IN THE SUPREME COURT OF FLORIDA

KRISTOPHER SANDERS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 87,231

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

PAGE NO.:

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 6

ARGUMENT 9

ISSUE I 9

WHETHER THE LOWER COURT ERRED REVERSIBLY IN EXCUSING FOR CAUSE PROSPECTIVE JUROR CLAIR PAYEUR.

ISSUE II 19

WHETHER THE LOWER COURT ERRED REVERSIBLY IN SUSTAINING THE PROSECUTOR'S OBJECTION TO CROSS-EXAMINATION OF WITNESS NASHEF ABOUT HIS ALLEGED DRUG RUNNING ACTIVITIES.

ISSUE111 26

WHETHER THE LOWER COURT IMPROPERLY FAILED TO CONSIDER ALLEGEDLY DISPARATE TREATMENT ACCORDED TO JOEY DUCKETT.

ISSUEIV. 29

WHETHER THE LOWER COURT ERRED IN ALLOWING DR. MERIN TO TESTIFY AS A STATE WITNESS.

ISSUEV 37

WHETHER THE LOWER COURT ERRED IN REFUSING TO FIND APPELLANT'S AGE OF TWENTY YEARS AS A MITIGATING CIRCUMSTANCE.

ISSUE VI 44

WHETHER APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE.

ISSUEVII 51

WHETHER THE TRIAL COURT'S FAILURE TO INSTRUCT ON THE SENTENCING OPTION OF LIFE IMPRISONMENT WITHOUT PAROLE VIOLATED DUE PROCESS, FUNDAMENTAL FAIRNESS AND THE EIGHTH AMENDMENT.

ISSUEVIII 55

WHETHER THE JURY INSTRUCTION ON THE CCP AGGRAVATOR VIOLATED DUE PROCESS BY RELIEVING THE STATE OF ITS BURDEN OF PROOF AND USURPING THE JURY'S FACT-FINDING FUNCTION.

CONCLUSION 58

CERTIFICATE OF SERVICE 58

TABLE OF CITATIONS

PAGE NO.:

Allen v. State,
636 So. 2d 494 (Fla. 1994) 37

Arango v. State,
411 so. 2d 172 (Fla. 1982) 44

Armstrong v. State,
399 So. 2d 953 (Fla. 1981) 44

Barwick v. State,
660 So. 2d 685 (Fla. 1995) 40, 50

Bowie v. State,
906 P.2d 759 (Okla. Cr. 1995) 54

Cardona v. State,
641 So. 2d 361 (Fla. 1994) 44

Cheatham v. State,
900 P.2d 414 (Okla. Cr. 1995) 54

Cooper v. State,
492 so. 2d 1059 (Fla. 1986) 37

Deaton v. State,
480 So. 2d 1279 (Fla. 1985) 37, 42

Douglas v. State,
328 So. 2d 18 (Fla. 1976) 44

Downs v. State,
572 So. 2d 895 (Fla. 1990) 44

Duncan v. State,
619 So. 2d 279 (Fla. 1993) 44

Ellis v. State,
622 So. 2d 991 (Fla. 1993) 37

Eutzy v. State,
458 So. 2d 755 (Fla. 1984) 39

Ferrell v. State,
680 so. 2d 390 (Fla. 1996) 7, 44

Fleckinger v. State,
642 So. 2d 35 (Fla. 4DCA 1994), rev.
den., 650 So. 2d 989 **(Fla. 1994)** **6, 15**

Fontenot v. State,
881 P.2d 69 (Okla. Cr. 1994) 54

Gardner v. State,
313 So. 2d 675 (Fla. 1975) 44

Gibson v. State,
661 So. 2d 288 (Fla. 1995) 24

Gray v. Mississippi,
481 U.S. 648, 95 L.Ed.2d 622 (1987) 16

Gudinas v. State,
--- So. 2d ---, 22 FLW S181 (Fla. 1997) 38, 40

Hain v. **State**,
852 P.2d 744 (Okla. Cr. 1993) 54

Hardwick v. State,
521 So. 2d 1071 (Fla. 1988) 43

Henyard v. State,
22 FLW S14, n 2 (Fla. **1996)** 28, 46

Hernandez v. State,
621 So. 2d 1353 (Fla. 1993) **14**

Hodges v. State,
595 So. 2d 929 (Fla. 1992) 50

Humphrey v. State,
864 P.2d 343 (Okla. Cr. 1993) 54

In Re Standard Jury Instructions
in Criminal Cases,
678 So. 2d 1224, fn. 1 (Fla. 1996) 53

Jones v. State,
580 So. 2d 143 (Fla. 1991) 23

Kelley v. State,
486 So. 2d 578 (Fla. 1986) 44

Kokal v. State,
492 So. 2d 1317 (Fla. 1986) 37

LeDuc v. State,
365 So. 2d 149 (Fla. 1978) 44

Lovette v. State,
636 So. 2d 1304 (Fla. 1994) 35, 36

Lucas v. State,
376 So. 2d 1149 (Fla. 1979) 53

Lucas v. State,
568 So. 2d 18 (Fla. 1990) 50

Maggard v. State,
399 So. 2d 973 (Fla. 1981) 23

McCarty v. State,
904 P.2d 110 (Okla. Cr. 1995) 54

Medina v. State,
466 So. 2d 1046 (Fla. 1985) 23

Melendez v. State,
612 So. 2d 1366 (Fla. 1992),
cert. denied, 510 U.S. 934 (1993) 28

Merck v. State,
664 So. 2d 939 (Fla. 1995) 7, 37

Mordenti v. State,
630 So. 2d 1080 (Fla. 1994) 7, 27, 44

Morgan v. State,
639 So. 2d 6 (Fla. 1994) 39

Nibert v. State,
574 so. 2d 1059 (Fla. 1991) 36

Occhicone v. State,
570 So. 2d 902 (Fla. 1990) 57

O'Connell v. State,
480 So. 2d 1284 (Fla. 1985) 14

Parker v. State,
887 P.2d 290 (Okla. Cr. 1994) 54

Pouncy v. State,
353 So. 2d 640 (Fla. 3DCA 1977) 35, 36

Provenzano v. State,
616 So. 2d 428 (Fla. 1993) 35

Randolph v. State,
562 So. 2d 331 (Fla. 1990) 15

Rose v. State,
591 So. 2d 195 (Fla. 4DCA 1991) 29, 36

Salazar v. State,
852 P.2d 729 (Okla. Cr. 1993) 54

Scott v. Dugger,
604 So. 2d 465 (Fla. 1992) 28

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1986) 24

Steinhorst v. State,
412 So. 2d 332 (Fla. 1992) 57

Stewart v. State,
549 So. 2d 171 (Fla. 1989) 52, 53

Tafero v. State,
403 So. 2d 355 (Fla. 1981) 35

Tedder v. State,
322 So. 2d 908 (Fla. 1975) 46

Watson v. State,
651 So. 2d 1159 (Fla. 1994) 15

Wickham v. State,
593 So. 2d 191 (Fla. 1991) 42

Wike v. State,
648 So. 2d 683 (Fla. 1994) 16

Willacy v. State,
640 So. 2d 1079 (Fla. 1994) 14

Williams v. State,
625 So. 2d 994 (Fla. 1DCA 1993) 23

OTHER ATJTHORITIES CITED

Florida Rule of Criminal Procedure 3.216(a) 35

STATEMENT OF THE CASE AND FACTS

Pasco County sheriff's officer Charles Calhoun observed a parked green or teal colored pickup truck at about 1:20 in the morning. He saw blood and brain matter on the top of the back seat. A large sum of money was over the visor. Bare footprints were on the dirt side of the road. There was a gunshot wound in the right temple area. No keys were in the ignition (Vol. VI, R 223-230). Officer Michael Schreck added that the footprints seemed to originate from the outside passenger side of the vehicle, almost as if an individual might have been running. Behind the pickup truck about eighty feet away lay a gold chain with two charms on it (R 234-236). Robert Jones found a shell casing, 9 millimeter on floor board, saw the gold chain, barefoot prints in the mud and money in the car (R 241-244).

Crime scene technician Boekeloo testified there was a large amount of money on the driver's side sun visor and another large amount in jeans on seat next to the victim and in a fanny bag pouch, totaling over two thousand dollars. Marijuana was found in the pickup truck (R 248-254). One bullet hole was located behind driver's left side, a bullet was recovered from the open part of the truck (R 256). A gold necklace with pendants and blood was found, a stun gun or cattle prod was found underneath the front driver's seat (R 265). A set of keys that would fit the ignition

was found in a cardboard box located in bed of truck right behind passenger side (R 273).

Barbara Jean Mock overheard a conversation a couple of days prior to the murder in Joey Duckett's living room in which Joey said victim Hank needed to die and appellant said he'd do it. Duckett and appellant had a close relationship (R 285-288).

Detective Clifford Blum taped an interview with appellant after Miranda warnings. Sanders mentioned things only the killer would know (victim was shot in the neck, four shots were fired, marijuana was in the truck, money was in the victim's sock, defendant was barefooted)(R 362). Appellant's taped confession of May 23, 1994 was played to the jury (Vol. VII, R 310-360). In that confession appellant admitted killing Henry Clark (R 311). He claimed that he and Clark had driven to Tampa to buy crack (R 312), claimed that Clark wanted to smoke the drugs and that he reacted when the victim grabbed for the cattle prod (R 315). Sanders admitted four shots were fired, that he left one shell casing on purpose (R 316), admitted shooting the victim in the temple (R 316). Sanders opined:

> 'Piss on his life, man. I have no remorse for it, ya know, I really don't, because it just means it's one less face in the world I have to deal with, dude, but, I mean, I was fucked up, dude."
>
> (R 318).

Appellant added that he **was** 'an aggressive person when it comes to shit like that 'cause I don't want to be taken out, dude" (R 318). Sanders explained that he had the nine millimeter Highpoint inside his pants where the victim couldn't see it (R 319). He burned his bloody clothes afterward (R 321) .[1] Sanders acknowledged that "George" picked him up after the shooting (R 323). Sanders stated that Joey paid him nine hundred dollars to kill the victim before the murder, four days earlier; the killing wasn't supposed to happen for two weeks (R 328, 330). He spent the nine hundred dollars he **was** paid (R 343). Sanders admitted stepping in the mud in his bare feet (R 351). He 'knew what the fuck I was doing that night" (R 357) and "Y'all can fry me, man, fuck it" (R 358). Appellant's prints were found on the victim's vehicle (R 383). David Clark identified **a** photo of the necklace that victim wore all the time (R 385-386). James Bossey identified the victim Henry Clark (R 387).

Rodney James Bishop testified that on May 23, 1994, subsequent to his confession to Detective Blum appellant made a spontaneous statement which included the remark that nothing really matters, "I'm going to the electric chair **anyway"** (R 389).

Associate medical examiner Dr. Robert Davis testified that the autopsy revealed three bullet wounds: (1) a medium range wound ½ -

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[1]Appellant denied in his confession taking the victim's gold necklace (R 322).

2½ inches distant from the head; (2) a wound ¼ inch below top of head and ¾ inch to right of anterior midline with no exit; it took a downward pitch and bullet was recovered out of the left lung; (3) a third entered the upper arm breaking the collar bone and recovered in the back of the neck (Vol VIII, R 411-415). It was highly unlikely the victim was using cocaine prior to death or would have been seen in the blood. Death was very, very rapid (R 420-422).

FDLE crime lab analyst Joseph Hall testified the bullets were fired from the same firearm, nine millimeter in caliber, and consistent with a Highpoint automatic (R 436).

George Nashef was at Joey Duckett's house April 25 or 26 at 6:00 or 7:00 pm Monday night. He was requested to go to the La Salle apartments to see Sanders. He drove there and talked to appellant. Appellant informed him that Hank was going to pick up the appellant and that George should wait a few minutes, then come and pick him up at Belcher's Mine. Thereafter, appellant got in the passenger side of the teal green pickup truck when it arrived, the witness waited, then drove to the mines. Appellant jumped out of the bushes and flagged him down. He had blood on his face and clothes (R 446-450). Appellant told Nashef "I killed him. . . . He wouldn't die" (R 452). Sanders showed him a tiny gold chain and one hundred dollars in twenties, which he said he got from Hank or the vehicle. He claimed he had to keep shooting him. They drove

back to Duckett's house and appellant told Joey he did it (R 452-453). Nashef did not report this to law enforcement because he was scared but subsequently told Detective Blum (R 454). Nashef did not think defendant was high on drugs or alcohol that night. His speech was clear (R 455).

At penalty phase the prosecutor called Detective Blum who talked to John Martin. Martin told Blum that he had seen Henry Clark wear a gold rope necklace. After Clark's murder, Sanders showed him the necklace which had a dent in it and appellant told Martin this is where he shot Hank in the neck and that's how the dent occurred in the chain. Martin is now deceased (Vol. IX, R 636-638).

The defense called appellant's former girlfriend, Lisa Cantrell, who described appellant's gentle nature, compassionate and kind (Vol. X, R 668-669); a neighbor, Betty Hersh, who stated that appellant brought her fish and fixed things (R 682); and a mental health expert, Dr. Michael Maher (R 687-811).

In rebuttal the state called mental health expert, Dr. Sidney Merin (Vol. XI, R 843-918).

The jury recommended a sentence of death by an eight to four vote (R 281, 971). The trial court agreed, finding one aggravator (CCP), no statutory mitigators but some non-statutory mitigation (R 307-314).

Sanders now appeals.

SUMMARY OF THE ARGUMENT

ISSUE I. The lower court did not err reversibly in excusing for **cause** prospective juror Payeur since her responses unequivocally demonstrated her inability to consider the option of imposing the death penalty. Defense counsel failed to demonstrate below that the questions propounded by the trial court were inadequate or that he had specific questions more appropriate than that provided by the court. There was no abuse of discretion. Fleckinger v. State, 642 So. 2d 35 (Fla. 4DCA 1994), rev. den., 650 So. 2d 989 (Fla. 1994). If there were error, it was harmless.

ISSUE II. The lower court did not err in limiting the defense cross-examination of witness Nashef about alleged drug-running activities. The witness **was** thoroughly examined about the circumstances that he witnessed on the night of the murder and his reasons for initially not coming forward. The proffer of testimony wherein the witness denied being a drug dealer for a group failed to establish the defense reason for asking the question that the witness owed money to drug suppliers. Such collateral matters were irrelevant.

ISSUE III. The lower court did not err in improperly failing to consider allegedly disparate treatment accorded to Joey Duckett; in fact, the court did give it some slight weight as a non-statutory mitigator as explained in the sentencing order.

ISSUE IV. The lower court did not err in permitting Dr. Merin to testify as a state rebuttal witness at penalty phase since the record is clear that Dr. Merin did not consider any material or **hear** confidential matters from the defendant in the abortive attempt of the defense to hire Dr. Merin.

ISSUE V. The lower court did not err in rejecting appellant's **age** of twenty years as a mitigating factor. Cf. Merck. v. State, 664 So. 2d 939 (Fla. 1995). The lower court properly considered non-age asserted mitigation in the non-statutory mitigation section.

ISSUE VI. The imposition of a sentence of death is not disproportionate in this contract-execution style murder. Mordenti v. State, 630 So. 2d 1080 (Fla. 1994). The CCP factor is weighty. Ferrell v. State, 680 So. 2d 390 (Fla. 1996).

ISSUE VII. The lower court did not err reversibly in failing to instruct the jury on the penalty of life without parole. The claim is unpreserved for Sanders' acquiescing to the court's ruling that prior case law precluded it and the claim is meritless as this court has determined that the statutory amendment applies to offenses committed after the effective date of May 24, 1995.

ISSUE VIII. The CCP jury instruction did not relieve the state of its burden of proof and usurp the jury's fact finding function. The claim is not preserved by objection at the trial court level and the jury would understand from the context of the

instruction that if they found the singular offered aggravator there must then be a weighing process with the mitigators.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED REVERSIBLY IN EXCUSING FOR CAUSE PROSPECTIVE JUROR CLAIR PAYEUR.

(1) Prospective Juror Payeur -

Prior to the attorneys questioning prospective jurors on voir dire this colloquy occurred between the court and prospective juror Payeur (Vol. V, R 38-39):

> Before allowing the attorneys to question you concerning your qualifications to serve as a juror in this case, I have a few general questions for you.
>
> Are any of you opposed to the death penalty? If so, please signify -- and I'm addressing the jurors in the box at this time -- if so, please signify by raising your hands.
>
> All right. Ms. Payeur?
>
> PROSPECTIVE JUROR PAYEUR: Right.
>
> THE COURT: All right. Ms. Payeur, would your views on the death penalty prevent or substantially impair your ability to judge the guilt or innocence of Kristopher Sanders in this case?
>
> PROSPECTIVE JUROR PAYEUR: No.
>
> THE COURT: All right. Would you automatically vote against imposition of the death penalty without regard to the evidence shown or the instructions of the Court in all cases?
>
> PROSPECTIVE JUROR PAYEUR: Yes.
>
> THE COURT: All right. Thank you, ma'am.

(emphasis supplied)

The prosecutor moved to excuse Payeur for cause because by her answer she would refuse to consider the death penalty regardless of

the facts. Defense counsel expressed the desire to try and rehabilitate the juror (Vol. V, R 40) and this colloquy ensued:

> THE COURT: Let me ask you this, Mr. Swisher. What possible clarification, in light of her answer, would remove her from being unable to serve?
>
> MR. SWISHER: A series of questions that I go through. I don't think some people understand the magnitude of what they are saying. Once they understand that, perhaps, they need to follow the law even if they don't agree with it becomes something that they can adjust to. And I'd like a chance to try to do that with her.
>
> THE COURT: I'm going to pose some additional questions of Ms. Paveur to make sure that there's no iquity or mj sunderstanding on her part, but if she confirms that previous answer, then I'm going to excuse her for cause.
>
> MR. SWISHER: May I suggest one line of questioning, or -- not suggesting a question, but something along the lines of, suppose Your Honor **was** opposed to the death penalty, you are sworn to uphold the law, even if the iurv comes back with a recommendation of death, you cannot just follow your feelings asainst the death penalty. You have to follow the law. I think if she understands that a Judge -- 1 don't mean necessarily you, but a Judge, maybe some Judges are opposed to it, but they have to follow the law, and she is sworn as a juror. she must do the same thing.
>
> THE COURT: State opposed to that?
>
> MR. HALKITIS: Well, it's difficult for me to understand the type of questioning because it seems almost identical to the question the Court asked, would you refuse to consider the death penalty regardless of any facts that are brought to you. I have no problem with either way the Court wants to ask the question. I think the Court is capable of asking at least a number of questions of this juror to find out if she can be fair and impartial and her views will not preclude her from following the law. I have no objection

to whatever questions the Court- feels are appropriate.

THE COURT: All right.

(OPEN COURT.)

THE COURT: Ms. Payeur, I don't want you to think I'm picking on you, but I want to pose just a couple of additional questions to you.

Were you able to understand my instructions to the jury as a whole that the jury, if we get to the second phase of the trial, will be requested to arrive at an advisory recommendation as to either life imprisonment or the imposition of the death penalty?

PROSPECTIVE JUROR PAYEUR: I personally feel that if it sets to that point, then I would ask to submit my vote -- I would sav life in prison over the death penalty. This is how I feel.

THE COURT: I understand that. Now let me ask you this: Do you understand that during the -- if we get to the second phase, that is the penalty phase of this trial, that the jury will receive additional evidence that they may consider, either of an aggravating nature or of a mitigating nature? Do vou feel that your feelinss concerninq the death penalty would not enable vou to receive and listen to the aggravating factors and the mitigating factors and to render an advisory verdict as to the imposition of the death penalty or life imprisonment because of these feelings?

PROSPECTIVE JUROR PAYEUR: I think my feelings would interfere with that.

THE COURT: Okay. And so -- I don't want to put words in your mouth, but are vou saving it woulmake anv difference what aggravating factors or what mitigating factors you heard, that you would not vote for the recommendation of the death penalty regardless?

PROSPECTIVE JUROR PAYEUR: That 's ri t. That's correct.

THE COURT: All right, Thank you.

> At this time, I will excuse Ms. Sands and Ms. **Payeur.** You may return to the central jury room.
>
> (emphasis supplied) (Vol. V, R 40-43)

The defense counsel objected that he felt he should have had the chance to try and rehabilitate and that to excuse her at this time would be violative of the Constitution. The motion was denied. (Vol. V, R 44)

(2) Rule 3.300(b), Rules of Crim. Procedure provides:

> **(b) Examination.** The court may then examine each prospective juror individually or may examine the prospective jurors collectively. Counsel for both the state and defendant shall have the right to examine jurors orally on their voir dire. The order in which the parties may examine each juror shall be determined by the court. The right of the parties to conduct an examination of each juror orally shall be preserved,

In the instant case prior to either counsel commencing any voir dire examination prospective juror Payeur definitively and repetitively informed the trial court that she would refuse to consider the death penalty regardless of the facts (Vol V, R 40-43). After her initial and unequivocal answers the court inquired of counsel what possible clarification would remove her disqualification to serve and counsel suggested reminding jurors that they need to follow the law even if they don't agree with it. The court responded that it would pose additional questions to make sure there was no ambiguity or misunderstanding on her part. The defense suggested "something along the lines of" informing her that

judges too must follow the law and "you cannot just follow your feelings against the death penalty". Counsel suggested informing the juror "she must do the same thing".

When the court then prodded prospective juror Payeur by asking if her feelings would not enable her to receive and listen to aggravating and mitigating factors and to render an advisory verdict, Payeur thought her feelings would 'interfere with that" and when asked if it wouldn't make any difference what she heard that she would not recommend death regardless, she answered:

"That's right. That's correct."

(Vol. V, R 43)

The state submits that there has been no violation of Rule 3.300(b). Prospective juror Payeur had unequivocally and decisively demonstrated her refusal and unwillingness to abide by the law even prior to any voir dire by the respective counsel. Additionally, appellee submits defense counsel's suggestion to the court to pursue the line that judges are required to follow the law as well as citizens constituted an adequate alternative to questioning by defense counsel. The trial court's subsequent interrogation leading to reaffirmation of the juror's adamant refusal to follow the law must be deemed sufficient, especially in the absence of a proffer by the defense at trial explaining why the trial court's questions were deemed inadequate and why additional specific questions (never identified below) would be necessary to

determine the juror's qualifications to sit. Appellant cites O'Connell v. State, 480 So. 2d 1284 (Fla. 1985) but there the conviction was set aside because the defense was denied the opportunity to rehabilitate excused jurors after the prosecutor had elicited their views on his examination and the prosecutor had been permitted to re-examine jurors after cause challenges for rehabilitation -- a double standard that amounted to a violation of due process. In Hernandez v. State, 621 So. 2d 1353 (Fla. 1993) this Court vacated the death sentence (but allowed the conviction to remain intact) where a juror who had given equivocal and inconsistent responses (could recommend death, but did not believe in capital punishment) was improperly excused without providing the defense an opportunity to rehabilitate when the juror had initially answered that he could recommend death if the crime were aggravated enough. Unlike Hernandez, the juror in the instant case had expressed no equivocation whatsoever in her refusal to consider the death penalty as an available option. Rehabilitation presupposes equivocation or ambiguity.

In Willacy v. State, 640 So. 2d 1079 (Fla. 1994) the Court vacated the sentence and remanded for a new sentencing proceeding when the juror had expressed her opposition to the death penalty upon the prosecutor's voir dire examination and the defense was denied the opportunity to rehabilitate apparently either by asking any questions or by proposing to the court a line of inquiry for

the court to propound. Here, in contrast, there was repeated inquiry by the court and the defense had suggested a line of questioning to the court for inquiry of the juror, the juror consistently and adamantly maintained an inability or unwillingness to consider aggravation and mitigation and decide on the death penalty if appropriate; the defense below failed to proffer a reason why it deemed the court's questions to have been inadequate.[2] See Fleckinger v. State, 642 So. 2d 35 (Fla. 4DCA 1994), rev. den., 650 So. 2d 989 (Fla. 1994)(not an abuse of discretion for trial court to excuse prospective juror without allowing defense counsel to examine juror once it became conclusively clear to trial court after questioning juror that there was no reasonable basis to anticipate that juror could return a verdict). In light of the uncompromising quality of juror Payeur's repeated responses to the court's inquiry, even if trial counsel had been able to successfully yield a subsequent ambiguous or contradictory response, the trial court could have excluded Payeur for badly vacillating. See Randolph v. State, 562 So. 2d 331 (Fla. 1990).

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[2]Indeed, the questions propounded by the trial court appear to be more suitable than the defense suggested inquiry to compare the situation to a judge who may personally oppose the death penalty. Cf. Watson v State 651 So. 2d 1159, 1162 (Fla. 1994) (acknowledging that counsel's obscure questions can lead to ambiguous responses).

Finally, any error is harmless. Juror Payeur was excused at the beginning of jury selection and had the trial court not excused her, undoubtedly the prosecutor would have exercised an available peremptory challenge. (The state did not deem it necessary to exercise a peremptory challenge throughout.) (Vol. V, R 1-176). Appellant cannot benefit from the decision in Gray v. Mississippi, *481* U.S. 648, 95 L.Ed.2d 622 (1987) precluding harmless error analysis because in Gray unlike the instant case there was an improper excusal for cause (juror Bounds could reach either a guilty or not guilty verdict and could vote to impose a death sentence). Sub judice, juror Fayeur was properly excluded for her adamant refusal to consider the law with respect to the penalty phase where a death sentence might be imposed. Thus, the question is whether the instant record discloses harmful error in the alleged refusal to permit defense counsel to ask additional questions (not otherwise specified below) that were not satisfactorily covered in the court's inquiry. Since appellant, even now, does not explain what the juror should have been asked that was not, the court should deem error, if any, to be harmless. The 'error" certainly is as harmless as those occurring in the cases cited by Justice Wells in his dissenting opinion in Wike v. State, 648 So. 2d 683, 689-690 (Fla. 1994):

> "This Court has in the past accepted the exceptional responsibility of applying harmless error analysis to many issues in the sentencing phase of a death case. *See Fennie*

v. *State,* 648 So.2d 95 (Fla.1994) (applying harmless error analysis where trial court provided an unconstitutionally vague jury instruction for the cold, calculated, and premeditated aggravating factor); *Peterka v. State,* 640 So.2d 59 (Fla.1994) (applying harmless error analysis where trial court permitted testimony regarding an unverified prior juvenile conviction during the penalty phase); *Atwater v.* State, 626 So.2d 1325 (Fla.1993) (finding that errors in allowing evidence of lack of remorse during penalty phase and giving of erroneous instruction for the heinous, atrocious, or cruel aggravator were harmless), *cert. denied,* --- U.S. ---, 114 S.Ct. 1578, 128 L.Ed.2d *221 (1994); Duncan* v. *State,* 619 So.2d 279 (Fla.1993) (finding that introduction of gruesome photograph during penalty phase was harmless error although the prejudicial effect of the photograph outweighed its probative value), *cert. denied,* --- U.S. ---, 114 S.Ct. 453, 126 L.Ed.2d *385* (1993); *Clark v. State, 613* So.2d 412 (Fla.1992)(applying harmless error analysis where trial court might have erroneously considered the felony murder and pecuniary gain aggravators separately), *cert. denied,* --- U.S. ---, 114 S.Ct. 114, 126 L.Ed.2d *79* (1993); *Randolph v. State,* 562 So.2d 331 (Fla.1990) (finding that improper questioning of medical examiner during penalty phase constituted harmless error), cert. *denied,* 498 U.S. 992, 111 S.Ct. 538, 112 L.Ed.2d *548* (1990); *Chandler v. State, 534* So.2d 701 (Fla.1988)(applying harmless error review to prosecutor's penalty phase comment on defendant's silence), *cert. denied, 490 U.S.* 1075, 109 S.Ct. 2089, 104 L.Ed.2d 652 (1989); *Hardwick v.* State, 521 So.2d 1071 (Fla.1988)(finding error in weighing aggravating and mitigating factors harmless), *cert. denied, 488* U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988); *Delap v. Dugger,* 513 So.2d 659 (Fla.1987) (applying harmless error review where trial court failed to instruct jury that it could consider nonstatutory mitigating factors). The instant case illustrates why harmless error review should apply to

procedural errors in the penalty phase of a death case.

ISSUE II

WHETHER THE LOWER COURT ERRED REVERSIBLY IN SUSTAINING THE PROSECUTOR'S OBJECTION TO CROSS-EXAMINATION OF WITNESS NASHEF ABOUT HIS ALLEGED DRUG **RUNNING** ACTIVITIES.

In his direct testimony Nashef testified that appellant had told him Hank (the victim) was coming to pick him up and that Nashef should wait a few minutes, drive to the mines and pick him up. Nashef did so and appellant jumped in the car, bloodied, and admitted to shooting and killing the victim, displaying a chain Sanders said he took from the victim (TR 448-452). The witness acknowledged on direct that he did not immediately report this to law enforcement because "I was scared to death" (TR 454). Additionally, he denied almost all of this when he talked to Detective Blum (TR 454).

On cross-examination the witness acknowledged that he had lied to Detective Blum and that he had lied in his deposition (TR 457). He admitted that he told Blum he was not involved because he was "very much scared" (TR 461). When asked why his story had changed the witness answered that in the eight months after being contacted by police his mother had contracted brain cancer and after she passed away he realized he had to tell the truth to the police. He didn't want to incriminate himself by picking up the defendant at the mines -- if he had known something was going to happen he wouldn't have done it (TR 481). When asked if he were afraid of being prosecuted, Nashef answered:

'No. I was afraid of being killed."

(TR 482).

He knew that Sanders was in jail (TR 482).

On redirect examination, the witness reiterated that he had told Detective Blum that he didn't want to get involved (TR 483), that he was afraid, that Sanders hung around a group of people whom Nashef was concerned for his safety (TR 484). The witness had told Detective Blum he was afraid of Kris Sanders and the group of people he dealt with. Although still concerned on December 8, Nashef told Blum about the murder and appellant's involvement (TR 485-486). When asked why when he told Blum about Sanders mentioning the murder and Nashef seking blood on him he did not also mention at that time that he had followed Sanders from the apartment to the mines, he answered:

> "Because I didn't want to rat on anybody. I mean, I come from up north. People usually rat on other people end up being dead sooner or later. I was in fear for my life the whole time this happened, from the point he opened the door and got in the car with that gun."

(TR 487).

And he was still concerned about his safety (TR 487).

On recross, the witness was asked if he were a part of this group that he was afraid of and Nashef denied it:

> "I was never part of anybody. I was on my own as far as I was concerned."

(TR 490).

When asked if he ran drugs for them, the prosecutor objected and a bench conference ensued. The prosecutor contended the inquiry was not relevant and that if the defense wanted to open the door "I have no problem with that" because 'we'll get into Kris Sanders' involvement with drugs and burglaries and putting shotguns at peoples' heads" (TR 492). Defense counsel submitted the questioning was relevant because the witness was afraid because he owes people money, he's been ripped off by this group of people; he owes his suppliers (TR 493).

The court asked to hear a proffer of the testimony. Nashef then testified that he did not deal drugs with this group of people, that on one occasion he got drugs for them from Fort Lauderdale. Nashef stated there were two different groups of people, Ole and Wayne, and Joey and Kris (TR 494). The witness further testified on the proffer:

> "Q (By Mr. Swisher) Weren't you afraid that because of the drugs you were fronting these people that they were after you for money?
> A Nobody was after me for money.
> Q You didn't owe people money?
> A No. I put out my own money.
> Q You didn't tell Detective Blum that's why you were working two jobs, to pay back the money you had to front?
> A This was money I took from myself.
> Q Did you hear the question? Did you tell Detective Blum that's why you were working two jobs, because you had to pay back the money that you had to front because you were loosing [sic] money?
> A I don't recall that.

Q You don't recall that same videotape?

A I hardly remember the entire video, no. That was -- how many months ago was that? I've been through a lot since then.

Q You told Blum -- let me just go to something else before we bring the jury back, You said you told Detective Blum that you were afraid because of people up north; is that what you said or what happened up north?

A What happens to people up north that rat on other people is they usually end up dead.

Q How does that relate to this?

A This is the same scenario.

Q Well, how?

A You ratted me out on something I did and you're going to pay for it. This man is on trial for murder here, you know. And somebody put him up to it. And that somebody is not in jail right now. I could walk out of this courtroom and end up dead.

Q Is that why you're afraid?

A. You're damn right that's why I'm afraid. Wouldn't you be?

MR. SWISHER: That's all I have, Judge.

THE COURT: Okay. I'm sustaining the State's objection and instructing the jury to disregard the last statement posed before we began the proffer. Return the jury, Mr. Nelson."

(TR 495-496).

Appellant complains that there was conflicting evidence as to Nashef's role in the homicide, that appellant's statement to Detective Blum indicated that George or George's brother had cocaine deals in Fort Lauderdale (Vol. VII, TR 329-330), that appellant and George Nashef told conflicting stories regarding the details of Nashef picking up appellant after the homicide, and appellant notes that Nashef admitted having lied to Detective Blum.

It is reiterated that Nashef testified as to his fear resulting from the murder of Henry Clark. Specifically, appellant complains that the trial court, after hearing the proffer of testimony by witness Nashef sustained the state's objection and instructed the jury to disregard the defense counsel's last statement posed before the proffer (TR 496).[3]

The question presented is whether the trial court abused its discretion and erred reversibly in sustaining the prosecutor's objection after hearing the proffer of testimony. No abuse of discretion is shown. See Jones v. State, 580 So. 2d 143, 145 (Fla. 1991) (Trial courts have wide latitude to impose reasonable limits on the scope of cross-examination and there was no abuse of discretion in limiting the cross-examination of a witness, Harris, about prior drug dealings in Tallahassee where the witness had testified there was no plan for a drug deal for the day of the murder); Maggard v. State, 399 So. 2d 973, 975 (Fla. 1981); Williams v. State, 625 So. 2d 994 (Fla. 1DCA 1993); Medina v. State, 466 So. 2d 1046, 1050 (Fla. 1985). The proffer of testimony heard by the trial court was Nashef's denying that other people were after him for his money -- the defense counsel represented to the court that the relevance of the inquiry was that Nashef was afraid because he owed people money (TR 493) -- and that people (at

[3]"Q You were running drugs for them weren't you?" (TR 490).

least up north) who "rat" on others usually end up dead (TR 495-496).

It is undisputed even in the incriminating and self-serving confession by Sanders to Detective Blum that Nashef did not kill or was even present during the murder. Appellant's confession alternately describes George as the one who picked him up after the shooting either because Sanders called him (TR 323) or because George followed him (TR 335) or that Joey sent George to meet him (TR 346). Whether witness George Nashef has been involved with drugs with Joey Duckett or others -- thereby corroborating the defendant's statement of premeditated intent on this contract killing (TR 329-330) or whether Nashef inadvertently wound up in the wrong place at the wrong time and initially lied to police because he feared incriminating himself by driving the killer away from the crime scene and was scared what might happen if he "ratted" on others changes nothing. Since the proffered testimony of Nashef that was disallowed did not even confirm the defense thesis that Nashef owed money to others, it constituted impeachment on a collateral matter and was not admissible.[4]

And even if it were error, it was harmless under State v. [illegible], 491 So. 2d 1129 (Fla. 1986). Gibson v. State, 661 So. 2d

[4]Additionally, allowing examination on irrelevant, extraneous matters would have yielded (under the opening the door doctrine) to the prosecutor's eliciting even more dangerous propensities of the defendant concerning his "involvement with drugs and burglaries and putting shotguns at people's heads" (TR 492).

288 (Fla. 1995) (any error in limiting Gibson's cross-examination of his wife Roxanne was harmless beyond a reasonable doubt).

ISSUE III

WHETHER THE LOWER COURT IMPROPERLY FAILED TO CONSIDER ALLEGEDLY DISPARATE TREATMENT ACCORDED TO JOEY DUCKETT.

Appellant contended in his sentencing memorandum below that:

> '7. The alleged person who hired the defendant to commit the murder **was** never charged for the subject offense in any capacity."

(R 297).

The trial court responded in its sentencing order:

> '7. The defendant related in his recorded statement that he was paid $900.00 by Joey Duckett to kill the victim. The defense argues that Joey Duckett was never charged for the subject offense in any capacity. The defendant has not submitted authority to support this as a non-statutory mitigating factor, but resolving the question of it's application in favor of the defendant, said ground has been accepted as a non-statutory mitigating factor. There exists any number of reasons why Joey Duckett has not been prosecuted for this matter, including the factor that the only proof that may exist consists of the statement of a convicted murderer, but said factor was considered and the Court gave it some slight weight."

(R 313).

It is correct that the state contended below in its penalty phase argument to the jury[5] and in its sentencing memorandum that this was an execution style murder which met the qualifications of

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[5]The majority of the prosecutor's argument to the jury, however, focused on the absence of relative insignificance of the proffered defense mitigation (Vol. XI, TR 924-943).

the cold, calculated and premeditated statutory aggravating factor (Vol. XI, TR 926-927; Vol. II, R 292).

Appellant contends that the trial court inexplicably denigrated the evidence relating to Joey Duckett, did not fairly weigh it and thus the reliability of the imposed death sentence was compromised. Appellee disagrees. The court did accept Duckett's non-prosecution as a non-statutory mitigating factor and gave it 'some slight weight" but noted that many legitimate reasons could explain it, including the absence of a satisfactory quantum of proof.

Sanders takes issue with the lower court's summary description of the Jean Mock testimony. While the trial court's elliptical reference to the Jean Mock testimony may be subject to criticism -- Mock testified on direct examination that Joey said Clark needed to die and appellant volunteered to do it (Vol. VII, R 287) -- the court's discussion of that occurs in the context of the court's finding the presence of the CCP aggravator to Sanders, i.e., his premeditated mind set, nonetheless Mock's testimony cannot be said to suffice for a prosecution of Joey Duckett for first degree murder (his comment is subject to interpretation and Mock did not witness any payment by Duckett to Sanders) .[6] If there is

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[6]This Court has recognized, for example, that it is not improper to impose a death sentence on the actual triggerman in a contract execution-style murder even if there are others who assist in the project that receive lesser punishment. Mordenti v. State, 630 So. 2d 1080, 1085 (Fla. 1994). This Court has recognized that the

insufficient evidence to prosecute a defendant's colleague, that would seem to be as legitimate a disqualification as a co-perpetrator's age of fifteen. Moreover, in Melendez v. State, 612 So. 2d 1366 (Fla. 1992), cert. denied, 510 U.S. 934 (1993), this Court declined to compare the defendant's sentence with that of an alleged accomplice who had never been charged in the crime:

> "Proportionality is used to compare a death sentence to other cases approving or disapproving a sentence of death. Arguments relating to proportionality and disparate treatment are not appropriate here when the prosecutor has not charged the alleged accomplice with a capital offense."

(emphasis supplied)
(text at 1368-69).

Appellant criticizes the trial court's explanation which noted that the primary proof of Duckett's involvement comes from the admissions of murderer Sanders. (Apparently, no one else confirmed the nine hundred dollar payment.) While it is understandable that appellant may desire the state to take a chance and prosecute Duckett with insufficient evidence -- a resulting acquittal would then form the basis for a newly discovered evidence claim pursuant to Scott v. Dugger, 604 So. 2d 465 (Fla. 1992) -- neither Melendez nor any other precedent nor the Constitution requires it.

Appellant's claim is meritless.

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proportionality principle is not violated by the imposition of a death sentence when another culpable co-defendant is legally ineligible for the death sentence because of age. See Henyard v. State, ___ So. 2d , 22 FLW S14 (Fla. 1997).

ISSUE IV

WHETHER THE LOWER COURT ERRED IN ALLOWING DR. MERIN TO TESTIFY AS A STATE WITNESS.

Prior to trial the defense moved to strike Dr. Sidney Merin as a state witness (Vol. I, R 185-191). At a hearing on February 24, 1995 defense counsel indicated that it would furnish the court in camera with the materials it had previously provided to Dr. Merin (Vol. III, R 523). The prosecutor cited Rose v. State, 591 So. 2d 195 (Fla. 4DCA 1991) and argued that in his communication with Dr. Merin the latter had received certain items, which he did not know what they were, the defense had not contacted him, that he normally makes notes when he reviews something, that he did not recall reviewing it and did not see any notes made and that he had no opinion at all at the present time regarding Sanders' state of mind. The prosecutor sent Dr. Merin some material. The prosecutor argued there was no client/psychologist confidentiality involved. Although Merin was appointed to examine appellant to determine if he was competent no examination was done. The prosecutor further argued that Rose rejected the defense argument, that mere communication by the defense with an expert does not make the expert a defense witness (Vol. III, R 523-526).

The court inquired and the defense agreed that the court could consider Exhibit A-D of the correspondence attached to the motion (Vol. III, R 527; Vol I, R 187-191). After hearing argument the court ruled:

> 'THE COURT: I understand that. And I'm not ruling on the scope of cross-examination on Dr. Marin [sic] at this point. But the relevant representation as contained in Dr. Marin's [sic] January 20th, 1995 letter to you is that while acknowledging that he had received the initial correspondence in June of 1994, and while acknowledging that he received subsequent -- rather tht [sic] his office received subsequent communication. I think that in Paragraph 2 that these documents that were sent to him in all encompassing form, referring to these documents were neither read by Dr. Marin, [sic] that's his representation, nor analyzed by him. And he goes on to attempt to furnish some -- what was seen of that representation.
>
> But whether there's an attempt to reset or not, what I find to be the salient feature of this correspondence, it's his representation that he neither became aware of information through you about your client, nor did he become aware of strategy or evidence on your behalf, thereby coming under work product.
>
> Obviously if there's additional evidence on this point contrary to the representations contained in your motion, I'll reexamine that issue. But at the present time, based upon the evidence before me, based upon the Rose case cited by the State -- you may have it back -- I'm going to deny your motion."

(R 531-532)[7].

Merin subsequently testified as a rebuttal witness for the state in the penalty phase (Vol. XI, R 843-919). He testified about the circumstances concerning his involvement in this case on

[7]Defense counsel stated below at the pretrial hearing on February 24, 1995 that he had given up on Dr. Merin and contacted Dr. Maher who saw Sanders on the previous weekend (Vol. III, R 491).

direct examination (Vol. XI, R 849-850) and cross-examination (R 867-878).

In his testimony at penalty phase Dr. Merin explained that he had been contacted by the defense and provided a great deal of documentation (Vol. XI, R 848).

> "Q. Mr. Swisher contacted you initially and provided you with documentation?
> A. Yes.
> Q. Did you review any of those documents?
> A. No.
> Q. Why not?
> A. Somehow it was set aside and one of those cases -- fortunately it was the only one I could think of right now that I never got to to review. I was never reminded of it and there was no reason for me to go back to it because of the absence of any stimulus in that direction, until such time as your office called.
> Q. Our office called and asked if you would be able to assist us or wound want to assist us in this case?
> A. That is correct. Now, it may have been that earlier when I had received the data from Mr. Swisher's office that there may have been some sort of communication, I may have spoken with somebody that time, but for whatever reason all of that material, all that data was set aside and I simply never got around to studying it."

(TR 849).

Dr. Merin testified that he had reviewed data provided by the prosecutor including a tape and transcript of the tape, certain police reports, Dozier Boys Home records, a psychologist report from Dozier Boys Home (TR 850-851). The witness testified that he had been apprised that Sanders was interviewed in February of 1995

by Dr. Michael Maher and denied involvement in the Hank Clark shooting and that appellant had again spoken to Dr. Maher on Friday -- after his conviction -- and told Maher that he did shoot the victim but it was impulsive (TR 858-859).

On cross-examination Dr. Merin identified letters from defense counsel of June 30, July 14, and August 18, 1994 (TR 867-871). Dr. Merin explained:

> "Q. Well, are you aware of the fact that you were listed as a witness the day after you sent back this stuff?
>
> A. No, I was not. I had indicated to Mr. Halkitis at that time that you had gotten in touch with me and I had not at all reviewed any of the data as evidenced by the fact that none of the data had any of my red marks on it, which I usually write or mark on everything that I read. I had not even looked at the data.
>
> I indicated to Mr. Halkitis at the time that you had already gotten in touch with me and that I could not be his witness unless there were some sort of clarification of what my position would be. I did not want to be retained by one side and then end up being retained again by the other side. He had then at a later time pointed out to me that the Court had accepted the fact that I had not reviewed any of the data sent to me by the Defense, none of this data had been sent to me by your office, and that it would be acceptable to be retained by the State.
>
> Q. And of course we know that you didn't review the documents because we have your word for that; is that right?
>
> A. Well, you have my word for it. I recall -- I have all the data and I'll be very happy to send it to you so that you can see that there's not one red mark on it whatsoever. In fact, when Mr. Halkitis sent this data to me he was asked if I should review the data you people had sent and he had

indicated no, not at all, just set that aside. I never even looked at it.

Q. That's what you say here in court today, right?

A. That's right.

Q. All right. So, you were provided documents, you had them in your office for six months and you didn't look at them, is that what you're saying?

A. That is correct."

(TR 871-872).

* * *

"Q. You have an option of accepting or rejecting a case, correct?

A. That is correct. And I gave Mr. Halkitis my thinking about that and he had indicated to me that he had taken it up with the Court and that the Court said that despite the fact -- this is my understanding -- despite the fact that the Defense had sent the material to me early on and because of -- and this is my understanding -- because of the fact that I had not reviewed any bit of it that it would be acceptable if I testified or got the material from the State. Now, when the State sent me the material I did not know at that time that I would have developed the opinion that would have been the position that they would hold."

(TR 877).

On redirect examination, Dr. Merin stated:

"Q. By the **way,** Defense counsel earlier asked you did you -- you chose to assist the State in this case; was that accurate? Did you choose to assist us?

A. No, not at all. I had written a letter, and I don't have the letter with me, explaining to Mr. Swisher what had occurred, and I don't recall the specifics of the letter, but I felt very uncomfortable about having been called by both sides.

Q. And were you told that the Court has

now allowed you to testify as a State expert in whatever opinion you might have in this case?

A. That is correct. When I talked with you several weeks ago you reminded me of that because I was still uncomfortable about it and you reassured me that it was acceptable to the Court, then I went ahead and accepted the commission.

Q. And that was prior to you forming any opinion either for the Defense or the State?

A. That is correct. I didn't -- I did not want to look at any data until I had that opinion."

(TR 917).

Appellant argues that the lower court erred in allowing Dr. Merin to testify as a penalty phase witness for the state on rebuttal. Appellant acknowledges that he 'does not suggest that he [Dr. Merin] was untruthful in claiming not to have read the materials which he eventually returned to the defense" (Brief, p. 79) but contends that the appearance of impropriety to Sanders (Brief, p. 77) required Dr. Merin's disqualification. Sanders -- an emotionally immature naif in defense counsel's eye but a proven "This-gun-for-hire" wannabe to the jury, who eloquently confessed to Detective Blum, 'piss on his life, man . . . it just means it's one less face in the world I have to deal with, dude . . ." (Vol VII, R 318) -- likely will not be overwrought at the prospect of a mental health expert testifying about him who has not looked at any

materials submitted by defense counsel.[8]

Appellant cites Florida Rule of Criminal Procedure 3.216(a) and Pouncy v. State, 353 So. 2d 640 (Fla. 3DCA 1977). In Pouncy the Court explained that defense counsel employed several psychiatrists to aid in the defense:

> 'The psychiatrists examined appellant and questioned him extensively about the murder of Wood. Their evaluations were thereupon relayed to appellant's counsel."
>
> (text at 642).

The Court ruled under these circumstances it was error to permit the state to depose the doctors and use them as state witnesses when appellant had no intention to utilize them as defense witnesses. In Lovette v. State, 636 So. 2d 1304 (Fla. 1994) this Court ruled:

> "We hold, therefore, that the state cannot elicit specific facts about a crime learned by a confidential expert through an examination of a defendant unless that defendant waives the attorney-client privilege by calling the expert to testify and opens the inquiry to collateral issues."
>
> (text at 1308).

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[8]As this Court well knows a defense assertion of a subjective fear that a judge may not be impartial because of prior adverse rulings is insufficient to warrant disqualification. See, e.g., Provenzano v. State 616 So. 2d 428, 432 (Fla. 1993). Unreasonable subjective fears cannot be used to oust a trial judge who had made adverse pretrial rulings. Tafero v. State, 403 So. 2d 355, 361 (Fla. 1981). Similarly, Dr. Merin need not be disqualified here where he reviewed no material provided by the defense and became involved in the case only after a court determined it was proper to do so.

Unlike Pouncy and Lovette, in the instant case Dr. Merin did not examine Sanders, and had used no confidential information to form his opinion. As in Rose v. State, 591 So. 2d 195, 197 (Fla. 4DCA 1991) and as Dr. Merin's testimony makes clear:

> " . . . all of the doctor's opinions rendered in this case were based on materials supplied by the state . . . not on any conversations or material provided by the defense."
>
> (Vol. ??, R ???).

Under the reasoning advanced by appellant, any criminal defendant upon being permitted by court order to utilize an expert to prepare for his trial could simply write a letter to all licensed mental health experts in the area -- or even the entire state -- and preclude the prosecution from using any of them in response at trial, even though none of the defense selectees ever examined the defendant or considered any materials furnished by the defense. It would be an effective ploy disabling the state from meeting any defense mental health expert testimony as suggested by Nibert v. State, 574 So. 2d 1059 (Fla. 1991). Appellant cites no authority compelling Dr. Merin to serve as a mental health expert at the beck and call of defense attorney Swisher or appellant Sanders prior to his agreeing to do so and appellant's unsuccessful attempt to retain Dr. Merin did not preclude his subsequent rebuttal testimony.

ISSUE V

WHETHER THE LOWER COURT ERRED IN REFUSING TO FIND APPELLANT'S AGE OF TWENTY YEARS AS A MITIGATING CIRCUMSTANCE.

The trial court's sentencing order recites:

> '3. While the defendant's chronological age at the time of the offense was twenty years of age, his emotional age was in his early teens. Dr. Maher testified that the defendant tested at an I.Q. of 80 as a young teenager, but conceded during cross examination that the defendant was not retarded, and, in fact, was of normal intelligence. Dr. Merin confirmed the defendant is of average intelligence. The defendant, confirming his intellect, obtained his GED while awaiting trial. Accordingly, the defendant's emotional age is consistent with his actual, chronological age. The defendant's age at the time of the crime is not a mitigating factor.

(R 311).[9]

Appellant is not ineligible for the death penalty based upon his age. See Allen v. State, 636 So. 2d 494 (Fla. 1994). Nor does Sanders benefit from Ellis v. State, 622 So. 2d 991 (Fla. 1993), because Ellis was, as Sanders is not, a minor. This Court has frequently approved the rejection of a finding of age as a mitigator for those younger than appellant. See Merck v. State, 664 So. 2d 939 (Fla. 1995)(age of nineteen rejected); Deaton v. State, 480 So. 2d 1279 (Fla. 1985); Cooper v. State, 492 So. 2d 1059 (Fla. 1986); Xokal v. State, 492 So. 2d 1317 (Fla. 1986); see

[9]The defendant's sentencing memorandum had briefly urged "While the defendant's chronological age at the time of the offense was 20 years of age, his emotional age was in his early teens." (R 296).

also Gudinas v. State, --- So. 2d ---, 22 FLW S181 (Fla. 1997) (age 20 rejected).

Appellant contends that there was "something more" presented than mere chronological **age** and he refers to the singular remark of defense witness Dr. Maher that Sanders was "emotionally immature, more consistent in his emotional and psychological development with a young teenager, fourteen, fifteen, that **age** range" (Vol. X, TR 695). Dr. Maher also admitted that Sanders' history included multiple charges related to breaking the law starting at age eleven or twelve continuing until ordered by the courts to the Dozier Boys school (TR 732), that he had **a** history of escaping and bringing drugs back to the facility for other inmates (TR 733), that his mother tried to get him counseling through HRS (TR 735), that at age sixteen he was placed in detention facilities because of his juvenile problems (TR 739), that he violated curfew, made verbal threats to his mother and refused to listen to his community control officer from HRS (TR 740). Sanders committed burglaries (TR 751) and dealt in stolen property (TR 752), received negative reports while at Dozier (TR 752-753), that the MMPI tests revealed anti-social personality traits (TR 754), that an evaluation by Dr. Baum indicated that a large proportion of his behavior serves to gain attention of those around him (TR 761), that he functioned within the **average** range of intelligence (TR 762). Dr. Maher was suspicious during his interview that Sanders was lying to him (TR

771). Dr. Maher listened to appellant's taped statement which provided details of the incident (TR 774-783). Dr. Maher was aware that Sanders' adult record included dealing things and using drugs (TR 791).

Appellant contends that the lower court applied the wrong legal standard and misconstrued the evidence, citing Morgan v. State, 639 So. 2d 6 (Fla. 1994). In Morgan, this Court opined that the lower court had inappropriately borrowed the standard from Eutzy v. State, 458 So. 2d 755 (Fla. 1984) (age of 43 not mitigating because reaching age of responsibility cannot be used as shield against death penalty) since Eutzy was not meant to preclude applicability of age of sixteen as a mitigating factor. In the instant case, the trial court committed no such error. The cross-examination testimony of defense witness Dr. Maher -demonstrated that appellant's lengthy history of juvenile and adult criminal behavior belied the assertion that Sanders had the emotional age of a child.

In addition to Dr. Maher's admissions, state rebuttal witness Dr. Sidney Merin described the anti-social personality (or sociopathic) traits he found in appellant (TR 854-856). Appellant used manipulative techniques, attention-getting devices (TR 856). Dr. Merin opined there were no mental mitigators (TR 857). Nor was appellant impaired on the night of the crime by any substance abuse

(TR 863). The lower court did not err. Cf. Gudinas v. State, --- So. 2d ---, 22 FLW S181 (Fla. 1997).

Finally, appellant faults the trial court for not including non-age asserted mitigation within the age discussion, although the trial court did address in the non-statutory mitigation section of its order his history of drug use, obtaining a GED and mental health problems. Cf. Barwick v. State, 660 So. 2d 685 (Fla. 1995). With regard to non-statutory mitigation the court explained (R 312-313):

> "1. Defendant's assistance to Lisa Cantrell
>
> 2. Defendant's assistance to Betty Hirsch
>
> 3. Defendant's GED
>
> 4. Defendant cooperated with law enforcement.
>
> 5. Defendant's history of drug abuse and at the time of the offense
>
> 6. Defendant's mental health problems
>
> 7. The alleged principal was uncharged
>
> 8. Defendants good conduct during the trial
>
> 1 & 2. The defendant visited his paramour, Lisa Cantrell, while she was hospitalized and helped her in other ways. She left the defendant when he refused to stop abusing cocaine and other substances. The defendant helped Mrs. Hirsch as she was the next door neighbor of Lisa Cantrell. The defendant's actions as described by Ms. Cantrell and Mrs. Hirsch are not of any extraordinary effort by the defendant, and thus while they are found to be mitigating

circumstances, the Court gave them little weight in the weighing process.

3. The fact that the defendant obtained his GED while in jail awaiting trial JR a mitigating circumstance. However, the Court gave it little weight,

4. The defendant did cooperate with law enforcement upon his arrest and made a voluntary statement. A careful examination of the defendant's statement reflects, however, that there is a strong argument that it was not done out of a sense of remorse, but rather demonstrates boastfulness and braggadocio, both in tone and content. However, the Court giving the defendant the benefit of the doubt, accepts it as a mitigating circumstance and gave it some moderate weight.

5. The evidence demonstrates that the defendant has a history of substance abuse. The totality of the evidence, including expert opinion, affirmatively shows that the defendant was not under the influence of drugs at the time of the offense. Therefore, this circumstance (defendant's history of substance abuse) is accepted as a mitigating circumstance and given some moderate weight by this Court.

6. The evidence of defendant's mental health problems is best characterized as light to mild depression brought about by incarceration or restraint of antisocial conduct. The Court finds the opinion, as to defendant's mental health history, of Dr. Merin to be more credible than that of Dr. Maher and Dr. Merin's opinions are corroborated by the facts of the case. Therefore, the defendant's mental health history (not at the time of the occurred) is accepted as a mitigating factor and given some minimal weight.

> 7. The defendant related in his recorded statement that he was paid $900.00 by Joey Duckett to kill the victim. The defense argues that Joey Duckett was never charged for the subject offense in any capacity. The defendant has not submitted authority to support this as a non-statutory mitigating factor, but resolving the question of it's application in favor of the defendant, said ground has been accepted as a non-statutory mitigating factor. There exists any number of reasons why Joey Duckett has not been prosecuted for this murder, including the factor that the only proof that may exist consists of the statement of a convicted murderer, but said factor was considered and the Court gave it some slight weight.
>
> 8. The defendant exhibited good conduct during the trial. Such conduct is a recognized non-statutory mitigating circumstance and it was given some slight weight by this Court."

(emphasis supplied)

There is no requirement that the trial court must also include non-statutory mental mitigation under age where the proffered mitigation is addressed in the sentencing order.[10]

Even if this Court were to deem the trial court's action error, such error is harmless. Deaton, supra; Wickham v. State,

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[10]Appellant cites a portion of Dr. Merin's testimony regarding appellant having previously been diagnosed with severe depression (Vol. II, TR 896). On redirect examination Dr. Merin testified that he did not find any depression by Sanders to be severe (TR 908). And earlier on direct testimony Dr. Merin explained that appellant's excellent memory for details exemplified by his taped statement showed extreme depression was not present at the time; moreover, depressed people are more apt to injure themselves than to injure others (TR 862-863).

593 So. 2d 191 (Fla. 1991); Hardwick v. State, 521 So. 2d 1071 (Fla. 1988).

ISSUE VI

WHETHER APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE.

There is no impediment to upholding the trial court's imposition of a sentence of death merely because a single aggravator has been found. See Ferrell v. State, 680 So. 2d 390 (Fla. 1996); Cardona v. State, 641 So. 2d 361 (Fla. 1994); Duncan v. State, 619 So. 2d 279 (Fla. 1993); Arango v. State, 411 So. 2d 172 (Fla. 1982); Armstrong v. State, 399 So. 2d 953 (Fla. 1981); LeDuc v. State, 365 So. 2d 149 (Fla. 1978); Douglas v. State, 328 so. 2d 18 (Fla. 1976); Gardner v. State, 313 So. 2d 675 (Fla. 1975). This Honorable Court has routinely upheld -- against a proportionality argument -- death sentences imposed on the triggerman in a contract execution-style murder. Mordenti v. State, 630 So. 2d 1080, 1085 (Fla. 1994)(it was Mordenti who actually carried out the contract murder); Downs v. State, 572 So. 2d 895 (Fla. 1990); Kelley v. State, 486 So. 2d 578, 586 (Fla. 1986) (J. Overton, concurring specially).

Appellant does not challenge the evidentiary sufficiency of the CCP factor (Brief, p. 89) and appellee submits that such an aggravator is "weighty". Ferrell, supra.

The trial court found in its sentencing order:

> A. AGGRAVATING FACTORS
> 1. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The defendant in his

> taped confession related that he committed the murder of Henry Clark and that it was done in an execution style. The evidence of the commission of an execution style murder by the defendant is corroborated by the physical evidence: location, four shots fired at close range, and theft of victim's jewelry as proof of murder, but leaving cash. The testimony of witness Jean Mock further confirms the degree of planning when she quoted the defendant as stating, before the murder, "Hank needs to die, I'll do it." That portion of the defendant's statement which suggests that the actual shooting and killing of the victim was committed in response to the victim's argument and movement towards a weapon is negated by the testimony of George Nashiff. Mr. Nashiff was approached by the defendant just before the murder and the defendant instructed Nashiff to pick him up at the mines (scene of murder) even though Henry Clark (victim) was picking up the defendant and the two were going out to the mines. George Nashiff's testimony is clear that the defendant was ordering a ride back from the scene knowing that the victim would be left at the mines after the murder. The evidence fully supports the conclusion that the murder was committed in a cold, calculated and premeditated manner and same has been proved beyond a reasonable doubt. The Court has given great weight to the aforesaid aggravating factor.
>
> (Vol. II, R 308).

Appellant argues that the lower court "likely distorted" the weight given to the CCP aggravator because of the contraction summarizing Jean Mock's testimony of the Sanders-Duckett

conversation.[11] The reliability of the death sentence has not been compromised since the court gave appellant the benefit of a non-statutory mitigator for Duckett's role in the affair:

> '7. The defendant related in his recorded statement that he **was** paid $900.00 by Joey Duckett to kill the victim. The defense argues that Joey Duckett **was** never charged for the subject offense in any capacity. The defendant has not submitted authority to support this as a non-statutory mitigating factor, but resolving the question of it's application in favor of the defendant, said ground has been accepted as a non-statutory mitigating factor. There exists any number of reasons why Joey Duckett has not been prosecuted for this murder, including the factor that the only proof that may exist consists of the statement of a convicted murderer, but said factor was considered and the Court gave it some slight weight."

(Vol. II, R 313).

Appellant contends that Dr. Merin should not have been allowed to testify for the prosecution but that even if Merin's testimony were properly admitted conflicting evidence existed as to the presence of statutory mental mitigation. He further argues there was extensive non-statutory mitigation presented. The trial court's order adequately addressed mitigation. With respect to

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[11]Appellant also alleges that the trial court in its sentencing order erroneously recited the jury recommendation vote as nine to three when it really was eight to four (Vol. II, R 307, R 281). Since there are no Tedder v. State, 322 So. 2d 908 (Fla. 1975) implications, the court's miscount in an order drafted three months later is similar to an error, i.e., harmless error, mislabelling mental mitigators **as** non-statutory mitigating circumstances. Henvard v. State, 22 FLW S14, n 2 (Fla. 1996).

statutory mitigating factors the court explained:

> "Statutory Mitigating Factors
>
> As to mitigating factors, the Court acknowledges its responsibility to consider **all** non-statutory mitigating factors as well as the statutory mitigating factors set forth in Florida, Statute 921.141(6). In his sentencing memorandum, the defendant requested the Court to consider the following statutory mitigating factors:
>
> 1. The capital felony was committed while the defendant **was** under the influence of extreme mental or emotional disturbance.
>
> The defendant relies upon the opinion of Dr. M. Maher, psychiatrist, to support this contention. Dr. Maher opined that defendant was not a sociopath; that he was competent to stand trial; and that he was sane at the time of the commission of the murder. The defendant lied to Dr. Maher at the first interview, advising the doctor that someone else shot the victim and it was only after the defendant had been convicted of Murder in the First Degree in this cause, that he told the doctor that he had consumed alcohol and smoked crack cocaine the day of the murder. Dr. Maher conceded that the defendant's medical/legal history included:
>
> A. Juvenile reports of defendant as uncontrollable, truant, smart mouthed, and using marijuana, alcohol, huffing, cocaine, and rock cocaine use.
>
> B. Defendant's prior juvenile record including commitment to Dozier Boy's School.
>
> C. Prior psychological opinion that defendant had an antisocial personality disorder; was proud of his aggressive conduct; and had utilized suicide attempts to provoke the staff or obtain a release from detention.
>
> Dr. Sidney Merin, psychologist, testified that in his expert opinion, the defendant had an antisocial personality disorder (sociopath). Dr. Merin testified that the defendant was not under the influence of extreme depression in that he exhibited no symptoms of such a mood referring to the defendant's excellent recall of facts of the

murder, as well as of his feelings, thoughts, and emotions that he was experiencing at the time of the murder. Dr. Merin further observed that the defendant's excellent memory of the facts of the murder negates the defendant's contention and Dr. Maher's opinion that at the time of the murder, the defendant had a major substance disorder. Dr. Merin stated that the defendant's memories as given on defendant's taped statement regarding the murder do not suggest that the defendant was factually, mentally or emotionally impaired on that particular night of the murder by virtue of any substance abuse. The Court allowed the defendant to argue this circumstance to the jury, but now finds that neither the totality of the facts, nor expert opinion cause this Court to be reasonably convinced that the defendant was under the influence of extreme mental or emotional disturbance. The opinion of Dr. Maher as previously related is directly refuted by the opinion of Dr. Merin as well as being in conflict with the evidence. This mitigating circumstance does not exist.

2. At the time of the offense, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

The defendant argues that Dr. Maher's opinion supporting this mitigating circumstance is confirmed by the defendant's medical records including an MMPI, interviews with the defendant, defendant's grandmother, and other discovery information, including depositions. Dr. Maher conceded that during defendant's prior MMPI, the defendant exhibited features associated with an antisocial personality disorder and that the defendant functioned within the average range of intelligence. The psychological tests, including the MMPI, actually corroborates Dr. Merin's opinion that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired. The defendant's statements to Dr. Maher consisted of defendant lying regarding the murder on his

> first interview to a one sentence scenario, "I smoked a lot of cocaine; a conflict developed and I shot Henry Clark", in his second interview, The depositions clearly demonstrate that the defendant was offered money for a contract murder of the victim and completed the murder. The defendant demonstrates excellent recall of the facts of the murder and his emotions, again negating any contention that his capacity was diminished by substance abuse or mental illness either at the time of the murder or at the time of his recorded statement. Therefore, this Court finds that neither the totality of the evidence, nor any expert or non-expert testimony demonstrates that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. This mitigating circumstance does not exist.
>
> 3. While the defendant's chronological age at the time of the offense was twenty years of age, his emotional age was in his early teens.
>
> Dr. Maher testified that the defendant tested at an I.Q. of 80 as a young teenager, but conceded during cross examination that the defendant was not retarded, and, in fact, was of normal intelligence. Dr. Merin confirmed the defendant is of average intelligence. The defendant, confirming his intellect, obtained his GED while awaiting trial. Accordingly, the defendant's emotional age is consistent with his actual, chronological age. The defendant's age at the time of the crime is not a mitigating factor.

(Vol. II, R 309-311).

The court then delineated the eight mitigating factors argued in the defense submitted sentencing memorandum (Vol. II, R 296-297) -- Lisa Cantrell testimony, Betty Hirsch testimony, appellant's acquisition of a GED, his cooperation with law enforcement, his history of drug abuse and at the time of the offense, appellant's

mental health problems, the person who hired him was not charged, and good conduct during trial and the court explained why it was finding and giving some weight to such factors. (Vol. II, R 312-314).[12] See also Barwick v. State, 660 So. 2d 685 (Fla. 1995) (sentencing order adequately reflected consideration of mitigating factors urged).

[12]If the defense did not argue additional non-statutory mitigation below but seeks to initiate its consideration now he may not do so. See Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990); Hodges v. State, 595 So. 2d 929, 934 (Fla. 1992) (we will not fault the trial court for not guessing which mitigators Hodges would argue on appeal).

ISSUE VII

WHETHER THE TRIAL COURT'S FAILURE TO INSTRUCT ON THE SENTENCING OPTION OF LIFE IMPRISONMENT WITHOUT PAROLE VIOLATED DUE PROCESS, FUNDAMENTAL FAIRNESS AND THE EIGHTH AMENDMENT.

At the jury instruction conference, the defense apparently requested instruction number 6:

> "MR. WILLIAMS: On six, Judge, I'm very interested in the first paragraph most importantly.
>
> THE COURT: How is that relevant when we're looking at a minimum mandatory of 25 years?
>
> MR. WILLIAMS: Because, Judge, the way things are set up now, 25 years is a meaningless number. Life is life.
>
> MR. WILLIAMS: I mean, the thought of 25 years leads one, and a jury could believe that that would mean that in fact he could in fact be free in 25 **years** when as the law says he cannot be freed.
>
> THE COURT: Do you have any argument as to paragraph two as not being directly -- almost a paraphrasing of the standard jury instructions?
>
> MR. WILLIAMS: I'm just concerned with paragraph one, Judge.
>
> THE COURT: State?
>
> MR. HALKITIS: Well, first, Judge, they have not abolished parole as it pertains to first degree murder as of January '95. Second of all I gave a case to Judge Mills because on one occasion this case was given to him and thereafter the Florida Supreme court case came out and said he can be eligible for parole in 25 years.

> I am hopeful I have a copy of it somewhere in my office. But from that point on Judge Mills refused to give that instruction based on that case. I don't have it; maybe Judge Mills has it.
>
> THE COURT: I'll take penalty instruction number six under advisement and we'll rule it on before we begin on Monday."

(Vol. x, R 833-834) .

Subsequently, the court called appellant's attention to Stewart v. State, 549 so. 2d 171 (Fla. 1989), and defense counsel agreed that it stood for the proposition that while the parole commission may be abolished it is not abolished for five felonies, minimum mandatory twenty-five years. The court denied defense requested instruction on number six (Vol. XI, R 840-841) .[13]

The court instructed the jury that if by six or more votes the jury determined that Sanders should not be sentenced to death,

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[13]Defense requested penalty instruction 6 recited (R 275):

> 'The Florida Legislature has abolished parole and, at present, there is no early release procedure for a person sentenced to life in prison. Fla. Stat. 921.001, (10).
>
> The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should first determine whether the aggravating circumstance previously read to you has been established beyond a reasonable doubt. If you find that the aggravating circumstance does exist, it will then be your duty to determine whether, beyond every reasonable doubt, it outweighs any mitigating circumstance that you find to exist."

their advisory recommendation should be 'a sentence of life imprisonment upon Kristopher Sanders without possibility of parole for twenty-five years" (Vol. XI, R 968; Vol. II, R 279).

Initially, appellant may not prevail because he acquiesced to the court's ruling. In Lucas v. State, 376 So. 2d 1149 (Fla. 1979), the defendant brought the state's noncompliance with Rule 3.220 to the attention of the court but deferred to the trial court's statement of the applicable law and this Court ruled:

> 'This Court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law."

(text at 1152).

Having accepted the trial court's suggestion that Stewart, supra, had repudiated his claim and having failed to insist that there were any bases to support his argument, his argument must fail here as unpreserved.

Secondly, appellant's claim must fail because this Court has determined that the 1994 amendment to F.S. 775.082(1) became effective on May 25, 1994 and "Therefore, it applies to offenses committed on or after that date". In Re Standard Jury Instructions in Criminal Cases, 678 So. 2d 1224, fn. 1 (Fla. 1996). Since Sanders committed his offense in April of 1994 (R 16), the

amendment is not applicable.[14]

[14]While appellant relies on a number of Oklahoma decisions supporting a contrary view, they are not binding on this Court's interpretation of a Florida statute. Appellee agrees with the dissenting view of Judge Lumpkin that the appropriate criminal penalty is the penalty in effect at the time the defendant committed the crime. Lazar v. State, 852 P.2d 729, at 740-742 (Okla. Cr. 1993); Hain v. State, 852 P.2d 744, at 754-755 (Okla. Cr. 1993); Humphrey v. State, 864 P.2d 343, 344 (Okla. Cr. 1993); Fontenot v. State, 881 P.2d 69, at 86 (Okla. Cr. 1994); Parker v. State, 887 P.2d 290, at 299 (Okla. Cr. 1994); Cheatham v. State, 900 P.2d 414, 429-430 (Okla. Cr. 1995); McCarty v. State, 904 P.2d 110, 129 (Okla. Cr. 1995); Bowie v. State, 906 P.2d 759, 765 (Okla. Cr. 1995).

ISSUE VIII

WHETHER THE JURY INSTRUCTION ON THE CCP **AGGRAVATOR** VIOLATED DUE PROCESS BY RELIEVING THE STATE OF ITS BURDEN OF PROOF AND USURPING THE JURY'S FACT-FINDING FUNCTION.

The trial court instructed the jury without objection that it was their duty to determine "whether an aggravating circumstance exists to justify the imposition of the death penalty" and whether sufficient mitigating circumstances exist to outweigh the aggravating circumstance. The court instructed:

> "The aggravating circumstance that you may consider is limited to the following circumstance that is established by the evidence:
>
> 1. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> "Cold" means the murder was the product of calm and cold reflection.
>
> "Calculated" means having a careful plan or prearranged design to commit murder.
>
> As I have defined for you a killing is 'premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing, The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> However, in order for this aggravating circumstance to apply, a heightened level of

> premeditation demonstrated by a substantial period of reflection is required.
>
> If you find the aggravating circumstance does not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for 25 years.
>
> Should you find that a sufficient aggravating circumstance does exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstance. . . ."
>
> (Vol. II, R 277-278; Vol. XI, R 965-966).

At the jury instruction conference the prosecutor suggested that the instruction on aggravation should read in the singular rather than plural form (Vol. X, R 828-829). Defense counsel agreed with the court that the instruction should read if an aggravating circumstance is established (to change the form from suggesting that additional aggravators were present) (R 830). After the instructions were re-typed the defense indicated there was no problem with them (Vol. XI, R 839) and reiterated no defense objection immediately prior to the penalty phase closing arguments (Vol. XI, R 922). The trial court granted the defense request that the jury be given individual copies of the instructions (R 922-923). At the conclusion of reading the instructions to the jury, defense counsel agreed with the court's correcting a typographical error and sending it to the jury (Vol. XI, R 968-969). The defense

offered no complaint in its motion for new trial (Vol. II, R 283-285).

Appellant is not entitled to any relief because (a) he is procedurally barred on appeal from complaining about a jury instruction form to which he did not object at trial. See Steinhorst v. State, 412 So. 2d 332 (Fla. 1992); Occhicone v. State, 570 so. 2d 902 (Fla. 1990); and (b) the error is not fundamental; in context, the jury would understand, especially after reading the last sentence of the instruction quoted, supra, that they **were being** told that if they found this singular offered **aggravator did** exist there must then be a weighing process with the mitigators.

Appellant's claim is without merit.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, Post Office Box 9000, Drawer PD, Bartow, Florida 33831, this 19TH day of May, 1997.

COUNSEL FOR APPELLEE