IN THE SUPREME COURT OF FLORIDA

CHADWICK WILLACY,

Appellant,

v.

CASE NO. 86,994

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

While Willacy's factual statement is generally correct, the state offers the following summary of the facts for the Court's convenience.

The state indicted Willacy for first-degree murder, armed robbery, burglary, and arson (appendix A), and the jury convicted him as charged. (Appendix B). The jury recommended that Willacy be sentenced to death by a vote of nine to three and the trial court imposed the death penalty. Willacy v. State, 640 So. 2d 1079, 1081 n.1 (Fla. 1994). On appeal this Court vacated the death sentence and remanded for resentencing because the trial court did not afford defense counsel the opportunity to rehabilitate a prospective juror who stated that she could not vote to recommend a death sentence.

A new penalty phase took place in the fall of 1995. The evidence showed that the victim left work between 11:00 and 11:30 a.m. on September 5, 1990 (T 1666)[1] and was expected back after lunch. (T 1669). She did not return, however, and the following day her boss asked two co-workers to go to the victim's home and

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[1] "T" refers to the transcript, located in volumes V through XX (pages 1 through 3183). "R" refers to the record, volumes I through IV (pages 1 through 658).

check on her. (T 1669-71). When no one answered the door at the victim's, the co-workers returned to work, and the victim's son-in-law was called. (T 1671-72; 1692-94; 1699). The son-in-law and his father went to the victim's home and found items on the back porch that were normally inside the home, i.e., a television, a video cassette recorder, a tape rewinder, and a shotgun. (T 1707-10). On entering the house through an unlocked sliding glass door they smelled gasoline and found the kitchen and living room in disarray. (T 1711-12). The dead victim was found in one of the bedrooms. (T 1713). A fan from another bedroom was at her feet and was turned on. (T 1713-14). They called 911 (T 1715) and found a gasoline can in the kitchen. (T 1718).

The medical examiner testified that he arrived at the scene at 2:50 p.m. (T 1892) and found the victim lying on her back with extensive fire damage to the body and the floor around it. (T 1893). The victim's arms and legs were bound with cord over which duct tape had been placed. (T 1895-96). There was also a ligature around the victim's neck. (T 1934). There were bruises and lacerations on the victim's head (T 1935) and bruises on her left hand, right forearm, and legs. (T 1936). The wounds to the head and face were made by two different weapons. (T 1943). The cause

of death was "smoke inhalation following strangulation and blunt force injury of the head." (T 1955).

Detective George Santiago testified that he went to the victim's home before 11:00 a.m. on September 6. (T 2071). He saw the items on the back porch (T 2079) and noticed a strong odor of gasoline in the house. (T 2083). In the kitchen he noticed the gasoline can and an iron with only four inches of cord attached to it. (T 2108). He also mentioned the smoke detectors (T 2110, 2113) that had been disabled.

Willacy lived next door to the victim, and Santiago spoke with him about a broken window at Willacy's house. (T 2140). Willacy said he had mowed the victim's lawn, but, when Santiago asked for his fingerprints to eliminate Willacy, Willacy refused to give them. (T 2145). Willacy agreed to go to the police station around 5:00 p.m., but never showed up. (T 2146-48). Later that evening, Santiago received a telephone call from Willacy's girlfriend (T 2152), and he returned to Willacy's house. There, he was given the victim's checkbook, which had been found in Willacy's house. (T 2185-89). Santiago arrested Willacy and secured his house. (T 2191). After obtaining a search warrant (T 2199), Willacy's house was searched. Among the items seized were coins and jewelry (T

2222-23) that the victim's daughter identified as belonging in her mother's home. (T 2536).

A fingerprint examiner testified that Willacy's fingerprints were on the fan found at the victim's feet and on the gasoline can. (T 2433-34). A serologist from the Florida Department of Law Enforcement testified that the victim had type A blood, while Willacy's was type O. (T 2540). She found blood consistent with the victim's on several items taken from Willacy's house, i.e., a paper towel (T 2545), a tennis shoe (T 2550-52), and a pair of shorts. (T 2552). A Barnett Bank employee testified about ATM activity on the victim's bank account on September 5, including two $100 withdrawals. (T 2581, 2590). A photograph of Willacy, with the victim's car in the background, taken by the ATM machine was introduced into evidence. (T 2641).

On October 3, 1995 the jury voted eleven to one that Willacy should be sentenced to death. (T 3173). Sentencing took place on November 20. The trial court found that the state had established five aggravators: felony murder/arson (R 615-16); avoid or prevent arrest (R 616); pecuniary gain (R 616-17); heinous, atrocious, or cruel (R 617-18); and cold, calculated, and premeditated (R 618). The court considered three statutory mitigators (no prior criminal history, accomplice, and age), but held that none of them were

supported by the record. (R 619-20). Willacy's sentencing memorandum listed thirty-seven items of nonstatutory mitigation (R 610-12) that the trial court also considered. (R 620-23). Those items that the court found had been established were assigned little weight. (R 623). The court found that the aggravators outweighed the mitigators and sentenced Willacy to death. (R 624).

SUMMARY OF ARGUMENT

ISSUE I: Willacy filed motions to recuse and to disqualify the trial judge. He did not, however, present legally sufficient reasons, and the trial judge properly denied those motions.

ISSUE II: Among other things, Willacy was convicted of arson. The victim died of smoke inhalation, and the trial court properly allowed the state to introduce evidence that Willacy set the victim on fire.

ISSUE III: The record supports the trial court's finding the heinous, atrocious, or cruel aggravator.

ISSUE IV: Willacy killed the victim to eliminate a witness, and the trial court properly found that the murder was committed to avoid or prevent a lawful arrest.

ISSUE V: Willacy was convicted of burglary, armed robbery, and arson. There was no improper doubling when the trial court found both felony murder/arson and pecuniary gain in aggravation.

ISSUE VI: The record supports finding the cold, calculated, and premeditated aggravator.

ISSUE VII: Willacy's death sentence is both proportionate and appropriate.

ISSUE VIII: The trial court did not err in allowing the state to present victim impact evidence.

ISSUE IX: The trial court did not err in refusing to strike five prospective jurors for cause. When the sentencing process was explained to them, they stated that they would put aside their personal beliefs and would follow the judge's instructions.

ISSUE X: No "cumulative error" that warrants reversal occurred.

ISSUE XI: The claims that Florida's death penalty statute is unconstitutional have not been preserved for appeal and have no merit.

ARGUMENT

ISSUE I

WHETHER THE TRIAL JUDGE PROPERLY REFUSED TO RECUSE OR DISQUALIFY HIMSELF.

Willacy argues that the trial judge should have recused or disqualified himself from presiding over the resentencing proceedings. There is no merit to this claim.

Circuit Judge Theron A. Yawn, Jr., conducted Willacy's trial and original sentencing in 1991. In an order dated July 1, 1994, then-Chief Justice Grimes assigned Judge Yawn and seventeen other retired judges to assist the Eighteenth Judicial Circuit. (R 319). On November 28, 1994[2] Chief Judge Antoon assigned Judge Yawn to hear Willacy's case. (R 392).

Kurt Erlenbach represented Willacy at trial and on appeal. The public defender's office evidently replaced Erlenbach after the remand because on January 16, 1995, Willacy filed an affidavit accepting Daniel S. Ciener as his attorney in place of the public defender. (R 410). Less than two months later, Judge Yawn granted Ciener's motion to withdraw and appointed the public defender's office to replace him. (R 420). On April 14, 1995 Judge Yawn appointed James G. Kontos to represent Willacy. (R 422).

On February 17, 1995 Ciener filed both a motion to recuse Judge Yawn (R 381) and a motion to disqualify him. (R 385). The recusal motion argued that there has been "no showing that the local circuit judge assigned to this case is unable to perform the duties of his office or that a substitute judge is necessary for

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[2] Judge Antoon's order is dated November 18, 1995, but the year is obviously a typographical error because the body of the order sets a status conference for January 1995.

the prompt dispatch of the business of the court." (R 383).[3] The motion also stated: "There has been no request that Circuit Judge Theron A. Yawn preside over the resentencing proceedings nor has there been any showing of necessity for Judge Yawn to preside over the resentencing proceedings" (R 382-83) (emphasis in original) and that "Judge Yawn has no authority to preside over this resentencing proceeding." (R 383).

The affidavit attached to the motion to disqualify contains the following averments:

> I have great fear that Judge Yawn is biased in favor of the state and prejudiced against me to the extent that I can not get a fair sentencing hearing if he is the judge.
>
> Judge Yawn hurried to get my first trial finished and sentenced me to death. He did not give my lawyer sufficient time to properly ask questions of the jury, or rehabilitate a juror, nor time to properly represent me or present my case. The judge constantly cut my lawyer off.
>
> Because of the way the judge acted at my first trial and sentencing in this case, I feel that Judge Yawn has also already made up his mind to sentence me to death again regardless of what happens at the resentencing hearing.

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[3] Apparently, this case was initially assigned to Judge Antoon, as evidenced by the substitution of Judge Yawn's name for Judge Antoon's in an order signed by Judge Antoon on December 1, 1994. (R 393-94).

> No amount of evidence or argument by me, or on my behalf, can convince this judge to change his mind or change his previously made decision to sentence me to death.
>
> Based on a combination of statements the judge made, his demeanor, his facial expressions, his tone of voice, and a belligerent and hostile attitude toward me, I believe he is bias[ed] and prejudiced against me and I therefore can not receive a fair hearing.
>
> I don't believe he can put aside his past animosity toward me and have a fresh and fair hearing on the resentencing.

(R 386).

Judge Yawn heard argument on these motions on February 17, 1995. As to the recusal motion, Judge Yawn held:

> The court is of the opinion that the motion to recuse Retired Circuit Judge Theron Yawn filed before the court on this date is untimely since counsel knew, or should have known, that I was the judge who would be trying the case for some considerable time. If such motion was to be forthcoming, it should have been filed long before this point. Secondly, I find that it would be without merit.

(R 22). The court also denied the motion to disqualify because the affidavit was insufficient. (R 23).

Judge Yawn correctly held that the recusal motion was untimely. Florida Rule of Judicial Administration 2.160(e) provides that a motion to disqualify must "be made within a reasonable time not to exceed 10 days after discovery of the facts

constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling." Willacy had been represented by counsel continuously since this Court's remand to the circuit court, and Judge Yawn was appointed to hear this case on November 28, 1994. The motion to recuse, therefore, should have been filed on or about December 8, 1994. Willacy, however, waited for more than two months after that date before asking Judge Yawn to recuse himself. The judge correctly held that the motion to recuse was untimely. Cf. Equitable Life Assurance Society v. Waller, 659 So. 2d 490 (Fla. 5th DCA 1995) (motion to disqualify was timely where promptly filed after judge was formally assigned); McGauley v. Goldstein, 653 So. 2d 1108 (Fla. 4th DCA 1995) (motion to disqualify was untimely under Fla. R. Jud. Admin. 2.160(e) when brought two months after counsel was appointed).

The court also correctly found the motion to recuse to have no merit. Judge Yawn was properly appointed to the Eighteenth Judicial Circuit pursuant to Florida Rules of Judicial Administration 2.030(3)(A) and (4)(C) and 2.050(b)(4). He was also properly assigned to hear Willacy's case.

As this Court has stated: "Flexibility must be given the chief judges to utilize effectively judicial manpower in the mutual assistance of each trial court." Crusoe v. Rowls, 472 So. 2d 1163,

1165 (Fla. 1985). The assignment of cases "is a matter within the internal government" of a court, "and a party possesses no right to have a particular judge hear or not hear his case absent grounds for disqualification." Gallagher v. State, 476 So. 2d 754, 756 (Fla. 5th DCA 1985); Kruckenberg v. Powell, 422 So. 2d 994 (Fla. 5th DCA 1982). The presiding judge may, in his or her discretion, assign a case to a judge who previously heard the matter. Morrison v. Morrison, 136 So. 2d 30 (Fla. 3d DCA 1962). Moreover, "the language of Rule 2.050 does not require that the initial judge be absent, disqualified, or disabled before temporary assignment of another judge is permitted." Judges v. Ernst, 615 So. 2d 276, 277 (Fla. 2d DCA 1993). Willacy has demonstrated no abuse of discretion or impropriety in Judge Yawn's appointment, and Judge Yawn correctly denied the motion to recuse.

Judge Yawn also properly denied the motion to disqualify. Florida Rule of Judicial Administration 2.160(c) requires that a motion to disqualify must "specifically allege the facts and reasons relied on to show the grounds for disqualification." The asserted facts must "create a 'well-founded fear' in the mind of the party that he or she will not receive a fair trial." Fischer v. Knuck, 497 So. 2d 240, 242 (Fla. 1986). When a motion to disqualify is filed, "the judge with respect to whom the motion is

made may only determine whether the motion is legally sufficient and is not allowed to pass on the truth of the allegations." Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983); Dragovich v. State, 492 So. 2d 350 (Fla. 1986).

To be legally sufficient, the motion "must contain an actual factual foundation for the alleged fear of prejudice." Fischer, 497 So. 2d at 242. "[T]he standard for determining whether a motion is legally sufficient is 'whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.'" MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332, 1335 (Fla. 1980) (quoting Livingston, 441 So. 2d at 1087); Rogers v. State, 630 So. 2d 513, 515 (Fla. 1993) ("The inquiry focuses on the reasonableness of the defendant's belief that he or she will not receive a fair hearing"). However, "without a showing of some actual bias or prejudice so as to create a reasonable fear that a fair trial cannot be had, affidavits supporting a motion to disqualify are legally insufficient." Dragovich, 492 So. 2d at 353. Allegations as to the following situations do not, in and of themselves, demonstrate a well-founded fear that a fair trial will occur and, thus, do not constitute adequate grounds for recusal: 1) the judge previously made a ruling adverse to the defendant, e.g., Barwick v. State, 660 So. 2d 685

(Fla. 1995); Jackson v. State, 599 So. 2d 103 (Fla. 1992); Gilliam v. State, 582 So. 2d 610 (Fla. 1991); Tafero v. State, 403 So. 2d 355 (Fla. 1981); Post-Newsweek Stations, Florida, Inc. v. Kaye, 585 So. 2d 430 (Fla. 3d DCA 1991); Nassetta v. Kaplan, 557 So. 2d 919 (Fla. 4th DCA 1990); 2) the judge previously heard the evidence, e.g., Jackson; Dragovich; 3) the judge had formed a fixed opinion of the defendant's guilt, e.g., Jackson; Dragovich; 4) the judge made gratuitous remarks about the behavior of a lawyer or his client, e.g., Oates v. State, 619 So. 2d 23 (Fla. 4th DCA 1993); Nassetta.

Applying the foregoing principles to this case, it is obvious that the court properly denied the motion to disqualify. Willacy's allegations that Judge Yawn, having sentenced Willacy to death previously, was predisposed to do so again are mere speculation and are insufficient as a matter of law. Any alleged problems that Erlenbach, Willacy's original counsel, had with Judge Yawn are an insufficient reason for disqualification because Erlenbach did not represent Willacy at the resentencing.[4] A motion to dismiss must

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[4] As demonstrated in issue XC, infra, there is no merit to Willacy's claim that "the sua sponte berating by Judge Yawn before the jury of defense counsel cross-examination technique during the critical cross-examination of the medical examiner is the exact kind of judicial behavior that Willacy stated would affect his ability to get a fair trial." (Initial brief at 28).

be based on existing facts, Post-Newsweek, not possible effects, id., or frivolous subjective fears. Fischer. Willacy has demonstrated no error in Judge Yawn's denial of his motions to recuse and disqualify, and the judge's rulings should be affirmed.

ISSUE II

WHETHER THE COURT PROPERLY ALLOWED THE STATE TO PRESENT EVIDENCE REGARDING WILLACY'S SETTING THE VICTIM ON FIRE.

Willacy argues that the trial court erred in allowing the state to present evidence and photographs proving that, after beating and strangling the victim, Willacy set her on fire. He claims that such evidence was not relevant to any aggravator. There is no merit to this claim.

On September 5, 1995 Willacy filed a motion in limine seeking

> to limit the prosecution or any of its witnesses, during any stage of the resentencing proceeding, from referring to, commenting on, or presenting any evidence that the decedent's body was set on fire or burned, including but not limited to any photographs or slides or other evidence of any fire or burning, any videotape of any evidence of burning, and any testimony of Dr. Dennis Wickham, the Associate Medical Examiner, regarding his findings, conclusions, or observations regarding the burning of the decedent's body.

(R 443). The motion further argued that, although relevant to Willacy's arson conviction, evidence that he set the victim on fire would be highly prejudicial and, because the victim was unconscious, would not prove that the murder was heinous, atrocious, or cruel (HAC). (R 444-45). The state filed a written response on September 8, in which it argued that setting the victim on fire was relevant to proving both the felony murder/arson and HAC aggravators. (R 457-60).

The trial court heard argument from the parties on September 8. Willacy argued both that evidence of the victim's burning did not go to proving any aggravators and, therefore, was not relevant and that allowing the jury to know that Willacy set the victim on fire would be overly prejudicial. (R 198). He also argued that the jury could be told about the burning without going into the "gruesome facts" if the state sought to establish the felony murder/arson aggravator. (R 202-03). Willacy asked that all evidence of the burning, including photographs, be excluded. (R 204). The state responded that the burning was an integral part of the case and was relevant to the HAC (R 209) and felony murder aggravators (R 213) and that the jury should be told the cause of death and all the circumstances surrounding the victim's death. (R 214). Willacy then reargued relevance versus the prejudice of

telling the jury that he set the victim on fire (R 217) and stated that the arson conviction was not sufficient to support finding felony murder in aggravation. (R 220). After listening to these arguments, the judge commented: "It seems to me it is a matter that should go to the jury." (R 225). He then denied the motion in limine.

Near the end of proceedings on September 25, 1995 it was decided that the state would proffer the medical examiner's testimony about the victim being burned so that the court could decide if the jury would be allowed to hear that testimony. (T 1794-1815). The proceedings reconvened at 8:30 the following morning, and Dr. Dennis Wickham, the medical examiner, described the condition of the victim's body and the extent of her injuries. (T 1832, 1834-39). The medical examiner stated that the victim's "cause of death was smoke inhalation following strangulation and blunt force injury of the head." (T 1938). He also stated that he thought the victim's body was moving during the time the fire was burning. (T 1854).

Following the proffer, the court heard the parties' arguments. Willacy argued that the doctor could testify to the cause of death without using photographs (T 1864) and that postmortem injuries or anything that happened after the victim became unconscious could

not be used to establish HAC. (T 1865). He also argued that photographs would not be needed to establish arson. (T 1866). The state responded that photographs were necessary to demonstrate Willacy's intent and that it had to explain to the jury what happened. (T 1873-74). The state also argued that evidence of Willacy's setting the victim on fire supported HAC (T 1874), felony murder/arson (T 1875), and cold, calculated, and premeditated (CCP). (T 1881). The court overruled the objection to evidence that Willacy set the victim on fire. (T 1885).

The state then called Dr. Wickham to testify before the jury. Wickham went to the scene and observed the victim's body lying on its back; there was extensive fire damage to the body and to the floor around the body. (T 1893). Willacy asked for and received a standing objection to the doctor's testimony. (T 1894). During his testimony the state sought to introduce numerous photographs, and, over defense objection, the court allowed three photographs into evidence.[5] Thereafter, the court excused the jury, examined the remaining photographs the state sought to introduce, and allowed direct and cross-examination of the medical examiner as to the necessity for the additional photographs. (T 1901-29).

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[5] Admitted into evidence as state's exhibits #8 (T 1897), #9 (T 1898), and #10 (T 1900).

Besides the three photographs already admitted, the state tried to introduce eighteen other photographs. (T 1901, 1903, 1905, 1911). After examining the photographs and listening to the questioning of the doctor, the court allowed only two of those eighteen photographs into evidence.[6] (T 1914, 1918, 1929).

In Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986), this Court stated that

> 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.

This Court has uniformly applied the principles of Teffeteller to resentencings. Hitchcock v. State, 673 So. 2d 859 (Fla. 1996); Preston v. State, 607 So. 2d 404 (Fla. 1992), 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993); Valle v. State, 581 So. 2d 40 (Fla. 1991); Lucas v. State, 568 So. 2d 404 (Fla. 1990); Chandler v. State, 534 So. 2d 701 (Fla. 1988).

This Court addressed a similar claim in Preston where the victim lost consciousness and/or died, and Preston objected "to any

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[6] State's exhibits #11 and #12.

testimony about injuries inflicted after the initial wound." 607 So. 2d at 410. This Court affirmed the admission of such testimony, stating: "Injuries inflicted after the victim was rendered unconscious are part of the criminal episode." Id. The state does not concede that Willacy's victim was unconscious throughout all the events that culminated in her death, but, as in Preston, those events were part of a single criminal episode and, therefore, admissible.

Testimony about Willacy's setting the victim on fire was relevant to several aggravators. The victim died of smoke inhalation caused by the arson that Willacy committed. Both the medical examiner and a bloodstain analyst (T 2331) testified that the victim could have been moving around after being set on fire.[7] This contravenes Willacy's argument (initial brief at 34) that the victim's burning is not relevant to HAC. Furthermore, setting the victim on fire goes to establishing CCP by showing that Willacy,

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[7] Willacy argues that the medical examiner changed his testimony from opining that the strangulation "would" have killed the victim to that it "could" have killed her and that the victim "would" have been unconscious. (Initial brief at 31). Dr. Wickham explained that he used the terms "probably . . . more interchangeably than he should" and that he thought the victim was in the process of dying when the fire was started. (T 1967).

not content with beating, binding, and strangling the victim, coldly and premeditatedly intended to effect her death.

This Court has addressed the admissibility of photographs many times and in Henderson v. State, 463 So. 2d 196, 200 (Fla. 1986), stated: "Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." (Emphasis supplied; citations omitted). The trial court conscientiously examined the photographs submitted by the state[8] and allowed the admission of only five of them during the medical examiner's testimony. See Taylor v. State, 630 So. 2d 1038 (Fla. 1993), cert. denied, 115 S. Ct. 107, 130 L. Ed. 2d 54 (1994); Henry v. State, 613 So. 2d 429 (Fla. 1992). The fact that photographs are gruesome does not mean that they are inadmissible. Preston; Foster v. State, 369 So. 2d 928 (Fla.), cert. denied, 444 U.S. 885, 100 S. Ct. 178, 62 L. Ed. 2d 116 (1979). Willacy complains that the "photographs and video of the burnt corpse"

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[8] The following statement by the court is typical: "[Y]ou're going to have to show me their evidentiary value outweighs the prejudicial effect. Those are especially gruesome photographs. You'll have to show me some reason for their admission or I'll reject them." (T 1904).

(initial brief at 35) and "this photograph" (initial brief at 36) were unnecessary and prejudicial. He does not, however, identify which photograph he is complaining about.[9] Willacy has demonstrated no abuse of discretion, and this claim should be denied.[10] Lockhart v. State, 655 So. 2d 69 (Fla. 1995); Preston; Jackson v. State, 545 So. 2d 260 (Fla. 1989); Wilson v. State, 436 So. 2d 908 (Fla. 1983).

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[9] The state introduced a videotape of the crime scene that included several minutes showing the victim's body. When the defense objected, the court directed the state to stop the tape "before it depicts any view of the body" because the still photographs would show the body adequately. (T 2132-33).

[10] Willacy's reliance on Smith v. State, 573 So. 2d 306 (Fla. 1990), and Czubak v. State, 570 So. 2d 925 (Fla. 1990), is misplaced. This Court found error in the state's showing autopsy photographs to a seventeen-year-old witness that caused her to break into tears on the stand in Smith. In Czubak the photographs did not help explain the medical examiner's testimony, and the condition of the body "was the result of the length of time she had been dead and the ravages of the dogs." 570 So. 2d at 929. Here, on the other hand, the photographs assisted the medical examiner in explaining what was done to the victim, and the condition of the victim's body was due solely to Willacy's cold-blooded, intentional acts.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY FOUND THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR APPLICABLE TO THIS MURDER.

Willacy argues that the trial court erred in finding that he committed this murder in a heinous, atrocious, or cruel (HAC) manner. There is no merit to this argument.

The trial court made the following findings regarding this aggravator:

> 4. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.
>
> In accomplishing Mrs. Sather's death, the defendant bludgeoned, strangled and choked her. He immobilized her, binding her hands and feet with duct tape and affixing a ligature to her throat. He directed the flow of air from an electric fan over her helpless body which he doused with gasoline and set on fire while still alive. Death was caused by the inhalation of smoke and flame from the inferno fueled by her own body.
>
> The defendant's actions raise his conduct to a level setting this case apart from the norm of capital felonies. It was conscienceless, pitiless and unnecessarily tortuous to the victim and well within the definition of "heinous, atrocious and cruel." DIXON V. STATE, 283 So.2d 1 (Fla. 1983).
>
> This aggravating factor was proven beyond reasonable doubt.

(R 617-18).

Relying on Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), DeAngelo v. State, 616 So. 2d 440 (Fla. 1993), and Jackson v.

State, 451 So. 2d 458 (Fla. 1984), Willacy argues that it is "possible" that the victim was unconscious prior to being strangled and that, therefore, HAC does not apply to this murder. (Initial brief at 41-44). In Rhodes this Court struck the HAC aggravator because the victim was, at most, only semiconscious during the attack on her and her murder was accompanied by no acts that set it apart from the norm of capital felonies. In DeAngelo this Court upheld the trial court's refusal to find HAC due to the lack of defensive wounds, the lack of a struggle, the presence of a substantial amount of marijuana in the victim's system, and testimony that the victim may have been unconscious. In Jackson this Court struck the HAC aggravator because the victim became unconscious moments after being shot the first time.

Willacy's argument totally ignores the evidence supporting HAC. The medical examiner testified that the victim died of "smoke inhalation following strangulation and blunt force injury of the head." (T 1955). He could not say if the beating would have caused unconsciousness. (T 1947). Furthermore, the victim was alive and breathing when the fire started. (T 1951). The medical examiner thought the victim's body was moving during the time the fire was burning. (T 1854). A bloodstain analyst testified that she found two bloodstains containing burnt head hairs on the wall

of the room where the victim was found (T 2320) and that the victim even though tied up, could have been moving. (T 2331). Even if the victim became unconscious at some point during the ordeal, the evidence shows that it is at least as likely, if not more so, that she regained consciousness as it is that she remained unconscious until succumbing to the smoke.

Unlike the victims in Rhodes and DeAngelo, there was no evidence that the victim had ingested alcohol or drugs or that she was other than fully conscious and aware of what Willacy intended to do to her. The bloodstain analyst found the victim's blood on the living room sofa and drapes (T 2290-91), the dining room ceiling and wall (T 2315), the foyer wall and floor (T 2317-18), and the floor of the garage (T 2318), as well as on the carpet in the living room and the bedroom where the body was found. (T 2319). There is a qualitative difference between Jackson's victim being incapacitated by a single gunshot and this victim's being savagely beaten while being chased through her home.

The HAC aggravator applies to the nature of the killing and the surrounding circumstances. Gorby v. State, 630 So. 2d 544 (Fla. 1993), cert. denied, 115 S. Ct. 99, 130 L. Ed. 2d 48 (1994); Stano v. State, 460 So. 2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111, 105 S. Ct. 2347, 85 L. Ed. 2d 863 (1985); Mason v. State, 438

So. 2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1330, 79 L. Ed. 2d 725 (1984). "In determining whether the circumstance of heinous, atrocious or cruel applies, the mind set or mental anguish of the victim is an important factor." Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988), cert. denied, 489 U.S. 1040, 109 S. Ct. 1175, 103 L. Ed. 2d 237 (1989); Wyatt v. State, 641 So. 2d 1336 (Fla. 1994), cert. denied, 115 S. Ct. 1983, 131 L. Ed. 2d 870 (1995); Phillips v. State, 476 So. 2d 194 (Fla. 1985). As this Court has held many times, fear and emotional strain preceding a victim's death contribute to the heinous nature of that death. Sochor v. State, 619 So. 2d 285 (Fla.), cert. denied, 114 S. Ct. 538, 126 L. Ed. 2d 596 (1993); Preston v. State, 607 So. 2d 404 (Fla. 1992), cert. denied, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993); Adams v. State, 412 So. 2d 850 (Fla.), cert. denied, 459 U.S. 882, 103 S. Ct. 182, 74 L. Ed. 2d 148 (1982).

As this Court has stated regarding the HAC aggravator:

> There can be no mechanical, litmus test established for determining whether this or any aggravating factor is applicable. Instead, the facts must be considered in light of prior cases addressing the issue and must be compared and contrasted therewith and weighed in light thereof.

Magill v. State, 428 So. 2d 649, 651 (Fla. 1983). This Court has rejected other appellants' claims that HAC did not apply because

their victims might have been unconscious or had no defensive wounds. E.g., Whitton v. State, 649 So. 2d 861 (Fla. 1994); Taylor v. State, 630 So. 2d 1038 (Fla. 1993), cert. denied, 115 S. Ct. 107, 130 L. Ed. 2d 54 (1994); Hildwin v. State, 531 So. 2d 124 (Fla. 1988); Routly v. State, 440 So. 2d 1257 (Fla. 1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3591, 82 L. Ed. 2d 888 (1984). Instead of being comparable to Rhodes, DeAngelo, and Jackson, the instant case is more similar to the just-listed cases and the cases that recognize that a victim's fear and emotional strain can establish HAC.[11] The facts of this case fully support the trial court's finding HAC in aggravation.

Willacy also reargues his claim from issue II, supra, that the arson he committed was an act independent of the homicide. (Initial brief at 45). His citation to Trawick v. State, 473 So. 2d 1235 (Fla. 1985), is not well taken because Trawick is factually distinguishable. Trawick robbed two gasoline stations and shot the

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[11] The fact that the murder occurs within the safety of the victim's home can also contribute to the heinous, atrocious, or cruel nature of the crime. Haliburton v. State, 561 So. 2d 248 (Fla. 1990), cert. denied, 501 U.S. 1259, 111 S. Ct. 2910, 115 L. Ed. 2d 1073 (1991); Dudley v. State, 545 So. 2d 857 (Fla. 1989); Perry v. State, 522 So. 2d 817 (Fla. 1988); Troedel v. State, 462 So. 2d 392 (Fla. 1984); Breedlove v. State, 413 So. 2d 1 (Fla.), cert. denied, 459 U.S. 882, 103 S. Ct. 184, 74 L. Ed. 2d 149 (1982).

clerk at each; the first lived, the second died. This Court found the trial court's reliance on the first victim's shooting, injuries, and pain to establish HAC for the second victim's death to be error. In doing so the Court commented: "Acts committed independently from the capital felony for which the offender is being sentenced are not relevant to the question of whether the capital felony itself was especially heinous, atrocious, or cruel." Id. at 1240 (emphasis supplied). Here, the arson was only the last event in this criminal episode that caused the victim's death. As such, it was relevant, and testimony about it was admissible. Preston.

Contrary to Willacy's claim (initial brief at 45), the HAC instruction was neither prejudicial nor confusing. A "trial court is required to instruct on all aggravating and mitigating circumstances 'for which evidence has been presented.'" Stewart v. State, 558 So. 2d 416, 420 (Fla. 1990) (quoting Fla. Std. Jury Instr. (Crim.) at 78, 80). The state presented more than sufficient evidence to warrant instructing the jury on HAC. Moreover, the trial court gave the HAC instruction approved in Hall v. State, 614 So. 2d 473 (Fla.), cert. denied, 510 U.S. 834, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1993). (T 3134). The trial court also included, at the request of the defense (T 2953), as a final

sentence in that instruction this admonishment: "The jury may not consider injuries inflicted after the victim lost consciousness in determining whether the murder was heinous, atrocious, and cruel." (T 3134).

Willacy's claim that this murder was not HAC "clearly as a matter of law" (initial brief at 46) is simply incorrect. Willacy attacked the victim in her home and used two weapons to beat her as she tried to flee from him. Not content with that, however, he then bound her wrists and legs and, with his victim immobilized, strangled her. When his victim still refused to die, he dragged her to another room and set her on fire. This murder was accompanied by additional acts that set it apart from the norm of capital felonies and was truly heinous, atrocious, or cruel. Cf. Henry v. State, 613 So. 2d 429 (Fla. 1992) (HAC established where Henry disabled the victims (by tying up one and hitting the other in the head) and then set them on fire).

Willacy has demonstrated no error in the trial court's finding the heinous, atrocious, or cruel aggravator applicable to this murder, and that finding should be affirmed.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY FOUND THE AVOID ARREST AGGRAVATOR.

Willacy argues that the trial court erred in finding in aggravation that he killed the victim to avoid or prevent a lawful arrest. There is no merit to this claim.

The trial court made the following findings of fact regarding this aggravator:

> 2. THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.
>
> The defendant and his victim were next-door neighbors. He had mowed her lawn for her. She knew him. She could identify him as her assailant and the person who she surprised in the act of burglarizing her home and robbing her. The victim was beaten into submission and securely bound rendering her incapable of interfering with or thwarting his purpose or preventing his escape. She could cause him no harm and posed no threat to him whatever. The dominant motive for this murder was the elimination of Marlys Sather as a witness and to avoid detection and arrest.
>
> The court finds this aggravating circumstance to have been proven beyond reasonable doubt.

(R 616). The record fully supports these findings.

The avoid arrest aggravator "focuses on a defendant's motivation for a crime." Stein v. State, 632 So. 2d 1361, 1366 (Fla. 1994). Therefore, as this Court has stated, "in order to

establish this aggravating factor where the victim is not a law enforcement officer, the State must show that the sole or dominant motive for the murder was the elimination of the witness." Preston v. State, 607 So. 2d 404, 409 (Fla. 1992); Thompson v. State, 648 So. 2d 692 (Fla. 1994); Hall v. State, 614 So. 2d 473 (Fla. 1993); Correll v. State, 523 So. 2d 562 (Fla. 1988). Furthermore, the existence of this aggravator can be proved through circumstantial evidence. Thompson; Hall; Preston; Swafford v. State, 533 So. 2d 270 (Fla. 1988); Routly v. State, 440 So. 2d 1257 (Fla. 1983).

The cases that Willacy relies on in arguing that the avoid arrest aggravator does not apply are factually distinguishable. This Court found this aggravator inapplicable in Menendez v. State, 368 So. 2d 1278 (Fla. 1979), because the events preceding the killing were unknown. In Armstrong v. State, 399 So. 2d 953 (Fla. 1981), the pathologist's equivocal findings were insufficient to support the aggravator.[12] The aggravator was also struck in Jackson v. State, 502 So. 2d 409 (Fla. 1986), where the victim did not know Jackson. In Cook v. State, 542 So. 2d 964 (Fla. 1989), this Court invalidated this aggravator where Cook shot the victim

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[12] Willacy's citation to Enmund v. State, 399 So. 2d 1362 (Fla. 1981) (initial brief at 49), is puzzling because that case did not involve the avoid arrest aggravator.

instinctively. In Garron v. State, 528 So. 2d 353 (Fla. 1988), this Court found no proof of a true motive for the killing. The victims in both Amazon v. State, 487 So. 2d 8 (Fla. 1986), and Green v. State, 583 So. 2d 649 (Fla. 1991), knew their killers. In Amazon, however, the defendant's irrational frenzy disproved witness elimination as a motive. Similarly, in Green this Court struck the avoid arrest aggravator on the facts "that the next thing he knew was that Mrs. Nichols was on the floor stabbed and bleeding; that he followed Mr. Nichols to the back bedroom; that the next thing he knew was that Mr. Nichols was on the floor stabbed, bleeding and moaning." 583 So. 2d at 649.

Contrary to Willacy's argument (initial brief at 51), there is a vast difference between the facts of his case and those in Green. If Willacy had only beaten the victim over the head when she found him burglarizing her home, his position might be correct. Willacy, however, chased the victim through much of the house and, after beating her into submission, dragged her back to the living room where he bound her arms and legs. Then, he strangled her. Still not satisfied because the victim was not dead, he dragged her to another room, doused her with gasoline that he retrieved from the garage, and set her on fire. If, as Willacy contends, the victim was unconscious after the beating, there was no reason to bind,

strangle, and burn her. On the facts of this case there is no reasonable inference but that Willacy intended to kill the victim to eliminate her as a witness to his crimes. Cf. Thompson, 648 So. 2d at 695 ("little reason to kill [the victims] other than to eliminate the sole witnesses to his actions"); Hall, 614 So. 2d at 477-78 (same); Preston, 607 So. 2d at 409 (same); Correll, 523 So. 2d at 568 (same); Routly, 440 So. 2d at 1263 (same).

Willacy has shown no error in the trial court's finding the avoid arrest aggravator, and that finding should be affirmed.

ISSUE V

WHETHER THE TRIAL COURT PROPERLY FOUND BOTH FELONY MURDER AND PECUNIARY GAIN IN AGGRAVATION.

Willacy argues that the trial court's finding both the felony murder and pecuniary gain aggravators constituted an improper doubling. There is no merit to this claim.

The trial court made the following findings as to these aggravators:

> 1. THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED, OR WAS AN ACCOMPLICE IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, ANY ROBBERY ... ARSON ... BURGLARY.
>
> Marlys Sather was still alive when she was bludgeoned about the head with two separate instruments, a ligature attached to her neck, her feet and legs secured with duct tape. Smoke alarms in her home were dislodged

from their fasteners and rendered inoperable. Blood deposits found in various places throughout her house suggest a violent struggle for her life during which she resisted her assailant for as long as she possessed the strength to do so and throughout which she was fully conscious, aware of and terrified by the knowledge of her approaching doom. The position and location of her body suggest that her struggle continued for some time until she was doused with gasoline and set on fire. She somehow managed to wrench free of her shoes before succumbing to the smoke and flames engulfing the exterior of her body and penetrating the recesses of her lungs.

This aggravating circumstance was proven beyond reasonable doubt.

(R 615-16).

3. THE MURDER WAS COMMITTED FOR PECUNIARY GAIN.

The state has proven beyond reasonable doubt that this murder was committed for pecuniary gain. In addition to murder and arson, the defendant was found guilty of robbery and burglary during the course of which he took personal property belonging to the victim, including her ATM card with which he obtained money from her bank account, an automobile, her checkbook and a collection of coins. An assortment of other items had been removed from the house and deposited on a porch preparatory to their removal which was thwarted by the unexpected and unfortunate arrival of the victim.

(R 616-17). The record supports these findings and demonstrates that no improper doubling of aggravators occurred.

This Court has long held that "[i]mproper doubling occurs when aggravating factors refer to the same aspect of the crime." Green v. State, 641 So. 2d 391, 395 (Fla. 1994), cert. denied, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995); Provence v. State, 337 So. 2d 783, 786 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2929, 53 L. Ed. 2d 1065 (1977). As Willacy admits, however, "the additional specified felony of arson was used to support the [felony murder] circumstance, so that the pecuniary gain factor can also be found without improper doubling." (Initial brief at 53). Cf. Wyatt v. State, 641 So. 2d 1336 (Fla. 1995) (both felony murder and pecuniary gain aggravators upheld where defendant was convicted of sexual battery, kidnapping, robbery, grand theft, and arson), cert. denied, 115 S. Ct. 1983, 131 L. Ed. 2d 870 (1995); Henry v. State, 613 So. 2d 429, 433 (Fla. 1992) (state proved "both robbery and arson, thereby supporting the pecuniary gain and felony murder aggravators"), cert. denied, 114 S. Ct. 699, 126 L. Ed. 2d 665 (1994); Johnson v. State, 608 So. 2d 4 (Fla. 1992) (felony murder and financial gain approved in aggravation for the Evans murder where defendant was convicted of robbery, kidnapping, and arson), cert. denied, 508 U.S. 919, 113 S. Ct. 2366, 124 L. Ed. 2d 273 (1993).

To establish the pecuniary gain aggravator, "the State must prove beyond a reasonable doubt that the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain." Finney v. State, 660 So. 2d 674, 680 (Fla. 1995). Furthermore, as this Court has stated, "every robbery necessarily involves pecuniary gain." Toole v. State, 479 So. 2d 731, 733 (Fla. 1985). Besides first-degree murder, the state charged Willacy with burglary, armed robbery, and arson (appendix A), and the jury convicted him of those three felonies. (Appendix B). As the trial court noted in the findings regarding pecuniary gain, Willacy stole the victim's ATM card, and used it withdraw money from her bank account, her automobile, her checkbook, and a coin collection. Both the robbery and arson convictions are amply supported by the evidence, and there is no merit to Willacy's claim that the arson and the taking of the victim's property were merely "afterthoughts." (Initial brief at 54).

The trial court correctly found that both the felony murder and pecuniary gain aggravators had been established. No improper doubling of aggravators occurred, and this Court should approve the trial court's findings.

ISSUE VI

WHETHER THE TRIAL COURT PROPERLY FOUND THAT THE STATE HAD ESTABLISHED THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATOR.

Willacy argues that the trial court erred in finding the cold, calculated, and premeditated (CCP) aggravator. There is no merit to this claim.

Four elements must be proved to establish the CCP aggravator: the murder must be "cold," it must be the product of a careful plan or prearranged design, there must be heightened premeditation, and there must be no pretense of moral or legal justification. Fennie v. State, 648 So. 2d 95 (Fla. 1994), cert. denied, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995); Jackson v. State, 648 So. 2d 85 (Fla. 1994);[13] Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), cert. denied, 115 S. Ct. 1705, 131 L. Ed. 2d 566 (1995); Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995). The trial court made the following findings as to this aggravator:[14]

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[13] The trial court gave the CCP instruction adopted in Jackson. (T 3134-35).

[14] Willacy argues that the trial court should not have found CCP because this aggravator was not found in his original sentencing. (Initial brief at 85). As he acknowledges, however, there is no merit to this claim. Hall v. State, 614 So. 2d 473 (Fla.), cert. denied, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1991);

> 5. THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.
>
> The victim returned home unexpectedly from work to find the defendant engaged in the burglary of her home and the theft of some of its contents. There is no evidence of any initial intent of his part to kill her. His surprise at being caught, and the fear of its consequences, spawned in his mind an urgent need to eliminate her as a witness. Killing her was the obvious solution to his problem and the intention to do so was thus born. The means for its accomplishment were set into motion.
>
> There is no evidence of the exact amount of time spanned by the conception, planning and execution of this murder. However, the various and numerous activities devoted to its accomplishment show a level of heightened premeditation, and that the resulting murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. This aggravating circumstance has been proven beyond reasonable doubt.

(R 618). The facts support these findings and demonstrate the requisite heightened premeditation needed to establish CCP.

As the court noted, the victim's arrival probably surprised Willacy during his burglary of her home, and he chased her around the house and beat her into submission. Not satisfied with that, however, he cut the cord from an iron and bound her wrists behind

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Preston v. State, 607 So. 2d 404 (Fla. 1992), cert. denied, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993).

her. He used a separate type of cord to bind her legs and then wrapped duct tape over those bindings. Still not satisfied because the victim was alive, he used more of the electrical cord from the iron and more duct tape and strangled her. Thereafter, Willacy dragged the victim to a bedroom she used as a home office, got a can of gasoline from the garage and a fan from another bedroom, disabled the three smoke detectors in the home, doused the victim with gasoline, used two matches to set her on fire, and turned the fan on to fan the flames.

Willacy argues that the physical attack on the victim evidenced no planning or preparation. (Initial brief at 59). The initial attack perhaps supports that claim, but the subsequent events do not. Willacy could have fled after subduing the victim. Instead of doing so, however, he strangled the victim and then set her on fire. The deliberate nature of Willacy's actions demonstrate the requisite level of coldness, planning, and calculation and "establish that the murder was not prompted by emotional panic or a fit of rage." Fennie, 648 So. 2d at 99; Lockhart v. State, 655 So. 2d 69 (Fla. 1995); Walls; Arbelaez v. State, 626 So. 2d 169 (Fla. 1993), cert. denied, 114 S. Ct. 2123, 128 L. Ed. 2d 678 (1994). The lengthy nature of these events demonstrates the requisite premeditation. Fennie; Walls.

Willacy had plenty of time to reflect on his actions during this extended sequence of events and obviously decided to do everything he could to kill the victim and conceal the evidence of his crimes. The time it took to kill the victim coupled with the calculated searching out items with which to bind the victim and to set her on fire and the deliberate ruthlessness of Willacy's actions demonstrate that this murder meets the standards for establishing CCP. Fennie; Walls; Atwater v. State, 626 So. 2d 1325 (Fla. 1993), cert. denied, 114 S. Ct. 1578, 128 L. Ed. 2d 221 (1994); Henry v. State, 613 So. 2d 429 (Fla. 1992), cert. denied, 114 S. Ct. 699, 126 L. Ed. 2d 665 (1994).

The facts support the trial court's finding that the state established the CCP aggravator. Where there is a legal basis for finding an aggravator this Court will not substitute its judgment for that of the trial court. Occhicone v. State, 570 So. 2d 902 (Fla. 1990), cert. denied, 500 U.S. 938, 111 S. Ct. 2067, 114 L. Ed. 2d 471 (1991). Therefore, the finding of CCP should be affirmed.

Even if this Court decides that the trial court erred in finding that the CCP aggravator had been established, no relief is warranted. As stated by this Court previously: "If there is no likelihood of a different sentence, the trial court's reliance on

an invalid aggravator must be deemed harmless." Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988). Striking CCP would leave four aggravators (felony murder/arson, avoid or prevent arrest, pecuniary gain, and HAC) to be weighed against inconsequential nonstatutory mitigation. Given the presence of four strong aggravators and the lack of significant mitigators, there is no reasonable likelihood that Willacy would have received a sentence of life imprisonment if the CCP aggravator had not been considered. Cf. Geralds v. State, 674 So. 2d 96, 104-05 (Fla. 1996) (no reasonable likelihood of different sentence where striking an aggravator left two aggravators to be weighed against a statutory mitigator and three nonstatutory mitigators); Barwick v. State, 660 So. 2d 685, 697 (Fla. 1995) (no likelihood of different sentence when eliminating CCP left five aggravators to be weighed against "minimal mitigating evidence"); Fennie, 648 So. 2d at 99 (eliminating CCP would be harmless because "[t]he totality of the aggravating factors and the lack of significant mitigating circumstances conclusively demonstrate that death is the appropriate penalty in this case"); Pietri v. State, 644 So. 2d 1347, 1354 (Fla. 1994) (striking CCP left three aggravators and, even if the trial court had found mitigators, there was no

reasonable likelihood of a different sentence), cert. denied, 115 S. Ct. 2588, 132 L. Ed. 2d 836 (1995); Green v. State, 641 So. 2d 391, 395 (Fla. 1994) (striking HAC was harmless where three aggravators remained to be weighed against weak mitigation), cert. denied, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995); Wyatt v. State, 641 So. 2d 355, 360 (Fla. 1994) (striking two aggravators was harmless where the three remaining aggravators "far outweigh the minimal mitigating evidence"), cert. denied, 115 S. Ct. 1372, 131 L. Ed. 2d 227 (1995); Peterka v. State, 640 So. 2d 59, 71-72 (Fla. 1994) (striking two aggravators was harmless where three aggravators remained to be weighed against lack of a significant criminal history), cert. denied, 115 S. Ct. 940, 130 L. Ed. 2d 884 (1995).

ISSUE VII

WHETHER WILLACY'S DEATH SENTENCE IS PROPORTIONATE.

Willacy argues that his death sentence is disproportionate because only one aggravator was properly established, i.e., felony murder/burglary. (Initial brief at 61). As demonstrated in issues III through VI, supra, this claim is incorrect. Instead, the state proved that five aggravators exist. Willacy's reliance on single-aggravator cases, therefore, is misplaced because those cases do

not provide a valid basis for comparison. E.g., DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Blair v. State, 406 So. 2d 1103 (Fla. 1981); Phippen v. State, 389 So. 2d 991 (Fla. 1980); Menendez v. State, 368 So. 2d 1278 (Fla. 1979). Also factually distinguishable and not comparable to Willacy's case are the cases where no aggravators had been established (Amoros v. State, 531 So. 2d 1256 (Fla. 1988); Garron v. State, 528 So. 2d 353 (Fla. 1988); Kampff v. State, 371 So. 2d 1007 (Fla. 1979)), the jury overrides (Irizarry v. State, 496 So. 2d 822 (Fla. 1986); Herzog v. State, 439 So. 2d 1372 (Fla. 1981); Chambers v. State, 339 So. 2d 204 (Fla. 1976)), and the cases where heated or longstanding domestic disputes precipitated the homicides (Blakely v. State, 561 So. 2d 560 (Fla. 1990); Fead v. State, 512 So. 2d 176 (Fla. 1987); Wilson v. State, 493 So. 2d 1019 (Fla. 1986)). Although Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988), is a multiple-aggravator case, it is distinguishable from the instant case due to the significance of the mitigators (both mental mitigators plus age) and the conspicuous absence of both HAC and CCP. Id. at 872.

Cases other than those cited by Willacy are more comparable to this case. Henry v. State, 613 So. 2d 429 (Fla. 1992), cert.

denied, 114 S. Ct. 699, 126 L. Ed. 2d 665 (1994), is remarkably similar to the instant case. Henry, to enable him to rob the store where he worked, subdued two co-workers by tying one up and by hitting the other in the head. He then set them on fire. This Court approved the trial court's finding the same five aggravators that the state proved in this case and affirmed Henry's death sentences. Id. at 433-34. That Willacy killed only one person while Henry killed two is a minor distinction given the similarity of the facts, the presence of five aggravators, and the lack of substantial mitigation.

Moreover, there are many cases with less in aggravation and more in mitigation where this Court has found the death penalty appropriate. Cf. Kilgore v. State, 21 Fla. L. Weekly S345 (Fla. August 29, 1996) (two aggravators; two statutory and several nonstatutory mitigators); Pope v. State, 21 Fla. L. Weekly S257 (Fla. June 13, 1996) (same); Orme v. State, 677 So. 2d 258 (Fla. 1996) (two aggravators; both statutory mental mitigators); Geralds v. State, 674 So. 2d 96 (Fla. 1996) (two aggravators; one statutory and several nonstatutory mitigators); Finney v. State, 660 So. 2d 674 (Fla. 1995) (three aggravators; five nonstatutory mitigators); Gamble v. State, 659 So. 2d 242 (Fla. 1995) (two aggravators; one statutory and several nonstatutory mitigators); Bogle v. State, 655

So. 2d 1103 (Fla. 1995) (four aggravators; one statutory and several nonstatutory mitigators); Whitton v. State, 649 So. 2d 861 (Fla. 1994) (five aggravators; nine nonstatutory mitigators); Fennie v. State, 648 So. 2d 95 (Fla. 1994) (three aggravators; both statutory and nonstatutory mitigators), cert. denied, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995); Davis v. State, 648 So. 2d 107 (Fla. 1994) (two aggravators; nonstatutory mitigators).

This case has five strong aggravators and inconsequential mitigators. The cases that Willacy relies on are distinguishable. This horribly gruesome murder was well beyond the "norm" of capital felonies. Willacy's death sentence is truly proportionate to the magnitude of the crime. Willacy has shown no impropriety in the imposition of his death sentence, and that sentence should be affirmed.

ISSUE VIII

WHETHER THE TRIAL COURT PROPERLY ALLOWED THE STATE TO PRESENT VICTIM IMPACT EVIDENCE.

Willacy claims that the trial court erred in allowing the state to present victim impact evidence through the testimony of the victim's three children. There is no merit to this issue.

After the defense rested (T 2840), the prosecutor announced his intention to call the victim's children as rebuttal witnesses

to "present what's commonly referred to as victim impact testimony." (T 2877). Defense counsel stated that, although he disagreed with the idea of victim impact evidence, the Florida Supreme Court had approved its use. (T 2877). He objected, however, to the state's presenting such evidence in rebuttal because it would not rebut the character evidence that Willacy had presented. (T 2877-78). He argued that he could find no case allowing the introduction of victim impact evidence as rebuttal evidence. (T 2879). The prosecutor quoted from Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), regarding a state's right to counteract mitigating evidence (T 2882) and argued that, although he could have introduced the evidence during his case in chief, "I submit that I am attempting to abide by what I believe to be the true meaning of Payne; and that is, I should only introduce this when it's necessary to rebut hours of testimony about this defendant." (T 2883). The court overruled the defense objections (T 2884), stating that "the state will be permitted to call its rebuttal witnesses in accordance with the thrust of" Payne. (T 2885). Defense counsel asked for an order telling the state not "to get into any evidence about the crime, the defendant and the appropriate sentence because the statute specifically limits them from doing that." (T 2886). The

court then told the prosecutor to "emphasize" to the witnesses that they could not "editorialize upon their comments or go beyond the scope of the questions that you put to them." (T 2886).

Thereafter, the victim's son and two daughters testified about their families, their relationship with their mother, and the impact their mother's death had on them and their families. (T 2888-93; 2894-2901; 2903-09). Willacy now argues that this testimony did "not speak about the unique characteristics of the victim and instead inflame[d] the passions of the jury" and that the court erred in allowing the state to present this evidence in rebuttal. (Initial brief at 68). There is no merit to these claims.

Subsection 921.141(7), Florida Statutes (1993), provides as follows:

> (7) Victim impact evidence.--Once the prosecution 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.

This Court upheld the constitutionality of this statute in Windom v. State, 656 So. 2d 432 (Fla. 1995). In doing so it commented that "this Court has held victim impact testimony to be admissible as long as it comes within the parameters of the Payne decision." Id. at 438. Since Windom, this Court has acknowledged and upheld the state's right to present victim impact evidence numerous times. Bonifay v. State, 21 Fla. L. Weekly S301 (Fla. July 11, 1996); Farina v. State, 21 Fla. L. Weekly S173 (Fla. April 18, 1996); Hitchcock v. State, 673 So. 2d 859 (Fla. 1996); Allen v. State, 662 So. 2d 323 (Fla. 1995).

In Bonifay this Court stated:

> Clearly, the boundaries of relevance under the statute include evidence concerning the impact to family members. Family members are unique to each other by reason of the relationship and the role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family.

21 Fla. L. Weekly at S303. As required by the statute, the testimony of the victim's children demonstrated her "uniqueness as an individual human being" and did not constitute "[c]haracterizations and opinions about the crime, the defendant, and the appropriate sentence." § 921.141(7). Because the testimony

met the requirements of Payne and the statute, it was both relevant and admissible.

Furthermore, there is no merit to Willacy's claim that the state should not have been allowed to present the victim impact evidence in rebuttal. As this Court recognized, subsection 921.141(7) "indicates clearly that victim impact evidence is admitted only after there is present in the record evidence of one or more aggravating circumstances." Windom, 656 So. 2d at 438. By presenting the victim impact evidence in rebuttal the state insured that it followed the dictates of the statute that such evidence be introduced only after one or more aggravators were established. While the state could have presented these witnesses' testimony at the end of its case in chief, there is no prohibition against the procedure employed in this case. If this Court were to decide that victim impact evidence should not be used as rebuttal evidence, any such judicial rule should be prospective only and any error perceived in this case should be declared harmless.

Willacy's claim that Burns v. State, 609 So. 2d 600 (Fla. 1992), is dispositive of this case (initial brief at 67 n.3) is incorrect because Burns is factually distinguishable. In Burns the state presented victim impact evidence in the guilt phase rather than the penalty phase. This Court found admission of the evidence

error, although harmless, because "[a]t the time the challenged testimony was admitted, nothing had been elicited by the defense to support its contention that the officer acted improperly." Id. at 605. Here, on the other hand, the state introduced evidence "relevant to the jury's decision as to whether or not the death penalty should be imposed," Payne, 501 U.S. at 827, only after it established numerous aggravators, as required by subsection 921.141(7). Burns is distinguished further by the fact that it was released in 1992, the year before the legislature enacted subsection 921.141(7).

The victim impact evidence introduced in this case was relevant and complied with the requirements of the statute and of Payne. Willacy has demonstrated no reversible error, and this Court should affirm the trial court's allowing the state to present victim impact evidence.

ISSUE IX

WHETHER THE TRIAL COURT PROPERLY DENIED WILLACY'S CHALLENGES FOR CAUSE TO FIVE PROSPECTIVE JURORS.

Willacy argues that the court erred in denying his challenges for cause to five prospective jurors because, he claims, they would automatically vote to impose the death penalty. He has failed,

however, to demonstrate an abuse of discretion, and this claim should be denied.

"The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely on the evidence presented and the instructions on the law given . . . by the court." Lusk v. State, 446 So. 2d 1038, 1041 (Fla.), cert. denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984); Bryant v. State, 656 So. 2d 426 (Fla. 1995); Vining v. State, 637 So. 2d 921 (Fla.), cert. denied, 115 S. Ct. 589, 130 L. Ed. 2d 502 (1994); Foster v. State, 614 So. 2d 455 (Fla. 1992), cert. denied, 114 S. Ct. 398, 126 L. Ed. 2d 346 (1993). A prospective juror must be excused for cause if "any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment." Hill v. State, 477 So. 2d 553, 556 (Fla. 1985); Bryant, 656 So. 2d at 428. A challenged juror's competency, however, is "a mixed question of law and fact, the resolution of which is within the trial court's discretion." Hall v. State, 614 So. 2d 473, 476 (Fla.), cert. denied, 510 U.S. 834, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1993); Parker v. State, 641 So. 2d 369 (Fla. 1994), cert. denied, 115 S. Ct. 944, 130 L. Ed. 2d 888 (1995); Vining; Davis v.

State, 461 So. 2d 67 (Fla. 1984), cert. denied, 473 U.S. 913, 105 S. Ct. 3540, 87 L. Ed. 2d 663 (1985).

Willacy challenged numerous prospective jurors for cause, claiming that they would automatically vote to impose the death penalty. (E.g., T 247, 250-51, 257, 258). He now argues that the court erred in denying his cause challenges to John Akers, Joseph Hemple,[15] Dolores Harrell, Nicholas Cioffi, and Vicky Warrensford. Willacy used peremptory challenges to excuse these prospective jurors. (T 324, 325, 1115, 1118, 1308). After exhausting Willacy's peremptory challenges, defense counsel asked for more and stated his concern with three particular members of the panel. (T 1392). When asked how many more challenges were needed, counsel responded "ten." (T 1393). The court saw no need for more peremptory challenges, however, and denied the request. (T 1396-97). Counsel stated that he wanted to make it clear that there were three people on the jury that he would remove if he had additional peremptory challenges. (T 1415).

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[15] At the beginning of voir dire Hemple told the court that he had taken a case to the state attorney's office that was not prosecuted because of insufficient evidence. Because of that experience Hemple thought it would be difficult for him to be fair to the state. (T 37). The court excused him on its own motion, but defense counsel asked that he not be excused (T 38), and the court rescinded the excusal. (T 39).

Because he identified specific jurors that he would excuse if more challenges were given to him, Willacy has preserved this claim for appeal. Farina v. State, 21 Fla. L. Weekly S176 (Fla. April 18, 1996); Pietri v. State, 644 So. 2d 1347 (Fla. 1994), cert. denied, 115 S. Ct. 2588, 132 L. Ed. 2d 836 (1995); Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994), cert. denied, 115 S. Ct. 1371, 131 L. Ed. 2d 226 (1995). He has not, however, demonstrated error, and, as the state will show, this claim should be denied.

Akers and Hemple

Akers and Hemple were in the first group of prospective jurors called. Although he was in favor of the death penalty (T 73-74), Akers also stated that he would follow the court's instructions:

> MR. CRAIG: Do you believe you can listen to the court's instructions and follow them in this case?
> MR. AKERS: Most definitely.
> MR. CRAIG: Are you prepared to hold the state to its burden of proof in accordance with the instructions the court will give you?
> MR. AKERS: Most definitely.
> MR. CRAIG: Do you agree with the proposition that not in all first-degree murders -- the death penalty is not appropriate for all first-degree murders?
> MR. AKERS: That's correct.
> MR. CRAIG: If I were to ask you now which ones were and which ones weren't, you'll be giving your personal opinion, wouldn't you?
> MR. AKERS: That's correct.

MR. CRAIG: Okay. Do you understand that you'll have to decide; that it's not your personal opinion but what the law is and what the judge will tell you?

MR. AKERS: Yes.

MR. CRAIG: Are you prepared to do that?

MR. AKERS: Yes.

(T 74-75). Hemple, who also favored the death penalty, responded similarly:

MR. CRAIG: Mr. Hemple, we talked to you a little bit about that before.

Are you going to be able to follow the court's instructions?

MR. HEMPLE: Definitely.

(T 75).

The following exchange, however, occurred when defense counsel questioned Akers:

MR. KONTOS: Okay. So it sounds to me --

And if I'm incorrect, please tell me.

-- basically the process that you would go through is: You would determine if the person was guilty, and if you were convinced that he was guilty, then you feel the death penalty would be the appropriate penalty?

MR. AKERS: Very much so.

MR. KONTOS: In that situation do you think that the death penalty should automatically be imposed?

MR. AKERS: I think in each case there's going to be extenuating circumstances that have to be taken into consideration.

MR. KONTOS: Okay. Let me ask this question. If a person was convicted of murder and was convicted of a robbery in the same case, would you feel that the death sentence

would be the appropriate sentence in that case?

MR. AKERS: I think there are other factors that have to be involved in it. I can't say yes or no.

MR. KONTOS: I understand.

Would there be factors other than -- would you consider factors other than whether you believe the person was 100 percent guilty?

MR. AKERS: I don't think so. I mean if he's 100 percent guilty of robbery and murder, I think my mind would be pretty well made up.

MR. KONTOS: Okay. So your decision would be based on you believing that the person was guilty of the crime 100 percent sure in your mind?

MR. AKERS: Yes.

(T 165-66).

After confirming that Hemple "very strongly" believed in the death penalty, defense counsel asked him the following questions:

MR. KONTOS: Okay. Sir, if a person was convicted of robbery and first-degree murder, do you believe that the death penalty is the sentence that should be imposed in that case?

MR. HEMPLE: Yes, sir.

MR. KONTOS: Okay. Again, that's an opinion that you strongly have?

MR. HEMPLE: Yes, I'm sorry. I'm sorry.

MR. KONTOS: That's fine.

Would you say that's a penalty that automatically should be imposed, the death penalty, in a situation where a person is convicted of robbery and first-degree murder?

MR. HEMPLE: Yes.

(T 160-61).

Later during voir dire, defense counsel asked the following question:

> MR. KONTOS: The state at this point hasn't done anything. If you were asked to make a recommendation at this point, what would your recommendation be? Life or death? Having heard no evidence, if you were asked to vote right now, what would your recommendation be?

(T 240). After several prospective jurors responded, the trial judge interrupted:

> THE COURT: Excuse me. I think we're getting some confusion in here, Mr. Kontos.
>
> The burden, as you've been told, rests upon the state to prove these aggravating circumstances beyond a reasonable doubt. Otherwise, there's nothing there for you to predicate or vote upon.
>
> Do you understand what I'm saying?
>
> There must be proof of these things beyond a reasonable doubt, and the question without any -- taking into account that requirement, I could see where it leaves you out in the cold. You have nothing to base your decision upon.
>
> I'm going to ask that you rephrase that, Mr. Kontos, if you don't mind, sir. I think it confuses the jurors.

(T 242). Defense counsel then asked a prospective juror the following questions:

> Do you agree, sir, that, if the judge instructs you that the burden is on the state to prove these aggravating factors, would you agree that you would follow that instruction?
>
> MR. HARD: Yes.

> MR. KONTOS: Okay.
>
> And if the state was not able to meet that burden, they didn't meet the burden, hasn't proved to you beyond a reasonable doubt that aggravating factors exist, they were not able to do that --
>
> Okay?
>
> MR. HARD: Okay.
>
> MR. KONTOS: -- then what would your verdict be?
>
> MR. HARD: It would have to be life.
>
> MR. KONTOS: If the state presented no evidence, no evidence at all, would they have proven any of those aggravating factors?
>
> MR. HARD: By your statement and the judge's instructions, no.

(T 243). Akers and Hemple also responded that life would be the appropriate sentence on the scenario presented in the defense questioning. (T 244).

Thereafter Willacy challenged both Hemple (T 245) and Akers (T 250) for cause, arguing that they, as well as Boarman, Bray, and Smith (T 257-58), would automatically vote for a death sentence. (T 248, 250-51). The court, after listening to the parties, stated that the state would be given the opportunity to rehabilitate the challenged persons. (T 250, 254, 256). Defense counsel then asked the court not to allow the state to question the prospective jurors further. (T 264). The court, however, refused, stating: "I'll given them an opportunity to rehabilitate them." (T 264).

The following exchange took place when the state questioned Akers:

> Number one, do you know what the aggravating circumstances are that you could legally consider?
>
> MR. AKERS: (The prospective juror shakes his head.)
>
> MR. WHITE: No? You're shaking your head no.
>
> MR. AKERS: No.
>
> MR. WHITE: Secondly, not knowing what they are, would you agree, if the judge tells you the state has to prove them beyond a reasonable doubt, you would follow that instruction?
>
> MR. AKERS: Yes.
>
> MR. WHITE: Could you agree that, if the state fails to prove any aggravating circumstance at all, that your verdict would have to be life no matter how the murder happened?
>
> MR. AKERS: That's correct.
>
> MR. WHITE: Do you understand that?
>
> MR. AKERS: Yes.
>
> MR. WHITE: What if the state were to prove an aggravating circumstance beyond a reasonable doubt or maybe two, for instance, but the defense showed or the evidence showed that there was a lot of mitigation?
>
> MR. AKERS: You have to balance it out.
>
> MR. WHITE: That's a good answer.
>
> What if you found that it did balance evenly or that the mitigation actually outweighed the aggravation in the case?
>
> MR. AKERS: If the mitigation outweighed the aggravation, it couldn't be anything but life with the two choices.
>
> MR. WHITE: You seem to be saying that with conviction, and I don't mean to insult you by asking you this. Does that run against your grain?

MR. AKERS: No.

MR. WHITE: Do you have any problem with that?

MR. AKERS: No. Because I think everybody up here is conscientious enough that they're not going to vote for the death penalty without really some sole searching and without the instruction of the judge.

MR. WHITE: You understand that you don't know the facts?

MR. AKERS: That's true.

MR. WHITE: It's possible there could be a great deal of mitigation in this case. It's possible. You don't know.

MR. AKERS: That's true.

MR. WHITE: You're willing to listen to that; and it if exists, you'll be willing to weigh it against the aggravating factors, if the state proves any?

MR. AKERS: (The prospective juror nods his head.)

MR. WHITE: All right, sir.

(T 289-91). Defense counsel then questioned Akers:

Let me ask you about premeditated. Assuming that you're convinced 100 percent that a premeditated murder had occurred, would you be able to say that you could vote for a penalty other than death or would your answer be different?

MR. AKERS: It's going to be all of the circumstances involved in it. It's going to have to be balanced and weighed out. Yes, there's a number of conditions I could think of, mental retardation being one example, and I'm sure there are many others.

(T 291-92).

Turning to Hemple, the prosecutor asked the following question and received the following answer:

So we put on a bunch of evidence, and all we show you is, in fact, there was a murder, but we failed to show you that there's any aggravating circumstances proven beyond a reasonable doubt. We haven't proved one, not a single one, but you agree with us. You say, by golly, they sure proved he was guilty of first-degree murder, but they haven't proven to me a single aggravating circumstance. Now, what would your verdict have to be under those circumstances?

MR. HEMPLE: Life.

(T 296). The prosecutor then returned to Akers:

MR. WHITE: Mr. Akers, do you understand the point I was making with him?

MR. AKERS: I believe so.

MR. WHITE: I've taken out of the equation that it's a robbery murder because you don't know that at this point. Right? You do not know how it was committed, do you?

MR. AKERS: (The prospective juror shakes his head.)

MR. WHITE: So not knowing that and, if the state failed to prove any aggravating circumstances at all beyond a reasonable doubt, do you have any question in your mind as to what your verdict should be as a juror?

MR. AKERS: No question at all.

MR. WHITE: What should it be?

MR. AKERS: Life.

* * *

MR. WHITE: If, in fact, we've proven none of the aggravating circumstances beyond a reasonable doubt, can you follow the law and return a verdict of life, even though in your mind if there was a robbery and you find that in your mind personally as a person and you believe that's something that probably deserves the death penalty?

That's your personal belief. Is that correct?

MR. AKERS: (The prospective juror nods his head.)

MR. WHITE: Can you put that aside and follow the law?

You're nodding your head. How about a verbal answer?

MR. AKERS: Yes.

(T 297-99). The prosecutor then asked Hemple: "Do you have any question in your mind then whether you could return a verdict according to the law in this case?" (T 300). Hemple responded: "Yes. I could." (T 300).

To clarify a prospective juror's apparent confusion, the trial could explained aggravators and mitigators. (T 303-05). Defense counsel then questioned Hemple:

MR. KONTOS: Okay. Do you understand there are certain aggravating and mitigating factors the judge is going to instruct you on?

MR. HEMPLE: Yes, I do.

MR. KONTOS: If you were informed that any aspect of the defendant's character could be a mitigating circumstance that you can --

MR. HEMPLE: I'm sorry. Repeat that.

MR. KONTOS: If you were to be informed that any aspect of the defendant's character is something that you can consider as a mitigating factor, if you were to be informed of that, if the judge were to tell you that, if the judge were to tell you that's the law --

MR. HEMPLE: That's better.

MR. KONTOS: -- and there was a conviction of first-degree murder and there were aggravators proved, would you be concerned

that in the jury room you might not be able to follow the law and agree that that is a mitigating factor that you would be -- that you would consider?

MR. HEMPLE: I would consider it.

* * *

Would you have a concern if you got back in the jury room and you have a personal belief that the death penalty is the appropriate penalty in a first-degree murder case that that's the penalty that should be given? If you believe that, would you have a concern that -- if the judge tells you the aggravating factors that you can find and the judge tells you the mitigating factors that you can weigh and regardless of what he tells you, whether legally the aggravating factors may not outweigh the mitigating factors, would you be concerned that you might -- there's a possibility that you might say it doesn't matter what he told me; I still think that death is the penalty for first-degree murder? Do you think that's a possibility?

MR. HEMPLE: Are you asking me how I would vote or how I would consider the mitigating factors?

MR. KONTOS: I guess what I'm asking you is: Might you not be able to consider the aggravating and mitigating factors and the weighing of them simply because possibly you would say back there that I know it's the way it's supposed to be done but I just feel so strong that death is the appropriate penalty for first-degree murder, that regardless of this weighing factor or what's proven and what's not in this room, that death is the appropriate penalty? Would you be concerned that that might happen?

MR. HEMPLE: No.

(T 313-16). The trial court denied the challenges for cause of Akers and Hemple (T 320), and Willacy used peremptory challenges to remove them from the panel. (T 324, 325).

Harrell and Cioffi

As with Akers and Hemple, Harrell and Cioffi were grouped together for questioning. The following exchange occurred when the prosecutor questioned Harrell:

> MR. CRAIG: How do you feel about it?
>
> MS. HARRELL: I am in favor of the death penalty, and I feel I'm a just and fair person; and I will listen to all the evidence and make a decision based on that.
>
> MR. CRAIG: If at the conclusion of the evidence the state has proved beyond a reasonable doubt that the defendant -- that the aggravating circumstances exist and that --
>
> You recognize that these aggravating circumstances perhaps will be things that are separate and apart from and in some respects associated with and some separate and apart from the murder itself?
>
> MS. HARRELL: Yes. I understand that.
>
> MR. CRAIG: You're satisfied that, if the state met its burden, we climbed up the hill and we convinced you that there's a reason, not just because I stand up here and say no, but we convince you there's a reason under the law why you should consider the death penalty, and you weighed that into the equation in the balance with all the other facts and circumstances, mitigating circumstances, all those things, and you decided that this case is one of those which is separate and distinct from all the murder cases in general. This is

one of those which, because of the nature of the case and the things that surround the case and so on, that under the law the death penalty is appropriate.

Will you have any hesitation to put your name to a verdict that will recommend to the court that he impose the death sentence?

MS. HARRELL: No.

MR. CRAIG: Would that cause you any consternation at all?

* * *

MS. HARRELL: No. I will listen and make the best decision I can.

MR. CRAIG: Okay. Do you recognize on the other side of the coin you're obliged, even though you say this is a horrible thing, horrible thing, but I'm not satisfied that the state has met its burden. We haven't proven aggravating circumstances, or at least sufficient aggravating circumstances, to overcome the mitigation. Would you have any hesitation in voting for a recommendation of life?

MS. HARRELL: No.

MR. CRAIG: As you sit here today knowing nothing about the case other than the fact that the defendant is already convicted of murder, are you predisposed one way or the other?

MS. HARRELL: I don't think so.

MR. CRAIG: No reason that you should be?

MS. HARRELL: No reason that I should be.

(T 927-29).

Cioffi gave similar responses to the state's questions:

MR. CIOFFI: I'm in favor of the death penalty.

MR. CRAIG: Do you think the death penalty ought to be automatic? Anybody committing murder should automatically get the death penalty?

MR. CIOFFI: No. I think it depends on the circumstances.

MR. CRAIG: Are you prepared to set aside your philosophical, moral or religious or other views about what sorts of crimes or what sorts of activities associated with crimes that may make them worse in your mind and listen to the court's instructions as to what things you may consider as aggravating circumstances?

MR. CIOFFI: Yes.

MR. CRAIG: Even if you may disagree with the court, do you believe you could follow the court's instructions?

MR. CIOFFI: Yes.

MR. CRAIG: If you're satisfied that the state at the conclusion of the evidence has met its burden and proved the existence of one or more aggravating circumstances, are you prepared to consider the death penalty as an appropriate penalty?

MR. CIOFFI: Yes.

MR. CRAIG: Are you prepared to weigh that consideration together with any mitigating circumstance that you may find are established and, only after weighing those and determining the consideration and the weight that you and the other jurors assign to both aggravating circumstances and mitigating circumstances, come to a decision in the matter?

MR. CIOFFI: Yes.

* * *

MR. CRAIG: Before you decide that this is such a case, you're going to agree and you're going to take an oath like the judge just read to follow what the law says you shall -- the

law says you shall use in making that determination?

MR. CIOFFI: Yes.

MR. CRAIG: Is that what you're saying?

MR. CIOFFI: Yes.

(T 971-74). Cioffi answered defense counsel's questions as follows:

What would you say as to your feelings about the death penalty, if you could give us a little more specific other than in favor of?

MR. CIOFFI: Well, as I said yesterday, probably the strongest belief I have would be any crime against a child, and that's where I would be flat out.

MR. KONTOS: Okay.

MR. CIOFFI: As far as anything else goes, I guess I would have to weigh the circumstances to see what the particular crime was and the severity of it and what other circumstances were involved in it.

* * *

And I imagine -- have you had some time to think about this from the time that you left the court yesterday and the time you got here this morning?

MR. CIOFFI: Think about what? As to what?

MR. KONTOS: Feelings on the death penalty, kind of what we're here about today. It's obviously an awesome responsibility, and anything I guess different or any other thoughts that you would want to share with us this morning that you think would be important?

MR. CIOFFI: No. The only thought I had was as you said. It is an awesome responsibility, and I think you have to weigh

the facts as you hear them; and I feel I could do that and make an honest decision.

* * *

MR. KONTOS: Do you have any feeling if you believed that there was a murder that a person -- not a felony murder, not where the person wasn't there, but a murder that the person actually committed, the person convicted actually did the act that resulted in death, do you feel as strongly about that situation as you do about crimes against children?

MR. CIOFFI: Again, I guess it would have to depend on what the circumstance of the murder was or the crime was.

(T 1017-20).

Defense counsel then questioned Harrell:

I think what the prosecutor said yesterday is basically you can consider anything in mitigation in this case. Okay?

MS. HARRELL: Okay.

MR. KONTOS: And he also said the burden of proof is beyond a reasonable doubt. Do you think, when the government is trying to execute a citizen, that it's appropriate and proper for you to be able to consider anything about that citizen to determine if you should impose the death penalty? Do you think that's proper?

MS. HARRELL: Yes. I think that's proper to consider anything.

MR. KONTOS: Is that something you'd be willing to do?

MS. HARRELL: Yes.

MR. KONTOS: You understand that you, you give the weight. You're the person who determines what weight to give to that. Do you understand?

MS. HARRELL: I understand.

MR. KONTOS: And do you understand and do you think it's appropriate that, when the government again is trying to execute a citizen, that they're the ones that have to bear the burden of proof? And that we're talking about burdens of proof before you can consider that. With mitigating circumstances that burden of proof does not exist beyond a reasonable doubt.

Do you think, because we have a lesser degree of proof, that that somehow diminishes the importance of mitigating circumstances?

MS. HARRELL: No. I don't think so.

(T 1026-27). Defense counsel later returned to Harrell and questioned her about her feelings on the death penalty.

MR. KONTOS: Is that -- have you held that -- do you have a strong belief that's the appropriate penalty? Tell me what you think.

MS. HARRELL: I have a strong belief it's appropriate in some cases but maybe not all of them.

MR. KONTOS: Let me talk about -- and I know we talked about, you know, cases where the person -- you know, some of the wild examples we had, and like I said yesterday, I think we can all come up with some example where, you know, we definitely under no circumstances impose the death penalty in this case and we would in this case; but have you come to formulate an opinion in your mind as to -- if you believe, if you believe that the evidence showed that a person convicted of first-degree murder had actually done the act that resulted in the death, if you believe that, do you have an opinion as to whether the person should definitely get the death penalty in that situation?

MS. HARRELL: I feel like, if he definitely did it, he should get the death penalty.

MR. KONTOS: Okay. So is it safe to say that --

MS. HARRELL: I will listen to all the other factors. Obviously, all I know is that he did it. I will be open-minded.

MR. KONTOS: Tell me if I'm wrong.

Is the distinction that you make in your own mind, as to whether you believe the death penalty is the appropriate penalty, whether the act was actually committed by the person as opposed to whether the person did not actually commit the act but is convicted as some type of an accessory or something of that sort?

MS. HARRELL: I understand it's the one who committed the murder.

MR. KONTOS: Right.

Is that the distinction in your mind that makes the difference as to whether you would vote to impose the death penalty or not?

MS. HARRELL: I think so. I think so. That would make a complete difference.

MR. KONTOS: I understand that you would do what you can to follow the law.

MS. HARRELL: Yes.

* * *

Do you think that because of your strong opinion that, if the judge reads you this instruction and you believe that the person actually committed the act, that you might not be able to follow the instruction; that your personal beliefs would not allow you to weigh the factors that the judge tells you you should weigh and go through this procedure that the judge tells you you have to, not because you don't want to, but because of what you believe you might not be able to? Is that a possibility?

> MS. HARRELL: Maybe it's a possibility, but I can assure you I will try. I guess I can.
>
> MR. KONTOS: I understand.
>
> MS. HARRELL: I would try.
>
> MR. KONTOS: You know, you had your belief and explored it and developed it, and you know it better than I do. I know you're trying. Everyone would try.
>
> I guess -- but you may not be able to if -- you might not be able to go through that process and you might say or you would say I just can't do that. You know, I think if the person committed the act, that death is the penalty.
>
> I mean is that something that you would be concerned about, that that might happen?
>
> MS. HARRELL: No. I don't think so. I believe I can make decisions. I believe I can listen to what's right and what's wrong and make a decision that's fair.

(T 1034-38).

Willacy challenged Harrell for cause (T 1078), arguing that she felt so strongly in favor of the death penalty that she would not give any weight to the mitigating evidence. (T 1078-79). The state objected to Harrell's being excused and pointed out that she made the distinction between aggravators and mitigators that the latter had a lesser standard of proof than the former. (T 1081). The state also noted that Harrell said she would have an open mind and stated: "Once a juror acknowledges they have personal views but she can set that aside and follow the court's instructions, that's all that [juror] needs to be qualified, and I don't think she said

anything that would disqualify her." (T 1082). The court then stated that the state could question Harrell again. (T 1083).

Willacy also challenged Cioffi for cause (T 1084) because "he has strong beliefs that under certain circumstances the death penalty would be automatic." (T 1085). The state argued that Cioffi stated he could put aside his personal beliefs and would follow the law. (T 1085-86). The court directed the parties to question Cioffi further. (T 1086).

The state then rehabilitated both Cioffi and Harrell.

> MR. CRAIG: Do you believe you can set aside any personal feelings you may have, whatever they may be -- and you don't need to disclose those to us here today. They are personal feelings perhaps. You can set those aside and follow the court's instructions and consider only what the court tells you you may consider as an aggravating circumstance?
>
> MR. CIOFFI: Yes. I can follow what the court says. Yes.
>
> MR. CRAIG: Even if what the judge says disagrees with what you may personally believe?
>
> MR. CIOFFI: Yes.
>
> MR. CRAIG: Would that cause you any difficulty?
>
> MR. CIOFFI: No.
>
> MR. CRAIG: Mrs. Harrell, the same question to you. You indicated in your comments previously that you -- I don't know if this was your word or not -- strongly favor the death penalty for some murder cases.
>
> MS. HARRELL: Yes.
>
> MR. CRAIG: Okay. Do you recognize and understand the concept that under Florida law

that a judgment of first-degree murder does not carry with it any automatic sentence?

MS. HARRELL: I understand that.

* * *

MR. CRAIG: Do you have any personal problem with the fact that all persons convicted of first-degree murder will not and should not under the law receive the death sentence?

MS. HARRELL: I understand that, and I think that's right.

MR. CRAIG: You think that's fair and just, and you can accept that?

MS. HARRELL: I can accept that.

MR. CRAIG: And as we talked about with Mr. Cioffi, you probably, as you come in here today and before you learned anything about the law, have some personal beliefs as to which sorts of cases would be more deserving of the death penalty.

MS. HARRELL: I guess. Yes, sir.

MR. CRAIG: Well --

MS. HARRELL: Yes. Some are more deserving.

MR. CRAIG: Okay. Can you make a distinction on a personal moral level that the death penalty is not appropriate for all?

Do you personally believe that, or do you believe that that's okay because the law says it's okay?

MS. HARRELL: I would follow the law. I would go by what the judge says.

MR. CRAIG: All right. That comment or that situation as I explained it, does that run against your own personal beliefs about --

MS. HARRELL: No. I don't think so because I don't think everyone deserves to die in the electric chair and get death.

(T 1102-05). Harrell also agreed that she would hold the state to its burden of establishing at least one aggravator (T 1107) and stated that she could vote for life imprisonment if the state did not carry its burden. (T 1108). Defense questioning ended with the following exchange:

> MR. THOMPSON: Would you say then that it is the rare murder case where the death penalty would not be the appropriate penalty or the just penalty?
>
> MS. HARRELL: Yes.
>
> MR. THOMPSON: All right. You say that not knowing what the law is, of course.
>
> MS. HARRELL: That's right.
>
> MR. THOMPSON: Obviously the concern I'm expressing is that that personal belief that you have --
>
> And this is not a criticism of that belief. You understand?
>
> MS. HARRELL: I understand.
>
> MR. THOMPSON: But that belief that you have may color your deliberations such that, when you go through the weighing process, it will go against your grain. It will be contrary to your nature, to your personal belief, to give very much weight at all to the mitigation simply because you believe -- or because it is your belief that murder is so serious that it almost -- it should almost always receive the death penalty.
>
> Do you understand?
>
> MS. HARRELL: I'm not sure.
>
> What I can say to assure you is that I will listen to what the judge says. I just told you how I feel and so I don't know what I can say to assure you that I'll be fair.
>
> MR. THOMPSON: What I want to know is: Obviously I need to know whether or not -- I need to know and my client needs to know

whether or not we should be worried at all; and, again, it's not a criticism, but if you have any doubt at all about your ability to set aside your predisposition, your feeling, if you have any doubts, then, of course, we should have doubts.

The question is: Do you have any doubts or should we have any doubts about your ability to set aside the feelings that you have about the appropriateness of the death penalty in most murder cases?

MS. HARRELL: I don't think you should have any doubts. I feel like I'm logical. I feel I'm practical, and I don't know what else to tell you.

(T 1111-12). The court then denied the cause challenges to Harrell and Cioffi (T 1115), and Willacy used peremptory challenges to excuse them. (T 1115, 1118).

Warrensford

The state questioned Warrensford as follows:

MR. WHITE: All right. Do you understand that the death penalty may not be appropriate in every single first-degree murder case?

MS. WARRENSFORD: Certainly, yes.

MR. WHITE: Does that fly against your conscience and your belief?

MS. WARRENSFORD: No.

MR. WHITE: It's not appropriate in every case.

MS. WARRENSFORD: No.

* * *

MR. WHITE: And would you have any problem requiring the state to prove those aggravating circumstances beyond a reasonable doubt? Do

you have any problem with requiring us to do that?

MS. WARRENSFORD: No.

MR. WHITE: On the other hand, will you also be willing to consider any mitigation that may come forward through the evidence?

MS. WARRENSFORD: Yes.

* * *

All right. Once we get to the point where you have all the evidence and the judge instructs you, if the judge instructs you to weigh the aggravating circumstances, weigh the mitigating circumstances, and if he were to instruct you that in order for you to vote for death, the state must prove sufficient aggravating circumstances that outweigh all of the mitigation that may exist, would you have any problem following that and requiring the state to do that before you vote for death?

MS. WARRENSFORD: No.

MR. WHITE: On the other hand, if the judge instructs you that if the mitigation is either equal to the aggravation or outweighs it --

Sometimes I go like this. I think it goes down.

-- if it outweighs the aggravation, your vote should be for life; or if it's even, your vote should be for life. Does that cause you any problem? Do you disagree with that philosophically in any fashion?

MS. WARRENSFORD: No.

MR. WHITE: All right. Do you feel like you have any predisposition at this point as to what your vote should be in this case just based on your personal feelings about the death penalty?

MS. WARRENSFORD: No. If I know nothing about the case, I can't make prejudgment without knowing something.

MR. WHITE: All right. Because it's possible that a first-degree murder case could exist where the death penalty isn't appropriate?

MS. WARRENSFORD: Certainly.

MR. WHITE: In fact, the majority of the cases of first-degree fit in that category.

MS. WARRENSFORD: Certainly.

(T 1277-80).

During defense questioning the following exchange occurred:

MR. THOMPSON: Can you imagine any circumstance, in other words, can you imagine that there could ever be enough mitigation in that circumstance where you would think life was an appropriate sentence?

MS. WARRENSFORD: I could imagine that there could be. Yeah.

MR. THOMPSON: Does that seem hard to imagine?

MS. WARRENSFORD: Nothing is popping into my head right now, but I believe there could be mitigating circumstances.

MR. THOMPSON: Do you understand what I would be concerned about?

MS. WARRENSFORD: Oh, yes. Definitely.

MR. THOMPSON: What I'm getting at is: You feel strongly in favor of the death penalty, and that's fine.

MS. WARRENSFORD: Well, I feel strongly in favor of life, too.

MR. THOMPSON: You feel --

MS. WARRENSFORD: If certain people -- it's just part of my religious beliefs and all this. I believe that everybody, god gave them the opportunity to live their life and be good people, and some people just did not do that. Now, whether it was just bad enough for the death penalty or not is an iffy subject. I feel that some -- it may be harsh but I feel some people do deserve to die and some don't.

It would just totally depend on the circumstances.

(T 1293-94). The trial judge noted his concern that the questioning was becoming repetitious (T 1296), and defense counsel continued questioning Warrensford.

MR. THOMPSON: I sort of lost where I was.

The concern that I have is that you have strong opinions about the death penalty. Okay?

MS. WARRENSFORD: Uh-huh.

MR. THOMPSON: Right?

I understand what you said about life and so forth, and the judge will instruct the members of the jury as to what the law is; and the judge is going to instruct the members of the jury that the state is obligated to prove certain aggravating factors beyond a reasonable doubt before the jury can consider the death penalty as a penalty.

MS. WARRENSFORD: Uh-huh.

MR. THOMPSON: Those aggravating factors must be sufficient to justify the death penalty.

MS. WARRENSFORD: I understand that completely. Yeah.

MR. THOMPSON: And then --

MS. WARRENSFORD: And only then.

MR. THOMPSON: Then you would consider whether there's mitigation and whether the aggravating circumstances outweigh the mitigation. Do you understand that?

MS. WARRENSFORD: Yes.

MR. THOMPSON: There's no burden of proof in regard to the mitigation. Only the aggravating circumstances must be proved beyond a reasonable doubt. Do you understand?

MS. WARRENSFORD: I understand. Yes.

MR. THOMPSON: Do you agree with that so far?

MS. WARRENSFORD: Yes.

MR. THOMPSON: Do you think that's appropriate?

MS. WARRENSFORD: Sure.

MR. THOMPSON: And the circumstances that you described where someone breaks into a home and so forth, do you have a predisposition as you sit there now as to -- without knowing the law, as to what the penalty should be in that circumstance that you described?

MS. WARRENSFORD: Like I said before, I would have to know the specific circumstances of the crime before I could --

MR. THOMPSON: More specific than what you describe?

MS. WARRENSFORD: Before I could make a complete 100 percent decision on that. I'm not just going to pull out of my head and say -- oh, somebody tells me a guy broke into the house. Kill him. No.

MR. THOMPSON: The answer is no? In the circumstance you described you can imagine --

MS. WARRENSFORD: I can imagine there might possibly be mitigating circumstances that would warrant life over death. Yes. Definitely.

(T 1296-98). Warrensford also stated that she thought mitigators were entitled to as much weight as aggravators (T 1299) and that her decision would not be influenced by sympathy for the victim or the victim's family. (T 1300).

Willacy challenged Warrensford for cause (T 1303), arguing that she made inconsistent statements (T 1303-04) and "that she was just answering the questions in a way that she thought would get her on the jury just perfunctorily without even thinking about what

she's being asked." (T 1305). The state responded that having an opinion does not disqualify someone from serving on a jury (T 1306) and that Warrensford said she could set aside her personal opinion and weigh the circumstances. (T 1307). The court denied the cause challenge, and Willacy used a peremptory challenge to strike Warrensford. (T 1308).

As the trial court recognized, it is the responsibility of the state and the judge to rehabilitate prospective jurors and insure that they can be impartial jurors. Bryant v. State, 601 So. 2d 529 (Fla. 1992). As with most prospective jurors, those called in Willacy's case had little or no knowledge of the law of capital cases. Castro v. State, 644 So. 2d 987, 990 (Fla. 1994). When it was explained to them, each of the challenged prospective jurors stated that he or she would follow the court's instructions as to aggravators and mitigators, would weigh the evidence, and could vote for a sentence of life imprisonment. Cf. Johnson v. State, 660 So. 2d 637, 644 (Fla. 1995) (juror's statement that she thought and hoped she would follow court's instructions rehabilitated her), cert. denied, 116 S. Ct. 1550 (1996); Bryant, 656 So. 2d at 428 (challenged jurors stated that they would follow the instructions or that they would weigh the aggravators and mitigators); Castro, 644 So. 2d at 990 (trial court's explanation of capital sentencing

proceeding rehabilitated prospective jurors); Parker, 641 So. 2d at 373 (questioning by state and court established that challenged jurors met Lusk standard); Reaves v. State, 639 So. 2d 1, 2 (Fla.) (challenged jurors were properly rehabilitated by questioning of the judge and prosecutor), cert. denied, 115 S. Ct. 488, 130 L. Ed. 2d 400 (1994).

As this Court has held: "There is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause." Cook v. State, 542 So. 2d 964, 969 (Fla. 1989). This is because "the trial court is in the best position to observe the attitude and demeanor of the juror and to gauge the quality of the juror's responses." Johnson, 660 So. 2d at 644. The record reveals competent support for the trial court's rejection of Willacy's challenges for cause to Akers, Hemple, Harrell, Cioffi, and Warrensford. Willacy has demonstrated no abuse of discretion, and this claim should be denied.

ISSUE X

WHETHER CUMULATIVE ERROR DEPRIVED WILLACY OF A FAIR TRIAL.

Willacy argues that cumulative error deprived him of a fair trial.[16] There is no merit to this claim.

A. Pretrial Publicity

Willacy claims that the trial court tainted the venire by questioning jurors about pretrial publicity in the presence of the venire. (Initial brief at 78). He has failed, however, to demonstrate error regarding this issue.

Early in voir dire two prospective jurors indicated that they had some knowledge of the case and were told that the subject would be addressed later. (T 59-60). Later, the court asked if any of the prospective jurors knew anything about the case. (T 387-88). One, Ms. Sloan, said she remembered a lot about the case and was questioned extensively by both the prosecutor and defense counsel. (T 390, 397-415, 465-69). When defense counsel asked to question Sloan outside the presence of the venire (T 469), the court allowed him to do so. (T 470). Sloan said that she could lay aside what

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[16] In a "Note" on page 85 of his brief Willacy argues that the trial court should not have found the cold, calculated, and premeditated aggravator in his resentencing. This claim is addressed in issue VI, supra.

she had read about the case and rely solely on the evidence presented at trial. (T 473-74). When the court questioned her, she indicated that what she knew of the case would have no impact on her decision. (T 476).

Other prospective jurors indicated they knew something of the case. For instance, Ms. Baker said she remembered the original newspaper story, but could recollect no facts. (T 615-16). She said she could lay aside anything she knew of the case. (T 616-17).

On the fourth day of jury selection the venire included five people who had been selected as jurors in another case, had served on that case, and then were put into the jury pool for Willacy's case.[17] Variously, they had discussed Willacy's case and/or read about it. The state asked that these people be questioned individually so that the venire would not be contaminated. (T 1163-64). After individual questioning, each of these five prospective jurors was excused. (T 1178, 1191, 1237, 1248, 1262).

Mr. Luba was the last prospective juror with prior knowledge of the case. He had seen a television broadcast about Willacy's case (T 1263) that impressed him so much that he had formed a

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[17] These five people were Ms. Wohlforth, Mr. Snow, Ms. Smith, Mr. Copeland, and Mr. Del Alcazar.

definite opinion as to what Willacy's penalty should be. (T 1264).

The following exchange then occurred:

> THE COURT: Gentlemen, do you wish to pursue the matter further, inquire further?
>
> MR. WHITE: I'll ask a couple of other questions and see it we can.
>
> Do you hold those opinions so strongly that, when you come into the courtroom, that, even if you listen to five days of evidence here and the judge instructs you on the law and tells you what laws you're supposed to apply and how you're supposed to weigh aggravating circumstances versus mitigating circumstances, you wouldn't be able to put aside whatever opinions you may have formed and base your verdict on the law and the evidence that you hear here in this courtroom?
>
> MR. LUBA: Well, I'm coming in with a pretty strong opinion. So it would take a significant amount of evidence to bring me back down to a level point where I could weigh out the trial.
>
> MR. WHITE: Okay.
>
> MR. LUBA: I guess the answer is it would take a significant amount of contrary evidence to what I believe I read.
>
> MR. KONTOS: Excuse me, your Honor.
>
> Would it be possible to briefly approach?
>
> THE COURT: Yes.
>
> (Whereupon, the following proceedings were had outside the hearing of the prospective jury.)
>
> MR. KONTOS: After saying that the information is being brought forward. Everyone is going to know what his opinion is and it's going to poison the panel.
>
> MR. THOMPSON: Judge, he is tainting this panel.

THE COURT: Why don't I just excuse him and let's not put ourselves in the position where we have to be concerned with that?
MR. KONTOS: Okay.
MR. WHITE: That's fine.

(T 1264-65). The court then excused Luba. (T 1266).

The next day defense counsel moved to strike the venire and/or for a mistrial (T 1313), claiming that the last group of prospective jurors had been exposed to pretrial publicity and, by saying so, had tainted the entire venire. (T 1311-13). After hearing argument from the parties, the court denied the motion. (T 1319).

As this Court has stated: "The mere fact that jurors were exposed to pretrial publicity is not enough to raise the presumption of unfairness." Castro v. State, 644 So. 2d 987, 990 (Fla. 1994); Farina v. State, 21 Fla. L. Weekly S176 (Fla. April 18, 1996); Bundy v. State, 471 So. 2d 9 (Fla. 1985), cert. denied, 479 U.S. 894, 107 S. Ct. 295, 93 L. Ed. 2d 269 (1986). During argument on Willacy's motion, defense counsel admitted that his only real concern was with Mr. Luba. (T 1318). Mr. Luba, although he had formed an opinion, did not express that opinion. Willacy's claim, both at trial and on appeal, that the fact that Luba had formed an opinion tainted the venire is mere speculation.

A motion for mistrial is addressed to the trial court's discretion and should be granted only when a new trial is the only means of assuring a defendant a fair trial. Terry v. State, 668 So. 2d 954 (Fla. 1996); Gorby v. State, 630 So. 2d 544 (Fla. 1993), cert. denied, 115 S. Ct. 99, 130 L. Ed. 2d 48 (1994). Willacy has not demonstrated that his jury was tainted in any manner by pretrial publicity.[18] No abuse of discretion occurred when the court denied the motion for mistrial, and this claim should be denied.

B. Systematic Exclusion of Blacks from the Jury

Willacy claims that the trial court erred in refusing to grant a continuance so that he could gather statistics to demonstrate that jury venires in Brevard County are selected in a racially discriminatory manner. There is no merit to this issue.

At a pretrial hearing on February 17, 1995, the clerk asked about which district the jury pool would be drawn from. (T 47). The assistant state attorney said that the venire would be drawn

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[18] Although not mentioning the case by name, the court complied with the directions of Derrick v. State, 581 So. 2d 31 (Fla. 1991), by asking the prospective jurors if they had any knowledge about the case and by allowing questioning regarding the effect of any such knowledge.

from the south county.[19] (R 48). Willacy's attorney at the time, Daniel Ciener, objected, stating: "I think the state will concede that certain parts of the county have a much higher percentage of black versus white or vice versa." (R 49). Ciener stated that he wanted a jury drawn from a cross-section of the county. (T 50). The trial court sustained the objection and directed that "the clerk is to summon a jury from the entire county." (R 50). Thereafter, the court issued a written order to that effect. (R 434).

On September 19, 1995, the second day of jury selection, James Kontos, Willacy's next attorney, observed that there was only one black person among the forty prospective jurors. (T 332). He stated that it appeared that blacks were being systematically excluded from the venire and asked for a thirty-to-sixty-day continuance to gather statistics proving his claim. (T 333). The prosecutor commented that this was a commonly raised issue, but that a defendant was not entitled to a jury that reflects the racial mix of the community. (T 334-35). He also noted that the

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[19] Due to its size and shape, Brevard County is divided into jury districts. Several counties in Florida are similarly divided. E.g., Craig v. State, 583 So. 2d 1018 (Fla. 1991) (Palm Beach County); Garcia v. State, 638 So. 2d 94 (Fla. 3d DCA 1994) (Monroe County).

court ordered the venire be drawn county wide (T 335) and that Willacy had no basis for this claim. (T 336). Thereafter, the clerk was sworn and testified that, of the 275 people summoned from the county wide venire, seventy-four had not received automatic excusals, and thirty had been sent to begin jury selection in Willacy's case. (T 337-38). The judge asked for case law and stated that he would take the issue under advisement. (T 351).

The following day, Kontos argued that one black person in a jury pool of forty demonstrated the systematic exclusion of blacks from the venire. (T 674-75). The state responded that the racial composition of the jury had been raised earlier and that moving for a continuance on the eve of trial was untimely. (T 681-83). The prosecutor also stated that the county's jury selection system was prima facie racially neutral. (T 685). Thereafter, the court denied the motion to continue. (T 690).

A motion for continuance is addressed to the trial court's sound discretion, and that court's ruling will "not be reversed unless there has been a palpable abuse of discretion" that "must clearly and affirmatively appear in the record." Geralds v. State, 674 So. 2d 96, 99 (Fla. 1996); Fennie v. State, 648 So. 2d 95 (Fla. 1994). Willacy has shown no abuse of discretion in the court's denial of his motion for a continuance.

As this Court stated in Bryant v. State, 386 So. 2d 237, 239 (Fla. 1980): "The fact that juries do not statistically reflect the racial makeup of a community does not, by itself, show an invidious discrimination prohibited by the equal protection clause." If a jury pool is selected in a random manner from a proper base, as was done in this case, the selection is, as the prosecutor stated, racially neutral. See Johnson v. State, 660 So. 2d 648 (Fla. 1995); Hendrix v. State, 637 So. 2d 916 (Fla. 1994). Furthermore, as the state noted, the motion to continue was untimely. Ciener raised the venire issue six months before trial, and the court issued its written order on June 13, 1995, almost two months after Kontos began representing Willacy. Any concerns about the racial composition of the venire could have been addressed much sooner than the actual selection of the jury.

Because Willacy has demonstrated no abuse of discretion this issue should be denied.

C. Trial Court's Orders to Defense Counsel Regarding Cross-Examination

Willacy argues that the trial court erred in holding "a trial advocacy clinic on the fine art of cross-examining a witness in front of the jury during defense counsel's crucial cross-

examination of the medical examiner." (Initial brief at 80). There are several problems with this claim.

Defense counsel's manner of cross-examining witnesses is somewhat confrontational. During his questioning of the medical examiner, the court stated:

> Excuse me.
>
> Mr. Kontos, I recognize your right to lead on cross-examination, but would you put questions to the witness rather than making statements and asking him to agree with it. I'm from the old school, and I don't go for that kind of examination.
>
> Go ahead, sir.

(T 1960). Thereafter, however, counsel used the phrases "Am I correct," "Correct," and "Is that a correct statement," seven times in seven questions. (T 1961-62). The court stated: "Excuse me. You're getting right back to where you were Mr. Kontos. Please don't do that." (T 1962). Counsel persisted, however, and used those phrases at least seven times in the next dozen questions. (T 1962-64). Thereafter, the following occurred:

> THE COURT: Excuse me.
>
> Would counsel please approach the bench.
>
> (Whereupon, the following proceedings were had outside the hearing of the jury.)
>
> THE COURT: Am I correct? Am I correct? You make a statement and then say, "Correct?" Strike that word out of your vocabulary for the purposes of this cross-examination and ask this gentleman questions. You're just asking, Am I correct? You can realize how monotonous

> that gets to these people listening to it. That's not a proper way to cross-examine the witness.
>
> MR. KONTOS: I wasn't going to do that.
>
> THE COURT: You're doing the same thing just doing it the different way. Initially you were make a statement and saying, "Correct?" Statement. Correct? Now you're saying, Am I correct? And then you make the statement. Leave that "correct" out.
>
> Let the jury decide. Ask the question and take his answer and let the jury decide.
>
> MR. KONTOS: Okay.

(T 1964-65).

The next day, during defense counsel's cross-examination of Detective George Santiago, the court again reminded counsel of his responsibilities in cross-examination:

> THE COURT: Mr. Kontos, I recognize as I told you yesterday your right to lead on cross-examination, but you must please let the witness testify. You're testifying for him. You're simply making statements and asking him to agree with you. That's not proper.
>
> Go ahead, sir.
>
> MR. KONTOS: Okay.

(T 2236). At a bench conference shortly thereafter, the court again reminded counsel that he should not "construct your cross-examination completely of leading questions and statements made by you that you throw out and ask him to agree with. Please ask questions." (T 2242). When counsel objected (T 2242), the court stated: "You're not leading. You're testifying and asking this

witness to agree with you." (T 2243). The court then overruled the objection. (T 2243). These exchanges continued throughout cross-examination of Santiago. (T 2249-51, 2253-54).

After Detective Santiago left the witness stand, defense counsel moved for a mistrial because he "was not allowed to ask leading questions and . . . was forced to ask a nonleading question which the police officer answered in a way that in my opinion substantially prejudiced my client['s right] to a fair trial." (T 2269-70). He also complained that he "was singled out in front of the jury repeatedly for doing something under the evidence code I was allowed to do." (T 2270). The following exchange occurred:

> THE COURT: Mr. Kontos, I think the problem is that you fail to discern a distinction between a leading question and giving testimony. I'll let you ask leading questions but I won't let you testify. That's the distinction. That's what you were doing. You were not asking leading questions. You were putting words into the witness' mouth and asking him to agree with you. It was your testimony, not his. You were giving the testimony. You were making the statements and simply asking him to agree or disagree with that. That's not a leading question. That's giving testimony. That is the distinction. I wish you would discern that. If you do, you'll have no problem.
>
> Keep one other thing in mind. This judge runs this courtroom.
>
> MR. KONTOS: I understand.

> THE COURT: Others have tried it and never succeeded. I will not permit that. Any judge who cannot do that when he comes into his courtroom shouldn't even sit down. He should leave immediately.
>
> MR. KONTOS: Judge --
>
> THE COURT: But I think your motion is probably predicated upon a misunderstanding of the distinction I tried to make here. That's all I was trying to get you to do and to me it's fundamental. I'm surprised by it quite honestly. I don't say that to embarrass you or anything like that. I've never seen that before in all my years, not to that extent, and at the same time the person doing it is asserting the right to do. You have no such right.

(T 2270-71). The court then denied the motion for mistrial. (T 2272). More argument followed the court's ruling. (T 2272-77).

The first problem with this claim is that it pertains to the wrong witness. Counsel did not object during the cross-examination of the medical examiner. Therefore, this issue has not been preserved as to that witness.

The main problem with this claim, however, is that Willacy has demonstrated no reversible error. This Court has long held that "a trial court has wide latitude in regulating the conduct of trials in order that the administration of justice be speedily and fairly achieved in an orderly, dignified manner and befitting the gravity of the business at hand." Hahn v. State, 58 So. 2d 188, 191 (Fla. 1952); Johnson v. State, 608 So. 2d 4 (Fla. 1992); Medina v. State,

573 So. 2d 293 (Fla. 1990). A trial court, in other words, has great discretion to control the proceedings before it. Johnson; Parramore v. State, 229 So. 2d 855 (Fla. 1969), vacated on other grounds, 408 U.S. 935, 92 S. Ct. 2857, 33 L. Ed. 2d 751 (1972); see Thomas v. State, 456 So. 2d 454 (Fla. 1984); Hamilton v. State, 366 So. 2d 8 (Fla. 1978). Rebuking counsel, even in front of the jury, "does not, in itself, constitute reversible error." Parramore, 229 So. 2d at 860. The trial judge treated both sides evenhandedly and only insisted that his directions be followed. Willacy has shown no abuse of discretion in the court's denying his motion for mistrial, and this claim should be denied.

D. Trial Court's Refusal to Recess the Sentencing Hearing

Willacy argues that, because he introduced evidence at the final sentencing hearing on November 20, 1995, the trial court should have recessed the proceedings to consider that evidence instead of sentencing Willacy at that time. He has not, however, demonstrated reversible error.

The penalty phase ended on October 3 when the jury recommended that Willacy be sentenced to death. (T 3173). Both sides asked for permission to file a sentencing memorandum. (T 3177). The

court directed that they be filed by October 27 and set sentencing for November. (T 3178).

At the November 20 hearing Willacy asked to be allowed to introduce a videotaped statement he made to the police when he was arrested that had been suppressed at Willacy's first trial.[20] The state objected that the videotape was a self-serving statement that had not been subject to cross-examination. (R 66). The court, however, stated: "For such evidentiary value that it may have I'll overrule your objection, and the tape may be played." (R 69). In his statement Willacy claimed that a man named "Goose" killed the victim. (R 627 et seq.). After the videotape was played, Willacy's father and a probation supervisor testified, and Willacy addressed the court. The state then called Detective Santiago, who testified that he interviewed an alibi witness for "Goose." (R 120).

After hearing the parties' argument, the court stated:

> Gentlemen, along with you the court has spent three weeks or thereabouts listening to evidence presented in this case. I spent three days last week researching this matter, studying your respective memoranda and working on this case preparatory to these sentencing proceedings. There's nothing that I've heard here that is any different from what I've

[20] The transcript of the videotape is located at R 627-40.

> already considered and heard throughout the preparation for this sentencing. So I don't know if any contribution would be made in any further delay in imposing sentence in this case.
>
> I'll ask you if you have any serious problems with regard to that that you wish me to hear and consider before I proceed to impose sentence.

(R 158-59). The state reminded the court that it must have a written order when sentence is imposed, and the court responded: "I came here with a tentative order, and some changes have been made in it as this case was proceeding." (R 159). Defense counsel asked that sentencing be rescheduled to another date "[s]o the court can consider all the evidence that has been presented today and all the arguments." (R 160).

The court noted that it had heard variations of the evidence presented that day throughout the resentencing proceeding and in the defendant's sentencing memorandum. (R 162-63). The court reiterated that a tentative order had been prepared and stated:

> Gentlemen, I do not feel that anything can be accomplished by continuing this thing for any additional purpose suggested by the defendant. I don't know how much more consideration I could give this case. Therefore, the court is prepared to proceed to sentencing.

(R 164-65). Thereafter, the court sentenced Willacy to death. (R 177).

In Spencer v. State, 615 So. 2d 688 (Fla. 1993), the trial judge prepared the sentencing order, with hands-on assistance by the state attorney, without giving defense counsel an opportunity to be heard. Id. at 689-90. In reversing for a new trial this Court commented:

> In Grossman, we directed that written orders imposing the death sentence be prepared prior to the oral pronouncement of sentence. However, we did not perceive that our decision would be used in such a way that the trial judge would formulate his decision prior to giving the defendant an opportunity to be heard. We contemplated that the following procedure be used in sentencing phase proceedings. First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order.

Id. at 690-91. This Court discussed Spencer in Armstrong v. State, 642 So. 2d 730 (Fla. 1994), and commented that Spencer's reversal

was not based only on the trial court's refusal to hear defense counsel before preparing the sentencing order. Instead, Spencer's judge "committed numerous errors," id. at 738, including improperly excusing several prospective jurors and engaging in ex parte communications with the prosecutor.

Even though the instant trial judge did not follow the Spencer guidelines to the letter, he also did not commit the egregious errors committed by Spencer's judge. Contrary to Willacy's claim, the court did not "wholly ignore[ ] the evidence presented in support of a statutory mitigator (accomplice)." (Initial brief at 85). The only additional "evidence" presented at the November 20 hearing was Willacy's self-serving statement to police in which he blamed an accomplice for the victim's death. As the trial court pointed out, the defense advanced the accomplice theory throughout the resentencing, and defense counsel spent six pages of his sentencing memorandum discussing the "accomplice." (R 604-09). The trial court, to be politically correct, could have recessed the hearing and then come back to read the sentencing order. The court obviously put a great deal of time and thought into preparing the sentencing order,[21] and the self-serving videotape added nothing new

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[21] The court made the following findings as to the "accomplice" theory:

to this sentencing equation. If any error occurred, it was harmless, and no relief is warranted on this claim.

ISSUE XI

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL.

Willacy argues that Florida's death penalty statute is unconstitutional because 1) this Court violates the separation of powers doctrine in interpreting the statute; 2) the aggravators fail to channel the sentencer's discretion adequately; and 3) the sentencer is not instructed adequately on the standard of proof. These claims were not presented to the trial court, and, thus, have

---

> 2. THE DEFENDANT WAS AN ACCOMPLICE IN THE CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR.
>
> The defendant's claim that he "...was a relatively minor participant in a murder committed by another person" is not supported by the evidence. An expert witness for the state opined that one of the blows to the victim's head was struck with someone's left hand. The witness did not say that the person striking the blow was left-handed. The defendant conjectures that the assailant was left-handed. He is right-handed and therefore could not be the murderer. The evidence points directly toward the defendant as the sole participant in and perpetrator of the murder. This statutory mitigator is not available to him.

(R 619).

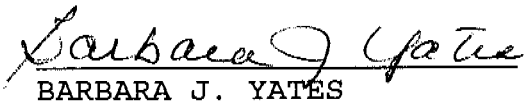
not been preserved for appeal. Hunter v. State, 660 So. 2d 244 (Fla. 1995); Espinosa v. State, 626 So. 2d 165 (Fla. 1993); Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992), cert. denied, 508 U.S. 924, 113 S. Ct. 2377, 124 L. Ed. 2d 282 (1993). Furthermore, even if preserved for review, these claims have been rejected because they have no merit. Johnson v. State, 660 So. 2d 648 (Fla. 1995); Castro v. State, 644 So. 2d 987 (Fla. 1994); Vining v. State, 637 So. 2d 921 (Fla. 1994); Sireci v. State, 587 So. 2d 450 (Fla. 1991). Therefore, this issue should be denied.

CONCLUSION

Therefore, the State of Florida asks this Court to affirm Willacy's sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. George D.E. Burden, 112 Orange Avenue, Suite A, Daytona Beach, Florida, this 12th day of November, 1996.

Barbara J. Yates

BARBARA J. YATES
Assistant Attorney General

APPENDIX A

WILLACY

NO. 90-16062-CF-A/T

IN CIRCUIT COURT
EIGHTEENTH JUDICIAL CIRCUIT OF FLORIDA
BREVARD COUNTY

STATE WITNESSES

THE STATE OF FLORIDA

VS

CHADWICK NMN WILLACY

INDICTMENT FOR

COUNT I FIRST DEGREE MURDER FROM A PREMEDITATED DESIGN (000002)
COUNT II BURGLARY (000213)
COUNT III ROBBERY (000219)
COUNT IV ARSON (000212)

Found Spring Term, A.D. 1990

A True Story
Foreman of the Grand Jury

Presented in Open Court and Filed this
25 day of September, 1990

R. C. Winstead, Jr.
Clerk

By Donna Ratliff D.C.

003251

REB

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA

IN THE CIRCUIT COURT OF THE Eighteenth Judicial Circuit of the State of Florida for Brevard County, at the Spring Term thereof, in the year of our Lord one thousand nine hundred and ninety, Brevard County, to wit: The Grand Jurors of the State of Florida: inquiring in and for the body of the County of Brevard, upon their oaths do charge that

CHADWICK NMN WILLACY

on the 5th day of September, 1990, in the County of Brevard, and State of Florida, did then and there unlawfully kill a human being, MARLYS SATHER, by SETTING FIRE TO THE PERSON AND CLOTHING OF MARLYS SATHER, STRANGLING MARLYS SATHER, STRIKING MARLYS SATHER WITH A HAMMER OR OTHER BLUNT OBJECT, and said killing was perpetrated by said CHADWICK NMN WILLACY from a premeditated design or intent to effect the death of said MARLYS SATHER, contrary to Section 782.04(1)(a)1, Florida Statutes,

COUNT II

The Grand Jurors of the State of Florida: inquiring in and for the body of the County of Brevard, upon their oaths do charge that in Brevard County, Florida, on the 5th day of September, 1990, CHADWICK NMN WILLACY, did then and there unlawfully enter or remain in a STRUCTURE, to wit: DWELLING, located at 1340 JARVIS STREET, N.W., PALM BAY, FL, the property of MARLYS SATHER, as owner or custodian, with intent to commit an offense therein, to wit: ROBBERY, THEFT, and in the course of committing said offense made an assault upon MARLYS SATHER, contrary to Sections 810.02(1) and 810.02(2)(a), Florida Statutes,

COUNT III

The Grand Jurors of the State of Florida: inquiring in and for the body of the County of Brevard, upon their oaths do charge that in Brevard County, Florida, on the 5th day of September, 1990, CHADWICK NMN WILLACY, did then and there by force, violence, assault or putting in fear, unlawfully rob, steal and take away from the person or lawful custody of MARLYS SATHER, against HER will, AUTOMOBILE, COINS, JEWELRY, TELEPHONE, TAPE RECORDER, of the value of $300.00 or more, good and lawful currency of the United States of America, the property of MARLYS SATHER, as owner or custodian, with intent to permanently deprive said owner or custodian of a right to said property or a benefit therefrom, and in the course of committing said ROBBERY, CHADWICK NMN WILLACY carried a DEADLY WEAPON, to wit: HAMMER OR OTHER BLUNT OBJECT, contrary to Sections 812.13(1) and 812.13(2)(a), Florida Statutes,

COUNT IV

The Grand Jurors of the State of Florida: inquiring in and for the body of the County of Brevard, upon their oaths do charge that in Brevard County, Florida, on the 5th day of September, 1990, CHADWICK NMN WILLACY, did then and there willfully and unlawfully, by fire or explosion, damage or cause to be damaged a DWELLING, or its contents, located at 1340 JARVIS STREET, N.W., PALM BAY, FL, the property of MARLYS SATHER, as owner or custodian, contrary to Section 806.01(1)(a), Florida Statutes,

and against the peace and dignity of the State of Florida.

A Bruce Stone
Foreman of the Grand Jury

I hereby certify that I have, as authorized and required by law, advised the Grand Jury returning the foregoing indictment.

Michael R. Hunt
Michael R. Hunt, Designated Assistant State Attorney for the Eighteenth Judicial Circuit Florida; Prosecuting for said State

003253

APPENDIX B

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY,
FLORIDA.

STATE OF FLORIDA,

Plaintiff,

CASE NO. 91-16062-CF-A-T

vs.

CHADWICK NMN WILLACY,

Defendant.
_____/

FILED IN CIRCUIT COURT
BREVARD COUNTY, FLORIDA
THIS 17 DAY OF October 19 91
R. C. WINSTEAD, JR., CLERK
BY M. Nelsen D.C.
4:25PM

VERDICT

We, the jury, find as follows, as to Count I of the charges:
(check one only)

X 1. The defendant is guilty of First Degree Murder,

_____ 2. The defendant is guilty of Second Degree Murder,

_____ 3. The defendant is guilty of Third Degree Murder,

_____ 4. The defendant is guilty of Manslaughter,

_____ 5. The defendant is not guilty.

So say we all in Melbourne, Brevard County, Florida this
17th day of October, 1991.

Edward G. Clark
FOREPERSON

003355

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR BREVARD COUNTY, FLORIDA.

STATE OF FLORIDA,

Plaintiff,

CASE NO. 91-16062-CF-A-T

vs.

CHADWICK NMN WILLACY,

Defendant.

FILED IN CIRCUIT COURT
BREVARD COUNTY, FLORIDA
THIS 17 DAY OF October 19 91
SCOTT ELLIS, CLERK
BY M. Nelsen D.C.
4:25 PM

VERDICT

We, the jury, find as follows, as to Count II of the charges: (check one only)

X 1. The defendant is guilty of Burglary of a Dwelling With an Assault,

_____ 2. The defendant is guilty of Burglary with a Weapon,

_____ 3. The defendant is guilty of Burglary of a Dwelling,

_____ 4. The defendant is guilty of Burglary of a Structure,

_____ 5. The defendant is guilty of Trespass,

_____ 6. The defendant is not guilty.

So say we all in Melbourne, Brevard County, Florida this 17 day of October, 1991.

Edward C. Clark
FOREPERSON

003356

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR BREVARD COUNTY, FLORIDA.

CASE NO. 91-16062-CF-A-T

STATE OF FLORIDA,

Plaintiff,

vs.

CHADWICK NMN WILLACY,

Defendant.
_____/

FILED IN CIRCUIT COURT
BREVARD COUNTY, FLORIDA
THIS 17 DAY OF October 91
R. C. WINSTEAD, JR., CLERK
BY M. Leisen D.C.
4:25PM

VERDICT

We, the jury, find as follows, as to Count III of the charges: (check one only)

X 1. The defendant is guilty of Robbery With A Deadly Weapon,

_____ 2. The defendant is guilty of Robbery with a Weapon,

_____ 3. The defendant is guilty of Robbery,

_____ 4. The defendant is guilty of Grand Theft of a Motor Vehicle,

_____ 5. The defendant is guilty of Petit Theft,

_____ 6. The defendant is not guilty.

So say we all in Melbourne, Brevard County, Florida this 17th day of October, 1991.

FOREPERSON

003357 69

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY,
FLORIDA.

STATE OF FLORIDA,

Plaintiff,

CASE NO. 91-16062-CF-A-T

vs.

CHADWICK NMN WILLACY,

Defendant.
_____/

FILED IN CIRCUIT COURT
BREVARD COUNTY, FLORIDA
THIS 17 DAY OF October 19 91
R. C. WINSTEAD, JR., CLERK
BY M. Leusen D.C.
4:25 PM

VERDICT

We, the jury, find as follows, as to Count IV of the charges: (check one only)

__X__ 1. The defendant is guilty of Arson in First Degree,

_____ 2. The defendant is guilty of Arson in Second Degree,

_____ 3. The defendant is guilty of Criminal Mischief,

_____ 4. The defendant is not guilty.

So say we all in Melbourne, Brevard County, Florida this 17th day of October, 1991.

FOREPERSON

003358

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