IN THE SUPREME COURT OF FLORIDA

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ERNEST WHITFIELD,

Appellant,

vs. CASE NO. 86,775

STATE OF FLORIDA,

Appellee.

______/

ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar I.D. No. 0134101
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

(A) GUILT:

Officer Steven Shoemaker was a patrol officer who arrived at the scene of the crime and learned one female was the victim of a stabbing and another was a sexual battery victim (R 767). The stabbing victim had shallow breathing; there were six children in the house (R 771). The victim's shorts were down around her knees (R 772). The victim was pronounced dead in his presence (R 774).

Paramedic Brett Williams described the unsuccessful efforts to revive the victim (R 784-796) . The court heard a proffer of testimony from Willie Mae Brooks (R 801-806).

Willie Mae Brooks was living with Claretha Reynolds and her five children at the time of the incident (R 819). She knew the appellant through her sister Estella Pierre (R 820) who had broken up with Whitfield. About two weeks before the murder appellant threatened to kill Claretha Reynolds, Ms. Brooks and Estella when his request for money was rejected (R 821-826). On the morning of June 19 appellant came to her bedroom window and woke her up (R 827-828). It was four in the morning and Brooks refused to let appellant inside (R 830). Whitfield woke her up a second time. The witness woke up Claretha and told her that appellant was

outside. Brooks went back to sleep and was awakened by appellant who held a knife to her neck and ordered her to pull down her clothes. Brooks asked him not to hurt the baby laying nearby (R 832-833). Appellant took her pants down and raped her; he told her that if she said anything or screamed he would return and kill her and the baby. He walked out the door to Claretha's room (R 834-835). Whitfield was still carrying the knife. Brooks heard Claretha screaming. Claretha walked out of her bedroom, lay on the bed and told Willie Mae to call the police and lock the door. She said Ernest Whitfield stabbed her. Ten minutes elapsed between the time appellant left Willie Mae's bedroom and she saw Claretha (R 836-838). Willie Mae exited the window, went to "Sister Weeks" house and called the police. She told Weeks "big girl" had been stabbed and that Ernest had raped her (Brooks). Big girl was Claretha's nickname (R 840). Willie Mae told police what happened (R 841). The knife appellant used when raping her was from the house (R 844). She identified Whitfield as her rapist and the man who stabbed Claretha (R 847). The witness stated that she did not let Whitfield in the house that night because she was afraid of him (R 864).

Carrie Weeks testified that Willie Mae knocked on her door and

said she had been raped by Ernest and asked her to call the police. Akeema, the victim's daughter, told her Ernest was stabbing and killing her mother (R 869).

Officer Robert Bell participated in Whitfield's arrest; before even getting him into the police car Whitfield said "I did it" (R 898). After Miranda warnings, appellant kept saying "I did it" (R 879). He agreed to take them to the location of the knife. Whitfield said he had thrown the knife on the roof of a house on the way to his parents' house. They drove to the house and he showed them exactly where it was (R 880). Appellant seemed very alert, did not seem to be having any problems (drugs or alcohol) and had no difficulty locating the knife (R 889-890). If Whitfield had used crack cocaine there was no visible effect of it (R 896).

Officer Dale Waugh similarly described appellant's arrest and admissions (R 897-904) as did Officer Kip Lyons (R 908-916).

Onethra Peggy LaRue, sister of Willie Mae Brooks and Estella Pierre, testified that appellant had a relationship with Estella for over a year. He came to her house about seven in the morning and admitted "I just killed big girl" (R 920-923). He said he had stabbed her eighteen times in the neck, in the heart, and cut her throat (R 924). He physically demonstrated how he had done it (R

924). Whitfield explained that Estella could have brought the kids over yesterday for Father's Day, that he had wanted to talk to Estella and Claretha told him "I don't want to hear it". That's when he started stabbing her (R 925-926). Appellant directed her to take him three places where he talked and explained things to those who answered the door (R 927). LaRue went to the victim's house and told police she could tell them where she had just left the appellant (R 931). She saw Whitfield with a knife at the second house she stopped at and when she asked if that was the murder weapon, he said "no" (R 932). He claimed the murder weapon was longer and sharper. The witness did not see any drugs that morning (R 946).

Crime Scene Technician Jackie Scogin identified the knife-from-the-roof taken into custody (R 949-950) and assisted in photographing footprints at the residence (R 951). The witness lifted a fingerprint from the bathtub in the bathroom which was the possible point of entry (R 952).

Technician Jocelyn Pell opined that the left palm print of Whitfield was left at the scene (R 963). She also made plaster casts of shoe impressions from under the bathroom window and took photographs of the shoe impressions at the crime scene and at

appellant's mother's house (R 966-975).

Technician James Tutsock collected clothing and fingernail scrapings from the defendant (R 1004). The point of entry at the residence was determined to be the bathroom window (R 1010). Kathleen Wasdin responded to the emergency room on June 19, 1995 to meet with the sexual battery victim and gather evidence (R 1012-1013). She was with Willie Mae Brooks for three and a half hours (R 1014). Two blood samples were obtained from Willie Mae Brooks (R 1023).

Dr. Bruce Kruglick, emergency physician at Sarasota Memorial Emergency Department, met with Willie Mae Brooks the morning of June 19; she was emotionally distraught and upset (R 1028-1029). She wore clothing spattered with blood and she said that was the blood of her cousin who had fallen against her (R 1031-1032). Swabbings were collected for DNA testing (R 1033). The redness he observed on the outside of her vagina was consistent with recent sexual intercourse; it is frequently what they see in sexual assault cases (R 1038).

Nurse Eunice Bowes saw Ms. Brooks and was involved with collecting evidence (R 1042).

FDLE employee Edward Gunther who had in the past been

qualified as an expert in footprint and fingerprint identification (R 1055) testified that three shoe tracks could have been made by Whitfield's right shoe (R 1063-1064). Two additional shoe tracks could have been made by his left shoe (R 1066).

Technician Tutsock was present when a blood sample was drawn from the defendant (R 1082). FDLE serology expert Mary Cortese testified that blood on the knife was the same type as that of Claretha Reynolds (R 1090). Semen was present on the defendant's undershorts with the same blood type as appellant (R 1093-1094). Semen was present on the rape kit samples from Ms. Brooks (R 1091). Semen was present on Ms. Brooks' shorts, which contained the same blood type as that of the defendant (R 1097).

Dr. James Eadens, the associate medical examiner, performed an autopsy on Claretha Reynolds (R 1108). The cause of death was multiple stab wounds in the neck and chest (R 1110). There were twenty-one stab wounds or cuts (R 1112). One perforated and cut the jugular vein in the neck (R 1112), two wounds perforated the small intestine, a deep stab wound beneath the breast bone penetrated into the right side of the heart six to seven inches deep (R 1113-1114). There was another wound beneath the right armpit penetrating into the upper lobe of the right lung six inches

in depth; there were multiple wounds in the chest, one of which cut the main pulmonary artery (R 1115-1116). A stab wound penetrated and perforated the ear; two stab wounds in the right breast (R 1117). There was a defensive wound on the finger (R 1118). These wounds were consistent with the mobility of the victim, her staggering to an adjacent room before collapsing and dying (R 1119-1120) and with her not losing consciousness right away (R 1120).

Defense witness Estella Brooks Pierre began a relationship with appellant in September of 1994 and lasted until May of 1995 (R 1137). She became concerned about his drug use (R 1138). She noticed his eyes would get big; he did not steal money from her but would make up lies to get money (R 1141-1142). She stated that he would begin to talk fast when he was under the influence but "he's like that always anyway" (R 1142). He admitted that he did drugs including crack cocaine (R 1143). He did not support her or her children (R 1145). She didn't have much contact with him in the month before this incident (R 1146). She did not see appellant the day of the murder, was not living with Claretha Reynolds or Willie Mae, didn't talk to him that day, or observe his demeanor. She did not know whether he used cocaine that day (R 1148). Appellant seemed not to like Claretha who told the witness she had to make up

her own mind about whether to go back with appellant (R 1151) .

Defense witness psychologist Dr. Eddy Regnier opined that appellant had a substance abuse problem (R 1191). He stated that you do not trust information from one in prison because they lie ('I've not met one yet who's told the truth" - R 1192) and he had not been able to reach all whom he would have liked; however, the witness spoke to appellant's sister and read some medical records (R 1192).

Regnier testified that from reading depositions, the defendant's statements and medical records it would be unlikely that Whitfield was not on drugs at the time of the murder incident (R 1218). On cross-examination the witness conceded that there was little "hard evidence information" to determine how much, if any, cocaine the defendant had in his system the day of these crimes (R 1224). He had no physical evidence (R 1225). The witness acknowledged that criminal defendants often lie and he had yet to meet a prison inmate who told the truth. Whitfield had every reason to exaggerate his report of drug use (R 1227). People using cocaine can still do what they intend to do (R 1228). Appellant intended to wake up Ms. Brooks, made the decision to enter the house when she would not let him in, and he made the decision to

arm himself with a knife after entry (R 1228). He intended to get rid of the murder weapon when he threw the knife away (R 1229). His intent can be seen by his actions (R 1230). The witness was aware the victim was stabbed twenty-one times (R 1231) and cut the jugular in the neck and aorta. The witness was aware that two weeks prior to the incident he had threatened to kill Claretha Reynolds (R 1242). There were contradictions between what appellant told him and what police reports or other witnesses had said. When confronted with the inconsistencies appellant said he did not remember (R 1242).

State rebuttal witness Dr. Daniel Sprehe opined that there were enough indicators that Whitfield was able to form specific intent at all times on the given evening (R 1251), including the police officers' observations, appellant's planning and use of subterfuge -- his actions before and after the killing (R 1252). He disagreed with Dr. Regnier, noting appellant's entry and use of a knife on the rape victim, the prior threat to kill the murder victim and the killing (R 1253-1254). He opined that appellant was not suffering from cocaine psychosis (R 1255-1256). The witness opined that appellant had the ability to form specific intent (R 1262).

The jury returned verdicts of guilty of first degree murder, guilty of burglary while armed or with assault or battery, and sexual battery with a deadly weapon (R 1447).

(B) P E N A L T Y :

Officer Connie Colton was the investigating officer on an incident involving the crime of throwing a deadly missile into a vehicle. Exhibit 35 was a copy of the appellant's conviction on that offense (R 1548-1549). Colton interviewed Whitfield's girlfriend, Barbara Hale, who informed the officer that appellant threw a quart-sized bottle through the rear window of the vehicle. Two females in the car were cut by glass (R 1550). Appellant admitted the offense (R 1551) .

Sergeant Paul Sutton was the investigating officer for the offense -- Exhibit 36 -- conviction of appellant for aggravated battery. The victim was appellant's ex-wife, Harriett Whitfield. She told Sutton that appellant was at her window, pleading to be let in, complained of being depressed, and after she let him inside he started choking her and warned her that he would kill her if she reported him to the police (R 1553-1555).

Detective George Connor investigated an incident that led to appellant's conviction -- Exhibit 37 -- for aggravated battery of

Tonya Kirce. Kirce related that appellant choked her into unconsciousness when she went to tuck her kids in the bedroom. When she woke up he told her if she called the police he would kill her and her two children (R 1556-1559).

Sadie Hester Morrison, mother of murder victim Claretha Reynolds, testified that Claretha had five children, was a good mother and helped people (R 1560-1564).

Defense witness Stephen Watson was an attorney for Eddie Curry who had been charged with the attempted second degree murder of Whitfield. A month and a half ago Watson attended a meeting in which Whitfield forgave Curry and the charges were dropped against Curry (R 1566-1569). Curry was the boyfriend of Tonya Kirce, the woman attacked by Whitfield which led to his aggravated battery adjudication (R 1573). Whitfield had recently been released from prison when he was shot (R 1577).

Detective R. G. Hinesley was escorting appellant from the police department to the jail when a reporter attempted to interview Whitfield. Inside the jail Whitfield stated he did not know Claretha was dead, did not mean to kill her and began to cry (R 1579-1580). The witness's impression was that he felt sorry more for himself (R 1581).

Psychologist Dr. Eddy Regnier testified that in his opinion appellant suffered from polydrug dependency and major depression (R 1590). Appellant was abused as a child (R 1595). Whitfield was hospitalized for an illness resulting from lack of hygiene in the house (R 1602). He had suicidal ideations and was involuntarily hospitalized pursuant to the Baker Act in 1991 (R 1603). Earlier in the year he was shot and became more frightened (R 1605) . He gets headaches when he tries to concentrate (R 1606) . Whitfield began to abuse drugs and, he opined, appellant's break up with Estella left him with no hope (R 1608-1609). The witness thought that Whitfield was high on crack cocaine the day of the killing (R 1610).

On cross-examination the witness admitted that appellant is a violent, angry man who takes his aggression out primarily against women, which predates his use of drugs (R 1618). Appellant has four children of his own and has never supported them or taken financial responsibility for them; nor does he support their mothers (R 1619-1620). Appellant's cocaine use was based primarily on what the defendant told him. There was no corroboration by others that Whitfield used cocaine the day of the crime (R 1620-1621). Appellant told the witness he used cocaine at his mother's

house after the murder and Regnier was aware the mother said she was unaware of his cocaine use (R 1622-1624). The witness was aware that appellant told his mother he was tired of Claretha Reynolds and that he stabbed her and that he blamed the victim for getting between him and Claretha (R 1625-1626).

His mother said appellant was good until something upset him and then he would become violent. Appellant's sister, Diana, said in a deposition that she never saw Whitfield use crack cocaine nor did she ever give him money for it (R 1626). Appellant's being rejailed could explain some of his depression (R 1628). Regnier was aware of appellant's extensive criminal record of violent crimes since 1990 (R 1630). He knew defendant had previously been on probation, community control and in prison. He was aware appellant gave a television interview expressing sorrow for himself (R 1631). Appellant would not even cooperate and take the basic tests to help in making the diagnosis (R 1640). He acknowledged that a cocaine high only lasts about fifteen minutes, that the rape of Ms. Brooks occurred prior to the murder and if the rape took longer than fifteen minutes he would not be under the direct influence of the cocaine at the time of the murder of Claretha Reynolds (R 1640).

The jury recommended a sentence of death by a vote of seven to five (R 1709). The trial court concurred and in its sentencing order found in aggravation that appellant was previously convicted of a felony involving the use or threat of violence to the person, to wit: two prior convictions for aggravated battery and one for throwing a deadly missile into an occupied motor vehicle;[1] the homicide was committed while defendant was engaged in the commission of a burglary (appellant armed himself with a knife and raped Willie Mae Brooks); and the capital felony was especially heinous, atrocious and cruel (R 2109-2111).

In mitigation the trial court declined to find the statutory mental mitigator of capital felony committed while under the influence of extreme mental or emotional disturbance but did find and apply it as non-statutory mitigation (R 2111), the trial court declined to find that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (R 2111-2112) and

[1]The trial court explained in its sentencing order that it did not permit the state to argue to the jury and refused to consider itself that the aggravated battery convictions were in fact downgraded plea bargains from armed sexual battery and committed in circumstances similar to the present sexual battery conviction on victim Willie Mae Brooks (R 2110).

rejected duress or under the substantial domination of another (R 2112). The court gave considerable or substantial weight to non-statutory mitigating factors such as impoverished background, suffering from chronic crack cocaine addiction; gave some weight to the fact that appellant's father abandoned him and his mother was an alcoholic; would give little or no weight to Whitfield's alleged cooperation with law enforcement and that he demonstrated forgiveness to the assailant who wounded him; and rejected as not established an expression or remorse and alleged willingness to support the victim's children (R 2112-2113).

Whitfield now appeals.

SUMMARY OF THE ARGUMENT

ISSUE I. The lower court did not err in permitting appellant to exercise his option of leaving the courtroom during jury selection.

ISSUE II. The lower court did not err in allowing the prior incident at the victim's house to be admitted into evidence as the threat to kill the victim two weeks prior to the completed homicide was relevant to the issue of his premeditated intent. See Pittman v. State, 646 So.2d 167 (Fla. 1994).

ISSUE III. Appellant's complaint regarding the prosecutor's closing argument about sentences received on prior convictions was not preserved for appellate review by contemporaneous objection below and did not constitute fundamental error, and alternatively, was harmless. Appellant's current argument that witnesses Sutton and Connor were providing hearsay testimony about threats to kill made in prior crimes was not the basis urged below and hence not preserved. This Court has approved the use of such hearsay in penalty phase. Rhodes v. State, 547 So.2d 1201 (Fla. 1989).

The prosecutor did not err in cross-examining defense witness Dr. Regnier since the Baker Act commitment helped explain the depression the witness referred to on direct examination. A

prosecutor may cross-examine an expert on the facts he used or considered in forming an opinion. Parker v. State, 476 So.2d 134 (Fla. 1985).

The lower court did not err reversibly in permitting cross-examination of defense witness Detective Hinesley about appellant's statement of alleged remorse and even if error it was harmless. Randolph v. State, 562 So.2d 331 (Fla. 1990).

Appellant's claim for relief on the basis of an improper 'Golden Rule" violation must fail as the singular remark was not egregious enough to warrant vacating the sentence, especially since upon the defense objection the prosecutor rephrased his comments to apply the facts of the case to the statutory HAC aggravator.

Appellant's complaint that the prosecutor's argument made an improper appeal to gender was not preserved by objection below and is meritless since the argument was in support of the statutory aggravating factors present.

ISSUE IV. The trial court correctly answered the jury's question by reference to the standard instruction -- a procedure the defense agreed to -- and it would have been speculative for the court to guess at whether there was a guarantee appellant would never return to society.

ISSUE V. The lower court did not err in its treatment in the sentencing order of the mental or emotional disturbance mitigating factor or the impaired capacity to conform conduct to the requirements of law mitigator. The defense expert's view was not shared by the state rebuttal expert and the facts of the case compelled rejection of the defense view.

The lower court did not err in giving great weight to the recommendation of the jury.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED IN PERMITTING THE DEFENDANT TO LEAVE THE COURTROOM DURING JURY SELECTION.

To fully appreciate this issue, the Court must note Mr. Whitfield's persistent intransigence below. Voir dire examination began on September 18, 1995 (R 151). On the second day of jury selection, September 19, Mr. Whitfield announced to the court that he was having conflict with his attorneys (R 470). The trial court attempted to make a Nelson inquiry[2] (R 474). Whitfield complained of counsels' "negativity" (R 474). Trial counsel Mr. Williams stated that he had explained to Whitfield that it took time to get things done and that Whitfield had been insistent on asserting his speedy trial rights (R 475-476). Co-counsel Scott explained that their client did not want them to prepare for penalty phase (R 478). The court asked Whitfield specifically what he wanted done that was not done (R 483). Whitfield complained that his lawyers told him that he did not have a chance (R 484). When the court informed appellant that he would have to conduct an inquiry before

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[2] Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973).

discharging counsel, appellant responded: ". , , take me back to my cell. I don't want to stay here" and "I'm not going to stay here" (R 486).

The court again attempted to inquire whether Whitfield had **a** basis to discharge counsel and appellant responded that they were unwilling to fight for him (R 486-487). Trial counsel Williams responded that he would always fight for his client and would represent him zealously within the bounds of the law; counsel added that the death penalty was a strong possibility but that he was prepared to proceed to trial (R 487-488). Whitfield said he felt "hostility" (R 488). When the court again attempted a Nelson inquiry, appellant refused to answer (R 491). Trial counsel Williams stated that he was prepared to go to trial (R 492). Whitfield continued to refuse to respond and the court did not discharge counsel (R 493-494). When the court suggested that appellant talk to his lawyer, there was more silence (R 495). Whitfield continued to refuse to respond (R 496).

Twenty pages later in the transcript, defense counsel noted that Mr. Whitfield was not facing the jury and it was obvious he was going to choose not to participate in the proceedings and counsel suggested an inquiry into competency. The court noted that

appellant was refusing to cooperate and trial defense counsel Scott added that Whitfield, in contrast to the previous day, was not assisting in the jury selection process (R 523).

Voir dire continued with appellant present (R 523-581). When the defense suggested a competency evaluation by their expert Dr. Regnier, the court agreed but observed that Whitfield could communicate when he chose to do so and that he was choosing to turn his back (R 583-584).

Defense expert Dr. Regnier examined appellant for one half hour. The court again attempted to make inquiry of Whitfield who still refused to speak and remained mute (R 592-593).

Appellant stated that he would not participate, would not come from the jail and would not do anything if he was going to be 'downgraded (R 597). Defense counsel responded to the complaints asserted by Whitfield (R 600-603) .

Dr. Regnier suggested there may be a communication problem and offered to mediate by talking with Whitfield and counsel (R 613). After a recess, Whitfield informed the court he was going through "depressed stress" and had a headache (R 615, 618). After a

Faretta[3] i r y , the court concluded that Whitfield was not able to represent himself and appellant requested to be taken back to his cell "because I don't want to be present" (R 620) . When the court offered the option of staying and listening in court, Whitfield maintained:

> "I don't want to, Your Honor. I would like to go back to my cell. They can go on without me.
>
> (R 620)

He thought he would be incriminating himself to be in a place and position he did not want to be in. The court offered to provide a telephone line with counsel and Whitfield insisted:

> "I don't want to have any communication with it. I just want to get back to my cell where I was."
>
> (R 621)

He claimed that he would not listen if kept in the courtroom (R 621).

Dr. Regnier then testified that Whitfield was competent to proceed, that he was free of any mental defect or illness and was completely cognizant of his actions and what he is doing in the courtroom. He appreciated the charges against him, the ranges and

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[3] Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

nature of possible penalties "with glaring detail", the adversary nature of legal process, had the ability to disclose to his counsel pertinent facts (but voluntarily chose not to), had the ability to manifest appropriate courtroom behavior and the ability to testify relevantly on his own behalf if he chose to (R 624-625). The defense withdrew the suggestion of incompetency (R 626). Defense counsel joined in Whitfield's request to return to his cell and that the jury be instructed that he had voluntarily absented himself from jury selection. Counsel argued that his continued presence would be more prejudicial with the jury (R 626). When appellant did not accept the court's offer to stay the court permitted him to go back to his cell. Whitfield announced that he was not coming back (R 627). The court explained to prospective jurors that Whitfield voluntarily absented himself (R 629).

Voir dire proceeded and a jury was selected (R 713).[4] On the following day, September 20, the court met with Whitfield at the county jail to urge his presence at trial and appellant declined (R 736-737). Subsequently, in court both the attorneys and the court stated on the record the facts of what had happened (R 737-744).

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[4]The court continued the effort, requesting counsel again to confer with appellant renewing the offer to be present (R 655-656).

Appellant returned to court on the afternoon of September 20 (R 817) and apologized to the court for his absence that morning (R 865).

Appellant acknowledges that this Court has held that a defendant may waive his presence in a capital proceeding. Peede v. State, 474 So.2d 808 (Fla. 1985), cert. denied, 477 U.S. 909, 91 L.Ed.2d 575 (1986); Kilsore v. State, ___ So.2d , Florida Law Weekly S345 (1996); Nixon v. State, 572 So.2d 1336 (Fla. 1996).[5] If the instant record demonstrates anything it is that the trial court with seemingly infinite patience attempted to question the appellant repeatedly concerning the appropriateness of keeping or discharging the two trial defense attorneys with the result that appellant refused to respond to the court's inquiries. In addition to the trial court's stated observations on appellant's refusal to respond, trial counsel called attention to the fact that Whitfield had turned his back on the jury and was not going to choose to

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[5]Appellant is not aided by his cited cases of Proffitt v. Wainwrisht, 706 F.2d 311 (11th Cir. 1983) and Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984). In the former, the Court declined to reach the question of whether presence was waivable since the defendant unquestionably did not waive; in the latter, it was determined the defendant was absent during a non-critical stage and was harmless error. Hall v. Wainwrisht, 805 F.2d 945 (11th Cir. 1986).

participate in the proceedings; he was not assisting in jury selection in contrast to the previous court day (R 523). Whitfield insisted that he would not participate, would not come from the jail and would not do anything (R 597). He repeatedly asserted the desire to go back to his cell (R 620, 621) and that he would not listen if he were kept in the courtroom (R 621). Additionally, a mental competency evaluation was performed contemporaneously and defense expert Regnier testified that Whitfield was competent to proceed and was cognizant of what he was doing in the courtroom and knew the nature of the charges and possible penalties "with glaring detail" (R 624-625). Defense counsel then joined in appellant's request that Whitfield be returned to his cell because his continued presence would be more prejudicial to the jury (R 626). Appellant insisted that he would not return to court when allowed to leave the courtroom (R 627). Appellant even refused the lower court's extraordinary offer on the following morning at the jail urging that he be present in the court for trial (R 736-737). In Kilsore, supra, this Court concluded that defendant's "angry comments and reactions indicate that he was fully aware of the proceedings" 21 Florida Law Weekly S345, 346 and "the instant facts show that Kilgore requested to waive his right to be present" Id.

at 347.

The Court should reject appellant's assertion of the right to manipulate the legal system for his own whimsical purposes. See Jones v. State, 449 So.2d 253, 259 (Fla. 1994); Waterhouse v. State, 596 So.2d 1008, 1014 (Fla. 1992).[6]

Appellant may obtain no relief under Coney v. State, 653 So.2d 1009 (Fla. 1995), since Coney was overruled in Bovett v. State, ___ So.2d ___. *21* Florida Law Weekly S535 (1996).

The law does not -- and should not -- require more than that provided to Whitfield below. ***Lex non praecipit inutilia, qui inutilis*** labor ***stultis***.[7] Cf. Valdes v. State, 626 So.2d 1316, 1320-1321 (Fla. 1993).

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[6]Appellant points out that he complained prior to the penalty phase that he had been absent during jury selection, that a number of women had been selected and that he did not have the last or final word., The trial court reminded Whitfield that he had chosen to be absent in spite of the court's urging (R 1455). Whitfield is mistaken in thinking that he has the last word. Cf. Curtis v. State, *21* Florida Law Weekly S442. Moreover, any attempt by appellant to excuse all women, based on gender, peremptorily would have been violative of J.E.B. v. Alabama ex rel T.R., U.S. ___, 128 L.Ed.2d 89 (1994); Abshire v. State, 642 So.2d 542 (Fla. 1994).

[7]"The law commands not useless things because useless labor is foolish."

ISSUE II

WHETHER THE LOWER COURT ERRED BY ALLOWING THE PRIOR INCIDENT AT THE VICTIM'S HOUSE TO COME INTO EVIDENCE.

On a proffer witness Willie Mae Brooks testified that about two weeks prior to the instant homicide appellant unsuccessfully sought money from her, victim Claretha Reynolds and Estella Pierre at the victim's residence (R 801-806). When rebuffed, he told Claretha within her earshot:

> " . . . Fuck you . . . I'm going to kill all three of you all, make sure you all don't have no more fun."
>
> (R 806)

The trial court permitted the evidence (R 807) and the witness testified in front of the jury (R 822-826). Appellant argues that "it is clear that the participants in the incident did not view it seriously" (Brief, p. 34). That is not exactly so. Testifying witness Willie Mae Brooks stated on redirect examination that she was afraid:

> "BY MR. MORELAND:
>
> Q. Ms. Mae, when you described this incident earlier between Claretha and the defendant Ernest Whitfield, she forced him out of the house; is that correct?
>
> A. Yes, she did.
>
> Q. However she did, she forced him out of the house, he didn't want to go?
>
> A. He didn't want to go.
>
> Q. And he was angry about that; wasn't

he?

A. Yes, he was.

Q. And he didn't say, I'll hurt you, he said, I'll kill you; didn't he?

A. I'll kill you.

Q. Now Claretha Reynolds may not have been afraid, but were you afraid of Ernest-Whitfield?

A. Yes, I was.

Q. Is that why you didn't let Ernest Whitfield in the house that night?

A. Yes, I did.

Q. And the night that this rape occurred, he had that knife to your throat, were you afraid then?

A. Yes, I was.

Q. He didn't say anything to you about money or cocaine or anything about that?

A. He asked me did I have any money. I told him he can check my purse, I do not have any money.

Q. He didn't get any?

A. He didn't get any."

(emphasis supplied)(R 863-864)

Whitfield apparently takes comfort that the witness stated that murder victim Claretha Reynolds was not afraid.[8]

Contrary to appellant's complaint the incident was not offered to show merely prior bad acts but to help establish the premeditated element in the charged offense of first degree murder. In any event, it is of no moment whether the victim was afraid since the victim's state of mind is not an issue in a homicide

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[8] Subsequent events conclusively demonstrate that she should have been!

prosecution. The instant case wherein Whitfield threatened to kill the victim and two others a mere two weeks prior to the slaying of Claretha Reynolds is appropriate evidence supporting the thesis that he did in fact do so with the requisite premeditated intent. The case is not unlike Pittman v. State, 646 So.2d 167 (Fla. 1994), wherein this Court found no error in the admission of evidence that the defendant had made several threats against his ex-wife and her family months prior to the double killing.[9]

Appellant acknowledges at page 35 of his brief that the prior threat to kill "could not have affected the jury's verdict in the guilt or innocence phase of this trial" (probably a wise concession since Willie Mae Brooks had testified appellant raped her at knife point then went into the victim's bedroom, victim Claretha Reynolds said Whitfield had stabbed her before she expired, appellant admitted stabbing and killing Claretha to Peggy LaRue, admitted to police after Miranda warnings to stabbing the victim and agreed to take them to the place where he had discarded the murder weapon,

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[9]Appellant's reliance on Pope v. State, So.2d , 21 Florida Law Weekly S257 (Fla. 1996) is misplaced. There the Court found harmless error in the admission of evidence that Pope had committed a battery on the victim months prior to the murder since the jury was not told of his ensuing arrest and incarceration which allegedly provided the vengeance motive for the killing. Thus, the isolated fact of the battery was irrelevant.

appellant's palm print was discovered on the bathtub near the bathroom window Whitfield had entered).

Nevertheless, appellant maintains that the 'threat" evidence could have contributed to the death penalty recommendation. He argues that the death penalty vote was 7 to 5 and that this Court has found error not to be harmless on such a split vote in Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Wav v. Duqqer, 568 So.2d 1263 (Fla. 1990) and Morgan v. State, 515 So.2d 975 (Fla. 1987). Rhodes involved a trial court's improper response to a jury inquiry outside the presence of the court and without notice to counsel regarding whether they would be individually polled on their penalty recommendation; there was a reasonable possibility some of the jurors would have voted differently if they thought they would not be required to reveal their vote in open court. Way involved a failure to instruct the jury they could consider nonstatutory mitigating evidence, as did Morgan, in contravention of Hitchcock v. Dugger, 481 U.S. 393, 95 L.Ed.2d 347 (1987). Appellee is unaware of any precedent holding that it constitutes reversible error (in the penalty phase) for the prosecutor in the guilt phase to introduce evidence of premeditation (as by the instant threat) in a first degree murder prosecution. The prosecutor would have

been derelict had he not done so.[10]

[10]The unobjected-to prosecutorial argument at R 1653-1658, 1669 was proper since it related to the statutory aggravating factors of prior violent felony convictions and homicide committed during a burglary.

ISSUE III

WHETHER THE JURY RECOMMENDATION WAS TAINTED BY THE INTRODUCTION OF IRRELEVANT EVIDENCE AND IMPROPER ARGUMENT.

(A). Introduction of Sentences Received on the Prior Convictions.

Before the penalty phase testimony began the trial court indicated that while it would allow the state to introduce a conviction for aggravated battery as a prior violent felony it would not allow the state to show that the offense was actually a sexual battery because of its prejudicial effect (R 1495). The defense asked for confirmation as to the court's ruling:

> 'MR. WILLIAMS: Judge, as far as the judgments, it's my understanding, and 1'11 go through them, I think the Court has agreed that the -- as far as 91-177F and 92-2689F, that the sexual battery reference will be whited out including the statute number and the degree of the crime --
>
> THE COURT: Right.
>
> MR. WILLIAMS: -- and the amended to language there.
>
> THE COURT: Right.
>
> MR. WILLIAMS: As to 90-3963F, throwing a deadly missile judgment and sentence, the failure to appear language will be whited out, including the offense statute numbers and the degree of crime as it relates to that.
>
> I'm also asking the Court if it would consider deleting the specifics of the jail sentences and the sentences imposed in these cases.
>
> THE COURT: That's part of the sentence. I don't --
>
> MR. WILLIAMS: Well, I'm making a request

> on the record.
>
> THE COURT: Yes.
>
> No, I'll deny that.
>
> MR. WILLIAMS: And also as to 92-2689F, whiting out any reference to pending parole violation --
>
> MR. MORELAND: Yes, we'll white that out.
>
> MR. WILLIAMS: -- or stipulated downward departure.
>
> And that will by my -- all my objections to the judgments.
>
> THE COURT: Those will be cleaned up. Okay.
>
> (R 1504-1505)

The defense while asking for deletion of the sentences did not assert that it would be legal error to admit them and seemed to acquiesce to the trial court's determination. See Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979) (this Court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law). When defense witness Watson was asked on cross-examination about the duration of Whitfield's prior sentence, defense counsel objected after the witness answered the question. Defense counsel objected that it was beyond the scope of direct examination and the trial court sustained the objection and instructed the jury to disregard it (R 1576).

Appellant complains that the prejudicial effect came during the prosecutor's closing argument (R 1655-1656). No objection was

interposed to the closing argument; consequently, any complaint ab initio here is untimely and improper. See Crump v. State, 622 So.2d 963 (Fla. 1993); Mordenti v. State, 630 So.2d 1080 (Fla. 1994); Sims v. State, ___ So.2d , 21 Florida Law Weekly S388 (Fla. 1996); Craig v. State, 510 So.2d 857, 864 (Fla. 1987).

Certainly the prosecutor's argument did not constitute fundamental error. The prosecutor could permissibly urge that appellant had not used his prior experience in the prison system as an opportunity to change his ways and to become a productive law-abiding citizen (R 1656). It was proper for the prosecutor to ague that the instant homicide was not appellant's failure to obey the law as a singular episode in his life ('First, it's important because this wasn't the first time that the defendant has committed violent crimes. There's a history. There's a history of four prior violent crimes, four prior violent convictions" -- R 1656; . . . He's been given a chance. He's had the opportunity to change his behavior , . . the defendant continues to commit crimes and escalate his violent behavior, which becomes more violent and more violent and more violent until it becomes deadly" -- R 1656-1657).[11]

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[11]Reliance on non-capital cases such as Fitzserald v. State, 227 So.2d 45 (Fla. 3 DCA 1969) and Sherman v. State, 255 So.2d 263 (Fla. 1971) are inapposite; the instant case involves the capital phase in which the jury must make a recommendation that the

There was no error; if there were error, it is harmless. State v. iGuilio, 491 So.2d 1129 (Fla. 1986).

(B). Admission of Hearsay Testimony that Whitfield Threatened to Kill the Victims in the Prior Violent Felonies if They Reported the Crimes:

Prior to the penalty phase opening statement there was a colloquy as to what evidence would be admissible:

> "MR. LEE: Okay. The third incident is the charge where he was convicted of aggravated battery involving a victim named Tonya Kirce. This incident occurred October 1 of 1992.
>
> It occurred in the early morning hours of the day. At 9:30 he was released from prison for the attack we just talked about on Ms. Whitfield, Harriett Whitfield. He had a party, celebrated, met Tonya Kirce at that party. Party continued at her house with the defendant's sister present.
>
> She goes into her bedroom where there are two children sleeping. The defendant attacks her, chokes her, chokes her into unconsciousness, and she wakes up naked.
>
> There was also -- I wouldn't mention anything about a sexual battery that occurred and he threatens if she calls the police to kill her and her children, so I need to know what you don't want to allow in that part.

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appropriate penalty should be death or life imprisonment and the legislature has determined that a defendant's felony conviction history is appropriate for the calculus. Rhodes v. State, 547 So.2d 1201 (Fla. 1989) is inapplicable; there, unlike the instant case, the prosecution had introduced a tape displaying the emotional trauma and suffering of the victim in the unrelated, untried case. In the instant case the prosecutor merely argued the facts of the offenses.

THE COURT: Well, I mean the fact that she woke up naked, well, obviously there **was a** sexual battery and I think that would be highly prejudicial.

MR. LEE: All right.

THE COURT: He went into her bedroom and he strangled her.

MR. LEE: Strangled her, she was unconscious.

THE COURT: Unconscious.

MR. LEE: I also have photographs evidencing her injuries. I don't know whether the Court would allow those in.

THE COURT: I don't think, you know, just my reading of these cases, I think that creates a retrial of a case that --

MR. LEE: All right.

THE COURT: -- **was** never tried and I'm not going to allow that.

MR. LEE: I'll just ask the officer to describe what injuries --

THE COURT: What injuries that he saw and that she was strangled into -- she **was** unconscious and then she was told that if she said anything -- her children were present, she was told if she said anything that, whatever it was, that he would kill her.

MR. LEE: All right. I will instruct the three witnesses at this time."

(R 1519-1521)

The court then permitted the prosecutor to make opening statement during which the prosecutor stated regarding a prior violent felony:

> "The third crime is another aggravated battery. The victim again is a woman. This crime occurred on October 1st of 1992 and he was convicted on July 6th of 1993.
>
> In this case they were at a party. There **was** drinking involved. The defendant

and his sister and two children went over to the victim's house, Tonya Kirce, where she lived with her two children. Again I think the children were around seven or eight years old.

The officer will tell you, you'll hear from Officer Connor, who was the investigating officer on that case, Ms. Kirce was in her bedroom, was about to go to sleep. Her two children were in the bedroom. They were asleep.

The defendant comes in the bedroom and chokes Ms. Kirce into unconsciousness and told both victims of these aggravated batteries, he told the first victim as he was leaving, if you call the police, I'll kill you, he told the second victim, Ms. Kirce, if you call the police, I'll kill you and your children,

MR. WILLIAMS: Judge, I'm going to make an objection and ask to approach the bench.

THE COURT: Yes, sir. Sidebar.

(THE FOLLOWING PROCEEDINGS ENSUED AT THE BENCH.)

MR. WILLIAMS: Judge, I am going to make a motion for mistrial.

I believe that when we talked about the proffer in this case it was understood there wasn't going to be anything that was unrelated to the aggravated battery.

I think both of these comments attributed to the defendant that had been brought out in front of the jury take in consideration crimes that were not contemplated during the aggravated battery.

MR. LEE: I don't follow you.

MR. WILLIAMS: He's talking about threats to kill.

THE COURT: It **was** part of the res gestae. I wish you would leave that alone.

MR. LEE: I will move on. I thought I proffered those statements and I thought I **was** allowed to use them.

THE COURT: I did. It was part of the res gestae. I've eliminated anything that had -- 1 eliminated anything that had any reference to any sexual battery or anything else.

MR. LEE: I didn't talk about those.

THE COURT: Okay."

(R 1528-1530)

Sergeant Paul Sutton testified without objection that on January 11, 1991, Harriett Whitfield was the victim of an aggravated battery by appellant. The victim reported to Sutton that appellant told her that if she screamed he would kill her and as he was leaving told her that if she reported the incident to police he would kill her (R 1553-1555). Detective beorge Connor testified without objection regarding appellant's aggravated battery conviction on Tonya Kirce and that she told the witness appellant told her at the time if she called the police he was going to kill her and her two children (R 1556-1559).

To summarize the events below, the prosecutor before the testimony obtained a ruling from the trial court which the defense did not contest that the threats to prior victims was admissible as part of the assault incidents. When the prosecutor mentioned them in his opening statement, the court reconfirmed his ruling but asked the prosecutor not to pursue it and the prosecutor did not. The prosecutor complied with the trial court ruling not to refer to

any sexual battery with prior victims (R 1529-1530). Appellant did not object to the testimony of witnesses Sutton and Connor (R 1553-1555, R 1556-1559).

Now on this appeal Whitfield initiates a complaint that Sutton and Connor were not present during the offense and were giving hearsay evidence. Since not raised below, the claim is barred. Mordenti, supra, Crump, supra, Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990). Even if the merits could be reached, this Court has approved the use of such hearsay. See Rhodes v. State, 547 So.2d 1201, 1204 (Fla. 1989); Wvatt v. State, 641 So.2d 355, 360 (Fla. 1994); Finney v. State, 660 So.2d 674, 684 (Fla. 1995); Long v. State, 610 So-2d 1268, 1274 (Fla. 1992).

(C). Improper Cross-Examination of Defense Witness Dr. [illegible]nier:

After Dr. Regnier testified on direct examination that appellant was committed pursuant to the Baker Act in 1991, the prosecutor cross-examined the witness:

> "Q. All right. Now this Baker Act that occurred back on September the 3rd -- is that when that occurred, Doctor?
> A. I believe so, 1991.
> Q. Were you aware that the defendant had just been released from jail August 26, 1991, a few days before that?
> A. No, I was not.
> Q. Okay. And that he had been placed

on community control at that time which is a house arrest?

A. I knew he was on community control, yes.

Q. And do you know that he had violated that community control, that house arrest?

A. I wasn't aware of that, no.

Q. And that he was subsequently -- that a warrant was subsequently issued and he was put back --

MS. SCOTT : Objection, your Honor.

BY MR. MORELAND:

Q. -- in jail September the 5th.

THE COURT: What's the basis of the objection?

MS. SCOTT: He said he wasn't aware of it.

THE COURT: Okay. I'll overrule the objection. You may ask the question. I don't know what --

MR. MORELAND: I just want to verify, Judge, that he was put back in jail.

BY MR. MORELAND:

Q. If he was put back in jail then on September 3rd for that violation -- September 5th for that violation, the Baker Act September 3rd, that would certainly explain some of his depression, some of his actions at that time when the Baker Act occurred; wouldn't it?

A. It could explain some of it, yes, also might explain his weight, that he ate while he was in jail."

(R 1627-1628)

Once again appellant appears to be changing the nature of his objection at the appellate level from that presented below, which is impermissible, The objection raised below was that the witness answered he was not aware that Whitfield was put back in jail on

September 5, 1991. And as the continued inquiry by the prosecutor demonstrated appellant's return to jail would help explain some of his depression and some of his actions at the time when the Baker Act occurred. (R 1627-1628). The cross-examination helps explain in context that defendant's depression had a normal basis or justification. This Court has consistently ruled that an expert may be cross-examined regarding the facts he know or considered in reaching an opinion. See Parker v. State, 476 So.2d 134, 139 (Fla. 1985); Hildwin v. State, 531 So.2d 124 (Fla. 1988), affirmed, 490 U.S. 638, 104 L.Ed.2d 728 (1989) (state could rebut evidence presented by defendant as to his nonviolent nature); Muehleman v. State, 503 So.2d 310, 315 (Fla. 1987); Valle v. State, 581 So.2d 40, 46 (Fla. 1991); Johnson v. State, 608 So.2d 4, 10 (Fla. 1992); Jones v. State, 612 So.2d 1370, 1374 (Fla. 1992); Bonifay v. State, 626 So.2d 1310, 1312 (Fla. 1993); McCrae v. State, 395 So.2d 1145 (Fla. 1980).[12]

(D). Improper Cross-Examination of Detective R. G. Hinesley:

Defense witness Detective Hinesley testified on direct examination that while escorting Whitfield from the Sarasota Police

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[12] There was no complaint lodged below that the prosecutor was adding facts or in effect testifying without placing himself under oath; this appellate afterthought need not be entertained now.

Department to the building at the county jail a newspaper reporter attempted to interview appellant. The defendant did not make any verbal response and the witness was not watching for any facial reaction when the reporter told Whitfield the victim was dead. Inside the jail building appellant said he did not know she was dead, stated he did not mean to kill her and began to cry (R 1578-1580). The prosecutor inquired on cross-examination:

> "BY MR. LEE:
>
> Q. You said the defendant said he did not know he had killed her?
>
> A. He stated, to quote him, he stated, I did not know she was dead.
>
> Q. Now are you aware that earlier that morning he told Peggy LaRue, I killed big girl?
>
> A. No, I'm not.
>
> I'm sorry.
>
> Q. Okay. Now, Detective Hinesley, you said he stated crying?
>
> A. Yes, sir.
>
> Q. Do you know why he was crying?
>
> MR. WILLIAMS: Judge, I'm going to object. That calls for a certain amount of speculation on his part. He can testify as to what he heard.
>
> THE COURT: I don't know whether it's speculation or whether he knows.
>
> I'll overrule the objection.
>
> THE WITNESS: I'm sorry.
>
> Would you repeat the question?
>
> BY MR. LEE:
>
> Q. Let me rephrase it.
>
> Do you know whether he was crying because he felt sorry for the victim or sorry for himself?

A. My impression was more for himself.

Q. Are you aware that he went on TV later that day and when a reporter asked, are you sorry, he said, I'm sorry for everyone, I'm sorry for myself?

MR. WILLIAMS: I'm going to object. That's outside the scope of my direct examination.

THE COURT: I'll sustain that.

MR. LEE: Nothing further, your Honor."

(R 1580-1581)

On redirect examination by defense counsel, he stated:

"BY MR. WILLIAMS:

Q. You do also recall that he made another statement other than, I didn't know that she was dead; what was the other statement that he made?

A. The other statement he made was, I didn't mean to kill her.

Q. And at that point is that when he began to cry?

A. Yes, sir.

Q. And as far as your impression, you don't have that based on anything other than your opinion; is that correct?

A. That's my opinion. Yes, sir.

MR. WILLIAMS: I don't have any other questions, your Honor."

(R 1581-1582)[13]

Appellee cites Walton v. State, 547 So.2d 622, 625 (Fla.

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[13]Appellee notes that after the trial court preliminarily ruled that it didn't know whether the witness' answer was based on speculation, the defense did not renew upon hearing the answer any objection or move to strike the answer based on speculation. The defense presumably was satisfied with the witness having given his impression (R 1581-1582). His initiation of complaint on appeal is untimely and procedurally barred.

1989) (Wherein this Court stated:

> "[3] In his second point, Walton argues that the state improperly presented evidence concerning lack of remorse as a nonstatutory aggravating circumstance. In response, the state asserts that Walton's counsel initiated the questioning of defense witnesses concerning remorse and expressly asked one witness 'what if any remorse" had Walton shown, thus opening the door concerning this issue. This Court has consistently held that lack-of-remorse evidence cannot be presented by the state as an aggravating circumstance in its case in chief, see Robinson v. State, 520 So.2d 1 (Fla. 1988); Patterson v. State, 513 So.2d 1263 (Fla. 1987); Pope v. State, 441 So.2d 1073 (Fla. 1983); Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982, cert denied. 463 U.S. 1229, 103 S.Ct. 3572, 77 L.Ed.2d 1412 (1983), but that does not mean the state is unable to present this evidence to rebut nonstatutory mitigating evidence of remorse presented by a defendant. See Agan v. State, 445 So.2d 326 (Fla. 1983), cert. denied. 469 U.S. 873, 105 S.Ct. 225, 83 L.Ed.2d 154 (1984).

Thus, the Court allows the state to rebut nonstatutory mitigating evidence of remorse presented by a defendant; the state merely is not permitted to use lack of remorse as a nonstatutory aggravating circumstance. Here, Detective Hinesley was a defense witness apparently called to repeat a hearsay declaration of Whitfield suggesting remorse. Since appellant did not testify and subject himself to cross-examination on the issue, all that was left for the state was to cross-examine the hearsay listener Hinesley.

In any event, even if eliciting the defense witness' impression were deemed error, it is harmless. See Randolph v. State, 562 So.2d 331, 338 (Fla. 1990) (improper question by prosecutor regarding remorse constituted harmless error). In the instant case, defense witness Dr. Regnier testified on cross-examination by the prosecutor:

> "Q. And, Doctor, you talked about the defendant's sorrow.
>
> Were you aware of a television interview the defendant gave when he was asked about whether he was sorry or not and he said, yeah, I feel sorry for everyone, I feel sorry for myself?
>
> A. Yes, I am. I saw the --
>
> Q. Were you aware of that?
>
> A. I saw the various --
>
> Q. Were you aware of that?
>
> A. Yes."
>
> (R 1631)

Thus, Whitfield's sorrow or remorse was for everyone, including himself.[14]

(E). The Prosecutor's Golden Rule Argument:

The transcript reveals the following during the prosecutor's closing argument:

> "Consider being woken up six A.M. in the morning, trying to defend off a stabbing

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[14]In the sentencing memoranda of both prosecutor and defense it was argued that Whitfield expressed remorse for himself in a television interview. (R 2084, R 2096).

> Ernest Whitfield with an eight-inch kitchen knife, in front of your five kids, not knowing about --
>
> MS. SCOTT : I'm going to object to this argument. I believe it encroaches upon the Golden Rule as it pertains to pain and suffering of the victim and I have two case cites if the court wants to consider those.
>
> THE COURT: That aspect of it, you may certainly talk about that, but --
>
> MR. MORELAND: What I'm asking you to do, ladies and gentlemen, is only apply the facts that you know them to this, to this aggravating factor.
>
> The kids were present, seeing their mother being attacked, extremely wicked, indifference to suffering. Consider Claretha Reynolds being attacked as she tried to defend herself, Consider her jugular vein being cut and her pulmonary artery, her pulmonary artery being severed, Claretha Reynolds trying to get up and fight, losing blood, becoming weaker, not being able to defend herself."
>
> (R 1662)

In Bertolotti v. State, 476 So.2d 130 (Fla. 1985), this Court affirmed a judgment and sentence of death although the prosecutor "clearly overstepped the bounds of proper argument on at least three occasions". Id. at 132. One of the arguments, a violation of the proscribed Golden Rule arguments, invited the jury to imagine the victim's final pain, terror and defenselessness. The Court cited State v. Murrav, 443 So.2d 955 (Fla. 1984), noting that prosecutorial error alone does not warrant automatic reversal of a conviction. In the penalty phase of a murder trial resulting in an

advisory recommendation, "prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty phase trial". Id. at 133. In that case the misconduct was not so outrageous to taint the validity of the jury's recommendation.

In Rhodes v. State, 547 So.2d 1201 (Fla. 1989), the Court, after condemning the prosecutor's closing argument, observed that it was not a case of a singular improper remark but rather "was riddled with improper comments". Id. at 1206 (including describing the defendant as acting like a vampire).

In the instant case, the prosecutor made a single remark -- an incomplete sentence ('consider being woken up", etc.) and upon the defense objection -- changed the structure of his comment:

> "What I'm asking you to do, ladies and gentlemen, is only apply the facts that you know them to this, to this aggravating factor."
>
> (R 1662)

The prosecutor then proceeded to outline the facts for their consideration -- which did not constitute a Golden Rule violation (and thus occasioned no other objection by the defense).

The instant case is not unlike Jones v. State, 612 So.2d 1370, 1374 (Fla. 1992), where the prosecutor argued that he wanted the jury to think about the effect that the period of five seconds

(time for firing three shots) had on the lives of the defendant, co-defendant and victim and this Court concluded:

> 'This comment did not vitiate the entire trial nor did it inflame the minds and passions of the jurors so that their verdict reflected an emotional response to the crime or defendant rather than the logical analysis of the evidence in light of the applicable law."

So, too, in this case, appellant's claim is meritless.

(F). Improper Appeal to Gender:

Appellant finally contends that the prosecutor made an improper appeal to gender in the penalty phase closing argument, citing R 1653-1657. Whitfield did not interpose any objection below, so any complaint regarding closing argument is not preserved for appellate review and is procedurally barred. Mordenti v. State, 630 So.2d 1080 (Fla. 1994); Crump v. State, 622 So.2d 963 (Fla. 1993); Cummings-El v. State, ___ So.2d , 21 Florida Law Weekly S401 (Fla. 1996); Ferrell v. State, ___ So.2d , 21 Florida Law Weekly S388 (Fla. 1996); Sims v. State, ___ So.2d , 21 Florida Law Weekly S320 (Fla. 1996); Craig v. State, 510 So.2d 857, 864 (Fla. 1987).

Even if the claim had been properly preserved it would be meritless as the prosecutor's argument permissibly focused on statutory aggravating factor of Whitfield's prior violent felony

convictions: Exhibit 35, the conviction for throwing a missile into a motor vehicle; Exhibit 36, aggravated battery conviction on Harriett Whitfield; and Exhibit 37, aggravated battery on Tonya Kirce (R 1548, R 1651-1658). That appellant has chosen as targets of his violent criminal felonies women cannot be visited upon the state -- only upon the defendant. The appellant's reliance on Robinson v. State, 520 So.2d 1 (Fla. 1988), is meritless which involved a prosecutor's impermissible appeal to racial bias and prejudice in the prosecution of a black defendant for the murder of a white woman. Here, both the victim and the defendant were black (R 1728).

The prosecutor could permissibly argue the fact of a rape in the instant case because one of the statutory aggravators considered -- and found by the trial court -- was the factor of homicide committed during a burglary and sexual battery on Willie Mae Brooks (R 1658-1659, R 2110).

The prosecutor committed no error in presenting evidence upon Whitfield's prior violent felony convictions and urging their applicability as statutory aggravators to the judge and jury.

ISSUE IV

WHETHER THE TRIAL COURT'S RESPONSE TO THE PENALTY JURY'S QUESTION WAS ERRONEOUS.

The record reflects that during penalty phase deliberations the jury presented a question. The trial court informed counsel:

> 'The jury sent me a note I guess immediately upon their entering the room and, quote, does life in prison without parole, does life in prison without parole really mean no parole under any circumstances, no parole is in quotes and under any circumstances is underlined, any is double, and he will never be allowed back into society again, with a question mark, respectfully, and it's signed by Gale May, the foreperson, as well as Donna VanTassell, Alfreda Wargacki, Beverly Fox, Josephine Filak, and Vivian Desrosier.
>
> Okay. Now what they're looking for is for me to say that they can never -- that this case could never be reversed, that post-conviction relief -- I don't know.
>
> So I propose either one of two things, either I will reread the instruction to them, if you choose, I will read them the statute, I don't see any reason why not read them the statute, or I will tell them that I can't further advise them, that they have all the law that they're going to have."
>
> (R 1701-1702)

The prosecutor suggested the jury be told to rely on the instructions they had been given; the defense suggested that the question be answered in the affirmative and the court declined, noting that "the legislature may change the law next week" (R 1703). In the alternative the defense requested the court reread

the pertinent portion of the jury instruction that said life without the possibility of parole (R 1704). When the court asked the defense what it should read, the defense responded that 'we took it back to our office" (R 1705) . The court was hesitant to answer the question "yes" because it did not know whether Whitfield could ever get out (R 1705). The court then accepted the defense request to read this paragraph and did read it and the defense sought no other explanation be given the jury (R 1706-1708) :

> 'The punishment for this crime is either death or life imprisonment without the possibility of parole. The final decision as to what punishment shall be imposed rests solely with the Judge of this court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant. I will place great weight upon your advisory opinion."
> (R 1706-1707; R 1708-1709)

First of all, appellant may not prevail because the trial court granted the relief requested by appellant; thus, he may not be heard to complain now. See McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971)(defendant estopped from asserting as fundamental error where defense had requested given instruction); Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979)(where defendant deferred to trial court ruling, appellate court will not indulge in presumption that trial judge would have made erroneous ruling had objection

been made and authorities cited). In the instant case the defense counsel ultimately acquiesced to the lower court's decision and agreed with the instruction given to the jury (R 1708).[15]

Secondly, even if the merits could be addressed, Whitfield may not prevail since the trial court properly handled the matter. What the jury was asking -- whether there was a guarantee that Whitfield would never be allowed back into society -- is unanswerable since no one can foresee the future, e.g., a grant of clemency or pardon by a future governor, escape, the granting of post-conviction relief by a state or federal tribunal, reversal of conviction on direct appeal. This Court has previously approved the trial court's handling of similar requests by the jury that they have to depend on the evidence and instructions. See Waterhouse v. State, 596 So.2d 1008, 1015 (Fla. 1992); Mungin v. State, ___ So.2d ___, 21 Florida Law Weekly S66 (Fla., February 8, 1996).

Appellant cannot receive sustenance under Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231 (1985), since the jury's role was not minimized; they were reinformed that the court "would place great weight upon your advisory opinion" (R 1708-1709). Nor

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[15] "MR. WILLIAMS: No, your Honor, I would request that you just read the instruction."

is he aided by Simmons v. South Carolina, 512 U.S. ___, 129 L.Ed.2d 133 (1994). There, the prosecutor had argued that defendant's future dangerousness was a factor to consider when fixing the appropriate punishment and the defendant was not permitted an instruction regarding his ineligibility for parole where it appeared the jurors may not have understood state law. In Florida, unlike South Carolina, future dangerousness is not an appropriate aggravating factor and the statutory aggravators listed in F.S. 921.141 are exclusive (R 1696). Unlike Simmons, appellant was not denied the due process right to deny or explain information to rebut the prosecution claim that he would pose a danger to society in the future if not executed. The jury was correctly informed that the options to be considered were "either death or life imprisonment without the possibility of parole" (R 1708). Asking the Court to speculate on more than that was not constitutionally required.

Appellant's claim must be rejected.

ISSUE V

WHETHER THE TRIAL JUDGE ERRED IN FAILING TO FIND AND WEIGH MITIGATING CIRCUMSTANCES AND IN GIVING GREAT WEIGHT TO THE JURY'S DEATH RECOMMENDATION.

(A) . Statutory Mitigating Circumstance of Extreme Mental or Emotional Disturbance:

The trial court's order recites:

> 'The only professional called to testify regarding mitigating circumstances was Dr. Eddie Regnier, Ph.D., a psychologist who specializes in treating addiction disorders. He spent a total of approximately 14 hours with the defendant. The majority of his testimony came from hearsay documents and interviews. No witnesses with direct evidence were called to testify. Dr. Regnier indicated he was unable to get very much information from the defendant because the defendant was uncooperative and "a poor historian."
>
> Dr. Regnier testified that the defendant suffered from long standing major depression as a result of childhood deprivation. He was neglected and abused as a child; he lacked stability in his life and as a result became a cocaine addict.
>
> In 1991, the defendant was committed under the Baker Act and held for a few days. The records were never produced. Dr. Regnier indicated that this commitment was the result of a cocaine binge.
>
> It was further disclosed that in 1995, the defendant was involved in a shooting and was injured. From this incident he suffers a post traumatic stress disorder.
>
> Even if the above facts were proven,

> which they weren't, they were not of the magnitude to cause an extreme mental or emotional disturbance which would rise to the level of this mitigator. If Dr. Regnier's second hand recounting of the defendant's unpleasant and deprived childhood is believable, it still does not prove the existence of this statutory mitigator; however, I do find and apply that evidence to non-statutory mitigators."
>
> (R 2111)

Appellant argues (Brief, p. 55) that even if the trial judge correctly found that his mental and emotional disturbance did not rise to the level of the statutory mental mitigating circumstance he erred by failing to find and weigh the evidence as a non-statutory mitigating factor. This is not accurate. The sentencing order specifically declares:

> Even if the above facts were proven, which they weren't, they were not of the magnitude to cause an extreme mental or emotional disturbance which would rise to the level of this mitigator. If Dr. Regnier's second hand recounting of the defendant's unpleasant and deprived childhood is believable, it still does not prove the existence of this statutory mitigator; however, I do find and apply that evidence to non-statutory mitigators
>
> (emphasis supplied) (R 2111)

Appellant criticizes the lower court for making 'no mention of the testimony given by Peggy LaRue and Estella Pierre during the guilt or innocence phase of the trial" (Brief, p. 54). He does not

specify what should have been addressed other than to **say** that 'the court ignored important evidence relating to Whitfield's emotional disturbance about the break-up of his relationship with Estella Pierre." The short answer is that Estella Pierre did not in her testimony describe any emotional disturbance arising from their break-up (R 1135-1152). With respect to Ms. LaRue's guilt phase testimony, while she briefly commented on cross-examination that appellant mentioned his love for Estella and that he said he 'snapped" when Claretha pushed him (R 935, 939), the witness also added that she (LaRue) felt like her life was in danger when she was with appellant (R 942-943, R 945) and she did not testify that the break-up with Estella was a cause of any emotional disturbance contributing to the homicide. Even if she had done so, such testimony could have been ignored in light of the fact that appellant -- having weeks earlier specifically threatened to kill Claretha -- armed himself with a knife upon illegally entering the residence and initiating his assaults on Ms. Brooks and murder victim Claretha Reynolds.

Thus, Whitfield's self-serving rationalizations to Ms. LaRue after the murder need not be given full credence. And even if it were error for the trial court not to consider it, it was so insubstantial' given the facts and circumstances of the instant

offense and Whitfield's violent criminal history against women, any such error must be deemed harmless. Cf. Wickham v. State, 593 So.2d 191, 194 (Fla. 1991).

(B). Impaired Casacitv to Conform Conduct to the Requirements of Law:

The lower court's order recited:

> '2. The capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired.
>
> Dr. Regnier testified both during the guilt and penalty phase regarding the defense of voluntary cocaine intoxication that the defendant was a crack cocaine addict and had been so for approximately nine years. It was alleged that the defendant used cocaine the evening of the murder.
>
> I believe that the defendant is a cocaine addict, and that he probably did use cocaine some time shortly before the murder. Dr. Regnier testified that a crack cocaine high or euphoric feeling lasts about 15 minutes. There is no evidence that the defendant smoked rock cocaine within 15 minutes of the murder. The evidence shows that the defendant was committing the rape of Willie Mae Brooks for at least 10 minutes before entering the bedroom of the deceased where he then spent at least 10 minutes. During the guilt phase, the same evidence was presented to the jury to nullify the existence of the specific intent necessary for pre-meditation, and the jury found beyond a reasonable doubt that it did not exist. The law enforcement witnesses who saw the defendant shortly after the incident testified that he appeared normal. There is no satisfactory evidence from which I find the existence of this factor. This mitigating

factor does not exist."

(R 2111-2112)

The court added in considering non-statutory mitigation:

> '4. The defendant suffered from chronic crack cocaine addition.
>
> Although the evidence **was** not very definitive as to the nature and extent of the addiction, I find that this factor has been established. Had this been a crime to obtain money for drugs, this factor would be entitled to great weight. The commission of this murder had absolutely no relationship to the defendant's addiction; however, I do consider this an aspect of the defendant's background and character and in that regard, I give it substantial weight,
>
> (R 2113)

Appellant's complaint really is that the trial judge did not treat as unchallengeable verity the opinion of the defense-retained expert. This is not required. See Walls v. State, 641 So.2d 381, 390-391 (Fla. 1994); Wuornos v. State, 676 So.2d 972, 975 (Fla. 1996); Farr v. State, 656 So.2d 448, 450 (Fla. 1995). While Dr. Regnier described in general the use of crack cocaine as including after the high feeling, "a drop, a falling off, a deep depression, despair, uneasy feeling" (R 1198) and opined that Whitfield was in a paranoid and hypervigilant state when he committed the homicide (R 1220),[16] his observations were contradicted by arresting Officer

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[16]Dr. Regnier described as hypervigilant as being so guarded they can't speak to you in a give and take situation. (R 1220)

Bell who described appellant as very alert, seemingly without drug or alcohol problems and could lead the officers to the discarded murder weapon without difficulty (R 889-890, R 896).

Moreover, Dr. Regnier's views were not shared by state rebuttal expert witness Dr. Sprehe who thought Whitfield was able to form specific intent through the actions that occurred that evening as evidenced by his own utterances, the arresting officers who detected no evidence of intoxication, his actions of subterfuge, planning and discarding of the murder weapon (R 1251-1252). He noted the significance of threatening victim Brooks at knife point not to make noise because it showed he had plans to do something in the house without waking others present (R 1253). Fleeing the scene is an indicator of awareness (R 1254). Cocaine psychosis could be ruled out because it does not go away in a matter of a few hours and Whitfield was competent and aware of his rights within an hour or two of the killing (R 1255). His behavior was not that of an erratic cocaine-high person, i.e., being loud, repetitious and showing very jerky behavior in contrast to the planning and subterfuge and quietly warning the rape victim to be quiet (R 1256). It takes a matter of hours to come down from a cocaine high (R 1261).

In light of the contrary evidence supplied by the police and

Dr. Sprehe, the court correctly decided "there is no satisfactory evidence from which I find the existence of this factor" (R 2112).

(C). Givina Great Weight to the Jury Recommendation:

Appellant acknowledged that this Court has approved what the trial court has done, i.e., give great weight to the jury recommendation, Grossman v. State, 525 So.2d 833, 839, n 1 (Fla. 1988), Smith v. State, 515 So.2d 182, 185 (Fla. 1987), and he notes that this Court rejected a similar argument in Brown v. State, 565 So.2d 304 (Fla. 1990); see also Thompson v. State, 648 So.2d 692 (Fla. 1994). This Court has repeatedly stated that the jury is the conscience of the community. See Hall v. State, 614 So.2d 473, 477 (Fla. 1993) (lower court did not err in noting in order that disagreement with jury recommendation should be rare circumstance where sentencing order reflected proper weighing); Smith v. State, 515 So.2d 182, 185 (Fla. 1987); Grossman v. State, 525 So.2d 833, 846 (Fla. 1988); Stone v. State, 378 So.2d 765, 772 (Fla. 1979) (jury recommendation of death entitled to great weight). It would be an odd jurisprudence that would hold that great weight should be given when the jury makes a life sentence recommendation but refuse to accord such weight when the recommendation is death.

Appellant declares that the issue is ripe for re-examination in light of Espinosa v. Florida, 505 U.S. , 120 L.Ed.2d 854

(1992) but that case which merely re-emphasizes that the jury has a significant role to play in Florida's capital sentencing scheme contains no suggestion that a bare majority death recommendation should not be given weight.[17]

Appellant's claim is without merit.

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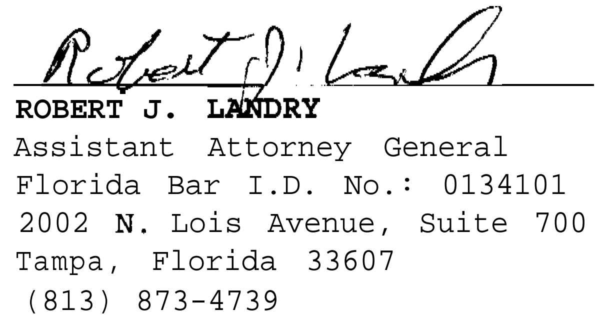
[17] Other alumni of the school of seven-to-five jury death recommendations approved by this Court include Ferrell V. State, ___ So.2d ___, 21 Florida Law Weekly S388 (Fla. 1996); Wuornos v. State, ___ So.2d ___, 21 Florida Law Weekly S202 (Fla. 1996); Orme v. State, ___ So.2d ___, 21 Florida Law Weekly S195 (Fla. 1996); Larzelere v. State, 676 So.2d 394 (Fla. 1996); Archer, 673 So.2d 17 (Fla. 1996); Coney v. State, 653 So.2d 1009 (Fla. 1995); Suggs v. State, 644 So.2d 64 (Fla. 1994); Derrick v. State, 641 So.2d 378 (Fla. 1994); Colina v. State, 634 So.2d 1077 (Fla. 1994); Thompson v. State, 619 So.2d 261 (Fla. 1993), as well as numerous pre-Espinosa cases.

CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



ROBERT J. LANDRY
Assistant Attorney General
Florida Bar I.D. No.: 0134101
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished by U.S. Regular Mail to, Douglas S. Connor, Assistant Public Defender, Public Defender's Office, Post Office Box 9000--Drawer PD, Bartow, Florida 33831, this 24Th day of January, 1997.

COUNSEL FOR APPELLEE