defendant has adapted well to prison life and that he can most likely continue to make a satisfactory adjustment to the life. However, whether or not he is likely to be dangerous in the future is speculative at best. The Defendant's actions in the Courtroom striking out at his Public Defender, although certainly not considered by this Court to be an aggravating factor, seriously places at issue the Defendant's ability to satisfactory [sic] adjust to prison life as well as his potential for being dangerous in the future. In either case, the underlying rationale and opinion expressed by Professor Michael L. Radelet regarding these issues, is entitled to little or no weight since it is based upon statistical speculation.

(R 512).

These findings more than adequately comply with Campbell. The trial court expressly evaluated each mitigating factor, determined whether it was supported by the evidence, and determined its weight in the balancing process. It reluctantly found age and factors fifteen through eighteen, but gave them little weight. Conversely, it did not find factors six and seven. Regardless, it properly considered and discussed Appellant's mitigating evidence. Cf. Sims v. State, 21 Fla. L. Weekly S320, 323 (Fla. July 18, 1996); Johnson v. State, 608 So. 2d 4, 11-13 (Fla. 1992), cert. denied, 113 S. Ct. 2366, 124 L. Ed. 2d 273 (1993). Therefore, this Court should

affirm Appellant's sentence of death for the first-degree murder of Sara Rivazfar.

ISSUE ON CROSS-APPEAL

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PROHIBITING THE STATE FROM PRESENTING VICTIM IMPACT EVIDENCE TO THE JURY.

Prior to trial, defense counsel filed an Amended Motion to Exclude Evidence or Argument Designed to Create Sympathy for the Deceased. In the motion, counsel alleged that victim impact evidence was prohibited in any phase of a capital trial for the following reasons: (1) such evidence does not relate to any aggravating factor, or to the defendant's character or record; (2) Section 921.143, Fla. Stat., does not apply to capital cases; (3) Payne v. Tennessee, 501 U.S. 808 (1991), relates only to federal law, and pursuant to Jones v. State, 569 So. 2d 1234 (Fla. 1990), cert. denied, 114 S. Ct. 112 (1991), state law prohibits such evidence; (4) Taylor v. State, 583 So. 2d 323 (Fla. 1991), cert. denied, 115 S. Ct. 518, 130 L. Ed. 2d 424 (1992), makes Payne inapplicable; (5) Section 921.141(7), Fla. Stat., is unconstitutional under state and federal law; and (6) "[t]he prejudice from this evidence would virtually always outweigh its probative value, thus violating Florida Statute, 90.403." (R 212-30).

At the hearing on the motion, which was held a month before the trial, defense counsel modified the grounds of the motion:

First we argue that the Florida statutatory

> [sic] scheme on victim impact evidence goes far beyond what [Payne] purports to allow. . . . And second, even if it is admissible that there has to be some limitation by the Court on what the State's witnesses can be elicited to say. Simply giving the families of a victim an opportunity to make an emotional appeal to the jury on the stand cannot be relevant or admissible. There has to be an indication that the evidence is limited to something showing that the particular victim was unique as a human being, and that there was a loss to the community; not to the individual family member. The statute says a loss to the community.

(R 654).

Citing to Burns v. State, 609 So. 2d 600 (Fla. 1992), and Hodges v. State, 595 So. 2d 929 (Fla. 1992), cert. granted, 113 S. Ct. 33, 121 L. Ed. 2d 6 (1993), aff'd on remand, 619 So. 2d 272 (Fla. 1993), the State argued that the statute and the case law specifically limit the type of evidence that it can introduce, and "recognizing that limitation we'll provide only that evidence which we believe is relevant and legal." (R 654-55). When asked by the court if those cases discussed the prejudicial nature of such evidence, the State offered Hodges and remarked that the victim impact evidence presented in the prior resentencing was very brief. (R 655-56). The trial court took the motion under advisement, indicating that it wanted to read the briefs from Appellant's last appeal in which the admission of victim-impact was challenged. (R 656).

Moments prior to the jury being sworn in, the trial court made the following comment to one of the prosecutors:

> Yesterday, Mr. Murray, I heard you advise the jury that you were planning on calling, I believe the victims' parents as witnesses. And I don't, really to be honest with you I don't recall what they testified to in the last penalty phase proceeding, but if it is victim impact I have ruled that that is not admissible to the jury.

(R 370-71). When the prosecutor remarked that the court had not ruled on the issue, the court indicated that it had issued an order the previous week granting the defense motion. (R 371). Obviously unaware of the previous ruling, the prosecutor pleaded for reconsideration of the ruling, citing to numerous cases and this Court's consideration of the issue in the previous appeal,[11] and referring the court to a memorandum of law on the subject written by Ray Marky of the Second Judicial Circuit. (R 371-73). The trial court made the following comments:

> I am finding and I've given this great thought. I am not declaring the statute to be unconstitutional, but I am also weighing the fact of the issue before the court is an appropriate sentence under the circumstances. I think that one of the factors that goes into that is whether or not the prejudicial effect of any evidence outweighs whatever probative

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[11] Appellant challenged the admission of victim-impact evidence during his first resentencing. Wike v. State, 648 So. 2d 683, 684 n.2 (Fla. 1994). Although this Court made no express ruling on it, the prosecutor argued that this Court implicitly found the issue without merit. (R 371-72).

value there is.

> And I don't believe that the victim impact evidence in this case, the nature of the case and the circumstances of the case as it exists outweighs the prejudicial value. Whatever probative value that would be obtained from the victim impact evidence is more prejudicial than it is probative.
>
> And that's why I decided not to allow it.

(R 373). The State then asked the trial court for leave to file an appeal on the issue, believing that it was "a clear departure from the constitutional rights of the victim to be heard . . . ." (374). The trial court clarified that it was excluding such evidence only before the jury, and would consider such evidence itself in the final sentencing:

> Well, I believe the victim still has input to be heard. And the victim can be heard and presented to the Court at the sentencing hearing. And the Court can consider the victim's impact. And the Court can set aside the sympathy and emotional testimony that a particular victim in this case, the victim's parents may have to offer. And I am not sure that the jury can do that.

(R 374). Again, the prosecutor pleaded with the court for reconsideration, but the trial court was unpersuaded. (R 375). It immediately swore in the jury, precluding the State from seeking immediate review of the ruling. (R 376-77).

At the end of its case-in-chief, the State proffered to the court the transcripts of those witnesses at the previous

resentencing who testified to victim-impact. (T 705-06). Sara's mother, Patricia Rivazfar, had testified that Sara's death made her life a "[l]iving hell." (State exh. __, at 243). Sara was "[k]ind, sweet and giving, [a] very sweet girl." (Id.). She was also "a very lovable child." (Id.). Sara and Sayeh had a very close relationship. Sara kept Sayeh and Arash happy. (Id. at 244). Sara's father, Ahmed Rivazfar, had testified that Sara was "a very sweet little girl. Very lovable." (Id. at 245). He did not know anyone who did not like Sara. Sayeh has had a very difficult time since Sara's death. Their birthdays were only one week apart. (Id. at 245-46). Arash is still struggling with it too. He has a lot of anger and still goes to counseling. (Id. at 246). He has also had a lot of problems in school. (Id.).

Although the jury unanimously recommended a sentence of death despite the lack of victim-impact evidence, the trial court nevertheless abused its discretion in excluding such evidence from the jury.[12] In section 921.141(1), the legislature set forth the

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[12] Recently, the Florida Legislature amended section 924.37(2), Florida Statutes, to read was follows: "A cross-appeal by the state is not jurisdictional. When the state cross-appeals from a ruling on a question of law adverse to the state, the appellate court shall decide the question if it is reasonably capable of repetition in any proceeding." Fla. Laws ch. 96-248, § 8 (emphasis added). This amendment became effective on July 1, 1996. Since this issue is "reasonably capable of repetition in any proceeding," this Court should address this issue even if it ultimately affirms Appellant's sentence of death.

following standard for the admission of evidence in the penalty phase:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

§ 921.141(1), Fla. Stat. (1993) (emphasis added).

This section has been interpreted consistently by this Court to allow the jury to hear evidence "which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence," Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986), cert. denied, 45 U.S. 1074 (1987), or which will allow the sentencer "to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977), sentence vacated on other grounds, 823 F.2d 1439 (11th Cir. 1987). In Teffeteller, this Court observed that it could not "expect jurors impaneled for capital sentencing

proceedings to make wise and reasonable decisions in a vacuum." 495 So. 2d at 744.

In 1991, the United States Supreme Court receded from previous decisions which prohibited victim impact evidence:

> We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, ___, 115 L. Ed. 2d 720, 736 (1991) (emphasis added). The Court explained that sentencing a criminal defendant involves factors which relate both to the subjective guilt of the defendant and to the harm caused by his acts:

> We have held that a State cannot preclude the sentencer from considering "any relevant mitigating evidence" that the defendant proffers in support of a sentence less than death. Thus we have, as the Court observed in Booth, required that the capital defendant be treated as a "'uniquely individual human bein[g.]'" But it was never held or even suggested in any of our cases preceding Booth that the defendant, entitled as he was to individualized consideration, was to receive that consideration wholly apart from the crime which he had committed. The language quoted from Woodson in the Booth opinion was not intended to describe a class of evidence that

> *could not* be received, but a class of evidence which *must* be received. Any doubt on the matter is dispelled by comparing the language in Woodson with the language from Gregg v. Georgia, quoted above, which was handed down the same day as Woodson. This misreading of precedent in Booth has, we think, unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering 'a quick glimpse of the life' which a defendant 'chose to extinguish,' or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide.

Id. at 822 (citations omitted; underscoring added).

The Court ruled that evidence of the specific harm caused by a defendant presented in the form of victim impact evidence could be admitted by state courts, subject to evidentiary rulings:

> "Within the constitutional limitations defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder should be punished." The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the Booth Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly

> prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.

Id. at 824-25 (citations omitted; emphasis added).

The Court concluded that a jury should hear all relevant evidence before sentencing a defendant for first-degree murder:

> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." By turning the victim into a "faceless stranger at the penalty phase of a capital trial," *Booth* deprives the State of the full moral force of its evidence and may prevent **the jury** from having before it all the information necessary to determine the proper punishment for a first-degree murder.

Id. (citations omitted; emphasis added).

In response to Payne, the Florida Legislature amended section 921.141 in 1992 as follows:

> (7) Victim impact evidence - Once the prosecutor has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence.

> Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

Likewise, in Hodges v. State, 595 So. 2d 929 (Fla. 1992), cert. granted, 113 S. Ct. 33, 121 L. Ed. 2d 6 (1993), aff'd on remand, 619 So. 2d 272 (Fla. 1993), this Court recognized the admissibility of victim impact evidence:

> Hodges also argues that allowing testimony about the victim's prosecuting him for indecent exposure and his attempts to dissuade her from doing so, the victim's sister's breaking down in tears while testifying, and the prosecutor's closing argument violated Booth v. Maryland, 482 U.S. 496 . . . (1987), and South Carolina v. Gathers, 490 U.S. 805 . . . (1989). Recently, however, the United States Supreme Court held that:
>
> > if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.
>
> Payne v. Tennessee . . . 115 L. Ed. 2d 720 (1991). In so holding the Court receded from

> the holdings in Booth and Gathers that "evidence and argument relating to the victim and the impact of the victim's death on the victim's are inadmissible at a capital sentencing hearing." Id. at 2611 n.2. The only part of Booth not overruled by Payne is "that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." Id. The comments and testimony Hodges complains about are not the type of victim impact evidence that the Court did not address, i.e., is still Booth error, in Payne. Therefore, we find no merit to Hodges' Booth claim.

Id. at 939.

More recently, this Court has upheld the victim impact statute, rejecting challenges that "the procedure for addressing victim impact evidence, as set forth in the statute, impermissibly affects the weighing of the aggravators and mitigators . . . or otherwise interferes with the constitutional rights of the defendant." Windom v. State, 656 So. 2d 432, 438 (Fla. 1995).

In effect, all of these cases hold that limited victim impact evidence is admissible before a sentencing jury, even though the evidence is highly emotional in nature. It is upon this basis, however, that the trial court prohibited all victim impact evidence from the jury in Appellant's case:

> Well, I believe the victim still has input to be heard. And the victim can be heard and presented to the Court at the sentencing hearing. And the Court can consider the victim's impact. And the Court can set aside

> the sympathy and emotional testimony that a particular victim in this case, the victim's parents may have to offer. And I am not sure that the jury can do that.

(R 374) (emphasis added).

The State acknowledges that a trial court has tremendous discretion in determining whether evidence is more prejudicial than probative. But for the trial court to decide categorically that the jury could not consider otherwise relevant testimony without becoming overly sympathetic is an abuse of discretion. As this Court held in a case involving the prejudicial effect of collateral crime evidence, "[a]ll evidence of a crime, including that regarding the murder in question, 'prejudices' the defense case. The real question is whether that prejudice is so unfair that it should be deemed unlawful." Wuornos v. State, 644 So. 2d 1000, 1007 (Fla. 1994), cert. denied, 115 S. Ct. 1705, 131 L. Ed. 2d 566 (1995). In Wuornos, the State was allowed to present evidence of Wuornos' involvement in six other murders because they were relevant to show the pattern of similarities among the murders, to establish premeditation, and to rebut Wuornos' claim that she was the one attacked first. Ultimately, this Court found that "[r]elevance clearly outweighs prejudice here; and the similar crimes evidence was fair within the requirements of the law." Id.

As in Wuornos, the victim impact evidence in this case was

relevant, and was not so prejudicial as to be unlawful. As indicated in Payne and its progeny, such evidence was relevant to counteract Appellant's mitigation by offering "a quick glimpse of the life" which Appellant "chose to extinguish," or by demonstrating the loss to the victim's family and to society which has resulted from Appellant's actions. Payne, 501 U.S. at 824. After all, just as the jury must consider Appellant as an individual, "'so too the victim is an individual whose death represents a unique loss to society and in particular to [her] family.'" Id. at 825 (citation omitted).

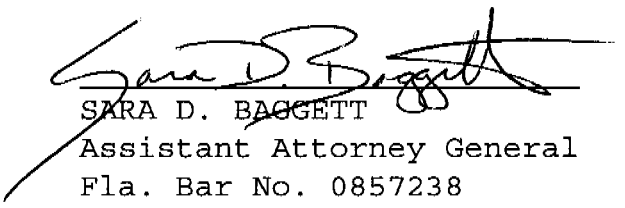
The victim impact evidence sought to be admitted in Appellant's trial was brief, and was appropriately confined within the requirements of section 921.141(7). Having consumed only six pages of the prior resentencing transcripts, such testimony could hardly have been considered a "feature" of that proceeding. Nor could it be said that such testimony was so emotional that it vitiated Appellant's prior resentencing. *A fortiori* it should not have been deemed so prejudicial as to be unlawful in this resentencing. In so finding, the trial court abused its discretion.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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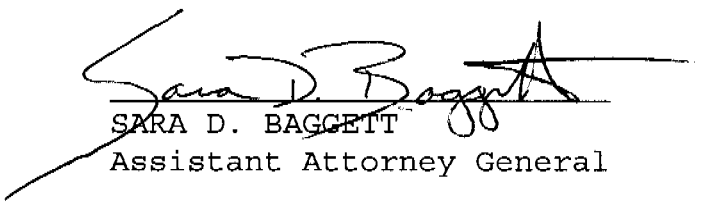
CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Chet Kaufman, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 5th day of September, 1996.



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