IN THE SUPREME COURT OF FLORIDA

LAWRENCE SINGLETON,

Appellant,

vs. **CASE NO. 93,035**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State generally accepts the Statement of the Case and Facts set forth in appellant's brief, but adds the following.

Jury Selection

Approximately seventy-five jurors were removed for exposure to pretrial publicity in this high profile case. The trial court conducted individual voir dire of jurors exposed to pretrial publicity. (V. XIX thru XXVII).

Prospective Juror Crumpton did admit he read a newspaper article and summarized his knowledge of this case: "I believe he killed somebody and chopped her arms off or something." (V. XX at 1730). Crumpton believed that this information concerned another case. (V. XX at 1730). He recalled nothing more about the facts of this particular case from the single article that he read in the newspaper about a month prior to jury selection. Id. Mr. Crumpton claimed to know nothing about the defendant himself. (V. XX at 1730). Mr. Crumpton realized that the defendant is presumed innocent until proven guilty. (V. XX at 1731). Further, Mr. Crumpton acknowledged that if chosen as a juror he would have "put aside anything" that he had heard prior to this trial and that he would base his decision solely upon the evidence and the law presented in this case. (V. XX at 1731). Mr. Crumpton stated that

he would be able to render a fair and impartial verdict even though he read something in the newspaper about this case. (V. XX at 1731).

Prospective Juror Crawford knew very little about the case. He recalled seeing a news broadcast with this gentleman [appellant] on it and "it talked about that he had killed a woman." (V. XXV at 2247). Crawford claimed that the news broadcast he observed about the appellant occurred "quite a while ago." (V. XXV at 2255). He did not hear the defendant say anything in the broadcast and did not recall any details except "that there was some statement to the effect that he had a crime in his past basically." (V. XXV at 2248). However, Mr. Crawford did not recall any details about the past crime or even what kind of crime it was. (V. XXV at 2248). In fact, Mr. Crawford did not know if appellant had been convicted of a crime. (V. XXV at 2248-49). Nor did he know if the prior crime victim was male or female, old or young. (V. XXV at 2257).

Crawford understood that if he was selected as a juror he would have to base his verdict solely upon the evidence presented in court. (V. XXV at 2249). Crawford also understood that whatever he heard on the news about this case may or may not be true and that his decision must be based solely upon what he heard in court. (V. XXV at 2249). He agreed that the appellant was

presumed innocent until proven guilty and claimed that he could afford appellant that presumption of innocence. (V. XXV at 2250). Crawford also claimed that he could hold the State to its burden of establishing appellant's guilt beyond a reasonable doubt. (V. XXV at 2250).

Prospective juror Meyer admitted that he had heard something about the murder of Roxanne Hayes but did not remember particular details of the offense. (V. XXV at 2379). He did not like to listen to the news but remembered "something about dismemberment." (V. XXV at 2379). However, he did not know if this information related to the current case or something "historical." (V. XXV at 2379). Mr. Meyer believed that he heard this information "[q]uite a long time ago" and had heard nothing about the case recently. (V. XXV at 2379, 2380).

Mr. Meyer continued, stating that he recalled that appellant was from out of state and believed that the last story he heard may have been five or six months ago. (V. XXV at 2389-90). Again, Mr. Meyer, however, could only remember something about dismemberment but did not "know if that was historical or part of the current investigation." (V. XXV at 2390, 2392). He also recalled that the alleged victim was female and underage. (V. XXV at 2391). Mr. Meyer claimed to know nothing additional about this case. (V. XXV

at 2380).

Mr. Meyer admitted that if he was chosen to serve on the jury that his verdict had to be based solely upon the evidence that he heard in the courtroom and nothing else. (V. XXV at 2380). The following colloquy occurred between Mr. Meyer and the prosecutor:

> MS. PEDEN [prosecutor]: So anything you may have heard in the news cannot at all play a part in your decision.
> MR. MEYER: Absolutely.
>
> MS. PEDEN: And would you do that?
>
> MR. MEYER: Yes.
>
> MS. PEDEN: Okay. Because you realize obviously, as you said, the news isn't always correct?
>
> MR. MEYER: Yes.
>
> MS. PEDEN: And anything that is reported could either be just an allegation or just be plain false, right?
>
> MR. MEYER: That's correct.
>
> MS. PEDEN: Okay. So if you are chosen as a juror, you would base your verdict solely on the evidence you hear in this case?
>
> MR. MEYER: Yes.
>
> MS. PEDEN: And you realize the defendant is presumed innocent?
>
> MR. MEYER: Yes.
>
> MS. PEDEN: And would you give the defendant the presumption of innocence?
>
> MR. MEYER: Until it's over.
>
> MS. PEDEN: Right. Exactly. And the presumption of innocence

> is obviously something that can be overcome. But as we sit here today before anything -- before the trial even started the defendant's presumed innocent, correct?
>
> MR. MEYER: That's correct.
>
> MS. PEDEN: And it's the state's burden to prove the defendant guilty beyond a reasonable doubt.
>
> MR. MEYER: That's right.
>
> MS. PEDEN: And you're going to [h]old the state to that burden?
>
> MR. MEYER: Absolutely.
>
> MS. PEDEN: As you sit here today, do you have any fixed opinion as to the defendant's guilt or innocence?
>
> MR. MEYER: NO.

(V. XXV at 2381-2382).[1]

Aside from exposure to pretrial publicity, the prosecution and defense addressed the use of alcohol during voir dire. On the issue of intoxication, the prosecutor asked the panel the following: "...But the question again is just the mere taking of a drug or alcohol of some sort. Does anyone believe that that in and of itself prevents a human being from making a conscious decision? Is there anyone who does? ..." (V. XXVI at 2650). Further, the prosecutor followed that question with: "Let me ask

[1]Appellant's challenges for cause to jurors Crawford, Crumpton and Meyer were denied. They were later all removed from the panel by exercise of peremptory challenges. (V. XXVIII 2909-11, 2915-16).

you this. In general terms, do you believe that a person who's intoxicated should be held responsible for their acts?" (V. XXVI at 2650). And, the prosecutor concluded by asking the following: "...Is there anyone who believes in general terms that in all cases under every circumstance intoxication prevents a person -- or -- excuse me -- the intoxicated person should not be held accountable for their acts? Okay." (V. XXVI at 2651). No juror indicated that an intoxicated person should not be held accountable for their acts. Id.

Defense counsel Menadier admittedly had trouble formulating a question regarding a defendant's mental state and alcohol use. (V. XXVIII at 2767-2769). As a result, the jurors expressed some confusion over the form of defense counsel's questions regarding alcohol use and criminal culpability. (V. XXVIII at 2771). Such confusion is exhibited by the following exchange:

> MR. PEARSON [JUROR]: Are you saying that because a person consumes alcohol, one should look at the fact that they consumed alcohol and therefore leniency should be given to them because of their current mental state because they have alcohol in their system? Is that what you're saying?
>
> MS. MENADIER: [defense counsel] It's not really what I'm saying. What I'm trying to find out is whether or not somebody's consumption of alcohol is something that you would be able to consider and factor in making that determination of that person's mental state. You're shaking you're head no. Are you thinking?
>
> MR. PEARSON: No. I mean consider it? Again, I'm still trying

to understand your question...

(V. XXVIII at 2772). Immediately after that exchange with another prospective juror, and without further clarification, prospective juror Belcher stated that he did not "feel alcohol is an excuse in any kind of crime no matter what it is." (V. XXVIII at 2773). Defense counsel did not follow up with another question or otherwise attempt to explore Mr. Belcher's response.[2] (V. XXVIII at 2773, 2778-2787). Next, another juror chimed in with the following:

> MR. DOSAL: I think this goes back to a question you asked early on. Whether the individual was drunk and killed someone and should he be tried as first degree, second degree, manslaughter right across the board, eh should be held accountable for his -- for his actions. And if he's drunk, then I can't consider that either for that matter.
>
> MS. MENADIER: You can't?
>
> MR. DOSAL: No.

(V. XXVIII at 2773).

The prosecutor and trial judge recognized that this line of questioning was getting "far afield." (V. XXVIII at 2773). The prosecutor observed that the jurors were not being told the law

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[2]This was not due to any time pressures placed upon the defense by the trial court. During later questioning on another issue, the trial judge stated: "You're right. You take as long as you want. If you want to spend an hour or two hours, that's fine." (V. XXVIII at 2817).

with regard to voluntary intoxication or whether or not they could follow it. (V. XXVIII at 2774-2775). The trial court stepped in and tried to clear up some of the confusion in this area, advising the jury:

> Ladies and gentlemen, let me square away some confusion that appears to be going on. This is not a DUI manslaughter case. This is not a case even coming close to where somebody gets drunk and drives a car and runs over somebody or causes an accident and kills them. Don't get hung up on that.
>
> This is an entirely different type of case. This is a murder case. A first degree murder case where the State of Florida must prove the defendant's guilt beyond and to the exclusion of every reasonable doubt and that whether he killed this individual and if, in fact, he did that he had a premeditated design to affect the death of that person.
>
> That's what this case is about. And then there's second degree murder and these things are on down the line. I'm going to give you the instruction on the law. All you have to do is be able to answer, yes, I will follow the law, whatever that law is. Don't get hung up on this DUI manslaughter. You're getting way off in left field. . .

(V. XXVIII at 2776-2777).

Defense counsel resumed questioning the prospective jurors, asking the following question:

> MS. MENADIER: Thank you, Your Honor. And what we're talking about here -- and if anyone's still a little confused, please let me know. Essentially is there anyone here that does not believe that the consumption of alcohol, in essence, clouds somebody's thinking process and effects their judgement? Is there anyone here that disagrees with that statement? Okay. I don't see any hands up, so I'm assuming that everybody agrees that alcohol effects somebody's ability to think, it effects their judgment, right, which is why partially we have the law against drinking and driving, right? Okay. And may question, I guess, is -- and I think, Mr. Dosal, I was talking to you last...

(V. XXVIII at 2778).

Later, Mr. Belcher indicated that he could in fact take alcohol use and the appellant's mental state into consideration in determining what punishment to impose. (V. XXVIII at 2854-2855). The following exchange occurred between Defense counsel and Mr. Belcher:

> MR. SKYE [defense counsel]: Any body in the first row that has any problem with that concept? I mean I live in this world, too. Okay. Mr. Belcher? And I understand the concerns being expressed by yourself and a couple of other people concerning, well, you know, should a person voluntarily taking alcohol reduce anything in mitigation. Okay. And that's fine. And you're entitled to that view.
>
> But again, let me just make sure you understand me here so that I understand you. At this point, I'm not talking about whether or not the defendant is guilty of first degree murder or not. We're talking about whether his mental state in any way -- would you be able to take that into consideration in deciding what punishment to recommend?
>
> MR. BELCHER: Yes, sir.
>
> MR. SKYE: Do you have any doubt about your ability to do that?
>
> MR. BELCHER: No, sir.
>
> MR. SKYE: Especially if the judge told you?
>
> MR. BELCHER: No, sir.

(V. XXVIII at 2854-2855).

All of the prospective jurors, including Mr. Belcher, indicated that they could follow the law and instructions provided by the court. (V. XXVIII at 2812). Defense counsel later

attempted to strike Mr. Belcher for cause, stating that he was left with some uncertainty about whether or not Mr. Belcher could afford appellant a presumption of innocence. (V. XXVIII at 2903). Further, counsel argued that Mr. Belcher could not consider intoxication as a defense or "as a lessening of any offense." (V. XXVIII at 2903). The trial court denied appellant's challenge for cause and defense counsel later used a peremptory strike to remove Mr. Belcher from the panel. (V. XXVIII at 2904).

Trial Testimony: The Murder Of Roxanne Hayes

Paul Hitson witnessed several minutes of appellant's attack upon Roxanne Hayes. Hitson was working as a house painter in the last part of 1996 and was hired to paint the house occupied by the appellant. On the afternoon of February 19, 1997, Hitson went to appellant's home to determine what needed to be done in order to finish the job. (V. XXIX at 3083). His uncle Robert was with him as he parked his vehicle in the appellant's driveway. (V. XXIX at 3084). He noticed appellant's van parked in the driveway and that the back door to the van was open with a roll of carpet or tar paper sticking out. (V. XXIX at 3085-3086).

Hitson knocked one time on the door and said "...hey Bill, and walked in. I'm here." (V. XXIX at 3087). He recalled passing

through the foyer and observing pills scattered over the counter.[3] (V. XXX at 3158). However, Hitson testified that it was not unusual for items to be knocked over or in disarray in appellant's home: "It was not unusual for everything to be knocked over in disarray while I was working there because the place was filthy." (V. XXX at 3198).

After he entered the house, Hitson heard someone say "[h]elp" and characterized it as "a muffled sound like a gurgling sound for help." (V. XXIX at 3087-3088). When he heard this sound he was at the back exterior door. He entered the first room and heard "[a]nother sound for help." (V. XXIX at 3079-3080). He described the tone of the voice as "weak," testifying: "Weak and muffled and just choking like gurgling sounds." (V. XXIX at 3089). He turned the corner walking into the house and stopped at the doorway of the living room. (V. XXIX at 3090). At that point, he observed appellant on the couch and could tell that another person was laying on the couch. (V. XXIX at 3093-3094). At first, Hitson thought appellant and the other person were having sex. (V. XXX at 3162). He observed part of a leg and could tell the person was

[3]Hitson also recalled that the house reeked with the smell of alcohol. (V. XXX at 3158). Upon cross-examination, Hitson testified that it was his recollection that appellant was an alcoholic who drank about two gallons of vodka a day. (V. XXX at at 3160).

facing up from the way the leg was facing. (V. XXIX at 3094). At first, appellant was hunched over the person on the couch but then he stood straight up. (V. XXIX at 3096). Appellant then knelt back down over the sofa doing whatever he was doing. (V. XXIX at 3097).

Hitson left the house and grabbed a shovel on the side of the house. (V. XXIX at 3099). He told his uncle what he had seen and was going to back in until his uncle stopped him. (V. XXIX at 3099). Instead of going inside, they both ran around to the front of the house and looked inside. (V. XXIX at 3099-3100). He kicked the front door which resulted in a loud banging sound. (V. XXIX at 3106). As Hitson was looking through the front window, he could see someone seated on the couch. (V. XXIX at 3106-3107). Hitson observed appellant "[s]tanding over her with his hand around her neck." (V. XXIX at 3108). He was leaning over the woman on the couch. At that point he heard another cry for help, describing it as "[j]ust weak and muffled, a choke, a gurgle." (V. XXIX at 3108). After hearing the woman say help, Hitson testifies: "He says shut up, bitch." (V. XXIX at 3109).

He did not observe the person on the couch swinging her arms in any manner nor did that person strike out at the appellant. (V. XXIX at 3109). He did observe the appellant, however, strike out

in a downward motion three times. While he did not observe a weapon in appellant's hands, he heard the following sounds corresponding with the blows inflicted by the appellant: "Bone crushing like chicken bones breaking." (V. XXIX at 3111). Hitson testified that it appeared that appellant's hand or fist came into contact with the victim's "chest and neck area." (V. XXIX at 3112). Hitson demonstrated for the jury the posture of the appellant with his hands around the victim's neck and using his fists in a downward motion. (V. XXX at 3197). After observing appellant strike those three blows, Hitson testified that he heard nothing else from the person on the couch. (V. XXIX at 3111-3112). Hitson testified that at most six minutes elapsed between the time he first saw the person on the couch to the time he heard the blows. Appellant apparently remained in the same relative position over the person on the couch the entire time. (V. XXIX at 3112-3113). At no point did Hitson observe any action or movement by the victim that could be described as a fighting action. (V. XXIX at 3113-3114). Hitson never gained entry through the front door and testified that he and his uncle left to call 911 from a nearby Chevron station. (V. XXIX at 3114).

Deputy Morffi testified that on February 19, 1997 he received a call about a neighbor dispute in Clarmel City in Hillsborough

County. (V. XXIX at 3034-3035). Deputy Morffi arrived at the house at approximately 6:23 p.m. (V. XXIX at 3039). He observed a van in the driveway and parked directly behind the van. (V. XXIX at 3039). He approached the house and knocked on the door adjacent to the driveway. (V. XXIX at 3042). A minute or two after knocking on the door, appellant opened the door and stepped outside. (V. XXIX at 3043, 3043).

Deputy Morffi noticed that appellant's shirt was open as well as the "fly" on his shorts exposing his genitals. (V. XXIX at 3044). Deputy Morffi told appellant he was dispatched to investigate a report of domestic trouble and asked him what happened. In response, Deputy Morffi testified: "And Mr. Singleton told me that he had been in a fuss or a spat with his girlfriend, that she was inside but that everything was okay now and that I could leave." (V. XXIX at 3045). As he was talking, it appeared to Deputy Morffi that appellant "was jittery, bouncing around." (V. XXIX at 3046). According to Deputy Morffi: "He was moving around from side to side insisting over and over again that everything was okay and that I didn't need to be there, that everything was okay now and that I didn't need to be there, that I could leave. And he was jabbering the way he was talking. Nervous." (V. XXIX at 3046). Deputy Morffi asked appellant how he

got blood on his chest: Appellant claimed that he was chopping turnips and cut his chest. (V. XXIX at 3047).

After hearing appellant's explanation, he heard the telephone ring and appellant entered the house. (V. XXIX at 3047). Deputy Morffi followed appellant inside the house, but only to the area between the exterior and interior doors. (V. XXIX at 3047, 3050). The interior door was slightly ajar and Deputy Morffi looked inside and observed what appeared to be the foot of a woman on the floor. (V. XXIX at 3051). At that point, he opened the door further and observed a naked woman laying on the ground. Deputy Morffi testified: "She was face down. One of her legs was cocked up or extended up. The other -- her left arm was down and extended out on the ground. She had cuts on the sides of her back. Her face -- her face was facing to the left and there was a blood clot in her nose and her eyes were closed. She had cuts on her fingers. She was a slight shade of gray. She wasn't breathing and she wasn't moving." (V. XXIX at 3049-3050).

After observing the body, Deputy Morffi knew the woman was either dead or very seriously injured. Morffi left the house to call for backup and medical assistance. (V. XXIX at 3052). At the time he was calling for help at his patrol car, appellant walked out of the house and approached Deputy Morffi. (V. XXIX at 3053).

Deputy Morffi motioned for appellant to step behind the van and place his hands on the van. He handcuffed the appellant and put him in the patrol car. (V. XXIX at 3053). Deputy Morffi smelled alcohol on appellant's breath. (V. XXIX at 3062).

Appellant's neighbor, Danny Sales, a defense witness, observed appellant on the evening of the murder. He claimed he was close enough to him to notice appellant's speech was slurred and that he was walking like he had been drinking. (V. XXXIII at 3676). In his opinion, he believed the appellant had been drinking. (V. XXXIII at 3677). However, when asked if appellant was "plastered," Mr. Sales testified: "I wouldn't say he was that far drunk. He was still able to walk around and everything." (V. XXXIII at 3677). Sales' observations were limited to appellant's interaction with Deputy Morffi and seeing him placed in the patrol car. (V. XXXIII at 3678).

On cross-examination, Mr. Sales testified that he went to appellant's door after securing appellant's dog and told appellant a police officer wanted to see him. (V. XXXIII at 3681). He knocked on the door and approximately a minute later, appellant appeared. (V. XXXIV at 3681). Mr. Sales told appellant the police officer wanted to see him, to which appellant responded: "I don't want to see the police officer." (V. XXXIV at 3681). Mr. Sales

noted that appellant's face was red or "flushed;" however, he did not attribute this to ingestion of alcohol as appellant's face was always "flushed." (V. XXXIV at 3682). Mr. Sales also testified that as he was standing at the door with Deputy Morffi, the phone rang and appellant responded by walking into the house. (V. XXXIV at 3683). Mr. Sales noted that the back doors and passenger side doors were open on the van. (V. XXXIV at 3685-3686). And, he observed that appellant as he came back out of the house moved to shut the van's back doors. (V. XXXIV at 3686). While appellant incorrectly attempted to close the back door, he nonetheless clearly made an effort to close the van doors. (V. XXXIV at 3687).

Christine Wiley, an emergency medical technician, examined appellant for any injuries at the murder scene. The only injury she observed to the appellant was a "red abrasion" on his upper chest area. (V. XXXI at 3236). Appellant did not complain of any other injuries. (V. XXXI at 3237). She had been alerted that appellant had complained of chest pains prior to her examination. Consequently, Ms. Wiley checked appellant's vital signs. (V. XXXI at 3238). No treatment was apparently necessary, but Ms. Wiley nonetheless offered to take appellant to the hospital. (V. XXXI at 3239). He declined the offer. Id. The abrasion on appellant's

chest did not require a bandage.[4] Id.

Ms. Wiley spent twenty to twenty-five minutes with the appellant. At no point while she was speaking with appellant or examining him did she notice any signs of impairment due to drugs or alcohol. (V. XXXI at 3240). Nor did she smell any alcohol on appellant's breath. He was able to articulate his concerns and appeared "lucid" and "coherent." (V. XXXI at 3240). When she asked how he was injured, appellant claimed that he was assaulted with a knife. (V. XXXI at 3241). Appellant also told Ms. Wiley that he was taking the prescription drugs "Paxil," "Demerol" and "Vistaril." (V. XXXI at 3242).

Deputy Brown was with Deputy Morffi when he made a protective sweep of the house. He noticed empty alcohol containers but did not know if they were from whiskey or beer. (V. XXXI at 3252). Deputy Brown observed appellant was in the back seat of a patrol car at the crime scene and being treated by EMS. Deputy Brown was standing next to the open door of the patrol car near the trunk area. (V. XXXI at 3253). At some point he heard the appellant state: "'We had an argument and she threw something at me so I

[4]Blood on a false fingernail located on the sofa possessed the genetic characteristics of appellant's blood. (V. XXXIIII at 3682). In contrast, blood taken from two knives found near the sofa carried the victim's genetic markers, but not the appellant's. (V. XXXIII at 3578-3580).

killed her. And I guess that makes me a murderer so you've got me now.'" (V. XXXI at 3250). Deputy Brown believed that statement was significant and wrote it down in his report approximately ten or fifteen minutes after appellant made the statement. (V. XXXI at 3256).

Associate medical examiner Dr. Lee Miller, an expert in the field of forensic pathology, performed an autopsy on Roxanne Hayes. (V. XXXI at 3271). Dr. Miller testified that the victim died from "[m]ultiple stab wounds of the trunk penetrating the heart and the liver." (V. XXXI at 3273). He noted a total of seven separate stab wounds, six on her trunk and one on her face. (V. XXXI at 3277). In Dr. Miller's opinion, the seven separate wounds found on the victim were from seven separate stabs. (V. XXXI at 3286-3287). The wounds were consistent with the attacker facing the victim as the victim was seated or slouched on a couch or chair. (V. XXXI at 3287).

A facial stab wound "went deeply into the soft tissue and muscle of the face about two inches." (V. XXXI at 3278). The fatal chest wound "only measured a quarter inch on the skin surface, but it went straight through two inches and it penetrated the right ventricle of the heart and Ms. Hayes bled to death rather rapidly from this wound." (V. XXXI at 3282). The wound marked as

number five was located on the right side of the victim's abdomen, on her stomach. Dr. Miller testified:

> This was the deepest wound. It went six or seven inches into the body and completely through the liver. Without -- if this had been the only wound sustained and without medical attention she undoubtedly would have died from it, but not right away.

(V. XXXI at 3283). This wound reached the spinal column without penetrating the spinal cord. (V. XXXI at 3283). The wound marked number six was located somewhat in the center of the victim's abdomen. (V. XXXI at 3283). Dr. Miller testified that this was also a fatal wound:

> This wound was also a deep wound. It also penetrated the liver and would have been fatal without medical care had she not sustained the other rapidly lethal wound. And this went about four inches into the body. The direction was from front to back without deviation to left or right or up or down.

(V. XXXI at 3284).[5]

Dr. Miller testified that three stab wounds could be characterized as fatal without rapid medical attention. (V. XXXI at 3285). However, the penetrating stab wound to the heart was the most rapidly fatal wound. (V. XXXI at 3285).

When asked to determine the time range from loss of

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[5]Wound marked number seven was located on the lower abdomen and was not a deep wound. The wound penetrated about a quarter inch below the skin surface and was a superficial wound, "at least superficial compared to most of the others." (V. XXXI at 3284).

consciousness to death from the stab wounds in this case, Dr. Miller testified:

> That's really hard to say and I can only say within rough limits. Probably the minimum would have been four or five minutes between sustaining the wound and loss of consciousness and death a minute or so afterwards. And the outside would be maybe as much as 15 or 20 minutes. Maybe even a little longer.

(V. XXXI at 3286). And, assuming the victim remained conscious after wound marked number four, Dr. Miller testified that she would have been able to feel the other stab wounds. (V. XXXI at 3286).

Dr. Miller also observed injuries to the victim's hands. Dr. Miller described these injuries as very deep wounds:

> Well, the victim has three wounds on her fingers across the fingers of her right hand. One involves the middle finger, the ring finger, and the other the small finger. And they are both -- they are all deep in size wounds or cuts. And illustrating on myself they go like this (Indicating) They are lined up with one another, one, two, three. And they go very deep. They almost go to the bone.

(V. XXXI at 3295). The wounds were "linearly" aligned, which indicated to Dr. Miller: "Well, there is virtually only one situation where you see wounds with this alignment and configuration. These wounds are called defense wounds and they are sustained when somebody who's being attacked by an assailant with a knife attempts to grab the blade of the knife and the knife is pulled from their hand and they sustain wounds like that. That's virtually the only way you can get them." (V. XXXI at 3296).

The victim's left hand also revealed defensive type wounds. Dr. Miller testified:

> Well, they're similar to the one on the right hand in that they are deep in size wounds, cuts or slashes. They extend almost to the bone and they extend -- and they involve, I believe, the index, middle and ring fingers. But they are different from the right hand in one respect. They are not lined up. They are not parallel to one another and they are not in a single line which indicates that they are defense wounds like that of the right hand but they weren't inflicted by a single slash or blow of the knife. They were probably inflicted by at least two, maybe three.

(V. XXXI at 3297). The wounds were so deep that they were cut to the bone on the index finger and middle finger that they were nearly severed from the hand. (V. XXXI at 3297-3298). The wounds on the left hand were also characterized as defensive wounds. (V. XXXI at 3298). The wounds to the victim's hands were sustained "with her holding the blade of the knife and having it yanked out of her hand fast and hard." (V. XXXII at 3370).

Dr. Miller also testified that he noticed three fresh scrape or scratch like abrasions on the victim. One on the face, one on the front of the left neck area, and one on the left forearm above the wrist. These injuries were fresh and consistent with having been inflicted at or near the time of death. (V. XXXI at 3299).

Dr. Miller personally examined the crime scene shortly after the murder. In court, Dr. Miller examined photographs of the crime scene and testified that the body had been moved from the area

where the wounds were inflicted. (V. XXXI at 3306). In Dr. Miller's opinion, it appeared wounds were inflicted on or adjacent to the couch and then the victim was dragged into the next room. (V. XXXI at 3306). There was a large pool of blood and some blood splatter located adjacent to the couch and on the way to where her body was found in the next room. (V. XXXI at 3306).

A test on the victim's blood revealed the presence of cocaine metabolite. Dr. Miller testified that he could not be sure when the victim consumed the cocaine and it could have been within hours or even days of her murder: "Let's say two days." (V. XXXII at 3368). Dr. Miller testified that he could not tell within any degree of certainty whether or not the presence of cocaine metabolite accelerated or delayed loss of consciousness due to the stab wounds. However, he testified: "I don't think that cocaine played any significant part in that, especially since she didn't have any cocaine in her system acting on her -- just a small amount of the breakdown product of cocaine, which is also a little bit active, but not as much as cocaine." (V. XXXII at 3369).

Penalty Phase

As noted in appellant's brief, Dr. Elizabeth McMahon, a clinical psychologist, who examined the appellant, concluded that appellant suffered from dementia and that he was under the

influence of an extreme mental or emotional disturbance at the time of the murder. (V. XL at 4541-46). Further, while he did have the capacity to appreciate the criminal nature of his conduct, he could not conform his conduct to the requirements of the law. (V. XL at 4546-4549).

Dr. McMahon denied that appellant's deceptive statements toward the police were inconsistent with her conclusion that he suffered dementia at the time of the offense.[6] (V. XL at 4574). When asked if the deceptive statements toward the police were evidence of goal directed behavior, she claimed that appellant told her he did not remember his statements to the police. (V. XL at 4576). However, Dr. McMahon agreed that if he made those untruthful statements they could indicate an awareness of the wrongful nature of his conduct. (V. XL at 4577-4578). Dr. McMahon also agreed that the van doors being open,[7] a rope located on the floor, the knife was dropped behind the couch, the body moved, were all consistent with goal directed behavior to move or dispose of the victim's body or conceal his crime. (V. XL at 4579).

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[6]Dr. McMahon also conceded that appellant had never before been diagnosed with dementia despite having been seen by several mental health professionals, both in California and Florida. (V. XL at 4589-4592).

[7]Earlier, witnesses had seen the van doors closed but when the police arrived the van doors were open. (V. XXIX at 3121; V. XXXIII at 3524).

On cross-examination, Dr. McMahon admitted that appellant felt "very threatened and often time(s) extremely aggressive -- aggressive towards women, yes." (V. XL at 4595). Dr. McMahon testified that she had heard appellant's explanation for the fatal stabbing of Ms. Hayes, that she in fact picked up a knife and assaulted him with it. (V. XL at 4598). Dr. McMahon testified that she was aware that appellant made a statement in California that Mary Vincent had forcibly kidnaped or threatened him by holding a sharp object or knife to his throat. (V. XL at 4598-4599). Until the prosecutor brought it up, Dr. McMahon had not thought about whether or not the similarities in blaming the victims for his violent attacks casts doubt upon his self-report concerning the victim's murder in this case. (V. XL at 4599).

The State called Dr. Barbara Stein, M.D., a psychiatrist and expert in forensic psychology in rebuttal to the defense expert, Dr. McMahon. Dr. Stein testified that someone with significant dementia would be someone who had problems with what's called "ADL, activities of daily living." (V. XL at 4698). Dr. Stein stated that someone with significant dementia would be very dangerous living alone. (V. XLI at 4698).

Dr. Stein noted that none of the records or information that she reviewed suggested that appellant was not capable of normal

activities such as driving and caring for himself. (V. XLI at 4699). Dr. Stein testified: "He was able to be involved in goal directed behavior which required him to be able to think clearly, to reason, to deliberate, to remember enough and to have an adequate degree of judgment and planning ability." (V. XLI at 4699). Dr. Stein noted that looking at all of the jail records from California, the St. Joseph's Hospital records, the care team records, the merit behavioral records, there was no diagnosis of dementia. (V. XLI at 4700). Dr. Stein observed that appellant has been seen "by at least 10 to 15 doctors back in California, various doctors between the jail and the -- and the St. Joseph's and the merit behavior, I think that's the most significant thing." (V. XLI at 4700). Further, even with an early diagnosis of dementia where the person is capable of independent living, the physicians would have placed appellant on medication for dementia: "We have some very good medications for dementia and they are particularly prescribed in the early stages because they are known to slow down the progression of dementia." (V. XLI at 4700). None of the doctors, even the doctors who treated appellant in February 1997 did not spell out any problems with ADL, nor did they show "recent or remote memory problems." (V. XLI at 4701). Based upon her review of the most recent medical records, Dr. Stein testified:

“...He is noted to have good recent and remote memory, to be fully cognitively [sic] intact. And that’s in spite of the carbon monoxide that he had that impacted him on a short term basis. So even having been subjected to carbon monoxide, he recovered fully according to the doctors and there was no evidence of cognitive compromise.” (V. XLI at 4703). In Dr. Stein’s opinion, the records she reviewed did not support a dementia diagnosis. (V. XLI at 4703).

SUMMARY OF THE ARGUMENT

ISSUE I--This was a high profile case which generated a tremendous amount of pretrial publicity. The trial court liberally granted challenges for cause based upon exposure to prejudicial pretrial publicity. The three challenged jurors who admitted they were exposed to some pretrial publicity were subject to individual voir dire. Each juror possessed only general knowledge about a crime in appellant's past and each unequivocally stated that such information would have no impact upon their ability to decide this case. Under these circumstances, the trial court did not abuse its broad discretion in denying appellant's challenges for cause.

The trial court also properly denied a challenge for cause against a prospective juror based upon his view of intoxication. Defense counsel's questions to the jury engendered much confusion among the prospective jurors and did not instruct the jurors on the law with regard to voluntary intoxication. The challenged juror's responses during voir dire did not reflect an inflexible view on intoxication which required him to be excused for cause.

ISSUE II--The trial court did not abuse its discretion in admitting a videotape of appellant admitting that he killed the victim. Such evidence was highly relevant and the brief depiction

of appellant in jail clothes did not substantially outweigh the probative value of such evidence.

ISSUE III--The trial court's sentencing order properly listed all the mitigating circumstances, both statutory and non-statutory that were supported by the evidence. Of the additional non-statutory mitigating factors proposed by the defense, the only factors not found by the trial court were 1) not mitigating, 2) considered with the non-statutory mitigators found by the trial court, and/or 3) not supported by the evidence. Assuming, *arguendo*, any error in failing to explicitly detail the weighing process, such error does not require reversal of appellant's sentence.

ISSUE IV--Appellant wanted May Vincent to be treated differently from any other witness in this case in order to hide the disability his own criminal misconduct created. The law does not require such an accommodation. The brief displays of Ms. Vincent's prosthetics were not gratuitous; they were only made as part of routine or necessary court-room procedure [identification of appellant; taking the oath]. Similarly, any argument that the trial court abandoned its neutral and impartial role in asking Ms. Vincent to identify the appellant is without merit. This argument was not made to the trial court below and has been waived on

appeal. In any case, since appellant did not dispute the felony convictions stemming from his attack upon Ms. Vincent, there is no danger that the trial court's single question somehow enhanced the credibility of Ms. Vincent and changed the result in this case.

ISSUE V--The trial court did not abuse its discretion in allowing a defense penalty phase witness to testify about appellant's denial of responsibility for attacking Ms. Vincent. The prosecutor's questions were well within the proper scope of cross-examination. Further, this testimony was admissible to rebut the defense attempt to portray appellant as a fully rehabilitated, 'model parolee.'

ISSUE VI--the trial court specifically stated in the sentencing order that nothing other than the two statutory aggravators was considered in aggravation. The language appellant complains about in the sentencing order was nothing more than a factual summary of the murder and/or general commentary. Appellant has not carried his burden of establishing a prejudicial error which requires remand for another sentencing hearing.

ISSUE VII--The trial court did not abuse its discretion in allowing Dr. Barbara Stein to testify on rebuttal that appellant had the capacity to deceive. Dr. Stein's testimony was relevant to her conclusion that appellant's mental state was not substantially

impaired at the time of the murder.

ISSUE VIII--The appellant's proportionality argument must be rejected. Appellant's sentence is supported by two particularly weighty and uncontested aggravators: Heinous, atrocious, or cruel, and prior violent felony convictions. A review of factually similar cases supports the propriety of the imposition of the death penalty on the facts of this case.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S CHALLENGES FOR CAUSE TO FOUR JURORS REQUIRING REVERSAL OF HIS CONVICTION? (STATED BY APPELLEE).

Appellant argues that the trial court erred in denying his challenges for cause to four jurors. Appellant later used peremptory challenges to excuse the four jurors he found objectionable. Nonetheless, he claims that the denial of his cause challenges forced him to exhaust his peremptory challenges and that as a result, he was forced to accept one juror on whom he would have otherwise exercised a peremptory challenge. Consequently, he claims that his conviction must be reversed. The State disagrees.

A. Standard of Review

The trial court's denial of a challenge for cause is reviewed

before this Court for an abuse of discretion. Lambrix v. State, 494 So.2d 1143, 1146 (Fla. 1986), cert. denied, 522 U.S. 1122 (1998). "Juror excusals for cause are normally within the trial court's discretion, and a court's ruling will be sustained unless no reasonable person would agree with the court." Kokal v. Dugger, 718 So.2d 138, 142-143 (Fla. 1998). As this Court observed in Cook v. State, 542 So.2d 964, 969 (Fla. 1989), cert. denied, 502 U.S. 890 (1991):

> **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.** Appellate courts consistently recognize that the trial judge who is present in voir dire is in a far superior position to properly evaluate the responses to the questions propounded to the jurors. In fact, it has been said:
>
> 'There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empaneling of a jury.'

(emphasis added) (citing United States v. Ploof, 464 F.2d 116, 118-19 n. 4 (2d Cir.), cert. denied sub nom, Godin v. Untied States, 409 U.S. 952, 93 S.Ct. 298, 34 L.Ed.2d 224 (1972)(additional string cites omitted).

B. The Trial Court Did Not Abuse Its Discretion In Denying The Cause Challenges To Prospective Jurors Crumpton, Crawford, And Meyer On The Basis Of Their Limited Exposure To Pretrial Publicity

Although prospective jurors Crumpton, Crawford and Meyer were exposed to some limited pretrial media coverage in this case, each

juror unequivocally stated that such information would play no part in their consideration of this case.[8] Appellant apparently contends that simply hearing anything about the California offense requires a *per se* excusal of the juror for cause. Fortunately, such a *per se* rule of excusal based upon exposure to pretrial publicity has not been adopted. The mere fact that jurors were exposed to pretrial publicity is not enough to raise the presumption of unfairness. Bundy v. State, 471 So.2d 9, 19 (Fla. 1985), cert. denied, 479 U.S. 894 (1986). "It is sufficient if the juror can lay aside his opinion or impression and render a verdict based on the evidence presented in court." Id. at 20. Accord Castro v. State, 644 So.2d 987 (Fla. 1994).

To be qualified, jurors need not be totally ignorant of the facts of the case nor do they need to be free from any preconceived

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[8]The trial court went to extraordinary lengths to protect the appellant from the effect of extensive and negative publicity, as the prosecutor observed in response to appellant's Motion for New Trial:

> ...And I would suggest that the Court afforded Mr. Singleton extreme protections against pretrial publicity to preserve his right to a fair trial, some of which, candidly as you know, the State didn't believe the Court needed to afford Mr. Singleton. But, nonetheless, in view of the fact that the Court did give Mr. Singleton those precautions -- sequestration and all the rest -- his rights to a fair trial as a result of pretrial publicity have amply been protected...

(V. LII at 4852).

notion at all:

> To hold that the mere existence of any preconceived notion as to the guilt of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irwin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642-43, 6 L.Ed.2d 751 (1961). Further, this Court observed in Puiatti v. Dugger, 589 So.2d 231, 235 (Fla. 1991):

> The fact that a juror knows something about the case or knows individuals who may be witnesses clearly is not grounds *per se* to excuse the juror for cause. Rather, this Court long ago adopted the following standard:
>
> 'The true doctrine is, that if the juror's conceptions are not fixed and settled, nor warped by prejudice, but are only such as would naturally spring from public rumor or newspaper report, and his mind is open to the impressions it may receive on the trial, so as to be convinced according to the law and the testimony, he is not incompetent.'

(quoting O'Conner v. State, 9 Fla. 215, 219 (1860)). See Murphy v. Florida, 421 U.S. 794, 44 L.Ed.2d 589, 95 S.Ct. 2031 (1975) (this Court's previous decisions do not "stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process."); Castro, 644 So.2d at 990 (rejecting claim that simply being exposed to pretrial publicity required the trial court to excuse jurors for cause). Moreover, Crumpton, Crawford, and Meyer

possessed limited information about the prior offense and generally acknowledged that what was heard through the media may or may not be true.

Sub judice, during individual voir dire none of the three jurors indicated that they had formed any conclusion about the case from their limited exposure to pretrial publicity. (V. XX at 1731, V. XXV at 2249-2250, XXV at 2381-2382). And, each of them unequivocally indicated that they would base their verdict solely upon the evidence introduced at trial. (V. XX at 1731, V. XXV at 2249, XXV at 2380). See Davis v. State, 461 So.2d 67, 70 (Fla. 1984), cert. denied, 473 U.S. 913 (1985)(finding no manifest error on the record where the challenged juror stated the last time defense counsel inquired that "she could listen to all of the evidence and render a verdict based on that, so I will deny your motion." [quoting the trial court]). Aside from exposure to pretrial publicity, appellant points to no particular response of any of these three prospective jurors during individual voir dire which raises any question about their ability to render a fair and impartial verdict.

Prospective juror Crawford did not even know any details surrounding appellant's prior conviction for the rape and mutilation of a minor. He simply recalled some "statement to the

effect that he had a crime in his past basically." (V. XXV at 2248). He did not know any details of the past offense or even if appellant had been convicted. (V. XXV at 2248-49). He did not know if the prior crime victim was male or female, old or young. (V. XXV at 2257). Prospective juror Meyer recalled hearing something about "dismemberment" but did not know if it was something historical or was related to the current case. (V. XXV at 2379). He believed that the alleged victim was female and underage. (V. XXV at 2391). Meyer believed he heard this information a long time ago and had heard nothing about the case recently. (V. XXV at 2379-2380, 2390, 2392).

Prospective juror Crumpton learned more from pretrial publicity than the other two jurors. However, Crumpton claimed to have read only one newspaper article about the case. The sum total of his knowledge was as follows: "I believe he killed somebody and chopped her arms off or something." (V. XX at 1730). Nonetheless, this juror, like Crawford and Meyer, specifically stated that he could base his verdict only on the evidence introduced at trial.

While appellant has established that Crumpton, Meyer, and Crawford, knew something about a prior crime in appellant's past, he has failed to show that any of these prospective jurors held fixed opinions about the present case. Nor has he shown that these

prospective jurors in any way equivocated in their responses on individual voir dire which might suggest that they would be biased against appellant by virtue of exposure to pretrial publicity. See U.S. v. De La Vega, 913 F.2d 861, 865 (11th Cir. 1990)("Since mere exposure to pretrial publicity and some juror knowledge of the facts and issues involved in a case is constitutionally permissible, (citation omitted), and since the record in this case in no way shows any evidence of jury bias or hostility towards the defendants, we must conclude that the trial court did not commit manifest error in concluding that this jury was not actually prejudiced against the appellants.").

In Bundy,[9] the Eleventh Circuit found no manifest error in the denial of the defendant's challenge for cause where the juror possessed detailed knowledge of the defendant's murder conviction in a separate case. Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988). A challenged juror in Bundy who actually sat on the case and was elected foreman admitted in voir dire that based upon pretrial publicity "'it sounded like a pretty gory case' and 'some brutal murders.'" Bundy, 850 F.2d at 1426. He also was aware that Bundy had escaped from confinement in Colorado. While the juror

[9]The Eleventh Circuit's opinion provides a comprehensive discussion of a challenge for cause to a particular juror in Bundy.

denied any fixed opinion as to guilt, he did not "recall if co-workers had reached a consensus of Bundy's guilt prior to the Leon County verdict, but said that family and friends thought Bundy was guilty." Such knowledge did not disqualify the juror where he acknowledged that the defendant was "entitled to be tried on the evidence presented in the present case alone, that he would follow the trial court's instructions as to the law, that he would accord the defendant a presumption of innocence and hold the state to its burden of proof, that he would not require the defendant to take the stand, and that he would set aside any opinion or impression he had about the defendant." Id. Neither the Eleventh Circuit nor this Court found the trial court erred in failing to excuse this juror for cause.[10]

In this case, none of the challenged jurors possessed as much

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[10]This Court's recent decision in Bolin v. State, 24 Fla.L.Weekly S273 (Fla. June 10, 1999), provides no support for appellant's position on appeal. The primary problem in Bolin is that the trial court did not allow "individual voir dire with specific questions concerning jurors' knowledge of newspaper articles containing inadmissible and prejudicial information." Consequently, this Court observed, "defense counsel, the trial judge, and this Court are left to speculate about what these jurors had learned from these newspaper accounts." Id. In this case, the trial court conducted individual voir dire and this Court need not speculate about what information the jurors were exposed to through pretrial publicity. Each juror possessed only limited information about this case from pretrial publicity and stated unequivocally that such information would not have any impact upon their ability to decide this case.

detailed information about a prior offense as the challenged juror in Bundy. However, like the challenged juror in Bundy each juror indicated that they could base their verdict solely upon the evidence introduced at trial. Consequently, it cannot be said that the trial court abused its discretion in failing to remove the three prospective jurors for cause.

Appellant's reliance upon Reilly v. State, 557 So.2d 1365 (Fla. 1990) is misplaced. In Reilly this Court stated that a juror's exposure to pretrial publicity indicating that the defendant had made a confession was more damaging than any testimony actually introduced at trial. In this case, none of the jurors challenged for cause had any information concerning a confession to the charged murder. Two possessed only general knowledge of the California offense, which admittedly, was not introduced during the guilt phase of appellant's trial.[11] One

[11]The jurors excused for cause generally possessed more detailed information about the instant offense and appellant's prior crime--e.g., Prospective juror Houser: "Well, I've read some in the newspaper, some from the TV. I'm not sure which one. But I heard that he had raped and mutilated a girl out in California. And then -- that was a while back. And then he's in our community and he lured a lady into his home and raped and killed her with a knife from what I understand from the paper." (V. XX at 1662). The trial court excused Ms. Houser for cause. (V. XX at 1663).

Prospective juror Johnson: "The girl he was accused, I guess, of raping and cutting her arms off and leaving her." (V. XX at 1742). Johnson was excused from the jury for cause.

simply heard about a prior offense but did not know any details about the alleged offense.

In contrast to Reilly, the evidence in this case was overwhelming and largely undisputed--i.e, that appellant murdered the victim.[12] In fact, among the evidence properly introduced in this case was appellant's taped admission to having killed the victim. The extrinsic information in this case, unlike the "confession" in Reilly, had no bearing on appellant's guilt or innocence in this case. Given the jurors unequivocal assurances that they could based their verdict solely upon the evidence introduced at trial, the trial court was under no obligation to grant appellant's challenges for cause in this case.

This was a high profile case which generated a tremendous amount of publicity in the Tampa Bay area. The trial court liberally granted challenges for cause in this case and a large number of jurors were removed for cause, many over the State's objection. See Cole v. State, 701 So.2d 845, 853-854 (Fla. 1997)(no palpable abuse of discretion shown in court's treatment of jurors on pretrial publicity). The record reveals that prospective jurors were quite candid in answering questions regarding beliefs

[12]The focus of the defense was to show that the murder was something less than first degree murder, not to suggest that appellant did not commit the offense.

and opinions gleaned from exposure to pretrial publicity. For example, prospective juror Delahunt Lopez on individual voir dire admitted she had heard a lot about the case: "It's a womens issue, so I've heard it a lot." (V. XX at 1746). She was aware of details about the California case noting: "Well, it was a very horrific experience for her and something that I don't think that I could survive that she did survive the attack and having her arms cut off." (V. XX at 1747). When Ms. Lopez was asked by the prosecutor if she could set aside anything that she heard about the appellant and base her verdict solely on the evidence introduced in court, she replied: "I hope I could, but I'm not -- I can't be a hundred percent sure." (V. XX at 1747). And, in view of everything Ms. Lopez had heard, she did not believe that she could give appellant a fair trial. (V. XX at 1748). Ms. Lopez was excused from serving on the jury by the trial court. See also V. XX at 1660.[13]

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[13] Prospective juror Bechore knew about appellant's prior conviction where he cut off the previous victim's arms and spent eight years in prison. (V. XX at 1658). When the prosecutor asked prospective juror Bechore if he could set aside any impression he received about information he learned in the case, Bechore responded: "Honestly, no, because me and my parents have talked about it. I've kind of got it set in my mind." (V. XX at 1659). Bechore was excused for cause. (V. XX at 1660).

Excused prospective juror Ms. Hampel admitted that based upon her knowledge of appellant's past crimes that she could not be a fair and impartial juror in this case. The trial judge noted that

Since the trial court granted appellant an additional peremptory challenge in this case, he can only show error if the trial court abused its discretion in failing to excuse at least two of the challenged jurors for cause. See Cook v. State, 542 So.2d 964, 969 (Fla. 1989), cert. denied, 502 U.S. 890 (1991)("Because the trial judge granted the appellant's motion for one additional challenge, appellant is entitled to have his conviction reversed only if he can show that the judge abused his discretion in refusing to excuse *both* jurors Sergio and Boan for cause."). However, since each juror had been exposed to only limited pretrial publicity and stated unequivocally that they could base their verdict solely upon the evidence introduced at trial, appellant has failed to show the trial court abused its discretion in failing to exclude prospective jurors Crumpton, Crawford, and Meyer. See Mendoza v. State, 700 So.2d 670, 675 (Fla. 1997), cert. denied, 142 L.Ed.2d 81 (1998)("A trial court has latitude in ruling upon a challenge for cause because the court has a better vantage point from which to evaluate prospective jurors' answers than does this Court in our review of the cold record.").

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in her questionnaire Ms. Hampel said: "...I already feel he's guilty from past knowledge and feel he should die." (V. XXVI at 2439).

C. The Trial Court Did Not Abuse Its Discretion In Failing To Grant Appellant's Challenge For Cause Against Prospective Juror Belcher

Defense counsel's questions on the issue of intoxication engendered a great deal of confusion among the prospective jurors. Mr. Belcher's comment regarding intoxication must be viewed in light of that confusion. Defense counsel's questions to the panel did not track the voluntary intoxication instruction. Nor did defense counsel ask the jurors if they could follow the law with regard to voluntary intoxication. The earlier questions regarding culpability and alcohol were obviously troubling to several of the prospective jurors. Immediately after Mr. Belcher and other jurors responded to the less than precise questions of defense counsel, the trial court and prosecutor recognized the confusion and acted to address it. (V. XXVIII at 2774-2777).

This Court has recognized that a juror's responses in voir dire must be viewed in light of the precision or imprecision of the questions posed to the panel. For example, in Castro v. State, 644 So.2d 987, 990 (Fla. 1997), this Court held that answers given during voir dire reflecting juror confusion on the death penalty did not require the trial court to grant the defense challenges for cause. The Castro Court stated:

> We find no error in the trial court's refusal to strike the prospective jurors for cause because of their views on the

> death penalty. **It is obvious from the record that when questioning began the jurors had not been given any explanation about their role in the case. In fact, the trial judge expressed his frustration and said an explanation would be helpful to the prospective jurors, but none was given.** Not surprisingly, the prospective jurors had no grounding in the intricacies of capital sentencing. Some of the jurors came to court with the reasonable misunderstanding that the presumed sentence for first-degree murder was death. When they were advised that they were responsible for weighing aggravating and mitigating factors, they indicated they would be able to follow the law.

Similar to the situation presented in Castro, the questions posed to the panel in this case were less than precise; they did not instruct the potential jurors on their role in evaluating a defendant's degree of intoxication. Although Mr. Belcher did state that alcohol intoxication does not constitute an excuse for any crime, that view does not suggest that he cannot consider and give appropriate consideration to a voluntary intoxication defense. As this Court is aware, intoxication, even severe intoxication, did not constitute a complete **excuse** for murder. An extreme level of intoxication, if established, may operate to reduce what would otherwise be classified as first degree premeditated murder, to second degree murder. Nonetheless, voluntary intoxication did not constitute a blanket excuse for murder.[14] Thus, in very general

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[14]In Linehan v. State, 442 So.2d 244, 249 (Fla. 2d DCA 1983), approved, 476 So.2d 1262 (Fla. 1985), the Second District observed:

> The great majority of moderately to grossly drunk or drugged

terms, the law was in accordance with Mr. Belcher's statement that voluntary intoxication does not **excuse** the commission of any offense. And, since Mr. Belcher was not specifically instructed on the law regarding voluntary intoxication at the time he made that statement, it cannot be said this isolated comment rendered him incompetent to serve as a juror in this case. Particularly in light of the entire voir dire of the panel in this case which indicated that Mr. Belcher could follow the trial court's instructions. See Penn v. State, 574 So.2d 1079, 1081 (Fla. 1991)(trial court did not err in failing to remove juror who expressed little sympathy for people who had voluntary chemical dependencies but where this juror acknowledged that "a person could be so intoxicated as not to know what he was doing and stated that she would follow the court's instructions.").

In earlier questioning, the prosecutor asked the panel the following question:

> Okay. Is there anyone who thinks for whatever reason for

> person who commit putatively criminal acts are probably aware of what they are doing and the likely consequences. In the case of those who are drunk, alcohol may have diminished their perceptions, released their inhibitions and clouded their reasoning and judgment, but they still have sufficient capacity for the conscious mental processes required by the ordinary definitions of all or most specific mens rea crimes.

(quoting State v. Stasio, 78 N.J. 467, 396 A.2d 1129, 1134 (1979)).

> whatever source you will have difficulty -- and I know this hypothetical in the early stage is somewhat unfair. Anyone who thinks they may have any difficulty following and adhering to the laws Judge Mitcham instructs you even though it may run counter to what you've heard from other sources or maybe your own beliefs? Is there anyone who at this stage would have a problem with that concept? Okay. Mr. Herring?

(V. XXVII at 2612). Thus, the record reflects that Mr. Belcher[15] thought he would be able to set aside his personal beliefs and follow the law as instructed by the trial court. Mr. Belcher and other prospective members of the jury later promised the trial court that they would do exactly that if selected as jurors in this case. (V. XXVIII at 2812). See generally Padilla v. State, 618 So.2d 165 (Fla. 1995); Pentecost v. State, 545 So.2d 861 (Fla. 1989).

Appellant's reliance upon Ferrell v. State, 697 So.2d 198 (Fla. 2d DCA 1997), is misplaced. In Ferrell, challenged juror Patterson said he "could not condone it [drug, alcohol use] and did not see how it could be used as a defense." 697 So.2d at 199. Moreover, upon further questioning, defense counsel asked Patterson if the court instructed him on the law in Florida and "we're not here to say what is good or bad or ugly, but this is the law, then you could have some concerns?" Id. Patterson responded:

> I would to the point that if the prosecution proves all three

[15]By his non-response to the above question.

> points, then what the what can the law tell me? That was the law he was convicted on or whatever, and you're going to use that, well, he was drunk at the time, I can't see how the Judge can tell me that I have to take that into consideration if the prosecution has already proved that he did this.

Ferrell, 697 So.2d at 199. The Second District found that the trial court erred in denying the challenge for cause to prospective juror Patterson where he expressed great reluctance to consider a voluntary intoxication defense.

In Ferrell, unlike the instant case, defense counsel asked a follow up question which essentially asked the prospective juror if he could follow the trial court's instructions on intoxication whether he agreed with them or not. The prospective juror's response in Ferrell left considerable doubt about whether or not he could do so, i.e., "I can't see how the judge can tell me that I have to take that into consideration if the prosecution has already proved that he did this." Ferrell, 697 So.2d at 199.

In this case, defense counsel did not ask any follow up question regarding Mr. Belcher's ability to follow the trial court's instructions on voluntary intoxication. Indeed, subsequent questioning in this case did not in any way suggest that Mr. Belcher possessed an inflexible view regarding voluntary intoxication. A subsequent question directed toward the entire panel indicates that Mr. Belcher agreed that alcohol may cloud a

persons thinking process and affect their judgment. (V. XXVIII at 2778). And, Mr. Belcher later agreed that he would be able to take appellant's intoxication level into account when attempting to determine the appropriate penalty in this case. (V. XXVIII 2854-2855). Thus, unlike the challenged juror in Ferrell, the record in this case shows that Mr. Belcher did not have an inflexible view about intoxication which would interfere with his ability to follow the law and instructions provided by the trial court.

In sum, the trial court and prosecutor recognized that defense counsel's questions were not instructing the jury on the law with respect to voluntary intoxication and was simply confusing the jurors. After attempting to clear up some of the confusion in this area, the jurors, including Mr. Belcher, agreed in response to defense counsel's inquiry that alcohol consumption effects a person's ability to think and also effects their judgment. (V. XXVIII at 2778). Based upon this record, it cannot be said that the trial court abused its discretion in denying appellant's challenge for cause to prospective juror Belcher. See Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980)("If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion.").

D. Appellant Has Not Established Prejudicial Error Requiring Reversal Of His Conviction

Assuming, *arguendo,* appellant has shown that at least two of his challenges for cause should have been granted, appellant has not carried his burden of establishing a prejudicial error requiring reversal of his conviction. Since none of the challenged jurors actually sat on his panel, appellant is essentially asking this Court to presume some form of prejudice from the failure of the trial court to grant a single additional peremptory challenge. While appellant did identify the juror he would have exercised the challenge on [Noriega], he has failed on appeal to even suggest that this juror was in any way incompetent to serve on his jury.[16] In the State's view, it is fatal to the instant claim that

[16]During voir dire juror Noriega admitted that he would base his verdict solely on the evidence introduced at trial, that he understood the defendant was presumed innocent and that he would hold the State to its burden of proving appellant's guilt beyond a reasonable doubt. (V. XXVI at 2442-2443, V. XXVII at 2707).

Noriega stated on his questionnaire that people who purposely kill another human being should themselves be put to death. (V. XXVIII at 2887). However, Noriega assured defense counsel that he would be able to follow the law with respect to aggravating and mitigating circumstances. He would leave his personal belief or view about the death penalty at home. (V. XXVIII at 2887-2888). In fact, Juror Noriega was not aware of the two part process of a capital trial and thought the death penalty was automatic. (V. XXVIII at 2888). After his dialogue with defense counsel and additional information gleaned therefrom, Mr. Noriega felt more comfortable with the process. (V. XXVIII at 2888).

appellant cannot show that a single biased juror actually sat on his jury.[17] In addressing a claim of constitutional error concerning the denial or interference with the exercise of peremptory challenges, the Supreme Court in Ross v. Oklahoma, 487 U.S. 81, 101 L.Ed.2d 80, 108 S.Ct. 2273 (1988), stated:

> Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error. But we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension. *Gray*, supra, at 663, 95 L.Ed.2d 622, 107 S.Ct. 2045; *Swain v. Alabama*, 380 U.S. 202, 219, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965); *Stilson v. United States*, 250 U.S. 583, 586, 63 L.Ed.2d 1154, 40 S.Ct. 28 (1919). They are a means to achieve the end of an impartial jury. **So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean that the Sixth Amendment was violated.** See *Hopt v. Utah*, 120 U.S. 430, 436, 30 L.Ed.2d 708, 7 S.Ct. 614 (1887); *Spies v. Illinois*, 123 U.S. 131, 31 L.Ed. 80, 8 S.Ct. 22 (1887).

(emphasis added).

Regardless of the standard of review utilized to test the error alleged in this case, appellant has failed to show that a

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[17]The presumed prejudice standard of Hill v. State, 477 So.2d 553 (Fla. 1985) is of questionable validity. Even before passage of Section 924.051 this Court took a step back from Hill in Trotter v. State, 576 So.2d 691 (Fla. 1990), by requiring the defendant to identify an objectionable juror who actually sat on his panel, rather than simply requesting an additional peremptory challenge. In the State's view, allowing ten peremptory challenges--eleven in this case--allows counsel to cure any potential error of the trial court in jury selection.

single unfit juror was impaneled in this case. Consequently, he has not shown that a prejudicial error occurred in the trial court which requires reversal of his conviction.[18] Cf. Farina v. State, 679 So.2d 1151, 1154 (Fla. 1996)("Thus, there were no objectionable jurors on his panel, so it does not matter that he was forced to exercise peremptory challenges as he argues in Issue 2"), receded from on other grounds, Franqui v. State, 699 So.2d 1312 (Fla. 1997); Penn, 574 So.2d at 1081 ("The reason given for the rule is that the accused has a right to an impartial jury but is not entitled to any particular persons as jurors."). Any error in failing to grant one additional peremptory challenge to the defense was clearly harmless.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY ADMITTING THE VIDEO RECORDING OF APPELLANT WEARING JAIL CLOTHING AND HANDCUFFS WHILE IN CUSTODY ON THE

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[18]The State is aware of Goodwin v. State, No. 93, 491, Slip op. (Fla. December 16, 1999), which had just been released but was not yet final at the time this brief was due. While largely invalidating the standard of review provided by the legislature under Section 924.051 (7), Fla. Stat (1996 Supp.), this Court apparently acknowledged that a defendant at least must make a preliminary showing of a prejudicial error before the burden shifts back to the State to show that the error was harmless beyond a reasonable doubt. The instant allegation of error, interference or loss of a peremptory strike, like many common allegations of error, has been classified as a non-constitutional error.

NIGHT OF HIS ARREST. (STATED BY APPELLEE).

Appellant next maintains that the trial court committed error of constitutional magnitude when it allowed the State to play a videotape of appellant in jail clothing wherein he admits killing the victim in this case. Conceding the relevance of this evidence, appellant nonetheless claims that the probative value of playing the tape was outweighed by the danger of unfair prejudice. The State disagrees.

Deputy Morffi escorted appellant out of the homicide office of the Sheriff's Office at approximately 9:30 p.m. (V. XXXIII at 3651). Deputy Morffi authenticated the videotape which was played for the jury over the appellant's objection. (V. XXXIII at 3653). On this tape, after initially stating no comment to a reporters questions, appellant admitted killing the victim. The following is an excerpt of the audio portion of the tape played for the jury:

...REPORTER: How did you kill her?

THE DEFENDANT: I have no comment.

REPORTER: How did all this start?

THE DEFENDANT: I have no comment. (Pause)

THE DEFENDANT: This time I did it.

REPORTER: You say you did do it, sir?

THE DEFENDANT: Yeah, I done it. (Pause)

REPORTER: Who is she?

THE DEFENDANT: What? Never mind.

REPORTER: Is she your girlfriend or --

THE DEFENDANT: Yeah, a girlfriend.

REPORTER: Why did you do it, sir? Did she upset you?

THE DEFENDANT: (Unintelligible) You got that much.

(V. XXXIII at 3653-3654).

Of course, a trial judge's ruling on the admissibility of evidence will not be disturbed on appeal absent an abuse of discretion. Gaskin v. State, 591 So.2d 917, 920 (Fla. 1991), cert. denied, 126 L.Ed.2d 274 (1993). In Amoros v. State, 531 So.2d 1256, 1260 (Fla. 1988), this Court stated: "[A]lmost all evidence introduced during a criminal prosecution is prejudicial to a defendant. Only where unfair prejudice **substantially outweighs** the probative value of the evidence should it be excluded." (emphasis added)(citing C. Erhardt, Florida Evidence § 403 (2d ed. 1984)).

The State first notes that a defendant does not control the manner in which the State presents relevant evidence. The jury in this case observed a video tape of the appellant answering a news reporter's questions and admitting that he killed the victim in this case. The tape was relevant as it showed his demeanor when making the statement and placed the statement in the appropriate

context. It also showed that the statement was a serious admission and was not made in a joking or farcical manner. The tape was apparently heavily edited and lasted approximately "a minute, minute and a half[.]" (V. XXXIV at 3624).

At trial, the thrust of appellant's argument against the admissibility of the videotape under Section 90.403 of the Florida Statutes was that it amounted to a comment on his right to remain silent and that it showed the intense media interest in covering this case. (V. XXXIV at 3635). Absent from counsel's argument on the prejudice versus probative value was the fact that appellant was depicted in jail clothes and may have shown him in handcuffs. (V. XXXIV at 3630-3633, 3641). While counsel mentioned that the video showed appellant in handcuffs and jail clothes, his argument was clearly directed toward some type of Fifth Amendment challenge as well as showing intense media scrutiny. Thus, the record reflects that the issue presented on appeal was not fairly presented to the trial court below. Consequently, the State questions whether or not appellant's argument has been preserved for review. See Section 924.051 (1)(b), Fla. Stat. (1996) ("'Preserved' means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence

was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982), post conviction relief denied, 574 So.2d 1075 (Fla. 1991)("except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court.").

In any case, that appellant was under arrest after the murder was a fact well known to the jury. (V. XXXII at 82; V. XXXIII at 3478, V. XXXVI at 3927). The fact that the appellant was in custody when he made the statement was going to be made known to the jury regardless of the manner the statement would be introduced. Briefly observing appellant in a jail uniform and handcuffs did not far outweigh the probative value of observing appellant's admission to having killed the victim.[19] See generally Alston v. State, 723 So.2d 148, 155-157 (Fla. 1998)(admission of videotaped interview of the defendant on walkover from the police station to the jail was admissible despite defendant's claim of unfair prejudice under section 90.403 because it distorted his appearance and attitude). Defense counsel minimized any prejudice

[19]Further, as the prosecutor argued below, an issue in this case was voluntary intoxication. Although the videotape was made some two to three hours after the first deputy approached him, it nonetheless constitutes evidence of his demeanor and could be relevant to the issue of his intoxication.

suffered by the defense, if any, of the jury seeing appellant in jail clothing by noting that appellant's regular clothing had been taken from him as potential evidence. (V. XXXIII at 3654).

In Anderson v. State, 574 So.2d 87, 93 (Fla. 1991), the State was allowed to introduce a news report briefly showing the defendant in jail clothes over defense counsel's objection. The news broadcast was relevant in that another inmate, Gallon, testified that he and appellant viewed it from prison before the camera focused on Beasly, a potential witness in the case. At that point, the defendant threatened to kill the victim and offered his cell mate money to murder Beasly. This Court rejected appellant's claim of error regarding admission of the videotape, stating:

> We also reject Anderson's contention that he was denied a fair trial because the videotaped news report of Grantham's murder investigation viewed by the jury depicted Anderson in jail clothes. The videotape, one and one-half minutes in length, showed a single, brief glimpse of Anderson wearing prison garb. Under the circumstances, there was no "constant reminder of the accused's condition," Estelle v. Williams, 425 U.S. 501, 504, 96 S.Ct. 1691, 1693, 48 L.Ed.2d 126 (1976), to support the conclusion that Anderson was denied a fair trial.

Anderson, 574 So.2d at 93-94.

The cases relied upon by appellant all refer to showing the defendant before the jury shackled or in jail clothing without any contention that such depiction was relevant in any way. In such cases the jail clothes depiction may unfairly prejudice the

defendant in that it could impinge upon the presumption of innocence. In this case, unlike the cases cited by the appellant, the depiction of appellant in jail clothes and handcuffs admitting that he killed the victim is relevant evidence of appellant's guilt. See generally Grant v. State, 171 So.2d 361, 364-65 (Fla. 1965)(film showing defendant re-enacting offense in jail clothing was properly admitted). Evidence with which the State is legitimately attempting to overcome the appellant's presumption of innocence. Thus, the cases cited by appellant provide little if any support for appellant's argument on appeal.

In Estelle v. Williams, 425 U.S. 501, 503 (1976) the principle policy reason articulated by the majority for concluding that trial in identifiable jail clothing could result in a denial of due process by denying the presumption of innocence was that it would be a "...constant reminder of the accused's condition..." As well as "a continuing influence throughout the trial..." 425 U.S. at 504-505. This record shows no suggestion that the policy concerns that prompt relief in the jail clothing cases are present here. The single depiction of appellant in the video tape is hardly the constant reminder and continuing influence seen by the Estelle Court as impinging on the presumption of innocence. Nor was the issue facing the Court in Estelle whether or not the unfair

prejudice of such a depiction far outweighed the probative value. Having the defendant stand trial in jail clothing is a circumstance of a defendant's trial that has no relevance to the guilt or innocence of a defendant. In contrast, in this case the brief depiction of appellant in jail clothing was admitted for a relevant purpose: Appellant confessed to killing the victim on the videotape.

Appellant's claim that any error in admitting the videotape was exacerbated when several jurors viewed appellant in handcuffs and jail clothes outside of the courtroom is without merit. (Appellant's Brief at 58). As noted above, the trial court did not abuse its discretion in admitting the videotape. Further, the trial court conducted individual voir dire and the jurors claimed that briefly viewing appellant in that state would have no impact upon their verdict. (V. XXXV at 3731-3739). As juror Power put it when asked if it would have any effect on her ability to be fair and impartial, she responded: "No, sir. I knew that they had to bring him in and out anyway. So I mean I assumed it anyway." (V. XXXV at 3737). Moreover, defense counsel's motion for a mistrial below did not link the viewing of appellant in the hallway to the earlier admission of the tape. Thus, this argument, which was not specifically made to the trial court below, provides no additional

support for his claim that a new trial is required based upon admission of the videotape. (V. XXXV at 3741).

In sum, the videotape contained highly relevant evidence of appellant's guilt. The State was not required to present only the audio portion of the tape simply because it briefly showed appellant in police custody and in jail clothes. A videotaped confession where the jury actually sees the words coming from the defendant's mouth is much more effective evidence than an audiotape.[20] Since this evidence was available and highly relevant, it cannot be said the minimal prejudice to the appellant of being shown in jail clothes far outweighed the probative value of seeing the videotape.

Even assuming, *arguendo*, that the trial court abused its

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[20]As the prosecutor aptly noted below:

> Ms. Menadier indicates that the state doesn't need this evidence. First, the state of the law is clear. The test for admissibility does need necessity, but relevance. Ms. Menadier argues that the state could introduce this type of evidence through live testimony of law enforcement officers.
>
> I'll concede that's a possibility. We could do that. But then the jury would have to be left to have to weigh and determine that law enforcement officer's credibility, the ability to remember, whether that law enforcement officer has a motive. This type of evidence where it's captured on video and you hear the words come out of the defendant's mouth is the very best evidence.

(V. XXXIV at 3636-3637).

discretion in allowing the State to show the videotape, any error in admitting the tape was harmless. As appellant notes in his brief, this Court has found brief encounters between a shackled accused and one or more jurors insufficient to show prejudice requiring reversal of a conviction. See Heiney v. State, 447 So.2d 210 (Fla. 1984)(inadvertent sight of defendant in handcuffs did not require mistrial); Neary v. State, 384 So.2d 881 (Fla. 1980) (recognizing that an individual accused of a crime cannot be forced to stand trial in prison garb but noting that the mere inadvertent sight of the defendant in handcuffs "was not so prejudicial that it required a mistrial."); United States v. Diecidue, 603 F.2d 535, 549 (5th Cir. 1979), cert. denied, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 781 (1980)(where the court declared "that brief and inadvertent exposure to jurors of defendants in handcuffs is not so inherently prejudicial as to require a mistrial, and defendants bear the burden of affirmatively demonstrating prejudice.")[21]

[21]Appellant's argument that this error is of a constitutional dimension is without merit. A constitutional error has been found based upon forcing a defendant to stand trial in shackles and jail clothing; however, a brief glimpse of a defendant in jail clothing has not, to the State's knowledge, been found an error of constitutional magnitude. Appellant probably made this argument in the well founded belief that Section 924.051(7) would apply to trial errors of non-constitutional magnitude. This Court's decision in Goodwin, *supra,* largely invalidating the legislature's harmless error reform was not, in the State's view, reasonably foreseeable at the time appellant's brief was written.

The State presented overwhelming evidence of appellant's guilt in this case. Appellant admitted to killing the victim, the victim was found in his residence, and he was observed telling the victim to shut up while attacking the victim. Mr. Hitson's testimony establishes that appellant was in complete control of the victim as she lay prone on the couch. While appellant claimed at least in part, that he was too intoxicated to form the intent to kill, he was able to overpower the victim and stab her repeatedly, told the victim to shut up when she called for help, and was able to concoct a false story immediately after the murder--i.e, evidence of conscious or reflective thought and absence of alcohol induced dementia. Thus, any error in showing the videotape did not have an impact upon the verdict in this case.

ISSUE III

WHETHER THE TRIAL COURT'S SENTENCING ORDER COMPLIED WITH THE DICTATES OF CAMPBELL V. STATE, INFRA., BY SUFFICIENTLY CONSIDERING AND WEIGHING ALL MITIGATING EVIDENCE.

As his third claim of error, appellant claims that the trial court abused its discretion in failing to expressly evaluate each mitigating factor proposed by the defense and that the court failed to provide a thoughtful and comprehensive analysis of the weighing process. However, a review of the order shows that the trial court

sufficiently complied with the procedures set forth by this Court in Campbell v. State, 571 So.2d 415 (Fla. 1990), and Rogers v. State, 511 So.2d 526 (Fla.), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). It is clear from the sentencing order that the totality of proffered mitigation was properly considered by the trial court. In any case, when balanced against the compelling aggravators present in this case, any error in the consideration or weighing of the mitigating factors was clearly harmless.

In Campbell and Rogers this Court set forth the procedures to be employed with regard to the consideration of mitigating evidence.[22] The trial court must first consider whether factors alleged in mitigation are supported by evidence and then determine whether the established facts are of a kind capable of mitigating the defendant's punishment. If such factors exist in record at time of sentencing, the sentencer must determine the weight to be accorded a given factor and, finally, the court must determine whether they are of sufficient weight to counterbalance any

[22]Appellant filed a motion to correct sentencing error in the trial court generally raising the same issues he now asserts on appeal. Consequently, it appears that the alleged sentencing errors have been preserved for appeal. See Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773, 775 (Fla. 1996); Fla.R.App.P. 9.140 (d).

aggravating factors." Mitigating circumstances are defined as "factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crimes committed." Consalvo v. State, 697 So.2d 805 (Fla. 1996), cert. denied, 523 U.S. 1109 (1997); Jones v. State, 652 So.2d 346, 351 (Fla.), cert. denied, 133 L.Ed.2d 136 (1995); See also Brown v. State, 526 So.2d 903, 908 (Fla.) cert. denied, 488 U.S. 944 (1988)("Mitigating evidence is not limited to the facts surrounding the crime but can be anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant.") The trial court's decision to accord a circumstance little weight is within its discretion. Consalvo, 697 So.2d at 819.

This Court has repeatedly held that "a trial court need not expressly address each nonstatutory mitigating factor in rejecting them, Mason v. State, 438 So.2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984), and '[t]hat the court's findings of fact did not specifically address appellant's evidence and arguments does not mean they were not considered.' Brown v. State, 473 So. 2d 1267, 1268 (Fla.), cert. denied, 474 U.S. 1038 (1985)." Lucas v. State, 568 So.2d 18, 24 (Fla. 1993). In Bonifay v. State, 680 So.2d 413 (Fla. 1996), this Court rejected a similar argument stating:

> We find no error with the trial court's findings as set forth in the sentencing order regarding this mitigator. While the trial court did not specifically mention the term "organic brain damage," the court's discussion about Bonifay's attention deficit disorder refers to Bonifay's organic brain damage. The trial court expressly evaluated the evidence presented on this mitigator, thus complying with the requirements of Rogers and Campbell. The trial court's determination regarding the establishment and weight afforded to this mitigator is supported by competent, substantial evidence; consequently, the sentencing order is sufficient.

Bonifay, 680 So.2d at 417.

Similarly, in Kilgore v. State, 688 So.2d 895, 901 (Fla. 1996), cert. denied, 522 U.S. 834 (1997), this Court rejected Kilgore's claim that the trial court erred in failing to thoroughly explain its rulings on nonstatutory mitigation. This Court found that the sentencing order satisfied the dictates of Campbell v. State, 571 So.2d 415 (Fla.1990), although the trial court failed to expressly comment on certain proposed mitigation. Noting that the evidence was presented during the trial, this Court concluded that, "We are confident that the trial judge was cognizant of this factor when weighing the mental health evidence." Kilgore, 688 So.2d at 901.

The decision as to whether a particular mitigating circumstance has been established is within the trial court's discretion. Bonifay, at 416, citing, Preston v. State, 607 So.2d 404 (Fla.), cert. denied, 507 U.S. 999 (1993); Lucas v. State, 568

So.2d 18 (Fla. 1990). A review of the complete sentencing order shows the court sufficiently considered and weighed each of the applicable aggravating circumstances and each of the statutory and non-statutory mitigating circumstances as required by this Court's decision in Campbell v. State, 571 So.2d 415 (Fla. 1990).

The record in the instant case shows that the trial court, relying on Singleton's sentencing memorandum, found the three proposed statutory mitigating factors, in addition to the following nonstatutory mitigation:

> ...The following mitigating circumstances were established:
>
> 1. The aggravating circumstance of the defendant being previously convicted of a crime involving violence to another was committed in 1978 when the defendant was 51 years old.
>
> 2. The intent to kill was formed during an argument or disagreement between the defendant and Roxanne Hayes.
>
> 3. Since his release on parole in 1987 and discharge from prison in 1988 the defendant has never been accused of or arrested for any offense except petit theft.
>
> 4. At the time of the offense the defendant was under the influence of alcohol and other possible medication.
>
> 5. The defendant suffered from alcoholism.
>
> 6. The defendant was suffering from mild dementia.
>
> 7. The defendant previously attempted suicide.
>
> 8. The defendant served honorably in the Armed Forces of the United States.
>
> 9. The defendant was a model prisoner while incarcerated in a California prison from 1979 to 1987.

(V. VIII at 1292-93)

The only factors not found by the trial court were 1) not mitigating, 2) considered in the context of the above, and/or 3) not supported by the evidence. A comparison of Singleton's

sentencing memorandum with the sentencing order shows that factors 9, 10, 11, 12, 13, 26, 27, 28, 29, 31, 32 as suggested by Singleton were neither truly mitigating nor compelled by the evidence presented in the instant case.

For example, suggested mitigating factor 10, that appellant did not flee after committing the murder, was not mitigating in this case. While appellant did not flee, he apparently did not have an opportunity to do so. Appellant lied to the first police officer at the scene, telling him that everything was okay and that he just had a fight with his girlfriend. (V. XXIX at 3045). Appellant's obvious attempt to avoid being caught immediately after the murder strongly militates against finding as a non-statutory mitigating factor that appellant did not flee after committing the murder.[23] Similarly, that he assisted the police and cooperated in the investigation [defense counsel's proposed 11] was not established based upon this record. Appellant did not volunteer to the police when he was first confronted that he had the victim's body in his house. That appellant cooperated with the police

[23]Also, since the victim's body had been moved from the sofa and the passenger door on the van opened, this evidence suggested that appellant was planning to remove the victim's body from his residence. (V. XXIX at 3121). The van doors were observed closed after appellant entered his house with Ms. Hayes. (V. XXXIII at 3524).

investigation beyond that which was compelled by normal circumstances inherent in the arrest and investigation of a murder case was not established. While appellant apparently wants credit for not portraying the murder victim as evil and foul mouthed [defense counsel's proposed 12], this was because the victim in fact possessed neither characteristic. Any attempt to portray her in that light would have backfired on the defense as it would have been easily rebutted by the State. See e.g. V. XXXV at 3787 (victim was not known to be violent). Appellant deserves no credit for refraining from characterizing the victim in a false light.

As for appellant's apparent remorse [suggested factor 13], appellant's first spontaneous statements made shortly after the offense suggested more remorse for himself and his own predicament, than any concern for either the victim or her family. See e.g. V. XXXV at 3789 ("I'm dead," "I'm dead."); V. XXXI at 3250 ("We had an argument and she threw something at me so I killed her. And I guess that makes me a murderer so you've got me now."); V. XXXIII at 3480 (in custody shortly after the murder, making a comment to Judge Coe in a jovial manner). Thus, suggested mitigating factor 13 was not established based upon this record.

Appellant's suggested factor 15, that he did not plan to commit the offense in advance, was considered and found by the

trial court. The trial court found as a non-statutory mitigator that the intent to kill was formed during an argument or disagreement between the appellant and Ms. Hayes. (V. VIII at 1292). Suggested factor 17, that appellant served in combat was considered by the trial court in non-statutory mitigator number 8. The trial court found that the appellant served honorably in the armed forces of the Untied States.[24] (V. VIII at 1293).

Suggested mitigating factors 19, 21, 22, and 30 were all related to appellant's conduct and achievements in prison, a factor found by the trial court in the ninth non-statutory mitigating factor. See Reaves v. State, 639 So.2d 1, 6 (Fla. 1994)(finding no error where the "judge reasonably grouped several proffered mitigating factors"). The trial court found that appellant was a model prisoner in California from 1979 to 1987. (V. VIII at 1292-1293). Similarly, appellant's suggested factors 23, 24 and 25 relating to his conduct after his release to parole were also of the same nature as the facts supporting the third nonstatutory mitigating factor found by the trial court. The trial court found as a non-statutory mitigator that since appellant's release on parole in 1987, appellant had never been accused of or arrested for

[24]Appellant supplied no details of his alleged combat experience in the Korean War.

any offense except petty theft. (V. VIII at 1292).

The last factor suggested by the appellant, number 33, that the totality of circumstances of this murder do not set this murder apart from other murders, was rejected by the trial court in its conclusion to the sentencing order. The trial court observed that this murder was heinous, atrocious and cruel:

> Lawrence Singleton drove a knife into the body of Roxanne Hayes seven (7) separate times. The fatal blow penetrated Ms. Hayes' breastbone, pierced her heart and caused her to bleed to death over several terrifying minutes. According to Dr. Miller, Roxanne Hayes could have remained conscious for several minutes after the infliction of this wound. Mr. Singleton also drove the knife through Ms. Hayes liver, stopping only as it ran up against the spinal column. He plunged the knife into her liver on another occasion as well.
>
> Roxanne Hayes fought for her life. Her futile attempts to ward off Mr. Singleton's knife left the fingers in one of her hands nearly severed and the fingers of the other hand cut down to the bone. She literally clawed for her life as she dug a fingernail into the Defendant's chest. These defensive wounds and the time that passed between Ms. Hayes' cries for help establish beyond a reasonable doubt that she was acutely aware of her impending death...

(V. VIII at 1288-1289). Thus, the trial court properly rejected proposed non-statutory mitigator 33, as it was clearly refuted by the evidence.

As the trial court sufficiently considered and weighed each of the applicable aggravating circumstances and each of the statutory and non-statutory mitigating circumstances as required by this Court's decision in Campbell, no error has been shown.

Nevertheless, even if the Court were to conclude that the lower court insufficiently articulated a number of factors suggested in Singleton's sentencing memorandum, it is clear from the sentencing order that the totality of proffered mitigation was properly considered and evaluated and, in light of the presence of unchallenged and serious aggravators, death is the appropriate sentence. This Court has previously determined that some Campbell error can be harmless. See e.g., Cook v. State, 581 So.2d 141, 144 (Fla. 1991), cert. denied, 502 U.S. 890 (1991)(court concluded that sentence of death would stand even if sentencing order had contained findings that each of the non-statutory mitigating circumstances had been proven); Thomas v. State, 693 So.2d 951, 953 (Fla. 1997), cert. denied, 522 U.S. 985 (1998)(sentencing order which failed to mention that defendant was a "delightful young man", "very loving" with a "lot of good in him" constituted harmless error because evidence in aggravation was massive in counterpoint to the relatively minor mitigation); Wickham v. State, 593 So.2d 191 (Fla. 1991), cert. denied, 120 L.Ed.2d 878 (1991) (evidence of abusive childhood, alcoholism and extensive history of hospitalization for mental disorders should have been found and weighed by the trial court but in light of the strong case for aggravation, trial court's error would not reasonably have resulted

in a lesser sentence); Barwick v. State, 660 So.2d 685, 696 (Fla. 1995), cert. denied, 133 L.Ed.2d 766 (1996) (any error in articulating particular mitigating circumstances was harmless); Peterka v. State, 640 So.2d 59, 70 (Fla. 1994), cert. denied, 513 U.S. 1129 (1995) (sentencing order in conjunction with instructions to jury indicates that trial court gave adequate consideration to the mitigating evidence presented); Mungin v. State, 689 So.2d 1026, 1031 (Fla. 1995), cert. denied, 522 U.S. 833 (1997)(rejecting claim of failure to evaluate substance of evidence from those who knew defendant during high school and rejecting attack on failure of sentencing order to mention good prison record or Dr. Krop's testimony about use of alcohol and drugs because court's reference to rehabilitation capacity encompassed prison record and Krop findings).

This murder was heinous, atrocious and cruel. The victim did not die immediately and appellant apparently assaulted the victim over several minutes. As the victim gurgled for help during the attack, appellant told the victim to "shut up" or "shut up" bitch and administered additional blows to the victim.

In addition to the heinous, atrocious, and cruel nature of the instant murder, appellant possessed the weighty aggravator of prior violent felony convictions. As the trial court noted in its

sentencing order:

> This Capital Felony was committed by the Defendant, who nineteen years earlier was found guilty by a California Jury of Rape, Kidnaping, Mayhem, Sodomy and Attempted Murder. The Defendant committed these crimes against a fifteen year-old hitchhiker, Mary Vincent. As Ms. Vincent described in her testimony during the penalty phase of this case, Lawrence Singleton held her against his will in his van wherein he chopped off each of Ms. Vincent's arms with a hatchet and left her for dead in a culvert alongside an isolated roadway...

(V. VIII at 1288).

This was not a close case as evidenced by the jury's recommendation in this case. The jury's vote in favor of the death penalty was ten to two. Given the weighty aggravating factors, there is no reasonable possibility that any alleged error in considering the proposed non-statutory mitigation had any impact upon the trial court's decision in this case. Based upon the record, appellant has not established an error which requires remand for another sentencing hearing before the lower court.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DIRECTING MARY VINCENT TO BE SWORN IN BY RAISING HER RIGHT HAND AND IN POINTING THE APPELLANT OUT FROM THE WITNESS STAND AS SUCH DISPLAYS EMPHASIZED THE FACT THAT APPELLANT MAIMED MS. VINCENT? (STATED BY APPELLEE).

Appellant acknowledges that the testimony of Ms. Vincent was relevant and admissible with regard to his prior violent felony

convictions. Nonetheless, appellant complains that having Ms. Vincent raise her right prosthetic to be sworn and to later identify appellant in the court room was unfairly prejudicial. Appellant's argument is devoid of any merit.

The brief displays of Ms. Vincent's prosthetic in this case were not gratuitous; they were only made as part of routine or necessary court-room procedure. The State maintains that a criminal defendant runs the risk in committing additional crimes that he or she will be confronted with their criminal past. It was entirely appropriate in this case to offer the testimony of Ms. Vincent to establish the details of the prior violent felonies appellant committed against her.[25] The fact that appellant chopped Ms. Vincent's arms off does not mean that Ms. Vincent should not have been sworn in as any other witness. Obviously, the jury has the right to know whether or not a witness is offering sworn testimony. The act of being sworn in as a witness is important and necessary for a proper evaluation of a witness' testimony. The

[25]"Details of prior felony convictions involving the use or threat of violence to the victim are admissible in the penalty phase of a capital trial." Waterhouse v. State, 596 So.2d 1008, 1016 (Fla. 1992)(citations omitted). "Such testimony 'assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence.'" Id. (quoting Rhodes v. State, 547 So.2d 1201, 1204 (Fla. 1989)).

jury was entitled to hear and observe that Ms. Vincent was accepting the solemnity of the oath.

Similarly, Ms. Vincent was legitimately making an in-court identification when she pointed to the appellant. Although the jury was exposed to Ms. Vincent's prosthetic, the brief viewing was not unduly gruesome, gory, or shocking. See e.g. Alford v. State, 307 So.2d 433, 441 (Fla. 1975), cert. denied, 428 U.S. 912 (1976)(ruling that photograph was admissible because the view depicted was neither gory nor inflammatory beyond the simple fact that no photograph of a dead body is pleasant.). The appellant essentially seeks to exclude the evidence of his past violent crimes against Ms. Vincent. While the view of Ms. Vincent was no doubt unpleasant; this is because appellant chose to chop off Ms. Vincent's arms with an axe after he raped her. See e.g. Henderson v. State, 463 So.2d 196, 200 (Fla. 1985), cert. denied, 507 U.S. 1047 (1993)("Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.")

In effect, appellant wanted the trial court to treat Ms. Vincent different from any other witness in this case because of

her physical handicap.[26] The law does not require such an accommodation for the appellant simply because such a display might remind the jury of the violence he committed against Ms. Vincent. It is important to note the State did not attempt to introduce bloody photographs reflecting the fifteen-year-old Ms. Vincent immediately after the appellant's brutal attack. Instead, the jury briefly heard from a thirty four year-old Ms. Vincent testifying only very generally about the attack she suffered years earlier at the hands of the appellant. (V. XXXIX at 4326-28). Her entire direct testimony comprises merely three pages of transcript. And, the State notes that Ms. Vincent provided few details of the sexual degradation she suffered at the hands of the appellant.

Any argument that the trial court abandoned its impartial role in asking Ms. Vincent to identify the person who committed the criminal acts against her is devoid of any merit. First, appellant failed to make this argument below and therefore it has been waived on appeal. Although appellant did make a motion for mistrial after Ms. Vincent identified appellant in court, he did not claim that the trial court abandoned its neutral and impartial role in asking her to do so. Appellant's objection below was as follows: "Your,

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[26]Defense counsel below routinely asked defense witnesses to point to the appellant and identify him in court. See e.g. V. XL at 4473 ("Would you point to him and describe what he's wearing, please.").

Honor, I believe she has [already identified appellant] and I object." (V. XXXIX at 4332). Since the specific argument made on appeal was not presented to the trial court below, appellant may not succeed on appeal unless he has demonstrated fundamental error. Section 924.051 (1)(b), Fla. Stat. (1996); Steinhorst, 412 So.2d at 338.

Appellant has not demonstrated error, let alone fundamental error based upon this record. A trial judge does not abandon his or her neutral and impartial role simply by asking questions of a witness. See e.g. Sims v. State, 184 So.2d 217, 221 (Fla. 1966)("The trial judge may have asked the witness as many questions as either of the attorneys, but this numerical equality standing alone does not demonstrate error.") Here, the trial court only asked one question of the prosecution witness and did not thereby unduly interject itself into the trial. The question did not introduce new or additional issues or evidence into the trial. The trial court's question merely amplified one asked earlier by the prosecutor on direct examination--i.e, the identity of the perpetrator. See Watson v. State, 190 So.2d 161 (Fla. 1966)("...it is our understanding a trial judge, in order to ascertain the truth, may, if he deems it necessary, ask questions of witnesses and clear up uncertainties as to issues in cases that appear to

require it.").[27] See also United States v. Hilliard, 752 F.2d 578, 582 (11th Cir. 1985)(In denying a claim that the defendant was denied a fair trial where, among other things, the trial judge asked four foundational questions for the admission of a business record by the government, the Eleventh Circuit observed: "It is well settled that the trial judge has broad discretion in the management of the trial and that a reviewing court should not interfere absent a clear showing of abuse.").

The instant case is clearly distinguishable from those cases cited in appellant's brief. Each case involved much more intrusive and partisan conduct by the trial judge. For example, in J.F. v. State, 718 So.2d 251, 252 (Fla. 4th DCA 1998), not only did the trial court ask questions of a witness, but he directed a law enforcement officer to conduct fingerprint testing of an automobile that was allegedly stolen by the appellant. The State had not planed to introduce such evidence and the trial court delayed the trial and allowed the State to reopen its case to introduce this

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[27]This Court in Watson also stated:

> ...Error is committed only when it appears that the judge departs from neutrality or expresses bias or prejudice in his comments in the presence of the jury. None of the comments made by the judge in the form of questions or in his rulings or in his statements at the trial clearly reflect partiality or bias. 190 So.2d at 164-165.

additional evidence of guilt.

Similarly, Abrams v. State, 326 So.2d 211 (Fla. 4th DCA 1976), cited in appellant's brief, provides no support for his position on appeal. In Abrams the trial court shook hands with the chief complaining witness, visited with her after she finished testifying in the presence of the jury, and later told the jury that "he and his family had known the witness for years." 326 So.2d at 212.

In this case, appellant can point to no other allegedly partisan conduct of the trial court other than asking one question of a state witness and allowing her to be sworn in front of the jury. While the answer to the trial court's single question may indeed have inured to the benefit of the State, the question itself indicates no bias by the trial court in favor of the prosecution. Appellant has not demonstrated error from the fact the trial court posed a question to Ms. Vincent, much less fundamental error requiring reversal of appellant's sentence.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF APPELLANT'S FAILURE TO ACCEPT PERSONAL RESPONSIBILITY FOR THE CRIMINAL ACTS HE COMMITTED AGAINST MS. VINCENT? (STATED BY APPELLEE).

Appellant next complains that the trial court erred in allowing the State to introduce testimony that showed his lack of remorse for having raped and mutilated Ms. Vincent. However, there was no direct evidence presented by the State to show appellant's lack of remorse for his prior violent felony convictions. Instead, on cross-examination of appellant's parole officer, Douglas Filangeri, the State was allowed to introduce testimony that appellant denied he committed the offenses against Ms. Vincent. Thus, at most, this was an indirect expression of appellant's lack of remorse for the **prior violent felony offenses**. The complained of testimony was properly admitted as it was well within the proper scope of cross-examination.

"A 'trial judge has wide discretion to determine the permissible scope of cross-examination.'" Monlyn v. State, 705 So.2d 1, 4 (Fla. 1997), cert. denied, 524 U.S. 957 (1998)(quoting Bryan v. State, 533 So.2d 744, 750 (Fla. 1988)). In Chandler v. State, 702 So.2d 186, 196 (Fla. 1997), cert. denied, 523 U.S. 1083 (1998), this Court stated, "we have long held that 'cross

examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief.'" (quoting Geralds v. State, 674 So.2d 96, 99 (Fla. 1996)). The prosecutor's cross-examination directly addressed matters revealed on direct examination and was admissible to rebut the model parolee image appellant was attempting to establish through Filangeri's testimony.

On direct examination, Filangeri stated that while he did not consider appellant a disciplinary problem, he did have areas of concern. Mr. Filangeri testified: "There was some areas where I would have to ask him to -- to refrain from certain areas of conversation or something where I just was uncomfortable." (V. XXXIX at 4374). On cross-examination, the prosecutor asked Filangeri about the "areas of conversation" with appellant that he felt "uncomfortable" with. (V. XXXIX at 4385). A question regarding appellant's insistence that Ms. Vincent offered him sex for money brought an objection from the defense counsel. Defense counsel claimed that the question exceeded the scope of cross-examination, that its only relevance "would be to impugn or impinge" upon appellant's character, and that it constituted a non-

statutory aggravating circumstance. (V. XXXIX at 4385-4386). However, defense counsel did not identify that non-statutory aggravating circumstance as lack of remorse.[28] The trial court overruled the defense counsel's objection, stating:

> Well, I think he was asked on direct examination a question and he himself said and made the statement that he was uncomfortable as a result of conversations that he had with Mr. Singleton. And now to deny the state the right to discuss those, I might -- I think would be improper. So I will overrule your objection.

(V. XXXIX at 4386).

Clearly, the prosecutor's questions on cross-examination served to explain and amplify Filangeri's testimony on direct examination. Moreover, such testimony was relevant in that it tended to address the picture appellant attempted to paint of himself as a "model" parolee. In Johnson v. State, 660 So.2d 637, 646 (Fla. 1995), cert. denied, 134 L.Ed.2d 653 (1996), this Court rejected a similar claim of error where the State elicited on cross-examination of a defense witness that appellant had a sometimes violent relationship with his long term companion. In finding such cross-examination relevant and admissible, this Court

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[28]Of course, the entire thrust of appellant's argument on appeal is that this constituted an impermissible comment on his lack of remorse. Since appellant failed to identify lack of remorse below as the foundation for his objection, it can be argued that this argument has been waived on appeal. Archer v. State, 613 So.2d 446, 448 (Fla. 1993)

stated:

> The State then elicited testimony that the two sometimes had violent arguments. Johnson now argues that the latter testimony was beyond the scope of direct examination and, in any event, constituted an illegal non-statutory aggravating factor. We disagree. When the defense puts the defendant's character in issue in the penalty phase, the State is entitled to rebut with other character evidence, including collateral crimes tending to undermine the defense's theory. *Wournos v. State*, 644 So.2d 1000, 1009 n. 5 (Fla. 1994), *cert. denied*, U.S. ___, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995). Such evidence in this context does not constitute an illegal nonstatutory aggravating factor provided the State uses it strictly for rebuttal purposes. Violent conduct in a relationship tends to rebut testimony that the relationship was loving and that a defendant was a good father figure. Accordingly, the trial court did not err on this point.

Johnson, 660 So.2d at 646.

Sub judice, the questions of Mr. Filangeri were well within the proper scope of cross-examination. Further, as in Johnson the State was entitled to rebut the testimony appellant was using in mitigation by eliciting facts tending to show that appellant was not a model parolee. Cf. Kormandy v. State, 703 So.2d 454, 462 (Fla. 1997)("While the statement would be admissible to rebut evidence of remorse or rehabilitation, it was introduced before the defense presented any evidence."). The jury was entitled to learn that appellant never accepted responsibility for the attack upon Ms. Vincent. Finally, appellant's denial of criminal responsibility for committing the prior violent felony offenses was arguably relevant so that the jury could consider and give

appropriate weight to the prior violent felony convictions. The trial court did not abuse its discretion in overruling defense counsel's objection to the cross-examination of Filangeri. See Ho Yin Wong v. State, 359 So.2d 460, 461 (Fla. 3rd DCA), review denied, 364 So.2d 886 (Fla. 1978)("[i]t is well settled that control of the scope of cross-examination lies with the trial judge and is not subject to review except for a clear abuse of discretion.").

Assuming, *arguendo*, any error in allowing the State's cross-examination of Agent Filangeri or appellant's denial of responsibility for committing offenses against Ms. Vincent, this error does not require reversal of appellant's sentence.

In an attempt to bolster his argument, appellant contends that this allegation of error is of Constitutional magnitude. The State disagrees.

In Wainwright v. Goode, 464 U.S. 78, 78 L.Ed.2d 187, 104 S.Ct. 378 (1983), the Supreme Court recognized that not all sentencing error in a capital case amounts to Constitutional error. The instant allegation of error is nothing more than a claim that the jury and trial court heard irrelevant evidence during the sentencing phase. The admission of testimony on cross-examination regarding appellant's denial of responsibility for committing the

prior violent felonies was a matter of State law. See Pickens v. Lockhart, 4 F.3d 1446, 1454 (8th Cir. 1993), cert. denied, 510 U.S. 1170 (1994)(rejecting claim of constitutional error based upon cross-examination of defense witness in the penalty phase, stating: "The proper scope of cross-examination is a question of state law, and ordinarily wide latitude is allowed on cross-examination with respect to witness credibility and bias."); Milone v. Camp, 22 F.3d 693, 702 (7th Cir. 1994) ("The admissibility of evidence is generally a matter of state law.")(citing United States ex rel. Lee v. Flannagan, 884 F.2d 945, 953 (7th Cir. 1989), cert. denied, 497 U.S. 1027, 110 S.Ct. 3277, 111 L.Ed.2d 786 (1990)). Nonetheless, the State recognizes that this Court's decision in Goodwin makes no distinction between errors of constitutional magnitude and mere allegations of trial error. Although Goodwin was not yet final as of the date of filing this brief, the State maintains that even if the more stringent DiGuilio[29] standard is applied, the error remains harmless.

This Court has repeatedly found that even direct reference to a defendant's lack of remorse can constitute harmless error. In Shellito v. State, 701 So.2d 837, 842 (Fla. 1997), this Court held:

> We have clearly stated that lack of remorse is a nonstatutory

[29]State v. DiGuilio, 491 So.2d 984 (Fla. 1985)

> aggravating circumstance and cannot be considered in capital sentencing. Colina v. State, 570 So.2d 929 (Fla. 1990); Trawick v. State. 473 So.2d 1235, 1240 (Fla. 1985); Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983). However, on this record, we conclude that the brief reference to lack of remorse was of minor consequence and constituted harmless error. See e.g., Wournos v. State, 644 So.2d 1000, 1010 (Fla. 1994)(brief reference to lack of remorse by prosecutor harmless error), cert. denied, 514 U.S. 1069, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995); Atwater v. State, 626 So.2d 1325 (Fla. 1993); Sireci v. State, 587 So.2d 450 (Fla. 1991).

Admission of Filangeri's brief testimony was clearly harmless error in this case.

The testimony at issue was not evidence of lack of remorse. It was, in fact, evidence that appellant denied he committed the heinous attack upon Ms. Vincent--i.e., the prior violent felony convictions. Consequently, it was at most, an indirect or strained expression of appellant's lack of remorse. And, any lack of remorse was not directed toward the victim of the instant capital murder, but for the victim of the prior violent felonies introduced by the State as an uncontested aggravator.[30]

Second, as noted above, this was not a close case. This death sentence is supported by two uncontested and particularly weighty

[30]This was not a case where lack of remorse was admitted or argued as a nonstatutory aggravator for the current capital murder. The alleged lack of remorse addressed the prior violent felony convictions. Neither was lack of remorse argued by the prosecutor in closing nor the jury instructed on lack of remorse as an aggravating factor.

aggravators, heinous atrocious or cruel, and prior violent felony convictions. The jury vote in favor of the death penalty was ten to two. The complained of testimony was of minor consequence in this case; any error in its admission was clearly harmless.

ISSUE VI

WHETHER THE TRIAL COURT IMPERMISSIBLY FOUND NON-STATUTORY AGGRAVATING CIRCUMSTANCES IN SUPPORT OF THE DEATH SENTENCE? (STATED BY APPELLEE).

Appellant complains that the trial court impermissibly found and weighed non-statutory aggravating circumstances. (Appellant's Brief at 75). However, the trial court specifically stated in its sentencing order that it only considered the two statutory aggravating circumstances in determining the appropriate sentence. Immediately after listing the two statutory aggravating factors, the trial court stated: "Nothing except as previously indicated in paragraphs 1 and 2 above was considered in aggravation." (V. VIII at 1289). Thus, appellant's argument is directly contradicted by the plain language of the trial court's sentencing order.

The language in the conclusion of the trial court's order which appellant submits amounts to non-statutory aggravators was nothing more than the trial court's summation of the instant offense--i.e, this was a senseless and brutal murder. See generally Parker v. State, 641 So.2d 369, 377 (Fla. 1994), cert. denied, 513 U.S. 1131 (1995)(In rejecting appellant's claim that the trial court considered that appellant left the victim to bleed to death in the street and that there were "three children" in a car that appellant attempted to commandeer, this Court stated:

"Rather than being nonstatutory aggravators, these items are simply facts."). The plain language of the sentencing order clearly indicates that the trial court only considered the two statutory aggravating factors in arriving at an appropriate sentence. See generally Blanco v. State, 706 So.2d 7, 11 (Fla. 1997), cert. denied, 119 S.Ct. 96 (1998)(In rejecting a claim that the trial judge impermissibly considered the prior death sentence on resentencing, the court noted: "The plain language of the sentencing order shows that the court gave no weight to the prior recommendation--the court was merely reciting a factual history of the case."); Mann v. State, 603 So.2d 1141, 1144 (Fla. 1992), cert. denied, 506 U.S. 1085 (1993)(In rejecting a claim that trial court impermissibly considered letters he received advocating the death sentence, this Court stated: "The judge made it clear that he did not rely on these letters in sentencing Mann.").

Appellant's claim that the evidence did not support a finding the victim had two lovely children has some record support. In fact, the victim had three presumably "lovely" children. (V. XLII at 4854). That appellant takes issue with this fact and argues in part, that this 'error' requires reversal of his sentence, strains

the outer bounds of credulity.[31] The trial court's recognition of the victim as a mother of two children was probably made to soften the blow of being memorialized so often in this proceeding as a "prostitute." Given the earlier statement of the trial court that only the two statutory aggravating factors were considered in arriving at an appropriate sentence, appellant has not shown that the inclusion of extraneous language at the conclusion of the trial court's sentencing order requires reversal of his sentence on appeal. Section 924.051 (1)(a)("Prejudicial error" means an error in the trial court that harmfully affected the judgment or sentence.").

ISSUE VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE EXPERT TO TESTIFY IN REBUTTAL THAT APPELLANT HAD THE CAPACITY TO DECEIVE? (STATED BY APPELLEE).

Appellant claims that the State expert, Dr. Barbara Stein, improperly commented upon appellant's credibility in this case. The State disagrees.

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[31] Similarly, the single biblical reference to "Sodom and Gomorrah" does not suggest the trial court considered any impermissible factors in arriving at an appropriate sentence. Even if it was improper to use a biblical reference in the sentencing order, no useful purpose would be served by remand simply to excise the single religious reference.

First, while appellant objected below to Dr. Stein's testimony, he failed to specifically argue that her testimony regarding the capacity to deceive impermissibly commented upon his credibility.[32] Instead, appellant argued that the State had failed to lay a proper foundation for this impeachment testimony, that it was hearsay, that it was simply Dr. Stein testifying about everything "unpleasant or unflattering" about the appellant without addressing whether or not he meets the criteria for dementia. (V. XLI at 4706-4707). Since the specific argument raised on appeal was not presented to the trial court below, it has been waived on appeal. Section 924.051 (1)(b), Fla. Stat. (1996); Archer v. State, 613 So.2d 446, 448 (Fla. 1993)(the court declined to address appellant's sufficiency argument, stating, "to be preserved for appeal. . . it 'must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved for

[32]Trial defense counsel made the following objection to this testimony below: "Judge, I think my objection is this is an opinion upon which this witness is not qualified to give an opinion." (V. XLI at 4711). Shortly thereafter, counsel objected again, stating: "Judge -- I apologize, Doctor Stein. Can I have a continuing objection to Doctor Stein to all of this testimony based upon hearsay and the other matters raised at the bench earlier. (V. XLI at 4712). The earlier objection did not mention that Dr. Stein's testimony constituted an impermissible comment on appellant's credibility. (V. XLI at 4706).

appellate review.'")(quoting Tillman v. State, 471 So.2d 32, 35 (Fla. 1985)). Appellant has not established error in the admission of Dr. Stein's testimony, much less fundamental error requiring reversal of his sentence. See Watson v. State, 633 So.2d 525 (Fla. 2d DCA 1994), rev. denied, 641 So.2d 1347 (Fla. 1994)("The Florida cases are extremely wary in permitting the fundamental error rule to be the 'open sesame' for consideration of alleged trial errors not properly preserved.").

"A trial court has broad discretion in determining the range of subjects on which an expert witness will be allowed to testify." State v. Townsend, 635 So.2d 949, 958 (Fla. 1994)(string cites omitted). Further, "[o]nce the defense argues the existence of mitigators, the State has a right to rebut through any means permitted by the rules of evidence, and the defense will not be heard to complain otherwise." Wuornos v. State, 644 So.2d 1000, 1009, 1010 (Fla. 1994), cert. denied, 514 U.S. 1069 (1995). See Johnson, 660 So.2d at 646 (the defense opened the door to rebuttal testimony regarding violence in the relationship with his companion by eliciting testimony from her that he was a good father figure to her two children).

Appellant's expert, Dr. Elizabeth McMahon, testified that her test results showed that appellant was not malingering or in any

other way trying to skew the psychological test results. (V. XL at 4520-4521). Dr. McMahon then related, apparently from appellant's recollection, the various medications he consumed the day of the murder as well as his alcohol consumption. (V. XL at 4532-4534). Dr. McMahon testified that in her opinion appellant was suffering from dementia when he committed the murder. (V. XL at 4542). Further, in Dr. McMahon's opinion, appellant was under the influence of extreme mental or emotional disturbance at the time of the offense. (V. XL at 4544). Dr. McMahon testified:

> ...I don't think he could stop at that point. I don't think he could back up and even evaluated long enough to say I should stop. It doesn't mean that he -- there was anything saying that if he were not in the middle of something that he -- he didn't have the brain power to be able to appreciate it. He can do that now and does do it." (V. XL at 4547-4548).

On cross-examination, Dr. McMahon admitted that in forming her opinion she relied at least in part upon "self-reporting" statements from Mr. Singleton. (V. XL at 4568-4569). Further, on cross-examination, the following colloquy occurred between Dr. McMahon and the prosecutor:

> Q: [prosecutor] Okay. And you're aware that Mr. Singleton at or near the time of the offense shortly thereafter was capable of deceptive action, lying to the police about what had occurred?
>
> A: [Dr. McMahon] I am aware that he -- or according to the police report, he told them that everything was okay.

(V. XL at 4574). Nonetheless, Dr. McMahon denied that appellant's

deceptive statements toward the police were inconsistent with her conclusion that he suffered dementia at the time of the offense.[33] (V. XL at 4574). When asked if the deceptive statements toward the police were evidence of goal directed behavior, she testified that appellant told her he did not remember his statements to the police. (V. XL at 4576). However, Dr. McMahon agreed that if he made those untruthful statements they could indicate an awareness of the wrongful nature of his conduct. (V. XL at 4577-4578).

In rebuttal, the State called Dr. Barbara Ann Stein, M.D., who was board certified in general psychiatry and forensic psychiatry. (V. XL at 4665). Dr. Stein testified that a forensic psychiatrist attempting to address a defendant's mental state at the time of the offense must look at the available records before this offense occurred. (V. XL at 4693). Dr. Stein testified:

> We look at their behavior before, during and after the incident occurs. And we also look to see whether this person has the capacity to deceive. Because in the forensic area, the medical legal area where people are facing prosecution, sometimes they're not always up front. So we look at the diagnosis. We look at their behavior.

(V. XL at 4694). A psychiatrist examines whether or not there is consistent reporting over time and whether the report is consistent

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[33]Dr. McMahon also conceded that appellant had never before been diagnosed with dementia despite having been seen by several mental health professionals, both in California and Florida. (V. XL at 4589-4592).

with the physical evidence. A forensic psychiatrist must review "collateral data that's corroborative, information about what people saw, what this person said, how they looked before, how they acted before and how they acted after." (V. XL at 4694).

The consistency of a defendant's report must be examined in attempting to determine the mental status of the offender at the time of the offense. (V. XLI at 4704). After examining various statements and reports, Dr. Stein concluded: "There were some significant inconsistencies in his reports over time to various people."[34] (V. XLI at 4705). And, in her opinion at or near the time of the homicide, appellant had the capacity to deceive. (V. XLI at 4711). Dr. Stein noted that his first statements to the police at the scene showed the ability to deceive. (XLI at 4712). Dr. Stein testified: "[H]is statements showed that he was aware of what was going on, that he showed deception towards the police." (XLI at 4713). The ability or capacity to deceive at the time of the offense is inconsistent with a defendant suffering from significant dementia at the time of the offense. (V. XLI at 4713). Dr. Stein continued:

> ...The only other -- the only other thing that I wanted to add to that before the objection was that the issue of selective recall over time is also inconsistent with dementia. When

[34]This question drew no objection from the defense.

> someone has dementia, they always have problems with their memory and it's not just sometimes and it's not just sometimes for things that are helpful for them to not remember, but yet they remember things that may be helpful to them.

(V. XLI at 4714). Appellant exhibited selective memory: "...He allegedly did not have memory for those things that could have potentially been hurtful to him in this case, but yet he remembered things that could have potentially also been helpful. That kind of inconsistency. And that's what we were talking about before."[35] (V. XLI at 4714-4715).

Dr. Stein's testimony regarding appellant's ability to deceive was relevant and admissible to rebut the testimony of the defense expert who concluded that appellant suffered from dementia and was under extreme mental or emotional disturbance at the time of the offense. Appellant's ability to deceive at or near the time of the murder was part of the reason Dr. Stein concluded that appellant was "not under extreme, emotional or mental disturbance" at the time of the offense. (V. XLI at 4715).

The cases cited in appellant's brief (Appellant's Brief at

[35]Dr. Stein observed that appellant's claim about how much he had to drink and what he told Dr. McMahon about how much anti-depressant medication he consumed varied, with his later report to Dr. McMahon indicating he consumed "two to three times as much." (V. XLI at 4711-4712).

82)[36] addressing a defendant's or another witness's credibility during the guilt phase provides no support for appellant's position on appeal. *Sub judice,* Dr. Stein did not testify that appellant was not credible during the guilt phase. The jury had already judged appellant's testimony less than credible by finding him guilty of First Degree Murder prior to Dr. Stein testifying. Moreover, appellant opened the door to Dr. Stein's testimony by placing his mental state directly in issue through the testimony of Dr. McMahon. The ability to deceive was directly relevant to Dr. Stein's conclusion that appellant was not "under extreme, emotional or mental disturbance" at the time he committed the murder. (V. XLI at 4715). Appellant has not carried his burden of establishing error in the admission of Dr. Stein's testimony, let alone fundamental error requiring reversal of his sentence.

ISSUE VIII

WHETHER THE DEATH SENTENCE RECOMMENDED BY THE JURY AND IMPOSED BY THE TRIAL COURT IS

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[36]E.g. Boatwright v. State, 452 So.2d 666, 668 (Fla. 4th DCA 1984); Morgan v. State, 639 So.2d 6, 12 (Fla. 1994). See also, Erickson v. State, 565 So.2d 328, 330, 331 (Fla. 4th DCA 1990), rev. denied, 576 So.2d 286 (1991) (error to admit testimony concerning statements a defendant made to a psychiatrist and expert testimony to attack the credibility of the accused where the defendant did not "open the door" to such inquiry by his own presentation of evidence).

DISPROPORTIONATE TO OTHER DEATH CASES IN THIS STATE?

Appellant's final claim disputes the proportionality of his death sentence. The State disagrees. When factually similar cases are compared to the instant case, the proportionality of appellant's sentence is evident.

A. Standard of Review

This Court has described the "proportionality review" conducted by this Court in every death case as follows:

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991) (citation omitted) (emphasis added); see also Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). While the existence and number of aggravating or mitigating factors do not prohibit or require a finding that death is nonproportional, this Court nevertheless is "required to weigh the nature and quality of those factors as compared with other similar reported death appeals." Kramer v. State, 619 So.2d 274, 277 (Fla. 1993). The purpose of the proportionality review is to compare the case to similar

defendants, facts and sentences. Tillman, 591 So.2d at 169.

B. Appellant's Death Sentence, Supported By Two Weighty Aggravating Factors, Is Proportional Despite The Existence Of Statutory And Non-Statutory Mitigation

The trial court below found two aggravating circumstances: (1) the murder of Ms. Hayes was heinous atrocious and cruel; and, (2) prior violent felony convictions for the rape, sodomy, mayhem and attempted murder of Ms. Vincent. Appellant does not dispute the existence of these two aggravating factors. The trial court found three statutory mitigating circumstances: (1) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance; (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (3) the age of the defendant at the time of the offense. (V. VIII at 1289-1290). The trial court also found a number of nonstatutory mitigators including the intent to kill was formed over a disagreement or argument, since his release on parole in 1987, he had not been arrested for any offense except petty theft, the defendant was suffering from mild dementia, the defendant previously attempted suicide, he had served honorably in the armed

forces, and was a model prisoner in California from 1979 to 1987.[37] (V. VIII at 1292-93).

The jury recommended death in this case by a vote of 10 to 2. The trial court followed this recommendation, stating: "The court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present." (V. VIII at 1293).

In his effort to show the sentence is not proportional, appellant attempts to diminish the severity of this murder by claiming it was simply the result of a fight between appellant and the victim. The State disputes appellant's characterization of this case as nothing more than a **fight** between a "disturbed alcoholic and a cocaine using prostitute." (Appellant's Brief at 87). Appellant's ridiculous theory of a mutual fight was in fact contradicted by the State's evidence.[38] Whatever precipitated the

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[37]While appellant was apparently a good prisoner, he evidently did have some problems with female corrections personnel. He had to be counseled against pinching a female corrections officer. (V. XXXIX at 4340-4341).

[38]Appellant boldly asserted that the victim managed to 'accidentally' stab herself a number of times while they were struggling over the knife. See e.g. V. XXXVI at 3902-3910.

dispute, it did not result in a mutual fight, but instead, resulted in the heinous, atrocious and cruel murder of Ms. Hayes. Contrary to appellant's assertion, Paul Hitson did not witness a "fight" between the victim the appellant. The victim was lying prone and did not appear in anyway to resist the blows Mr. Hitson observed the appellant inflict upon her. Appellant appeared to be in complete control of Ms. Hayes as she lay on the couch. Moreover, as Mr. Hitson heard the victim gurgle for help, he heard the appellant tell her to "shut up bitch." (V. XXIX at 3109).

During the so-called fight appellant received a single small cut or abrasion on his chest, probably from the victim's false fingernail which was found on the sofa with appellant's blood on it. (V. XXXIII at 3582). In contrast, the victim suffered numerous deep stab wounds. The trial court noted extensive defensive wounds to the victim's hands which indicate that Ms. Hayes struggled for her life. The trial court observed:

> Roxanne Hayes fought for her life. Her futile attempts to ward off Mr. Singleton's knife left the fingers in one of her hands nearly severed and fingers of the other hand cut down to the bone. She literally clawed for her life as she dug a fingernail into the Defendant's chest. These defensive wounds and the time that passed between Ms. Hayes' cries for help establish beyond a reasonable doubt that she was acutely aware

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However, appellant had no **plausible** explanation for the severe defensive cuts to both of the victim's hands and his own conspicuous lack of injuries.

of her impending death...

(V. VIII at 1289).

The two statutory aggravators present in this case are two of the most compelling in Florida's capital sentencing calculus.[39] This Court has upheld as "especially weighty" the aggravating factor of prior violent felony convictions such as presented in the instant case. See Ferrell v. State, 680 So.2d 390 (Fla. 1996), cert. denied, 137 L.Ed.2d 341 (1997) (prior second degree murder); Lindsey v. State, 636 So.2d 1327 (Fla.), cert. denied, 513 U.S. 972, 115 S.Ct. 444, 130 L.Ed.2d 354 (1994)(contemporaneous first degree murder and prior second degree murder); Duncan v. State, 619 So.2d 279 (Fla.), cert. denied, 510 U.S. 969 (1993)(death sentence affirmed where single aggravating factor of prior second-degree

[39]This Court has affirmed the death penalty even in single aggravator cases, despite the presence of mitigation. Ferrell v. State, 680 So.2d 390 (Fla. 1996), cert. denied, 137 L.Ed.2d 341 (1997); Windom v. State, 656 So.2d 432 (Fla. 1995), cert. denied, 133 L.Ed.2d 495 (1997) (as to murders of two of the victims, the only aggravating factor was prior violent felony conviction, based on contemporaneous crimes; in mitigation, trial court found no significant criminal history, extreme mental disturbance, substantial domination of another person, helped in community, was good father, saved sister from drowning, saved another person from being shot over $20); Cardona v. State, 641 So.2d 361 (Fla.), cert. denied, 513 U.S. 1160 (1995)(single aggravating factor of HAC; mitigation included extreme emotional disturbance, daily use of cocaine and substantial impairment therefrom, defendant raped as a child); Arango v. State, 411 So.2d 172 (Fla. 1982) (single aggravator of HAC; defendant had no prior criminal history).

murder of fellow inmate was weighed against numerous mitigators); Lemon v. State, 456 So.2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230 (1985) (prior conviction for assault with intent to commit first degree murder); Harvard v. State, 414 So.2d 1032 (Fla. 1982), cert. denied, 459 U.S. 1128 (1983)(prior conviction for aggravated assault from shooting attack). The prior violent felony convictions were particularly serious in this case. The trial court noted the following:

> This Capital Felony was committed by the Defendant who nineteen years earlier was found guilty by a California Jury of Rape, Kidnaping, Mayhem, Sodomy And Attempted Murder. The Defendant committed these crimes against a fifteen year-old hitchhiker, Mary Vincent. As Ms. Vincent described in her testimony during the penalty phase of this case, Lawrence Singleton held her against her will in his van wherein he raped and sodomized her. The defendant then chopped off each of Ms. Vincent's arms with a hatchet and left her for dead in a culvert alongside an isolated roadway. Certified copies of conviction pertaining to these crimes were admitted during the penalty phase proceedings...

(V. VIII at 1288). Appellant committed the instant murder within ten years of his release from custody for the California violent felony convictions.

This Court has also stated that heinous atrocious or cruel is one of the strongest aggravators to be considered in this Court's proportionality review. See e.g. Larkins v. State, 24 Fla.L.Weekly S379, S381 (Fla. July 8, 1999)(noting that "heinous, atrocious, or cruel" and cold, calculated and premeditated aggravators are "two

of the most serious aggravators set out in the statutory sentencing scheme..."); See also, Guzman v. State, 721 So.2d 1155 (Fla. 1998) (affirming sentence where victim received nineteen stab wounds to face, skull, back, and chest, and a defensive wound to a finger on his left hand).

Appellant contends that the two uncontested aggravating factors are "overshadowed" by the mitigation in this case. However, this Court has repeatedly recognized that the relative weight to be assigned any aggravating or mitigating circumstance is within the broad discretion of the trial judge. Blanco v. State, 706 So.2d 7, 10 (Fla. 1997), cert. denied, 142 L.Ed.2d 76 (1998); Cole v. State, 701 So.2d 845, 852 (Fla. 1997), cert. denied, 118 S.Ct. 1370 (1998); Bell v. State, 699 So.2d 674, 678 (Fla. 1997), cert. denied, 118 S.Ct. 1067 (1998). Further, in addressing a similar challenge to the defendant's sentence in Freeman v. State, 563 So.2d 73, 77 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991), this Court stated: "The trial judge carefully weighed the aggravating and mitigating circumstances and concluded that death was the appropriate penalty. It is not this Court's function to reweigh these circumstances." (citing Hudson v. State, 538 So.2d 829 (Fla. 1990)).

Appellant's case is similar to Spencer v State, 691 So.2d

1062, 1063 (Fla. 1996), cert. denied, 522 U.S. 884 (1997) where "the defendant was sentenced to death for the first degree murder of his wife Karen Spencer, as well as aggravated assault, aggravated battery, and attempted second degree murder." The trial court found the same two aggravating circumstances present in this case: "1) Spencer was previously convicted of a violent felony, based upon his contemporaneous convictions for aggravated assault, aggravated battery, and attempted second degree murder; and 2) "the murder was especially heinous, atrocious, or cruel." The judge found the following mitigating circumstances: 1) "the murder was committed while Spencer was under the influence of extreme mental or emotional disturbance; 2) Spencer's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and 3) the existence of a number of non-statutory mitigating factors in Spencer's background, including drug and alcohol abuse, paranoid personality disorder, sexual abuse by his father, honorable military record, and ability to function in a structured environment that does not contain women."[40] Spencer, 691 So.2d at

[40]No evidence that appellant suffered from a dysfunctional family background or was abused as a child. The non-statutory mitigators all indicate that appellant can function within the framework of the law when he chooses to do so.

1063. The trial court found that the mitigating circumstances did not outweigh the aggravators and this Court affirmed after conducting a proportionality review. See also Pope v. State, 679 So.2d 710 (Fla.), cert. denied, 136 L.Ed.2d 858 (1996)(death sentence proportional for murder of defendant's former girlfriend with aggravating circumstances of prior violent felony convictions and murder committed for pecuniary gain while mitigation included extreme mental or emotional disturbance and the defendant's capacity to conform conduct to the requirements of the law was substantially impaired); Guzman, 721 So.2d at 1155 (affirming sentence where victim received nineteen stab wounds to face, skull, back, and chest, and a defensive wound to a finger on his left hand); Brown v. State, 565 So.2d 304 (Fla.) (death sentence for murder committed during the course of burglary was proportionate where there were two aggravating factors balanced against the mental mitigators), cert. denied, 498 U.S. 992 (1990); Lemon, 456 So.2d at 888 (death penalty proportionate where HAC and prior violent felony convictions for attempted murder (stabbing female victim) balanced against serious emotional disturbance at the time of the offense).

Appellant's reliance upon Kramer v. State, 619 So.2d 274, 276 (Fla. 1993) is misplaced. In Kramer, a majority of this Court

concluded that the defendant's death sentence was disproportionate, stating that the murder, in its "worst light suggests nothing more than a spontaneous fight, occurring for no discernable reason, between a disturbed alcoholic and a man who was legally drunk." 619 So.2d at 278. The victim had a blood alcohol content of ".23." Kramer, 619 So.2d at 275. A majority of this Court assumed "arguendo" that the murder was atrocious, heinous, or cruel, thereby casting some doubt on the strength of this aggravator in Kramer. 619 So.2d at 278. The only other aggravator was for prior violent felony convictions.

As noted above, this was not simply a fight between a disturbed alcoholic and a cocaine using prostitute. This was a brutal murder which occurred over a number of minutes and was witnessed in part, at least, by Paul Hitson. His testimony establishes that this was no fight. Appellant was in control of the victim and told her to shut up as she gurgled out a cry for help. While in Kramer this Court noted the victim was intoxicated with a high blood alcohol reading of .23., in the instant case the victim only had the presence of cocaine metabolite in her blood and it was impossible to know if she was under the influence of cocaine at the time of the murder. (V. XXXI at 3368). In any case, consumption of cocaine would not likely have any impact upon her

knowledge regarding her impending death or her ability to suffer pain during appellant's attack. (V. XXXII at 3369).

In sum, the appellant's sentence is supported by two very strong aggravating factors. The evidence presented in the instant case established that appellant repeatedly stabbed Ms. Hayes in an attack that lasted several minutes. Ms. Hayes fought for her life. Deep cuts to both the victim's hands reflect that she attempted to fend off appellant's blows by taking the extreme measure of grabbing the knife blade wielded by the appellant. Appellant previously attacked fifteen-year-old Mary Vincent, sexually assaulting her before chopping off her arms and leaving her for dead. Balanced against appellant's heinous crimes were a laundry list of character traits and aspects of the crime which appellant urged as mitigating evidence. Based upon on the foregoing, this Court must find that appellant's sentence is proportionate.

CONCLUSION

WHEREFORE, 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 Paul S. Helm, Assistant Public Defender, P. O. Box 9000, Drawer PD, Bartow, FL 33831, this _____ day of December 1999.

COUNSEL FOR STATE OF FLORIDA