IN THE SUPREME COURT OF FLORIDA

HARRY BUTLER,

Appellant,

vs. **CASE NO. SC95158**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Guilt Phase:

Appellant was charged by indictment with the first degree murder of Leslie Fleming (Vol. I, R. 6). Trial by jury resulted in a guilty verdict (Vol. IV, R. 745; Vol. XVII, TR. 1231-33) and an eleven to one recommendation of death (Vol. IV, R. 749; Vol. XVII, TR. 1321). Butler now appeals.

At trial, Police Officer Philip Biazzo testified that while on patrol duty the afternoon of March 11, 1997 he went to 1400 Alpine Road, Apt. 1 in Clearwater regarding a domestic incident. Ms. Leslie Fleming opened the door, tears were running down her face and she replied in the negative to his question if she were all right. She let him in, appellant was on the couch interrupting so the officer asked her to come outside to talk to him. He observed injuries including red marks on her back and she complained of soreness at the shoulder. Biazzo notified his sergeant, had her respond to the scene and Butler was arrested (Vol. XI, TR. 145-148). He took a photo of the victim, Exhibit 1 (TR. 149).

Detective Steven Bohling responded to a follow-up on the investigation at 4:45 p.m. on March 11th, he met with and interviewed Ms. Fleming. She was still upset and he observed bruising on the shoulder. Bohling interviewed appellant at the main station downtown. Appellant was under arrest for domestic violence, domestic battery (TR. 151-156).

Intake specialist Patricia Root testified Butler was arrested and booked into jail for domestic battery about 7:20 p.m. March 11th and bonded out March 12th at about 7:20 p.m. (TR. 157-159).

Lakisha "Red" Miller, a cousin of appellant and best friend of victim Leslie Fleming ("Bay") testified that appellant began a relationship with Bay when she was sixteen, they had children and were living together in early 1997 (Vol. XII, TR. 169-173). Appellant moved out of the residence - Bay put him out - about March 9, 1997, less than a week before Bay's murder. The witness was aware that Butler had been arrested on March 11th and bonded out March 12th (TR. 173-174). She spent the evening of March 12th at Bay's house along with the children but declined Bay's request to spend the next night (March 13th) there, preferring to stay at home. She last spoke to the victim at 8 p.m. after she went home. Miller testified that appellant didn't like her (Miller) because he said she was the cause of breaking them up and that Butler was mad and upset about the breakup; he was upset and mentioned Bay's messing with Adonis Hartsfield (TR. 175-178). Bay was found dead Friday morning (TR. 181).

Terry Jackson, a co-worker of appellant saw him Wednesday night March 12th and Butler told him he was going to kill Bay and Red but Jackson paid no attention. He told appellant to leave that mess alone. Jackson knew Butler just bonded out of jail (TR. 184-186).

Shawna Fleming, the victim's sister, lived right across from her on Alpine Road and could see her apartment complex from the window. They were close and talked basically every day. Butler was dating her sister, the father of her kids and Bay moved in with him at age sixteen (TR. 191-193). They were living together in early 1997 at 1400 Alpine Road, Apt. 1 with the three kids (including six year old Lashara Butler). Bay tried to end the relationship, didn't want Butler any more, and was trying to start a new life months before. She kept putting him out and telling him to leave her alone and he'd always come back. Appellant moved out on March 9th because Bay didn't want him anymore (TR. 194-197). Fleming went to the victim's apartment about 3 p.m. on March 11th at Bay's request, then again at her request went home and called police. The police came and arrested Butler (TR. 197-198). She last saw Bay alive Thursday morning and spoke to her on the phone Thursday night at 8 or 8:30. The next morning, Friday March 14th, she tried calling her to wake her up at 5:20 a.m. and the victim did not answer the phone. Her boyfriend knocked on the door and there was no answer. Fleming phoned five or six times unsuccessfully. She went back to sleep, then at 7:15 a.m. walked over to Bay's house with her three year old son. Initially there was no answer. Then six year old Lashara opened the door. The witness saw what she thought was Lakisha (Red) on the floor, called police and went into the bathroom with Bay's three kids and her

son. Police interviewed Lashara at the station. Fleming knew that it was Leslie Fleming on the floor. The victim was 5'3" and about 105 pounds. Police covered the children's heads when removing them from the apartment so they couldn't see the body when they walked by (TR. 199-206).

Police officer Terrence Kelly was dispatched to the scene of the crime about 7:33 a.m. and found the victim - who appeared deceased - laying face up on the living room floor. Blood was spattered above the floor. The victim was wearing a T-shirt but nude from the waist down. There was a dark colored pillow by the head and a clear plastic bag near the head (TR. 211-212). He called for paramedics, removed the residents to a back bedroom and spoke to Shawna Fleming and Lashara (TR. 213). Subsequently Shawna and the children were taken outside the apartment, a yellow sheet was placed over the victim and towels over the children's heads so they couldn't see the victim (TR. 214-216). The body was in the living room (TR. 219).

Lashara Butler, the victim's seven year old child, was sleeping in her mother's bedroom and her dad picked her up and took her to her room. She saw his face (TR. 229-230). When she woke up she was in her bedroom; she was awakened by her mother screaming loud "Stop" (TR. 231-232). Lashara went to the bathroom, went by the door of the bedroom and saw her mother's and father's legs. One of the mother's legs was on the floor and "my daddy had his leg

on her leg" (TR. 232). He was wearing short pants and it sounded like her mother was being hurt (TR. 233-234). She heard the screen door close and steps on the outside. She went back to bed and later that morning opened the door when there was a knocking by her aunt (TR. 235). Lashara identified Harry Butler in court (TR. 236). Since then - in January - her grandmother has told her that her mother died on March 14th (TR. 258).

Police officer Scott Ballard responded as a backup officer, found the female laying inside the doorway on the ground with a shirt covered in blood and naked from the waist down. He was ordered to start a crime scene log. While transporting Lashara Butler to the police department she stated out of the blue "My daddy hurt my mommy. I heard him yelling at her" (TR. 260-263).

Donald Barker of the forensic science section of the sheriff's department arrived at the crime scene about 8:15 on March 14th. He documented and collected evidence and took photographs (TR. 265-278). Barker testified that within a foot of the victim's head was a pillow which appeared to be heavily stained with blood and a plastic shopping bag also stained by blood directly beside the left side of her head. There were multiple possible stab wounds on the upper torso, the shirt was saturated with blood and there was possible swelling in the face (TR. 280-282). There was no obvious sign of rifling through the apartment as is so often seen in a burglary (TR. 289). All the blood droplets were about three feet

up and lower indicating consistency with the attack being made in the supine position (back on the carpet) (TR. 292). Barker got blood samples from the victim and spent thirteen hours at the crime scene (TR. 303-304).

Detective Marvin Green interviewed appellant's cousin Martisha Kelly, drove to the store located at Marshall Street and Myrtle Avenue with her and provided information he received from her to other detectives, i.e. to look in the dumpster (TR. 330-334). Clearwater Detective Wilton Lee arrived at the crime scene about 8:04 A.M. and later went to the convenience store on Myrtle and looked in the dumpsters, three quarters to a mile away from appellant's motel apartment efficiency (TR. 336-338). A main walking or bike-riding thoroughfare known as the trail (the Pinellas County Trail) is about one-half block from the dumpster area. Lee collected and supervised the collection of evidence from the dumpster area including a pair of blue shorts, long knee length white T-shirt, pair of underwear, strawberry-colored towel, white T-shirt and a pair of tennis shoes. The clothing was wet, damp (TR. 339-341). Exhibit 7, the shorts were size 34; the underwear was size 34 to 36. The white T-shirt (Exhibit 8), also wet, was a Fruit of the Loom size small. When appellant was arrested by Clearwater Police he also wore a small white color Fruit of the Loom shirt. The Exhibit 9 towel was wet when retrieved Sunday, March 16th at 11 or 11:20 a.m. and the Exhibit 10 sneakers,

Converse, size 12, did not have shoelaces (TR. 341-348). The witness identified photos, Exhibits 11-15 (TR. 351).

Forensic science specialist John Grubbs took a videotape, collected evidence, processed some items for fingerprinting, took autopsy photos and received blood samples (Vol. XIII, TR. 365-371).

Jeannie Eberhardt, a forensic scientist in serology DNA, testified she passed a DNA test in proficiency on PCR testing (TR. 375-380). She performed PCR testing on all the items of evidence in this case (TR. 380) and testified in front of the jury that when she worked on this case she was working with Florida Department of Law Enforcement (FDLE) as a crime laboratory analyst in serology DNA (TR. 436). After receiving the blood sample of victim Leslie Fleming she determined a DNA profile for that. At the LDLR location (low density lipoprotein receptor) the victim had type AB; at the GYPA location (glycophorin A), type AB; at the HBGG location (hemoglobin g gammaglobulin) it was AC; at the D7S8 location (chromosome 7 linked to cystic fibrosis) it was AA; at the GC location (group specific component) it was BB; at the DQA1 (human leucocyte antigen) it was 1.1, 1.2 (TR. 438-440). The defendant's profile was LDLR=BB; GYPA=BB; HBGG=AA; D7S8=AA; GC=BB; and DQA1=1.2, 1.3 (TR. 441). There was not enough material to determine PCR, DNA type on Exhibits 7-9 (TR. 442-449). However on the Exhibit 10 size 12 Converse tennis shoes, the left shoe had the same grouping as the victim's; the sample from the sneaker was

consistent with the DNA profile from Leslie Fleming (TR. 454-455). Butler was excluded as a possible contributor to that DNA (TR. 456). The blood sample from the west wall of the apartment (Exhibit 5A) and from the love seat (Exhibit 6A-D) was consistent with the victim's DNA profile (TR. 457-458). Butler could be excluded as a source providing the blood on the couch and child's toy (TR. 458-459). The blood taken from the phone headset was consistent with the DNA profile from Leslie Fleming (TR. 461-462). Blood on the pillow was consistent with that of the victim (TR. 470). Appellant Butler was excluded as the source of blood from all the samples tested from the residence and it was consistent with the profile from Leslie Fleming (TR. 472). Blood on the motel room door of the appellant was not consistent either with Fleming or appellant (TR. 475). Eberhardt testified that the likelihood someone would match all the genetic markers is approximately 1 in 3000 African Americans, 1 in 112,800 Caucasians and 1 in 538,000 Southeastern Hispanic individuals (TR. 479). All the DNA from the residence was consistent with the profile of the victim (TR. 505).

Forensic specialist John Grubb identified Exhibits 19 and 18 as items he found in the residence near the victim's head (pillow and shopping bag) (TR. 515-517).

The prosecutor put on witnesses Shawn Meeks who testified that when appellant was arrested on March 11th, the Exhibit 10 sneakers were loose fitting and had no shoelaces (TR. 526-530).

Additionally Shawna Fleming, the victim's sister, and Vivian Harris, the victim's mother, both testified appellant normally wore sneakers with no shoelaces (TR. 534-545). A videotape Exhibit 21 depicted appellant and his laceless shoes (TR. 534-540). Harris also testified that she had no contact with Lashara Butler from the time the victim's body was discovered and the time police transported and interviewed the child (TR. 547).

Donald Barker of the Pinellas County Sheriff's Office Forensic Science Unit measured appellant's foot and stated that Butler's foot was wider than the average D size; he would start at a size 11 based on what he viewed (Vol. XIV, TR. 570-574).

Associate Medical Examiner Dr. Marie Hansen arrived at the crime scene at 12:10 on March 14th. The victim was clad in a T-shirt, naked from the waist down with a large area of blood around the head and upper neck area in the carpet. There were a lot of multiple incised and stab wounds to the neck, upper chest and abdomen (TR. 575-580). As to victim Leslie Fleming, the final total appeared to be twenty-five (25) stab wounds, nine (9) incised wounds, eleven (11) other labeled as a group, and eight (8) defensive wounds on the palm and elbow (TR. 585-586).

The autopsy in this case took close to seven hours and the normal range is one to two hours. The report was fourteen rather than three to five pages before she started doing the internal surface of the body. It took twenty to forty hours to prepare the

report (TR. 589-591). Dr. Hansen described the multiple injuries reflected in Exhibits 24-43 (fractured jaw, bruises on the frenula, multiple stab wounds, defensive wounds). Wound K on central neck depicted in Exhibits 32 and 34 was a fatal wound; it got the vein next to the carotid artery, opening the vascular system at a point big as a pinky causing bleeding to death. Wound G to the thyroid gland and J into the trachea were eventually fatal (TR. 592-607). Petechial hemorrhages in the eye were consistent with strangulation, asphyxiation. She observed a plastic bag and pillow near the head and facial area (Exhibits 19 and 18) which were consistent with causing suffocation or asphyxiation. The cause of death was homicidal violence including multiple stab wounds to the head, neck and torso, blunt trauma to the head and suffocation. The victim was 5'4" tall and weighed 91 pounds. The stabbing was going on while the victim attempted to defend herself and the incident took at least ten minutes, maybe quite a bit longer (TR. 608-616). Some of the wounds were consistent with torturous wounds to the chest, abdomen and neck (TR. 625). For asphyxiation it takes a couple of minutes for unconsciousness and up to eight minutes to get closer to death. One would not necessarily expect to see a lot of blood on the attacker since most of the wounds were superficial and the blood would not spurt. The vein is relatively low pressure compared to an artery and the T-shirt cloth absorbs blood (TR. 625-628).

Appellant's employer James Wood visited Butler in the county jail and asked him if he killed Bay and Butler responded that if he did it he "don't remember nothing like that" (TR. 633-635).

Lola Young who knew both appellant and Bay testified that in the early morning hours on March 14 (between 3:30 and 5:00 a.m.) she saw movement and a person wearing a pullover shirt near the hedges looking for something or peeping, in a squat or bent over position. The man asked what she was doing out early in the morning and she responded asking what the hell he was peeking at. Appellant was that man; she recognized his voice. She started back to her apartment, heard brakes squeaking and when she entered the apartment saw a blue sports car come from behind Bay's building. There were no lights on the car, the passenger door opened, appellant got in and the car went away from Kings Highway back around Alpine (TR. 659-663).

Detective Wilton Lee met with James Wood and showed him Polaroid photos, Exhibits 46 and 47, of tennis shoes. Wood got excited and said several times these are Butler's shoes. Wood mentioned they were usually unlaced or no laces at times (TR. 684-687). Lee went to Bay's apartment the night before this testimony at 12:30 A.M. to see if he could identify his wife from the distance Lola Young said she saw Butler and he was able to see her and hear her voice in conversation from the approximate distance of eighty feet (TR. 684-694). His March 14 videotaped interview with

Lashara Butler (Exhibit 44) was introduced without objection (TR. 696-698).

Detective James Steffens who assisted Detective Lee interviewed appellant on Friday the 14th. Butler denied committing the crime, provided names of people he was with and said he had been to the victim's residence the night before - Thursday - between 9:45 and 10:30 with Carl Jeter whom he claimed wanted to see a car appellant owned. Butler claimed that on the prior day he was there and assisted a cable company man installing wire to move a console. When the officers indicated his daughter Lashara indicated he was at the house, appellant became agitated, called her a liar and said anyone contradicting him was a liar (TR. 724-728).

Butler had superficial cuts or lacerations on his hands, Photo Exhibits 54-64. He was also in possession of a beeper and the last number showed 1:17 a.m.; the digital number came back to Martisha Kelly (461-1424) (TR. 729-730). The Exhibit 53 photo depicts the clothing worn during the interview; Exhibit 49, the white T-shirt was taken from appellant that day. The Exhibit 8 T-shirt taken from the dumpster was size 34 to 36. Exhibit 48, the boxer shorts taken from appellant on March 14th were size 34 to 36; Exhibit 7 shorts and underwear from the dumpster were size 34 to 36. The Exhibit 50 brown shorts taken from appellant March 14th were size 36; the Exhibit 10 shorts from the dumpster were size 34. The

Exhibit 12 Converse shoes in the dumpster were size 11 ½ and the Exhibit 51 shoes (actually belonging to Tennell) were size 11½. (TR. 731-738).

Defense witness investigator Jim Ley testified that the distances from Butler's motel room residence to Biscuit Williams' residence was .85 mile, from Leslie Fleming's residence to appellant's residence 1.8 miles, and from Biscuit's house to Fleming's 2.55 miles. There was no problem seeing the bushes from the dumpster (Vol. XV, TR. 777-782).

Detective Green had seen appellant's name on an E-mail about domestic violence arrest two days earlier, saw Butler walking southbound on Myrtle Avenue with Dennis Tennell and Butler voluntarily went with law enforcement. Tennell ran (Vol. XV, TR. 787-790). On cross-examination the witness stated he determined Butler might be a possible suspect and would be negligent if he didn't consider it (TR. 795-797).

John Dosher, a cable man, removed the cable box at the Fleming residence on Thursday, March 13th around lunch time and appellant was present (TR. 801-802). On cross, he stated Butler grabbed and groped Fleming's breasts and she told him to stop (TR. 806).

Adonis Hartsfield, a good friend of the victim, stated he spent Tuesday night with the victim the night appellant went to jail (TR. 808-813). On cross-examination, he stated he did not kill Leslie Fleming, he was with Bay and her mother Tuesday night,

that appellant thought much more was going on, appellant was very mad, very angry and Butler didn't like him and thought appellant was mad at Bay about it (TR. 814-815). He did not see Lola Young the night of the crime (TR. 816) and he has never worn the Exhibit 8 shirt or the Exhibit 10 shoes or the shorts or underwear (TR. 816-817).

Appellant's friend Theodore Dallas picked Butler up from jail on Wednesday evening on the 13th, drove him around for a couple of hours doing errands. He claimed he knew about the relationship with Bay (TR. 818-820). On cross, he testified that he went by Bay's house but did not go inside and that Butler was obsessed with her (TR. 821-822). He was examined on how well he knew of their relationship (TR. 823-830).

Forensic specialist Rast described his efforts to find trace evidence on a vehicle (TR. 832-833). Witnesses Perkins and Miller described efforts in obtaining fingerprint and other evidence (TR. 840-856). Wilton Lee was called to testify to what was done and not done in the investigation (TR. 857-877). Willie Glasco felt appellant loved Bay and he advised Butler he needed to forget about her (TR. 878-887).

Larry Meek was at Anthony (Biscuit) Williams' house between 8:00 and 9:00 P.M. on Thursday night. Appellant and Dennis were there and he didn't know how long Butler stayed (TR. 888-889). Carl Jeter, a friend testified that he saw appellant Thursday night

between 11 and 11:20 and on cross stated that appellant wanted to show him a jeep (it was not Jeter's idea); appellant told him of the separation and that Bay was seeing Adonis (whom he called a punk). Butler was talking about Bay over and over (TR. 890-897).

Latwana "Gidget" Allen arranged to have appellant's beeper at her house so he could come by and pick it up and somebody picked it up while she was asleep (TR. 899-901).

Anthony (Biscuit) Williams testified there was a drinking party at his house after a death in the family. Appellant came over and left; Williams retired early because he was intoxicated (TR. 902-905). Earl Williams testified appellant was there but didn't remember at what time (TR. 907-908). Antonio Strappy testified Butler was with Dennis Tennell at about 11 or 11:30 (TR. 910-912).

Dennis Tennell saw appellant Thursday night at about 9:15 or 9:30, appellant left Biscuit's house before midnight (TR. 919-920). Tennell again saw Butler at 11:15 or 11:30. Tennell took the Trail and appellant took Myrtle Avenue to Butler's motel room. Tennell did not go anywhere and lay on the bed asleep dozing off while watching a basketball game (TR. 919-924). Tennell did not go "on a mission" or leave. When he arrived there appellant was there with the shower running (TR. 926). Tennell allowed appellant to borrow his sneakers (black Nike's, size 12) because Butler said his were wet (TR. 928). Tennell claimed that whenever he rolled over

and woke up appellant was not asleep but looking at him. When police approached them he kept walking because he carried a bag of cocaine (TR. 930-932).

On cross-examination Tennell stated that at the second time at Biscuit's house appellant was asking people for shoes and couldn't find any that fit so he ended up giving his shoes. State Exhibit 10 is Butler's shoes. Butler was asking for Tennell's black Nikes (TR. 933-935).

Tennell admitted he didn't know what Butler may have done when Tennell fell asleep, whether he may have gone and killed someone or returned to the scene of the crime. But appellant wanted different sneakers (TR. 938-939). They went in different directions - when Tennell started to walk down the Trail appellant was coming from over by the dumpster, off course of where he was supposed to have been going. Butler could have been coming to see if items he put there were still there. When Tennell got to the motel room Butler was wearing only a pair of boxers with the shower running. Hot water was steaming from the shower but appellant wasn't in it. Butler could have been washing something (TR. 939-941). Butler was restless, kept following Tennell and specifically requested Tennell stay with him that night. Between the first and second time he saw him Butler was gone for about two hours. Tennell saw Jeter driving a blue sports car that night (TR. 941-944, Vol. XVI, TR. 977). Later Martisha Kelly came over and Butler acted strange, pushing

her out of the door area to speak to her. Tennell asserted that Martisha Kelly and Butler were romantically involved (Vol. XVI, TR. 978-979). When stopped that morning Tennell was carrying cocaine and Butler told him to run but police caught him and he talked to them (TR. 979). Subsequently Tennell felt threatened at a basketball game when appellant's friend Oran Pelham asked why he was telling stuff on Butler (TR. 980).

Appellant's good friend Oran Pelham denied threatening Tennell or talking to him about the case. Pelham denied that Butler told Wood at the jail anything about the killing and claimed Butler answered no when asked if he killed Bay (Vol. XVI, TR. 985-988).

Jacent Blake was in a car when Martisha Kelly purchased cocaine and claimed to have seen appellant around 3 or 4 that night (TR. 989-991). On cross-examination the witness admitted Martisha Kelly was in appellant's room for 30-60 minutes and didn't know what they were talking about (TR. 995).

Martisha Kelly, appellant's cousin, testified about twice getting cocaine that night (TR. 997-1000). On cross-examination she testified that the hot steamy shower was on in appellant's motel room and nobody was in it (TR. 1003). She remembered talking to Detective Steffens and denied telling him where he could find the bloody clothes. She admitted driving with Detective Green but denied showing him where the bloody clothes would be found and denied telling Green she had knowledge of where the weapon was

possibly located. She claimed the police tried to intimidate her on Sunday, March 17th. She did not tell them about a weapon or clothes and she denied telling Steffens that she drove to the apartment and got out of the car (TR. 1003-1007). Kelly denied telling her cousin Latwanda Allen that appellant killed Bay; she did tell her she went to Bay's window but did not tell her she saw Bay (TR. 1009-1010) laying on the floor or that she saw appellant with blood on him.

Appellant testified and claimed that he loved Bay more than anything and provided for her and the kids by hustling (selling cocaine, gambling, etc.) (Vol. XVI, TR. 1015). He had heard the rumor that Bay was messing around with Adonis Hartsfield but it wasn't a problem for him since "if I don't see my woman do nothing, then it ain't nothing" (TR. 1023). Butler denied killing her (TR. 1023). He claimed Bay was the type of person to hold a grudge and although they made love Bay told Shawna to call the police. He went to jail on a misdemeanor not a felony, it was just an argument ("wasn't no drag-down, throw down fight") (TR. 1024-1025). He bonded out and Ted [Dallas] picked him up and told him "Bay locked me up" (TR. 1026). Appellant denied telling Terry Jackson he was going to kill Bay and Red (TR. 1029). He retrieved his beeper from Martisha's house (TR. 1037), did some cocaine (TR. 1042) and denied going by the dumpster (TR. 1051). Butler claimed that Dennis Tennell left "to go on a mission" for about an hour (TR. 1053) and

that Dennis took a shower upon his return (TR. 1054). He asked Dennis about his (Butler's) tennis shoes that were in evidence and Dennis replied that he was on a mission with them and didn't have them any more. Appellant took a pair of Dennis' black Nike shoes (TR. 1058-1060).

On cross-examination the prosecutor inquired about the March 11th domestic incident and Butler explained that "anytime a woman want to get you in trouble from the police to take you to jail, she will proceed to cry so the police will believe her" and that the police did believe her and arrested him but that it didn't bother him (TR. 1069). Butler admitted that when interviewed by the police he wore a small 34-36 size Fruit of the Loom shirt product and the same size shirt was found in the dumpster (TR. 1075). When he went to the police station and eventually was arrested he claimed he was wearing Dennis Tennell's shoes (TR. 1076) and acknowledged that the videotape Exhibit 22 shows him wearing his sneakers which the DNA witness testified matched Leslie Fleming's blood. He admitted the dumpster and convenience store was not too far from his motel (TR. 1077). Lashara Butler, his six year old daughter, was lying because she didn't see him and Terry Jackson's testimony was not truthful and Wood was not telling the truth in reporting his answer to the question if he had killed Bay (TR. 1079-1080). He denied acting strange to Mr. Strappy and he wasn't acting nervous or fidgety in Tennell's presence (TR. 1081). He

told police he was with Tennell from the time he went to the motel room until he left for work in the morning (TR. 1084). He denied taking a shower that night and denied turning the shower on (TR. 1087-1088).

State rebuttal witness Detective Marvin Green testified that he came into contact with Martisha Kelly on Sunday, March 16th at her residence. She said she had knowledge of the location of the murder weapon, that it was located where nobody would think to look. She said it was probably located in one of the dumpsters at the Arian store, Marshall and Garden Avenue. He contacted Steffens and he contacted Detective Lee (Vol. XVI, TR. 1094-96). The dumpster he went to he was directed to by Martisha Kelly (TR. 1100-1101).

Martisha Kelly's cousin Latwanda Allen testified that Kelly told her Butler killed Bay but didn't say how she knew. Kelly told her she passed by on the street Kings Highway but someone wouldn't let her turn up in there. Somehow she stopped, blew the horn at Bay's apartment and nobody came out. She looked around to Bay's window and saw appellant standing there, over Bay and shirt full of blood. Kelly denied being inside, claimed she saw Bay laying on the floor and appellant had blood on him (TR. 1101-1106). She reported this to Detective Lee (TR. 1106).

Sergeant James Steffens contacted Kelly on April 2nd, and aware of the statements made to Latwanda Allen, stressed to her the

importance of telling the truth and basically pleaded with her; it was evident she was holding back on crucial information (Vol. XVI, TR. 1107-1108). She started to cry and mentioned a couple of things she had not previously stated. In fact she had driven to the victim's apartment, got out of the car and went up to the apartment. She looked through the Venetian blinds, saw the apartment in disarray and thought Leslie was dead. She got in the car and left. She didn't want police to know before this because she didn't want friends to know she had any involvement in the case. After that, she shut up and wouldn't talk any more (TR. 1108-1109).

Penalty Phase:

The state presented no additional witnesses at the penalty phase portion (Vol. XVII, TR. 1251). The defense presented two witnesses, Junior Butler and Sandra Butler (TR. 1254-1272). Junior Butler, appellant's father, testified that Stella Butler (appellant's mother) was killed and that the witness was accused of the murder. Appellant was about eight years old at the time (TR. 1255-1256). The witness never had to beat on his children and he didn't want to see him executed. Appellant lived with his grandmother in Bainbridge, Georgia after the mother's death and grew up with his brothers and sisters while Junior lived in Largo (TR. 1257-1259). The grandmother died about age 65 or 70, Junior brought appellant and the other kids back to Florida (TR. 1261).

Appellant stayed with him until he left at about age 18. Appellant loved his children and would give Bay money to take care of the family. Junior loved his son (TR. 1262). Junior was acquitted of the murder of appellant's mother (TR. 1263-1264). On cross-examination the witness testified the only time appellant wasn't with his children was when he was in prison; he didn't know where appellant got his money (TR. 1266-1267).

Sandra Butler, appellant's sister, grew up without a mother and learned she had a brother at age five or six. She had to work in a field when school was out but didn't know if appellant did also (TR. 1268-1270). Appellant loves her and protected her in school. Appellant denied the killing to her but she prayed and God told her appellant committed the crime (TR. 1270-1272).

The jury recommended death by a vote of 11 to 1 (Vol XVII, TR. 1321; Vol. IV, R. 749). At the Spencer hearing on November 2, 1998, the defense called Dr. Michael Maher (Vol X, TR. 1733-1742). Dr. Maher, a psychiatrist, testified that he was asked to review the case within "relatively defined hypothetical parameters". He was told there was a first degree murder conviction and cocaine was present at or around the time of the alleged behavior. He interviewed appellant for a couple of hours but did not review extensive material on the case (TR. 1735-1736). The witness opined that when an individual is intoxicated on cocaine (a central nervous system stimulant), predictable and regular features include

perseveration, repetitive behavior, something that people with obsessive compulsive disorder do (TR. 1737). The number of stab wounds here suggests that pattern of behavior (TR. 1738). After explaining that he had only one interview with appellant and that he was not basing anything on school or social service records or other childhood records he stated that when a child grows up in a home where his mother is found dead under circumstances believed to be violent or criminal there is a risk the child will turn to violence to resolve conflicts, and depending on later life experiences will make them either more at risk or more opposed to violent activities (TR. 1739). On cross-examination the witness conceded he had not reviewed trial transcripts or depositions or police reports; that Butler maintained his innocence and only said he used a lot of cocaine. Appellant had difficulty putting it in any quantitative terms, in volume or amount of money spent for it. Appellant did not indicate he had so much cocaine he didn't know what he was doing. The witness did not have any indication appellant had an obsessive personality outside of the cocaine use. Appellant did not express an opinion that he thought his father was responsible for his mother's death. The witness did not recall asking about his brothers and sisters and didn't think it was relevant to his opinions. The witness received the facts of the case from defense counsel (TR. 1740-1742).

SUMMARY OF THE ARGUMENT

ISSUE I. The lower court did not err in permitting the prosecutor to elicit the now challenged testimony on cross-examination of defense witnesses Detective Green and Theodore Dallas since such cross-examination was appropriate to modify, supplement, rebut or make clearer the direct testimony and in witness Dallas' case to inquire as to his awareness of facts when formulating his opinions. The prosecutor did not depart from the trial court's pretrial ruling. With regard to the cross-examination of appellant, most of the now challenged examination was not preserved by objection below. The prosecutor could permissibly ask appellant if he had been advised that felony charges would be referred to the prosecutor's office since his knowledge of that fact was relevant to motive and intent and to correct the impression on direct that his argument with the victim was non-violent and that the State Attorney's Office agreed with his assessment.

ISSUE II. The lower court did not err reversibly in permitting witness Eberhardt to testify regarding DNA evidence. First, appellant did not adequately preserve below any claim that the database evidence failed to satisfy the Frye test (appellant only argued that the witness was not competent to testify about the statistical prong of the DNA evidence). Secondly, the trial court did not abuse its discretion in permitting the Eberhardt testimony because the witness was aware that the database was compiled by Dr.

Budowle of the FBI, was familiar with his peer-reviewed 1995 article and any challenges to the witness's testimony went to the weight not admissibility. Even if this court were to engage in de novo review affirmance is appropriate since the product rule has gained acceptance in the scientific community (and at worst the Court could remand for a limited evidentiary hearing). Finally, any error is harmless since none of the DNA testimony pertained to the discovery of appellant's blood at the crime scene, it pertained to the victim's DNA and the conservative estimate of the profile was not unduly prejudicial given the remainder of the evidence at trial.

ISSUE III. The lower court did not err in denying the motion for new trial. The prosecutor did not "suppress" the Lola Young probation violation report since he was not aware of it until after trial and was furnished it by the court, the defense could have discovered the report with the exercise of due diligence by examining the court records, and appellant has failed to show a reasonable probability of a different outcome had he had the report earlier.

ISSUE IV. The claim that the lower court erroneously instructed the jury that the only proposed aggravator had been established by the evidence is procedurally barred for the failure to raise objection below. The defense agreed with the instruction given and the claim is meritless since the total instructions taken in context

demonstrate that the court did not direct a finding by the jury of the aggravator.

ISSUE V. The trial court did not err reversibly. Appellant abandoned reliance on the statutory mental mitigator, F.S. 921.141(6)(f) and even if preserved the claim is meritless or amounts to harmless error since there is no supporting testimony that the use of cocaine impaired appellant's capacity. Further, appellant did not testify that his capacity was impaired that night and his testimony reflects he remembered the events about which he testified. The trial court's sentencing order dealt with the basis for this claim when discussing F.S. 921.141(6)(b) elsewhere in the sentencing order. Any error is harmless.

ISSUE VI. The death sentence imposed is proportionate. The single aggravator found here - HAC - is at the height of statutory aggravators, appellant is not entitled to invoke any alleged "domestic dispute" exception since that merely applies to rebut the CCP factor which is not present in this case, and the mitigation testimony presented was weak.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY ALLEGEDLY ALLOWING EVIDENCE OF APPELLANT'S PRIOR ACTS OF VIOLENCE.

The motion in limine hearing:

On June 23, 1990, prior to the opening statements the defense presented and argued motion in limine number one (Vol. IV, R. 657; Vol. XI, TR. 9-22). The trial court denied paragraph one of the motion (the defendant's statement he was going to kill Bay and Red)(Vol. XI, TR. 14-15). The state agreed not to mention hearsay and the court granted paragraph two relating to the victim's fear of defendant and ordered the state not to mention it in opening statement (TR. 15-16). As to paragraphs three through five the prosecutor reminded the court and defense that at a prior hearing Judge Rondolino held a hearing on the March 11 domestic battery issue and ruled it admissible to show motive and "I think we are on the same wavelength here". The court granted the motion, cautioning the state not to mention a kidnapping or sexual battery during opening statement (TR. 17-20). The prosecutor added without defense contradiction that it seemed the defense was withdrawing paragraph four (that defendant struck, touched or caused bodily harm to victim Leslie Fleming on or about March 11, 1997) and the court denied paragraph four of the motion "to the extent that it's

introduced to show motive or any other issue in the trial" (TR. 21). As to paragraph six, the prosecutor noted that hearsay statements by the decedent were hearsay (TR. 21-22).[1]

The court repeatedly stated at the hearing that if the defense had an objection at the time testimony was sought, they needed to raise it by contemporaneous objection (Vol. XI, TR. 12, 13, 14, 16, 20, 22, 26).

The motion in limine earnestly relied on here sought to prohibit "all witnesses testifying on behalf of the State of Florida" from testifying as to certain enumerated matters (Vol. IV, R. 657). There was full compliance with the ruling. Appellant now is complaining about testimony from defense witnesses (including appellant) after their direct testimony given was incomplete or misleading.

The Trial Testimony:

(1) The defense elicited on direct examination from Detective Green that when he heard on the radio of a potential homicide at 1400 Alpine Road on March 14, 1997 he asked officers to confirm the address because he had seen Butler's name on an E-mail concerning

[1]Appellee would clarify or correct a statement in Appellant's Brief at page 40. At the motion in limine hearing immediately prior to trial the answer of the prosecutor quoted in the middle of the page was to the court's question: "The state is not intending to introduce any evidence about him being arrested for sexual battery and kidnapping, are you?" (Vol. XI, TR. 19) (emphasis supplied)

a domestic violence arrest two days earlier and that when he saw appellant walking on Myrtle Avenue with Dennis Tennell, appellant voluntarily went with law enforcement but that Tennell ran (Vol. XV, R. 788-790). On cross-examination Detective Green explained that he was reviewing E-mail incident reports to see if a similar crime committed elsewhere may relate to a crime he was investigating (Vol. XV, R. 791-792). When the trial court sustained an objection, a bench conference ensued, and thereafter the prosecutor asked the witness:

> "...without going into details about what you read in the allegation, after you read that, did you take that in consideration determining Harry Butler might be a possible suspect in this case?
>
> A. Yes."
>
> (Vol. XV, R. 794-795)

The defense objected on relevancy grounds to the question:

> "Q. All right. Now, sad enough, but a true fact is, isn't it, that many times, not many times, but when a murder occurs to a woman sometimes and it's the night before, two nights before there is a domestic violence incident, you automatically —- don't you look --"
>
> (Vol. XV, R. 795)

At a bench conference the trial court opined - with the agreement by the defense - that it was a fair comment that they didn't arrest him with no facts; they only asked if he would accompany them. The court added that they should stay away from the allegations of the

nature of the previous offenses (Vol. XV, R. 796) and there were no further objections to Green's testimony (R. 797).

(2) Defense witness Theodore Dallas testified on direct that he picked up his friend the appellant from jail the evening of the 13th. As they drove around on errands for a couple of hours appellant told him why he had been in jail. Dallas indicated that he knew about the relationship between "Harry and Bay" since it started about seven years earlier (R. 818-819). But he claimed he could not recall friction between them, that appellant was "cool" and Butler did not seem any different toward the victim or express how he felt about her that day (R. 820).

On cross, the prosecutor elicited from the witness that Butler wanted to go to the victim's house as soon as he got out of jail and Dallas took him there. The witness claimed appellant was in love with and obsessed by Bay, was not mad she was leaving him and didn't think Butler was mad about Adonis Hartsfield. He reiterated that appellant and Bay in his opinion never had any problems (R. 821-822).

The witness testified that he was aware of the March 11, 1997 domestic battery incident after Dallas picked up Butler from jail. The defense objected to a question whether he was aware that on April 24, 1993 Butler was accused of pushing her down (R. 822). At a bench conference the trial court agreed with the prosecutor that

inquiry could be made as to the knowledge of the witness for his opinion and overruled the objection (R. 823-824). After a discussion on the scope of the allowed inquiry and to avoid making it a feature of the trial, the court suggested asking the witness whether he was aware of any incident wherein she was allegedly touched or struck on that date. The witness then testified that as to an incident on April 24, 1993 he had heard rumors that Leslie Fleming was touched or struck by the defendant, but that would not change his opinion they got along fine; and the witness was unaware of the allegation that appellant punched and struck the victim on June 21, 1993 (R. 825-827). The witness added that every relationship has problems, that many times appellant and Bay separated and got back together "so I stay out of their business, you know" (R. 828-829).

Legal Analysis

The cross-examination of Detective Green and Theodore Dallas:

This Court has stated and reiterated the permissible bounds of cross-examination in the following language:

> When the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts ... or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, 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.

Geralds v. State, 674 So.2d 96, 99 (Fla. 1996) quoting from Coco v. State, 62 So.2d 892, 895 (Fla. 1953). Accord, Chandler v. State, 702 So.2d 186, 195-196 (Fla. 1997):

> "[8][9][10][11] Nevertheless, Professor Ehrhardt has noted that:
> All witnesses who testify during a trial place their credibility in issue. Regardless of the subject matter of the witness' testimony, a party on cross-examination may inquire into matters that affect the truthfulness of the witness' testimony. Although cross-examination is generally limited to the scope of the direct examination, the credibility of the witness is always a proper subject of cross-examination. The credibility of a criminal defendant who ***196** takes the stand and testifies may be attacked in the same manner as any other witness.
>
> Charles W. Ehrhardt, *Florida Evidence* § 608.1 at 385 (1997 ed.)(footnotes omitted). *See also Shere v. State,* 579 So.2d 86,90 (Fla. 1991)(recognizing the general rule that the "purpose of cross examination is to elicit testimony favorable to the cross-examining party ... and to challenge the witness's credibility when appropriate"). Similarly, 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." *Geralds v. State*, 674 So2d 96, 99 (Fla. 1996)(quoting *Coco v. State*, 62 So.2d 892, 895 (Fla. 1953)); *Coxwell v. State*, 361 So.2d 148, 151 (Fla. 1978) (same)."

There was nothing improper in the cross-examination of Officer

Marvin Green. After the testimony on direct attempted to convey the impression that Butler was picked up while innocently walking the streets and his voluntary accompaniment with officers to the station suggested innocence in contrast to the fleeing companion Tennell, the prosecutor was entitled to have the witness explain that there was a legitimate basis for the officers to focus initially on Butler as a possible suspect - and appellant can hardly complain since the defense elicited on direct that the witness had seen appellant's name in the E-mail regarding a domestic incident two days earlier.

Similarly, with respect to witness Theodore Dallas, on direct examination the witness offered that he had known about the "Harry and Bay" relationship for seven years and claimed that he could not recall friction between the two (Vol. XV, R. 818-820). He thought Butler was "cool" the day he got out of jail and reiterated initially on cross his opinion that Butler and Bay "never had any problems" (R. 821-822). The prosecutor could legitimately inquire - as the trial court ruled -into the factual basis for this opinion testimony and whether he knew of, or whether it would affect his opinion, of specific incidents in which appellant struck the victim. The court properly determined that the witness could be examined as to whether he was aware of certain facts in forming his opinion. As stated in Bonifay v. State, 626 So.2d 1310, 1312 (Fla.

1993):

> [3,4] It is proper to explore the basis for a witness' opinion. *See Parker v. State*, 476 So.2d 134 (Fla. 1985). To this end, the state can rebut testimony by a defendant's witnesses to give the jury a more complete picture or to correct misperceptions. *See Hildwin v. State*, 531 So.2d 124 (Fla. 1988), *affd*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989); *Muehleman v. State*, 503 So.2d 310 (Fla.), *cert. denied*, 484 U.S. 882, 108 s.Ct. 39, 98 L.Ed.2d 170 (1987); *McCrae v. State*, 395 So.2d 1145 (Fla. 1980), *cert. denied*, 454 U.S. 1041, 102 S.Ct. 583, 70 L.Ed.2d 486 (1981).
>
> (emphasis supplied)

The witness answered the question that he had heard rumors about striking incidents on April 24, 1993 and June 21, 1993 but that it would not change his opinion they got along fine, that every relationship has problems, that many times appellant and Bay separated and got back together "so I stay out of their business" (Vol. XV, R. 825-829). The cross-examination was proper to demonstrate that the witness' testimony regarding a lack of problems between the two was not as certain and positive as the direct testimony might suggest.

Neither Detective Green nor Mr. Dallas testified about any alleged kidnapping or sexual battery, and the inquiry was in conformity with the pre-trial ruling. The prosecutor did not elicit hearsay testimony about what the victim Leslie Fleming may have told friends on March 11th.

With respect to the claim initiated on appeal that any inquiry about 1993 incidents was too remote, this claim is procedurally barred since appellant did not interpose any objection on remoteness grounds in the lower court.[2] See Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Mordenti v. State, 630 So.2d 1080 (Fla. 1994).

The testimony of appellant Butler:

Prior to cross, on his direct examination Butler claimed that he "couldn't have loved her [Bay] more. More than anything I could ever asked [sic] for" (TR. 1015). He claimed that on the Tuesday before the homicide "I talked to her and made love" (TR. 1021). Butler maintained that he didn't have a problem with Adonis Hartsfield and Bay because he never saw them together and "I'm the type of person if I don't see my woman do nothing, then it ain't nothing" (TR. 1023). When the police came and talked to Bay, he went to jail, not on a felony but a misdemeanor:

> "That mean whatever argument me and Bay had wasn't no drag down throw-down fight. It was just an argument. If it was a felony, I would have had a bond so high. In fact, the State Attorney called Bay's house."
>
> (TR. 1025)

[2]Even if it had been preserved, the remoteness issue would be meritless. See, e.g. State v. Statewright, 300 So.2d 674 (Fla. 1974)(evidence of a homosexual act committed five years earlier deemed relevant to motive and premeditation issue); Pittman v. State, 646 So.2d 167 (Fla. 1994)(prior threats against victim and her family admissible).

When he was released from the county jail, he ran from the county jail (because sometime they let you out and you got a warrant here and they come and get you)(TR. 1026). He told Ted Dallas "Bay locked me up" (TR. 1026). Butler denied telling Terry [Jackson] he was going to kill Bay and Red (TR. 1029). He claimed when he saw Bay again on Thursday they were kissing and hugging and making up (TR. 1033).

On cross-examination Butler admitted to nine or ten prior felony convictions (TR. 1066) and the prosecutor pursued the aspect of appellant's direct testimony regarding the circumstances leading to his March 11th arrest at her apartment. Appellant testified without objection by the defense denying that with respect to his lovemaking on March 11th that the victim had said no to his offer, and that he had yelled at her. He maintained that he and Bay made love twice and she did not say no, denied that when he took her for a ride in the car it was against her will, denied that she alleged to police he kidnapped her and raped her or that she was screaming during that incident. Butler explained - without objection - that when a woman wants to get you in trouble from the police to take you to jail she will cry so the police will believe her, that the police did believe her and arrested him but that it didn't bother him. Butler acknowledged - without objection - that the police first told him when he was arrested that the case was being

referred to the prosecutor's office on felony charges but that they charged him with a misdemeanor battery (TR. 1067-70).

In the twenty-four pages of cross-examination by the prosecutor (Vol. XVI, TR. 1069-1089) the defense objected on only one occasion at TR. 1070. Over defense objection the prosecutor was permitted to ask whether the police told Butler the case was being referred by the state attorney's office for sexual battery (TR. 1070) and appellant gave a lengthy response that yes they told him that but that he never raped her, didn't force her and Bay only wanted to press a domestic battery misdemeanor charge (TR. 1071-73).

Appellee disagrees with Butler's assertion that the claim was adequately preserved in a motion for new trial. The record reflects that two motions for new trial were filed, one by defense counsel Watts (Vol. IV, R. 759-760) and one by defense counsel Schwartzberg (Vol. IV, R. 762). At the hearing on motion for new trial August 7, 1998, counsel Schwartzberg represented they were proceeding on the one that he filed (Vol. X, TR. 1700). His written motion was non-specific and the oral argument did not reference this matter (Vol. X, TR. 1698-1728). Neither the Schwartzberg motion nor Watts motion specifically asserted that there was any error in the prosecutor's cross-examination of appellant Butler.

If the appellant is now complaining that the trial court erroneously admitted into evidence testimony relating to appellant's domestic battery on victim Leslie Fleming (Bay) shortly before the homicide, on March 11, 1997, appellee would respectfully submit that such a claim is procedurally barred. Following Judge Rondolino's earlier ruling that such evidence was appropriate to show motive (Vol. XI, TR. 20), at the June 23rd motion in limine hearing before Judge Quesada, trial defense counsel appeared to agree that paragraph 4 of the motion in limine was appropriately denied since the March 11, 1997 incident was appropriate to show "motive or any other issue in the trial" (Vol. XI, TR. 21). Additionally, the claim is meritless. See generally, Chandler v. State, 702 So.2d 186, 194 (Fla. 1997) (evidence of other crime relevant to show motive and intent; Jorgenson v. State, 714 So.2d 423, 427-428 (Fla. 1998) (evidence that Jorgenson was a drug dealer was relevant to defendant's motive for the murder); Heiney v. State, 447 So.2d 210, 214 (Fla. 1984); Fotopoulos v. State, 608 So.2d 784, 790 (Fla. 1992) (evidence of each offense would have been admissible at trial of the other to show common scheme and motive as well as the entire context out of which the criminal action occurred); Zack v. State, ___ So.2d ___, 25 F.L.W. S19 (Fla. 2000) (evidence of other crimes relevant demonstrating Zack's motive and intent).

If appellant's complaint is that cross-examination of Butler concerning the March 11th incident was improper, most of what he now complains of was unobjected to and thus not preserved for appellate review. The singular objection at TR. 1070 was properly denied since the prosecutor could appropriately inquire whether officer had advised Butler that the case was being referred to the State Attorney for the felonies of kidnapping and sexual battery - after Butler had left the impression on direct that there was only an argument "no drag down, throw-down fight" and that the State Attorney's office had called the house (TR. 1025). Appellant's acknowledgment that he had so been advised satisfied any requirement that the prosecutor was acting in good faith and the cross-examination was proper under the principles of Coco, supra; Geralds, supra; and Chandler, supra at 195-196. It was relevant and not unduly prejudicial for the prosecutor to make the jury cognizant of the fact that Butler was aware that officers had mentioned referencing felony matters to the State Attorney's office as pertinent to his motive and intent in killing Bay after the March 11th domestic battery incident. Cf. Walker v. State, 707 So.2d 300, 308-310 (Fla. 1997) (evidence deemed admissible concerning defendant's desire that Ms. Jones abort their child and his unhappiness about paternity/child support proceedings on the issue of motive and intent). Similarly, appellant's remoteness

contention was not preserved by objecting below. See San Martin v. State, 705 So.2d 1337, 1345 (Fla. 1997) ("we note that San Martin's intelligence level was never argued to the trial court as a basis for suppressing the statements. Thus, that issue is not available for appellate review"). Moreover, the inquiry about the 1993 incident was appropriate in light of Butler's assertion on direct that he loved the victim more than anything and he wouldn't do anything like this to her (Vol. XVI, TR. 1015).

In Stewart v. State, 620 So.2d 177 (Fla. 1998) this Court rejected a defense appellate complaint that the prosecutor had improperly cross-examined the capital murder defendant at sentencing finding that "the initial question on cross-examination was a fair response to Stewart's comment on direct that it was simply too difficult for him to testify concerning the events of his life." Id. at 179.

In the instant case the significant point is not that the prosecutor was improperly attempting to show that Butler was arrested for felonies (he wasn't, he was arrested on a misdemeanor charge) or even that the conduct would have supported a felony charge but rather that the defendant had knowledge that the matter was being referred to the prosecutor's office on possible felony charges and that knowledge was relevant to his intent in the subsequent homicidal conduct to Bay. If, in his view Bay was

complaining to police about a mere argument - and his testimony was that Bay was the type to carry a grudge - that along with his unhappiness at Bay's ending their relationship could have formed the basis to his decision to kill her. Additionally the prosecutor could permissibly correct the impression Butler was attempting to convey on direct that prosecutors agreed with his misdemeanor version ("In fact, the State Attorney called Bay's house" - TR. 1025).

Appellant's claim is without merit and should be rejected.

ISSUE II

WHETHER THE LOWER COURT ERRED IN PERMITTING WITNESS EBERHARDT TO TESTIFY REGARDING DNA EVIDENCE.

(A) The proffer and testimony of DNA witness Eberhardt:

Turning to Eberhardt's proffer and testimony, the witness stated that the database she used in the laboratory was from 1995, updated from the one used or created by Dr. Budowle (Vol. XIII, TR. 399). Her determinations were based on the 1995 article entitled "Validation and Population Studies of the Loci LDLR, GYPA, HBGG, D7S8 and GC (PM Loci) and HLA-DQ alpha Using a Multiplex Amplification and Typing Procedure" (Vol. XIII, TR. 400).[3] The witness stated that she was not aware of any articles that dispute the validity of the database and that it was published in a journal for review by expert statisticians (Vol. XIII, TR. 400-401). The FDLE in Tampa has performed validation studies in the lab before they actually use that testing in casework (Vol. XIII, TR. 401). Eberhardt stated that the PCR testing is less discriminating than the RFLP method and the results with PCR are from 1 in 100 to 1 in a couple hundred thousand as distinguished from 1 in a billion in RFLP. This product rule allowed her to multiply the frequency from each allele set that we find; thus she multiplied six numbers together because she looked at six different numbers at the DNA

[3]That article can be found at Vol. 40, Journal of Forensic Sciences, pp. 45-54 (January 1995) a copy of which Appellee is attaching herewith as Exhibit 1.

(TR. 405). On a further proffer this witness testified that Leslie Fleming's profile (LDLR-AB, GYPA-AB, HBGG-AC, D7S8-AA, GC-BB, DQA1-1.1, 1.2) had the same profile as that found on the sneaker (TR. 422) and she used the product rule, a mathematical formula multiplying the frequency of finding those types at each of the six different alleles and six different locations. The traditional product rule has been accepted in any article she's seen written published in peer review articles and journals, by geneticists, population statisticians and other experts (TR. 423-424).

Eberhardt testified in front of the jury that the left sneaker in the state Exhibit 10 size 12 Converse tennis shoe, DNA type was consistent with the DNA profile from Leslie Fleming; she could not be excluded as a possible contributor to the DNA found there but Butler could be excluded (TR. 449, 454-456). All the blood at the crime scene came from Fleming as a possible source (TR. 476). The likelihood that someone would match all the genetic markers tested is one in 3000 African-Americans, one in 112,800 Caucasians and one in 530,000 Southeastern Hispanic individuals (TR. 479). On cross-examination by the defense the witness explained that each of the allele address sites (e.g. LDLR and HBGG) is ascribed a specific number that it will occur an amount of time or percentage of time in the population and you multiply the numbers for each of those sites (TR. 498). The information posted in the article published in 1995 is put out by the FBI. Eberhardt was familiar with the

Hardy-Weinberg principle and that the 1995 test result reported that the databases are in Hardy-Weinberg equilibrium (TR. 499-500). On redirect Eberhardt reiterated that the database used was prepared by Bruce Budowle of the FBI, the samples came from recruits from California, Florida and Texas (TR. 512).[4] All of Eberhardt's results were administratively and technically reviewed by her supervisor and provided to the defense (TR. 514).

(B) Any challenge to the database pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) has not been preserved:

In the trial court the defense did not file any pretrial motion to limit the state's use of DNA testimony. In Correll v. State, 523 So.2d 562, 567 (Fla. 1988) this Court quoted from State v. Harris, 152 Ariz. 150, 730 P.2d 859 (Ct. App. 1986):

> "The defense knew well before trial that such evidence would be introduced by the state... To wait to the day of trial to make this motion appears to be an instance of trial by ambush." 152 Ariz. At 152, 730 P.2d at 861.

The Correll Court concluded:

> Thus, we hold that when scientific evidence is to be offered which is of the same type that has already been received in a substantial number of other Florida cases, any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such

[4]The Budowle study attached here as Appellee's Exhibit 1 recites that the number of individuals used in the database were 145 African Americans, 148 Caucasians, 94 Southeastern Hispanics and 96 Southwestern Hispanics, a total of 483 individuals and the article indicates that all loci meet Hardy-Weinberg expectations.

> an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed.
>
> Id. at 567

More recently, in Hadden v. State, 690 So.2d 573 (Fla. 1997) while reaffirming its allegiance to the Frye test for the admissibility of novel scientific evidence this Court wrote:

> Moreover, it is only upon proper objection that the novel scientific evidence offered is unreliable that a trial court must make this determination. Unless the party against whom the evidence is offered makes this specific objection, the trial court will not have committed error in admitting the evidence. *See Archer v. State*, 673 So. 2d 17, 21 (Fla.)(finding defendant's failure to object to a claimed error at trial provided no ruling by the trial judge upon which to base a claim of error on appeal), *cert. denied*, ___ U.S. ___, 117 S. Ct. 197, 136 L. Ed. 2d 134 (1996). For example, in *Glendening v. State*, 536 So. 2d 212 (Fla. 1988), we addressed the question of whether it was improper for an expert witness to testify to her opinion about whether the alleged victim had been sexually abused. *Glendening*, 536 So. 2d at 219-20. The defendant objected to this question. However, the objection was not on the basis that the evidence was scientifically unreliable; rather, the objection was that the question called for an opinion on the ultimate issue in the case and that the witness was not competent to make this conclusion. *Id.* at 220. As the defendant did not make a *Frye* objection, the only basis upon which the trial court could rule on this evidence was the relevancy standard for expert testimony as outlined in the evidence code. Accordingly, this was the only basis for the appellate court to rule on the evidence. *See Terry v. State*, 668 So. 2d 954, 961 (Fla. 1996) (finding that in order for an argument to be

> cognizable on appeal, as the legal ground for objection, exception, or motion below); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) (same). (footnote omitted, emphasis supplied)

690 So.2d at 580. See also Kimbrough v. State, 700 So.2d 634, 637 (Fla. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1316, 140 L.Ed.2d 479 (1998) (no abuse of discretion in allowing DNA evidence where there was no timely request for inquiry into its reliability); Robinson v. State, 610 So.2d 1288, 1291 (Fla. 1992) (no error or abuse of discretion in admitting DNA test results where defendant did not produce anything that questioned the general scientific acceptance of the testing); McDonald v. State, 743 So.2d 501, 506 (Fla. 1999) (repeating the holding of Hadden v. State, supra, that it is only upon proper objection that the novel scientific evidence is unreliable that a trial court must make this determination).

At one point in the lower court defense counsel appears to have acknowledged that he was not making a Frye challenge to the statistical analysis but only that this witness could not express an expert opinion on it:

> "MR. SCHWARTZBERG: Which would be fine if I was arguing Frye as far as the statistical analysis, but that is not what we are arguing. I haven't heard him address Murry. That's clearly what the law is, and she can't render a statistical analysis. She can't go forward. That's what Murry says."
>
> (Vol. XIII, TR. 407) (emphasis supplied)

Accordingly, any complaint about a failure to comply with the requirements of Frye has not been adequately preserved; all that is present for appellate review is a question whether the trial court abused its discretion in allowing Eberhardt to testify as an expert witness on population frequencies.

(C) The product rule:

Despite appellant's exhortation to the contrary below that the product rule had not been accepted in the scientific community (Vol. XIII, TR. 407), a review of the literature and extant decisional law demonstrates overwhelming acceptance. See e.g. State v. Copeland, 922 P.2d 1304 (Wash. 1996) (en banc)(on de novo review, court finds that the product rule is generally accepted; noting that FBI worldwide study concluded that estimate of likelihood of occurrence of DNA profile derived by current practice of employing multiplication rule and using general population databases for allele frequencies is reliable, valid and meaningful without forensically significant consequences; and that former opponent of use of the product rule Dr. Eric Lander has changed position and co-authored an article with Bruce Budowle declaring "the DNA fingerprinting wars are over", that use of the product rule in establishing statistical probabilities of a genetic profile frequency in the human population is generally accepted within the relevant scientific community and that a significant dispute no longer exists on this matter; that the Committee authoring DNA

technology concluded that a collection of 100 randomly chosen people is quite adequate for estimating allele frequencies and that the size of the database goes to weight and not admissibility under Frye); see also opinion of concurring Justice Talmadge explaining that the Frye test applies only to the evaluation of novel scientific theories themselves; differences of opinion as to how to apply such theories such as the product rule or size or representativeness of the database goes to the weight not the admissibility of the evidence. Id. at 1333-1334. See also U.S. v. Shea, 957 F.Supp. 331 (USDC, N.H. 1997)(upholding the use of the PCR typing protocols noting that "the tests used to type each of the 7 sites examined in this case were validated in a carefully constructed series of experiments and the results were later published in peer-reviewed publications". Id. at 339 and fn. 21 at 348 citing the identical article by Bruce Budowle reported in 40 Journal of Forensic Sciences 45 (1995) that expert witness Eberhardt relied on in the instant case. There the PCR database was comprised of DNA profiles for 148 Caucasians, 145 African Americans, 94 Southeastern Hispanics and 96 Southwestern Hispanics. Id. at 341.) The Shea Court continued that:

> "This study states that the distribution of the various genotypes found at the 7 loci at issue in this case meet Hardy-Weinberg expectations and exhibit little evidence of deviation from linkage equilibrium. Accordingly, it concludes that "[t]he data demonstrate that valid estimates of a multiple locus profile deficiency can be derived for

> identity testing purposes using the product rule under the assumption of independence." Id. at 53."

Id. at 341.

Since the government had produced a peer-reviewed study using accepted statistical methods to support its position that the estimation of a random match probability from the database used in the case would produce a reliable result, any further concerns affected weight rather than its admissibility. Id. at 343; Commonwealth v. Blasioli, 713 A.2d 1117, 1126 (Pa. 1998)("A majority of jurisdictions have acknowledged these developments - including the FBI study, the article by Lander and Budowle, and the 1996 NRC report - and have concluded that the controversy over the use of the product rule has been sufficiently resolved [citations omitted]"). The Court concluded at page 1127:

> "At present, however, it is clear from the scientific commentary, the clear weight of judicial authority, and the evidence in this case that the product rule has gained general acceptance across the disciplines of population genetics, human genetics and population demographics."

And see State v. Loftus, 573 N.W.2d 167, and fn. 9 (S.D. 1997)(since the early 1990's an overwhelming amount of scientific commentary and legal authority exist indicating the dispute has been resolved and the product rule method of DNA statistical evidence is now generally accepted in the relevant scientific community); State v. Freeman, 571 N.W.2d 276 (Neb. 1997)(collecting

cases, recognizing the current scientific consensus affirming use of product rule); State v. Kinder, 942 S.W.2d 313 (Mo. 1996)(en banc)(collecting cases, affirming use of DNA statistical evidence derived using product rule); Lindsey v. People, 892 P.2d 281 (Colo. 1995).

Reversal is not required by this Court's decisions in Brim v. State, 695 So.2d 268 (Fla. 1997) and Murray v. State, 692 So.2d 157 (Fla. 1997). Brim was a Frye test case. This Court reviewed the ruling of the Second District Court of Appeal that DNA population frequency statistics do not have to satisfy the Frye test.[5] This Court clarified that the DNA testing process consists of two distinct steps - the first relies upon principles of molecular biology and chemistry and the second based on principles of statistics and population genetics. Thus, "calculation techniques used in determining and reporting DNA population frequencies must also satisfy the Frye test." 695 So.2d at 270. The Brim Court added that scientific unanimity is not a precondition to a finding of general acceptance in the scientific community. Id. at 272 and acknowledged in footnote 7 that:

> 7. The "product rule" is a traditional calculation used by statisticians and

[5]In Brim v. State, 654 So.2d 184 (Fla. 2DCA 1995) the court summarized "It is appellant's position that DNA population frequency statistics did not meet the test for admission of novel scientific evidence established in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) which requires that novel scientific evidence be generally accepted in the relevant scientific community in order to be admissible." Id. at 185.

> population geneticists to calculate population frequency statistics. It is well explained in the 1992 NRC report. A more detailed explanation of the calculations performed in creating population frequency statistics is set out in the 1996 NRC report.

The Court reviewed the history including the 1992 NRC report, the criticism that use of the product rule did not adequately adjust for the possibility of population substructures, the NRC response in the creation of a ceiling principle, the subsequent disavowal of ceiling principles in the 1996 NRC report. Id. at 272-274. Brim rejected the abuse of discretion standard of appellate review in Frye rulings and announced adoption of de novo review. But since the Court felt it could not properly evaluate whether the methods used in Brim satisfied the Frye test in 1996, the Court remanded for a limited evidentiary hearing and explained that if the methods used satisfied Frye the convictions should remain in effect. Id. at 274-275.

The instant case does not present the problem present in Brim of using ceiling principles (which were either unnecessary or unreliable depending on one's viewpoint) and with the passage of time the product rule has been overwhelmingly accepted within the scientific community by statisticians and population geneticists. Copeland, supra. In the instant case there was no Frye challenge below and since the state's expert relied on an accepted method supported by peer-reviewed journals, this Court can properly

conclude that Eberhardt's testimony was admissible and that there was no abuse of discretion in the lower court's ruling.[6]

Appellee respectfully submits that in its de novo appellate review capacity this Court can conclude that the product rule has achieved acceptance in the scientific community. Additionally several courts have appropriately concluded that questions about the size of the database generally go to the weight of the evidence rather than to admissibility. Copeland, supra; State v. Marcus, 683 A.2d 221, 227, n. 7 (N.J. 1996); Lindsey v. People, 892 P.2d 281, 292-293 (Colo. 1995); United States v. Shea, 957 F.Supp. 931 (USDC N.H. 1997).

If, as in Brim the Court deems it more appropriate to remand for a limited evidentiary hearing, that would be the more suitable remedy than merely to reverse unnecessarily on a matter more easily corrected by a simple hearing.

Similarly Murray v. State, 692 So.2d 157 (Fla. 1997) serves as no impediment - there, the defendant had urged in a motion in limine to exclude scientific DNA evidence both that the PCR method of testing was not generally accepted in the scientific community and thus did not meet the Frye test for admissibility and that the probability calculations used by the state expert to report the

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[6]Cf. State v. Colbert, 896 P.2d 1089 (Kan. 1995)(in view of the general acceptance of the basic techniques underlying the analysis used by the FBI were widely accepted, the estimate of the match probability was admissible despite an expert's concessions that he was not a population geneticist and was not qualified to explain how the databases applied to the town of Coffeyville, Kansas).

frequency of a match also failed to meet Frye. This Court found multiple errors in the acceptance of state expert Nippes' testimony. The witness repeatedly avoided answering questions as to the procedures used in conducting the tests at issue, he affirmatively misled the trial court as to the NRC acceptance of PCR DNA methodology at the time of the hearing, and his testimony was unenlightening as to the probability calculations he used to report that Murray's DNA matched the sample recovered from the crime scene ("91.8 percent of the population would be anticipated to have different DNA types") Id. at 163-164. The expert Eberhardt in the instant case did not suffer all the deficiencies exhibited by Nippes in the Murray case. The biological credentials and testimony were impeccable. And while she did not participate in the creation of the database as the Murray Court stated:

> "We are not ruling that the expert in this case could only testify if he helped to assemble the database. We are finding, though, that this expert must, at the very least, demonstrate a sufficient knowledge of the database grounded in the study of authoritative sources."

Id. at 164.

While Eberhardt did not participate in the creation of the database, she was familiar with the leading authority Budowle, spoke generally about the database. As noted in Murray it is not required that the testifying expert be the one to assemble the database.

(D) Any error is harmless:

Finally even if the lower court committed error, it would be harmless beyond a reasonable doubt. The instant case is unlike Murray, supra, in the prejudicial impact of the evidence to the jury. There, the evidence was particularly damaging because Murray's DNA matched only one of five hairs recovered from the crime scene and he was eliminated as the donor of all the other seminal and blood stains found at the crime scene. 692 So.2d at 160. In the instant case the evidence presented below did not pertain to Butler's DNA found at the crime scene but rather the victim's DNA profile was consistent with the blood found on the tennis shoes in the dumpster near appellant's motel residence. All the DNA found at the crime scene belonged to the victim. Concerning Butler's statistical profile Eberhardt testified on cross-examination:

> "A. I haven't done any stats on his profile. I can't tell you anything on that.
> Q. The reason you haven't done any statistics on his profile is because none of the blood samples that you have tested gave you any indication that Harry Lee Butler could have been a potential contributor of any of these bodily fluids and subsequent DNA evaluation?
> A. That's correct."
>
> (Vol. XIII, TR. 503-504)

Earlier on direct examination the witness explained that Butler was excluded as the source from all the samples tested from the residence-crime scene (TR. 472, see also TR. 505). Victim

Leslie Fleming was the possible source of the DNA found in all the blood at the victim's residence and "I found no other profiles other than the profile consistent with Leslie Fleming in any of the items that I was submitted to test from her residence" (TR. 476, 514). On cross she added that of the approximate one hundred items tested Butler was excluded as the source (TR. 480). And in response to a hypothetical example posed by the defense Eberhardt explained the one in 3000 figure as meaning if there were 27,000 African-Americans at a baseball game in Tropicana Field, there is a possibility of nine people having a similar DNA type profile as victim Fleming (TR. 502, 512).

Butler argues that without the Eberhardt testimony, the state cannot establish whose blood was on the sneaker found in the dumpster and that the state's case hinges on the reliability of Lashara Butler. But the state's evidence included the testimony of Lakisha "Red" Miller that appellant was mad and upset about the breakup with the victim (Vol. XII, TR. 177-178), that of coworker Terry Jackson who testified that following appellant's release from jail on the evening of March 12, Butler said he was going to kill Bay (TR. 184-185). Additionally, Officer Ballard testified that Lashara Butler volunteered while being transported to the police station following discovery of the murder victim that "My daddy hurt mommy. I heard him yelling at her" (Vol. XII, TR. 262-263) and Lashara testified that she saw appellant's face when he picked

her up in the mother's bedroom and took her to her room, then was awakened by her mother's scream and saw Butler's leg (he was wearing short pants) (Vol. XII, TR. 228-233). The suggestion that Lashara was influenced by her grandmother Vivian Harris is belied by the fact that Harris testified she had no contact with Lashara from the time the body was discovered to the time the police transported and interviewed the child (Vol. XIII, TR. 547). Finally, in the early morning hours Lola Young saw and heard appellant Butler at a dumpster, near the victim's residence. Additionally appellant was connected to the clothing and shoes in the dumpster by Martisha Kelly's providing information to look in the dumpster (Vol. XII, TR. 333) and the discovery of the material there (TR. 330-351). Indeed, appellant admitted the bloody sneaker was his (Vol. XVI, TR. 1058-1059).

In light of the conservative statistic cited by Eberhardt, any error in permitting her testimony on that point is harmless beyond a reasonable doubt given the remainder of the evidence. State v. Diguilio, 491 So.2d 1129 (Fla. 1986).

ISSUE III

WHETHER THE LOWER COURT ERRED IN DENYING A MOTION FOR NEW TRIAL FOLLOWING THE DEFENSE DISCOVERY OF AN UNDISCLOSED PROBATION VIOLATION REPORT.

On July 10, 1998 appellant filed a motion to compel a probation violation report regarding Lola Young (Vol. IV, R. 761). On July 9, 1998 appellant filed a motion for new trial claiming exculpatory and/or substantial impeachment evidence had been withheld (Vol. IV, R. 762). At the hearing on motion for new trial conducted August 7, 1998, appellant argued that Lola Young was arrested after her deposition was taken and that the State did not notify the defense of the arrest. The prosecutor had indicated she was arrested for violation of probation on drug offenses when Young appeared in prison orange garb to testify at trial (Vol. X, TR. 1702). After the verdict the defense received a phone call from the Public Defender's office asking if they had received a violation report dated May 15 concerning Lola Young; they had responded they had not and subsequently the defense filed the motion to compel. The defense argued that the violation report indicated Young had a history of cocaine use and cocaine induced psychosis including tactile and visual hallucinations. The defense argued her most recent drug treatment experience had been plagued with falsehoods and deviations from approved travel plans (TR. 1704-1705).

In response the prosecutor stated that the first time he learned about that violation was after the trial when the assistant public defender assigned to Lola Young called him and said he brought that to the attention of Mr. Dillinger (the Public Defender) and the first time the prosecutor saw it was when the Court sent him a copy. He argued that it would be relevant if she were having psychotic episodes either at the time of testifying or at the time of witnessing the event and there's nothing to indicate that's what happened. Moreover, Young gave various statements, a taped statement to police right after the murder on March 14th (which the defense had), a sworn statement to the prosecutor on March 19th and her December 12, 1997 deposition - all of which were consistent with each other and with the trial testimony. Her condition right before her arrest wasn't relevant. The prosecutor couldn't answer when he was first aware of her probation but the defense deposition of Lola Young revealed that she had six or seven convictions, was on probation and in drug treatment (Vol. X, TR. 1719-1722; Vol. VII, R. 1096-1097). The Court denied the motion for new trial (R. 1724).

The record also reflects that when Lola Young was called to testify at trial in late June of 1998 a colloquy ensued. She had been served with a subpoena in the county jail where she was being held on a violation of probation charge and after she conferred with Assistant Public Defender Gary Welsh she agreed to testify in

open court (Vol. XIV, TR. 641-655) (As noted above, defense counsel mentioned at the motion for new trial hearing she was dressed in orange prison clothing). She admitted that she was in jail for violation of house arrest on a drug charge (TR. 657) and on cross-examination was interrogated concerning her multiple felony convictions (TR. 667).

Appellant contends that the State's failure to furnish to the defense Lola Young's May 15, 1998 violation of probation report constituted a violation of Brady v. Maryland, 373 U.S. 23, 10 L.Ed.2d 215 (1963) and it progeny. He contends that this impeachment evidence was favorable to the defense and that prejudice resulted from its non-disclosure. Butler asserts that this is so because Young was the single adult witness who observed him at or within the immediate vicinity of the victim's residence the night of the murder and that the report's assertion of her cocaine history would have severely questioned her ability to identify Butler on the night of the murder and might have led to further exculpatory evidence.

In State v. Reichmann, ___ So.2d ___, 25 Florida Law Weekly S163, 169 (Fla. 2000) this Court restated the requirements to be considered in considering claims for relief under Brady v. Maryland, 373 U.S. 87, 10 L.Ed.2d 215 (1963) and its progeny:

> Recently, the United States Supreme Court announced three components that a defendant must show to assert a *Brady* violation successfully:

> The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.
>
> *Strickler v. Greene*, 119 S.Ct. 1936, 1948 (1999). This prejudice is measured by determining "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at 1952 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). In applying these elements, the evidence must be considered in the context of the entire record. *See Haliburton v. Singletary*, 691 So. 2d 466, 470 (Fla. 1997) (quoting *Cruse v. State*, 588 So. 2d 983, 987 (Fla. 1991)).

See also Melendez v. State, 718 So.2d 746, 748 (Fla. 1998) (defendant must prove government possessed favorable evidence, that defendant did not possess evidence nor could he obtain it himself with any reasonable diligence, that prosecution suppressed favorable evidence, and that had the evidence been disclosed a reasonable probability exists that the outcome of the proceeding would have been different); Jones v. State, 709 So.2d 512, 519 (Fla. 1998) (same); Robinson v. State, 707 So.2d 688, 693 (Fla. 1998) (same); Buenoano v. State, 708 So.2d 941, 948 (Fla. 1998) (same); Spivey v. Head, ___ F.3d ___, ___ F.L.W. Fed ___ (11th Cir. Case No. 98-8288, opinion filed March 28, 2000) (To establish a Brady violation, defendant must prove (1) government possessed evidence favorable to defense, (2) that defendant did not possess

evidence and could not obtain it with any reasonable diligence, (3) that prosecution suppressed evidence and (4) that reasonable probability exists that the outcome of the proceeding would have been different had evidence been disclosed to the defense. Defense claim failed since evidence could have been obtained with reasonable diligence and no reasonable probability existed of a different outcome.)

Appellant cannot prevail for several reasons. First of all, the prosecutor did not suppress the Lola Young violation of probation report; the prosecutor explained below that he first learned about the violation well after the trial and the first time he saw the report was when the court sent it to him (Vol. X, TR. 1719).

Moreover, since appellant had taken the Lola Young deposition in December of 1997 wherein she had admitted drug convictions and being on probation and in drug treatment (Vol. VII, R. 1096-1097) and since she appeared at trial in jail garb and testified she was in jail on a violation of probation (Vol. XIV, TR. 647) the defense could just as easily have obtained the probation violation report in the court file as could the prosecutor. See Roberts v. State, 568 So.2d 1255, 1260 (Fla. 1990) (there is no Brady violation where alleged exculpatory evidence is equally accessible to the defense and the prosecution); Jones, supra at 519; Robinson, supra at 693 ("it appears that Robinson either had or could have easily obtained

this deposition, thus not satisfying the second prong; it does not appear that the prosecution 'suppressed' the evidence"); Provenzano v. State, 616 So.2d 428, 430 (Fla. 1993) (no Brady violation where information could have been obtained through exercise of reasonable diligence); Porter v. State, 653 So.2d 374 (Fla. 1995) (information in court file could have been discovered with due diligence); Bryan v. State, ___ So.2d ___, 24 F.L.W. S516, 518 (Fla. 1999) (rejecting Brady claim because existence of tape was known by defense counsel at the time of trial); Sims v. State, ___ So.2d ___, 24 F.L.W. S519 (Fla. 1999) (rejecting Brady claim pertaining to State's failure to provide information contained in a Gainesville report undermined confidence in the outcome of the proceedings where record showed defense counsel's acknowledgment of awareness of Halsell's criminal involvement with Gayle in other robberies and burglaries). In Jones, supra, this Court observed that while it agreed with the general proposition that evidence suppressed by the police can constitute a Brady violation there was no indication in that case that Officer Smith's testimony was withheld by police. The statements were not part of any documents or report in the possession of the police and there was no indication that he revealed the information to any investigator in the case. 709 So.2d at 520. Similarly in the instant case, the prosecutor did not become aware of the probation violation report until after the trial when furnished it by the court.

Appellant is not aided by State v. Gunsby, 670 So.2d 920 (Fla. 1996). As to the Brady violation - the State's non-disclosure of the criminal records of two key witnesses - this Court noted that if that were the only guilt phase issue having merit "we would be inclined to agree that the trial judge correctly decided this 'close call'". Id. at 923. But the combination with the ineffective assistance of counsel and the newly discovered testimony of four witnesses at a Rule 3.850 evidentiary hearing concerning the fact that it was a drug-related murder rather than a legitimate family run business undermined confidence in the result.

Secondly, the evidence would not have been admissible. In Edwards v. State, 548 So.2d 656, 658 (Fla. 1989) this Court held that introduction of evidence of drug use for the purpose of impeachment was limited:

> We find that the view expressed by this Court in *Eldridge* and *Nelson* should continue to prevail. This view excludes the introduction of evidence of drug use for the purpose of impeachment unless: (a) it can be shown that the witness had been using drugs at or about the time of the incident which is the subject of the witness's testimony; (b) it can be shown that the witness is using drugs at or about the time of the testimony itself; or (c) it is expressly shown by other relevant evidence that the prior drug use affects the witness's ability to observe, remember, and recount.

The violation of probation report was not relevant since it did not

reflect that the witness was having any psychotic episodes either at the time of testifying or witnessing the event about which she was testifying; and in her multiple statements to the police right after the murder on March 14th, the sworn statement to the prosecutor on March 19th, her December 12, 1997 deposition were consistent with each other and the trial testimony according to the prosecutor (TR. 1719-1722). Thus, the report could not be used under Edwards for impeachment. See also Woods v. State, 733 So.2d 980,988 (Fla. 1999) (citing case law and Rule 3.600, Florida Rules of Criminal Procedure that a new trial will not be awarded on the basis of newly discovered evidence unless the evidence goes to the merits of the cause and not merely to impeach a witness who testified). The lower court did not abuse it discretion.

In White v. State, 729 So.2d 909 (Fla. 1999) the Court determined that the trial court's order correctly ruled that the State's failure to provide information which would have been used to impeach a witness did not require relief because of the failure to demonstrate the materiality requirement of a reasonable probability that the outcome of the trial would have been different. Id. at 912-913. The same is true here.

Appellant argues that Young was the single adult witness to observe appellant at or within the immediate vicinity of the victim's residence around the time of the murder. She testified at trial that in the early morning hours of March 14th she saw a person

standing near the hedges in a squat or bent over position whom she recognized both visually and by voice as Harry Butler (Vol. XIV, TR. 659-662). She knew him as they had grown up in the same neighborhood (TR. 658) and there was "a big bright light, a big corner streetlight above my dumpster. I wouldn't have went there if there wasn't a light" (TR. 661). Appellant alludes to Detective Lee's testimony but the full testimony recited:

> "Q. What are the lighting conditions there?
>
> A. Lighting condition is not too bad, but not the best in the world. But on the corner of the building on the street you may see right there is a pole that's a light, and there's also further down the front of the building there is another light on the building itself, and on the corner of the street is a light that is just 25, 50 feet. The lighting wasn't too bad. You could see outside.
>
> Q. From where you were standing, were you able to see your wife?
>
> A. From where I was standing I could see my wife. I could see her face and glasses. In fact, I engaged in conversation with her. From that distance, I could hear her and she could hear me."
>
> (TR. 693-694)

Even defense witness investigator Ley admitted there was no problem seeing the bushes from the dumpster (Vol. XV, TR. 781-782).[7] While Young may be the only adult placing appellant at the scene of the

[7]While defense witness Ley described the distance as 147 feet from the furthest part of the dumpster to the furthest part of the bushes (Vol. XV, TR. 774), state witness Detective Lee approximated the distance at about eighty feet (Vol. XIV, TR. 693-695) but it could be farther (TR. 713).

victim's residence, that does not detract from Lashara Butler's testimony that appellant "hurt mommy". And appellant in his testimony admitted that the white and blue tennis shoes in evidence were his shoes (Vol. XVI, TR. 1058-1059). He reiterated on cross-examination that the sneakers with the blood matching Leslie Fleming's DNA were his (TR. 1077).

Thus, even if the Court were to hold that the prosecutor should have had the Young probation violation report and should have furnished it to the defense, there is no reasonable probability of a different outcome for the failure to do so, when considering the entire evidence in the case.[8]

[8]For the convenience of the Court, appellee is attaching as Exhibit II to this brief a copy of the May 15 Lola Young probation violation report which apparently was not included in the record on appeal. Undersigned counsel has spoken to counsel for appellant, Kevin Briggs who stated he has no objection to this.

ISSUE IV

WHETHER THE LOWER COURT ERRONEOUSLY INSTRUCTED THE JURY THAT THE ONLY PROPOSED AGGRAVATOR HAD BEEN ESTABLISHED BY THE EVIDENCE.

(A) The instant claim is procedurally barred:

The record reflects that no contemporaneous or even non-contemporaneous objection was presented on this issue in the lower court. After the jury returned a guilty verdict, the court and counsel discussed penalty phase jury instructions. The court indicated that it would have the jury instruction conversation on the following day (TR. 1235). On June 27, 1998, the defense announced it would have no objection to the court's preliminary instruction to the jury prior to opening statements and evidence (TR. 1239).[9]

The defense then announced a twofold objection, that the HAC circumstance failed to adequately inform the jury what they must find (that it was vague on its face) and secondly that the factor did not apply on the evidence (TR. 1241-1243). The prosecutor announced no objection to the defense requested instruction relating to the inapplicability if the victim were unconscious or dead (TR. 1244) and such an amended instruction was given to the

[9]In the preliminary instruction the court informed the jury in pertinent part that the evidence "is presented in order that you might determine first whether sufficient aggravating circumstances exist that would justify the imposition of a death penalty" and "second whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any." (emphasis supplied)(Vol. XVII, TR. 1247).

jury (TR. 1315).

After the presentation of penalty phase evidence, the court and counsel again discussed instructions and this colloquy ensued in discussing the location of the amended HAC instruction:

> THE COURT: I will put it in with a separate paragraph and I will modify that instruction that the aggravating circumstance period. Aggravating circumstance that can be considered is limited to the following that are the following. I think I'm going to leave that is the following established by the evidence or that is established by the evidence.
>
> MR. SCHWARTZBERG: If you are going to make it singular.
>
> THE COURT: So I will put a comma in there by the following that is established by the evidence the crime for which -- and was conscious. It reads standing alone with an -- insert special instruction at that point.
>
> MR. SCHWARTZBERG: Pardon me, Judge?
>
> THE COURT: I inserted it right after that just before if you find the aggravating circumstances.
>
> MR. SCHWARTZBERG: That's fine, Judge.
>
> (emphasis supplied)(Vol. XVII, TR. 1281-1282)

The defense requested and received a copy of the instructions prior to the jury being instructed (Vol. XVII, R. 1292). Following arguments and reading of instructions to the jury, the defense declined the court's invitation to be heard prior to the court's giving a written copy of the instructions (TR. 1318-1319).

In the subsequently filed motion for new trial appellant did not complain about the issue he now asserts (Vol. IV, R. 759-760).

No complaint was lodged or objection raised at the Motion for New Trial Hearing on August 7, 1998 (Vol. X, R. 1698-1728) or at the Spencer hearing on November 2, 1998 (Vol. X, R. 1730-1746).

Regretfully, the failure to object contemporaneously below in order to preserve the point for appellate review precludes consideration *ab initio* now. *See generally* Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Mordenti v. State, 630 So.2d 1080 (Fla. 1994); San Martin v. State, 705 So.2d 1337, 1345 (Fla. 1997) ("we note that San Martin's intelligence level was never argued to the trial court as a basis for suppressing the statements. Thus, that issue is not available for appellate review."); Hazen v. State, 700 So.2d 1207, 1211 (Fla. 1997)(issue regarding admissibility of witness' statements about Hazen staring during a pre-trial hearing procedurally barred for lack of a contemporaneous objection, although asserted in motion in limine prior to witness' testimony); Lindsey v. State, 636 So.2d 1327, 1328 (Fla. 1994) (When the sister testified some three witnesses after the proffer of Williams Rule evidence, Lindsey did not object specifically to her testimony about the car accident and claim was procedurally barred. Because Lindsey failed to object to the testimony when given and on the ground now argued, he failed to preserve this issue for review.); Correll v. State, 523 So.2d 562, 566 (Fla. 1988)(challenge to introduction of similar fact evidence "is not properly before this Court because of defense counsel's

failure to object to the testimony at trial. Even when a prior motion in limine has been denied, the failure to object at the time collateral crime evidence is introduced waives the issue for appellate review.")(emphasis supplied); Lawrence v. State, 614 So.2d 1092, 1094 (Fla. 1993) (same); Norton v. State, 709 So.2d 87 (Fla. 1997) (appellant's motion for mistrial at the close of the witness' testimony insufficient to preserve issue for appellate review); Pomeranz v. State, 703 So.2d 465, 470 (Fla. 1997) (failure to object to collateral crime evidence when it is introduced violates contemporaneous objection rule and waives the issue for appellate review); Hardwick v. Dugger, 648 So.2d 100 (Fla. 1994) (failure to object at time collateral crimes evidence is introduced waives issue for appellate review, even where prior motion in limine relating to that evidence has been denied); Feller v. State, 637 So.2d 911 (Fla. 1994); Harmon v. State, 527 So.2d 182 (Fla. 1988); Perez v. State, 717 So.2d 605 (Fla. 3DCA 1998) (opinion granting rehearing holding that following the Criminal Reform Act of 1996 the appellant's failure to preserve the Williams-Rule claim by contemporaneous objection precluded reversal on appeal); Chandler v. State, 702 So.2d 186, 195 (Fla. 1997) (failure to renew objection contemporaneously at the time of the testimony precludes review); Zack v. State, ___ So.2d, ___, 25 Fla. L. Weekly S19 (Fla. 1999). *See also* Goodwin v. State, ___ So.2d ___, 24 Fla. L. Weekly S583, 585 (Fla. 1999):

> Our appellate cases are filled with examples of errors that are unpreserved either because no objection was made[6] or because the objection was not specific.[7] If the error is "invited,"[8] or the defendant "opens the door" to the error, the appellate court will not consider the error a basis for reversal.[9] In addition, if it is alleged that evidence has been improperly excluded and the appellate record does not establish that a proffer has been made, the lack of an adequate record will be grounds to affirm.[10] Indeed, our case law is filled with procedural pitfalls that may preclude an error from being considered on appeal. (footnotes omitted)

See also Rhodes v. State, 638 So.2d 920, 926 (Fla. 1994) (defendant waived objection to erroneous instruction by defense counsel's failure to object to curative procedure).[10]

(B) <u>The instant claim is also meritless</u>:

Appellant's attempt to create confusion in a given instruction which went unnoticed by all parties below (not only did the defense agree to the court's instruction but also the jury had no inquiries after being instructed) must fail. The trial court neither directed the jury to find the proposed aggravator nor uttered an impermissible judicial comment on the evidence. In the preliminary instruction the court had explained:

> "You are instructed that this evidence when considered with the evidence you have already

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[10]While appellant now criticizes the Standard Jury Instruction (and by implication those responsible for it) for not anticipating the employment of a single aggravator, his failure to object below to any perceived unfairness and his acceptance and acquiescence to the court's actions - when he did object and urge error on other grounds - precludes initiation of review now to this appellate afterthought.

heard is presented in order that you might determine just whether sufficient aggravating circumstances exist that would justify the imposition of a death penalty, and second whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any."

(emphasis supplied)(Vol. XVII, TR. 1247)

In the final instructions the court explained:

"... it is your duty to follow the laws that will now be given to you by the court and to render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist

* * * *

The aggravating circumstance that you may consider is limited to the following that is established by the evidence: The crime for which the Defendant is to be sentenced was especially heinous, atrocious, or cruel. ...

(Vol. XVII, TR. 1314)

* * * *

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. ...

(emphasis supplied)(Vol. XVII, R. 1314-1315)

* * * *

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating

> circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.
>
> (emphasis supplied)(Vol. XVII, TR. 1316)

(See also Vol. IV, R. 746-748).

In context it is abundantly clear that the court was instructing the jury that they were required to determine whether an aggravating circumstance was established beyond a reasonable doubt, whether the aggravating justified the imposition of a sentence of death and that if they found sufficient aggravation they must then determine whether there were mitigating circumstances and weigh against the aggravating. The total context of the instruction reveals that the word "is" used at p. 1314 has the same meaning as "if you find to be established by the evidence".

This court has held that jury instruction challenges must be considered and resolved by examining the totality of the instructions in context, and not in isolation in a vacuum. See, Johnson v. State, 252 So.2d 361 (Fla. 1971); see also U.S. v. Adams, 74 F.3d 1093 (11 Cir. 1996); Antone v. Strickland, 706 F.2d 1534 (11 Cir. 1983); U.S. v. Starks, 157 F.3d 833 (11 Cir. 1998).

Appellant's claim is both barred and meritless; relief must be denied.

ISSUE V

WHETHER THE TRIAL COURT ERRED REVERSIBLY BY ALLEGEDLY FAILING TO CONSIDER A STATUTORY MITIGATING CIRCUMSTANCE.

Appellant next contends that the lower court erred in failing to consider a proposed statutory mental mitigator, that Butler's capacity to appreciate the criminality of his conduct or conform to the requirements of law was substantially impaired, Florida Statute 921.141(6)(f).

(A.) The instant claim has been abandoned:

The record reflects that appellant abandoned reliance on this mitigator. While it is true that the court provided an instruction to the jury on it (Vol. XVII, R. 1316), thereafter when the defense team submitted its post-jury recommendation memorandum in support of life sentence they chose to rely on only the statutory mental mitigator of "under the influence of extreme mental or emotional disturbance" (Vol. V, R. 775-776) and seven non-statutory mitigators (raised without natural mother, troubled childhood, hard worker, loving and good father, loving and good son, well thought of by friends, neighbors and co-workers, and long term substance abuse problem)(Vol. V, R. 776-781).[11]

At the motion for new trial on August 7, 1999 the defense only complained with regard to the penalty phase that the court in the instruction had not itemized the non-statutory background matters

[11]Appellant was represented by three attorneys - Michael Schwartzberg, Richard Watts and Anne Borghetti.

(Vol. X, R. 1725).[12]

At the Spencer hearing conducted November 2, 1998, the defense elicited the testimony of Dr. Michael Maher concerning the effects of cocaine (Vol. X, R. 1730).

The record further reflects that the lower court had granted the defendant's motion for confidential expert prior to trial in February of 1998 (Vol. II, R. 373-374). A list containing the name of Dr. Alfred Fireman appears on a list of witness subpoenas for trial (Vol. IV, R. 662) and according to the state's sentencing memorandum the appellant was examined by Dr. Alfred Fireman before trial but Fireman did not testify during the guilt or penalty phases (Vol. V, R. 788).

It would seem that the defense chose to rely merely on appellant's illegal cocaine use on the night of the crime in support of a non-statutory mitigating factor since no mental health expert testimony was forthcoming in support of Florida Statute 921.141(6)(f) (capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired). This is understandable not only because of the absence of supporting expert testimony on the issue of impaired capacity to appreciate criminality or to conform to the law's requirements but also in

[12]Defense counsel Watts urged "Each one of the seven mitigating circumstances that we could come up with were, quote, non-statutory" (Vol. X, R. 1725).

light of the testimony by appellant and others negating any such impairment.

Appellant did submit the testimony of Dr. Maher at the Spencer hearing but as he stated his involvement was within "relatively defined hypothetical parameters". He had only one interview with Butler and did not review the extensive material on the case (he was not basing anything on school, social records or other childhood records). He merely opined that when an individual is intoxicated on cocaine, regular features that may be present include repetitive behavior (perseveration) and the number of stab wounds suggest that pattern of behavior. The witness had not reviewed trial transcripts, or depositions or police reports. Butler maintained his innocence, only said he'd taken a lot of cocaine but didn't quantify the use. Appellant did not indicate he had so much cocaine he didn't know what he was doing and Maher had no indication that he had an obsessive personality disorder (Vol. X, R. 1733-1742).

(B) If preserved the instant claim is meritless or amounts to harmless error:

While there was some testimony presented relating to appellant's ingestion of cocaine that night there was no evidence presented concerning the statutory mental mitigator that the ability to appreciate the criminality of his conduct or to conform to the requirement of law was substantially impaired. This court

has previously ruled that the mere ingestion of alcohol or drugs does not demonstrate the presence of this mitigator. See, e.g. Geralds v. State, 674 So.2d 96, 101 (Fla. 1996) (held defendant was not entitled to instruction on statutory mitigator of extreme mental or emotional disturbance because he presented no evidence that this capital felony was committed while under the influence of extreme mental or emotional disturbance, although he had bipolar manic disorder and mental health expert did not comment on his actual or probable mental condition at time of murder); Cooper v. State, 492 So.2d 1059, 1062 (Fla. 1986)(rejecting defense contention that trial court erred by rejecting as an instruction and not considering as a mitigating circumstance evidence that the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; evidence of some use of alcohol and marijuana without more does not require instruction and no error in rejecting mitigator when defendant able to give detailed account of crime); Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986)(rejecting defense argument that trial court erred in not finding impaired capacity mental mitigator; although appellant and his mother testified as to abuse of alcohol and drugs, the specificity with which Kokal recounted the details of the robbery and murder contradicts the notion that he did not know what he was doing).

Here, in addition to the absence of expert testimony to the

jury - although apparently Dr. Fireman examined Butler - the proffered testimony of Dr. Maher at the Spencer hearing was confined to narrow parameters, focused on the effects of cocaine (which the trial court addressed elsewhere in the sentencing order (Vol. V, R. 832-833) and he did not offer an opinion on impaired capacity and Maher conceded that Butler did not indicate he had so much cocaine he didn't know what he was doing (Vol. X, R. 1741). Finally, appellant's testimony denying the crime reports in detail his activities that night (Vol. XVI, R. 1013-1089) and he did not claim impaired capacity.

Appellant is not aided by cases such as Jackson v. State, 704 So.2d 500 (Fla. 1997) and Bryant v. State, 601 So.2d 529 (Fla. 1992). This court found error in the Jackson trial court treatment refusing to find mitigation when three experts all opined as to the presence of statutory mitigators and the court's order did not refer to any contrary evidence. Id. at 506-507.

In Bryant the trial court refused to instruct the jury on the extreme mental or emotional disturbance mitigator when it was clear that defendant presented sufficient evidence of emotional problems resulting from retardation and physical disability. Id. at 532-533. Here, in contrast, the trial court provided the benefit of an impaired capacity instruction although unsupported by sufficient evidence and correctly dealt with the asserted cocaine use as a non-statutory mitigator as the defense team ultimately concluded

was the proper approach.

Furthermore, the trial court dealt with the basis for this claim when discussing Florida Statute 921.141(6)(b), the extreme mental or emotional disturbance mitigator (Vol. V, R. 832-833):

> "The defendant states that he was under the influence of extreme mental or emotional disturbance when the crime was committed. Florida Statute 921.141(6)(b). He argues that he presented the court with his own testimony and the testimony of friends and relatives "to the effect" that he was under extreme emotional disturbance. He does not cite or quote any testimony.
>
> The Court is not reasonably convinced--the test for a mitigating factor--that this factor exists. The defendant, when testifying, did not offer any such evidence. Several of his friends testified to events of that evening, and pictured the defendant as engaged in a cocaine party at a motel. But there was no description of the defendant presented which could meet the standard of extreme emotional disturbance. The defendant testified that he ingested cocaine during the evening, but never stated that he was impaired. Based upon the totality of the facts, the Court finds that this factor does not exist."

And the trial court's sentencing order reflects in the non-statutory mitigator section that Butler's asserted long-term substance abuse problem may exist but was entitled only to "slight weight" (Vol. V, R. 835).

But even if the lower court erred, it was harmless. The evidence showed Butler's actions to be purposeful (hiding sneakers and clothing spattered with victim's blood in a dumpster near the

residence to cover up his involvement and his efforts to keep within view of witnesses after the murder to establish an alibi). Even if the trial court had mentioned this factor as now urged, the result would not have been different. See Cook v. State, 581 So.2d 141, 144 (Fla. 1991); Thomas v. State, 693 So.2d 951, 953 (Fla. 1997) (failure to mention minor mitigation harmless); Wickham v. State, 593 So.2d 191 (Fla. 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) (any error in articulating particular mitigating circumstances was harmless); Peterka v. State, 640 So.2d 59, 70 (Fla. 1994) (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) (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 testimony about use of alcohol and drugs because court's reference to rehabilitation capacity encompassed prison record and Krop findings).

In summary, it would appear that appellant abandoned the

impaired capacity mitigator; there was insufficient evidence to support such a finding; the trial court considered the appellant's alleged cocaine intoxication elsewhere in the sentencing order and any omission in the order constitutes harmless error, if error at all.

ISSUE VI

WHETHER THE SENTENCE OF DEATH IMPOSED IS PROPORTIONATE.

This Court recently stated in Robinson v. State, ___ So.2d ___, 24 Fla. L. Weekly S393 (Fla. 1999):

> Upon review, we find that death is the appropriate penalty in this case. In reaching this conclusion, we are mindful that this Court must consider the particular circumstances of the instant case in comparison with other capital cases and then decide if death is the appropriate penalty. *See Sliney v. State*, 699 So. 2d 662, 672 (Fla. 1997) (citing *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996), *cert. denied*, 118 S. Ct. 1079 (1998)); *Livingston v. State*, 565 So. 2d 1288, 1292 (Fla. 1988). Proportionality review is not simply a comparison between the number of aggravating and mitigating circumstances. *Terry*, 668 So. 2d at 965. Following these established principles, it appears the death sentence imposed here is not a disproportionate penalty compared to other cases.[9] (footnote omitted) *See Spencer v. State*, 691 So. 2d 1062 (Fla. 1996); *Foster v. State*, 654 So. 2d 112 (Fla. 1995).

(Id. at 396)

In performing its proportionality review function the Court must "consider the totality of the circumstances in a case and ... compare it with other capital cases." Nelson v. State, ___ So.2d ___, 24 Florida Law Weekly S250, 253 (Fla. 1999); Terry v. State, 668 So.2d 954, 965 (Fla. 1996). Proportionality review requires a discrete analysis of the facts entailing a qualitative review by the Court of the underlying basis for each aggravator and mitigator, rather than a quantitative analysis. Urbin v. State,

714 So.2d 411 (Fla. 1998); Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). It is not a comparison between the number of aggravating and mitigating circumstances. The Court must consider and compare the circumstances of the case at issue with the circumstances of other decisions to determine if death penalty is appropriate.

Appellant contends that the death penalty is disproportionate in this single aggravator (HAC) case. Appellee disagrees. The trial court found regarding this aggravator:

> "The defendant was convicted of killing his live-in companion, Leslie Fleming. Ms. Fleming was 23-years-old and the mother of three small children. Three days before her murder, the five-foot-nine-inch, 200-pound, 36-year-old defendant had been arrested for domestic battery on Ms. Fleming, who stood five feet, four inches tall and weighed only 91 pounds. After he bonded out of jail, he told a friend he was going to kill Ms. Fleming and her cousin. Although the defendant had rented a room at a local motel, his belongings, including his stash of cocaine, were still in Ms. Fleming's apartment.
>
> Ms. Fleming's body was found by her sister on the morning of March 14, 1997. Ms. Fleming's body was lying on the living room floor, in a pool of blood, clothed only in a T-shirt. The door was opened by Ms. Fleming's six-year-old daughter, who walked past the death scene to get to her aunt at the door.
>
> The evidence showed that Ms. Fleming was brutally stabbed, slashed beaten, strangled, suffocated, and left for dead while her three little girls slept just down the hall. According to the medical examiner, she was stabbed or slashed with a sharp instrument 45 times on her neck, torso, and lower abdomen. Twenty-five of the wounds were deep stab wounds, and twenty of the wounds were wide,

elongated incised wounds. There were so many wounds, in fact, that the medical examiner testified that "after a while describing them you run out of new words to describe them with." Some of the wounds were consistent with "torturous wounds" designed to torture or terrorize a victim. Ms. Fleming, the medical examiner testified, had such wounds on her neck, chest, and abdomen. Some of her wounds were "defensive wounds" inflicted when a victim tries to shield vital body parts from an attacker. A victim is, by definition, alive and conscious when such wounds are inflicted. Ms. Fleming had six of these wounds on her hands, and additional arguable defensive wounds on her arms. One stab wound went through her wrist. In addition to the stabbing and slashing, Ms. Fleming was beaten. The medical examiner testified that she had a fractured jaw, bruises in her mouth, swelling of her face and lips, and abrasions on her upper and lower lips. In addition to the stabbing and slashing and beating, Ms. Fleming was strangled. The medical examiner found petechiae in her left eye, a symptom consistent with pressure injury to the neck. Finally, a plastic bag was found on Ms. Fleming's face. A pillow was on the floor next to her face. The fatal wound, in the medical examiner's opinion, was a stab wound to the side of the neck which caused Ms. Fleming to bleed to death. The entire episode lasted ten minutes or more, the medical examiner estimated.

The State argues that it proved beyond a reasonable doubt that the murder of Leslie Fleming was especially heinous, atrocious or cruel, as cited in Florida Statute 921.141 (5)(h).

The Court agrees that the State has proven this aggravating factor beyond a reasonable doubt.

To apply the heinous, atrocious or cruel factor, the crime must be both consciousless (sic) or pitiless and unnecessarily torturous to the victim. Richardson v. State, 604 So.2 1107 (Fla. 1992). The defendant offered the testimony of a psychiatrist to mitigate the

> State's position that the crime was unnecessarily torturous. The psychiatrist testified that a person experiencing a cocaine high may engage in behavior which is abnormally persevering and repetitive. However, the defendant, in his own testimony, never claimed that he was impaired by cocaine or other substances during the time of the murder. No witnesses testified to impairment. Therefore, the Court finds that this crime meets the criteria for heinous, atrocious, or cruel. Surely, the defendant showed no pity for Ms. Fleming in the way he killed her. The condition of her body, as described by the medical examiner, shows that the methods used to kill her were unnecessarily torturous. The evidence shows that some of the wounds were actually inflicted specifically to torture her. While we will never know for certain the order in which she was assaulted with a virtual menu of horror show techniques, we do know from Ms. Fleming's wounds that she was alive and fighting during part of the assault. We also know this from the testimony of her young daughter by the defendant, who awoke briefly to the sound of Ms. Fleming screaming "Stop! Stop!" and glimpsed her father's leg entangled with her mother's legs. The was no conscience present in that living room that night, no pity. There was only horrible violence, torture and terror.
>
> The Court gives this aggravating factor great weight."
>
> (Vol. V, R. 829-832)

This court has where appropriate approved the trial court's imposition of death when only a single aggravator has been found. *See, e.g.* Ferrell v. State, 680 So.2d 390 (Fla. 1996); Duncan v. State, 619 So.2d 279 (Fla. 1993); Cardona v. State, 641 So.2d 361 (Fla. 1994); Arango v. State, 411 So.2d 172 (Fla. 1982); Armstrong v. State, 399 So.2d 953 (Fla. 1981); LeDuc v. State, 365 So.2d 149

(Fla. 1978); Douglas v. State, 328 So.2d 18 (Fla. 1976); Gardner v. State, 313 So.2d 675 (Fla. 1975); *See also*, Burns v. State, 699 So.2d 646 (Fla. 1997) (avoid arrest, victim engaged in performance of official duties, and disruption of lawful exercise of government function or enforcement of laws which trial judge merged in one because based on a single aspect of the offense – the victim was a law enforcement officer).

This court has placed the HAC statutory aggravator at the apex in the pyramid of the capital aggravating jurisprudence. *See* Maxwell v. State, 603 So.2d 490, 493 (Fla. 1992) (". . . the present case involves only two aggravating factors. These do not include the more serious factors of heinous, atrocious, or cruel, or cold, calculated premeditation.")(emphasis supplied). See also Larkins v. State, 739 So.2d 90, 95 (Fla. 1999) ("We also note that neither the heinous, atrocious, or cruel nor the cold, calculated, and premeditated aggravators are present in this case. These, of course, are two of the most serious aggravators set out in the statutory sentencing scheme, and, while their absence is not controlling, it is also not without some relevance to a proportionality analysis.")(emphasis supplied).

The instant case is not comparable to Terry v. State, 668 So.2d 954 (Fla. 1996) where the sentence was reduced in a "robbery gone bad" episode, the prior felony conviction occurred contemporaneously, the court acknowledged that it could not know

what transpired before the victim was shot and the aggravation was not extensive. Similarly in Hardy v. State, 716 So.2d 761 (Fla. 1998) the court reduced the sentence after striking CCP and finding the remaining law enforcement officer aggravator insufficient to outweigh the defendant's age of eighteen, childhood abuse and self-inflicted gunshot wound to the head resulting in severe brain damage. The instant case involves a more brutal murder (the quality of aggravation is greater) and lesser mitigation.

Appellant contends that the lower court gave too much weight to the HAC aggravator, noting that Orme v. State, 677 So.2d 258 (Fla. 1996) had explained that "strangulation creates a prima facie case for this aggravating factor; and the defendant's mental state then figures into the equation solely as a mitigating factor that may or may not outweigh the total case for aggravation". Id. at 263. The Orme Court upheld the sentence of death and the HAC finding despite an argument that his "will was overborne by drug abuse" and that the case involved a "lover's quarrel". The same result should apply here.[13]

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[13]Some of the cases relied upon by appellant are incomplete in the analysis. For example Jones v. State, 332 So.2d 615 (Fla. 1976) and Holsworth v. State, 522 So.2d 348 (Fla. 1988) involved jury override cases with the attendant protection of Tedder and its progeny (Indeed Jones was a unanimous life recommendation). In Burns v. State, 699 So.2d 646 (Fla. 1997) this court explained in its proportionality analysis that some of the cases urged by the defense were jury override cases which "involve a wholly different legal principle and are thus distinguishable". Id at 649, n.5. Additionally, in Buford v. State, 403 So.2d 943 (Fla. 1981) the court approved both the HAC finding and the sentence imposed.

With regard to appellant's argument that the instant case should be categorized as a mere "domestic dispute", appellee would respond that this Court has clarified in its opinions that there is no domestic dispute exception in proportionality analysis. Rather, this Court has explained that sometimes the Court will determine that a CCP aggravating factor has been erroneously found in domestic disputes because the heated passions involved were antithetical to cold deliberations. But the Court only reverses the death penalty in those cases if the striking of the CCP aggravator results in the death sentence being disproportionate. Spencer v. State, 691 So.2d 1062, 1065 (Fla. 1997); Walker v. State, 707 So.2d 300, 318, n.12 (Fla. 1997). No "domestic dispute" explanation is viable here since CCP is not a factor against which to weigh it - and factually appellant had already moved out of the victim's residence following their breakup.[14]

[14]Appellant's reliance on page 43 of his brief on cases like Febre v. State, 30 So.2d 367 (Fla. 1947), Tien Wang v. State, 426 So.2d 1004 (Fla. 3 DCA 1983) and Douglas v. State, 652 So.2d 887 (Fla. 4 DCA 1995) is misplaced. Obviously Febre antedates the legislative enactment on the current death penalty statute which contains ameliorative features such as mitigating circumstances. More significantly, these cases deal with the insufficiency of evidence to support a premeditated murder conviction. Appellee would certainly agree that if no premeditated murder were present in the instant case the death penalty would be inappropriate (not on the basis of proportionality but rather because of the failure to meet the threshold requirement of F.S. 921.141, 775.081 and 782.04. significantly, appellant does not challenge in this brief the sufficiency of the evidence to support a first degree murder conviction and would not succeed if he did. Cf. Sims v. State, ___ So.2d ___, 25 F.L.W. S128 (Fla. 2000)(rejecting reliance on an earlier precedent which had applied a different statute than the one at issue).

Similarly in Walker v. State, 707 So.2d 300, 318, n.12 (Fla. 1997) the Court reiterated:

> Walker's related assertion that the trial court erroneously failed to consider in mitigation that these murders arose out of a domestic dispute is without merit. This Court had never treated "domestic dispute" cases as categorically different than other death cases and the fact that a case is "domestic" in nature is not, in and of itself, mitigating. In any event, this case is distinguishable from other domestic disputes in that, unlike the typical domestic case, the evidence here does not suggest that the murders were a result of a sudden, emotionally charged fit of rage or anger.

And in Pooler v. State, 704 So.2d 1375, 1381 (Fla. 1997) this Court repeated the Spencer doctrine that some cases involving domestic disputes have resulted in striking the CCP aggravator since heated passions negate the cold element of CCP and reversal was warranted only when elimination of CCP factor there rendered the death penalty disproportionate. But the Court added that the death penalty had been approved in a number of cases where the victim had a domestic relationship with the defendant.

> "Indeed, we have upheld the death penalty as proportionate in a number of cases where the victim had a domestic relationship with the defendant. *See Spencer; Cummings-El v. State*, 684 So.2d 729 (Fla. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2460, 138 L.Ed.2d 216 (1997); *Henry v. State*, 649 So.2d 1366 (Fla. 1994); *Porter v. State*, 564 So.2d 1060 (Fla. 1990)."

In Pooler this Court approved the trial court's finding that the

defendant had not established that the murder was the result of a heated domestic dispute. There was no abuse of discretion:

> The trial court further found that Pooler had not established that the murder was the result of a heated domestic dispute. Again, we find no abuse of discretion. Although the evidence established that Pooler had had a romantic relationship with Kim Brown, that relationship had ended. Nor was there any evidence the two had been in the middle of a heated dispute at the time of the murder. In any event, the trial court took into account Pooler's subjective view of his relationship with the victim when finding that Pooler was under the influence of extreme mental or emotional disturbance at the time of the murder.

(Id. at 1380)

This Court has approved the death penalty where supported only by the single aggravator of HAC in Cardona v. State, 641 So.2d 361 (Fla. 1994) and this Court saw no occasion to interject a domestic dispute impediment in the murder of a child through torturous abuse and neglect. The Court found the sentence of death proportionately warranted, despite the fact that the trial court had found that at the time of the murder Cardona was under the influence of extreme mental or emotional disturbance due to her "fall from riches to rags" and daily use of cocaine, and that during her ingestion of cocaine had ability to conform her conduct to the requirements of law was substantially impaired. This Court concluded that "the ultimate sentence is warranted in this case." Id. at 365.

Appellant argues that the HAC aggravator would be inapplicable if the murder had been accomplished by only a single stab wound [citing homicide by gunshot cases like Amoros v. State, 531 So.2d 1256 (Fla. 1988) and Cheshire v. State, 568 So.2d 908 (Fla. 1990)][15] and he contends that the multiple stabbing is explained by Dr. Maher's brief testimony at the Spencer hearing that "perseveration" in cocaine users may describe the repetitive forty stab wounds. Appellee submits that this Court should not so easily abandon its consistent jurisprudence that multiple stabbings constitute HAC.

As stated in Brown v. State, 721 So.2d 274, 277 (Fla. 1998)

> [2] We have upheld the heinous, atrocious, or cruel aggravator in a number of cases where the victim has been repeatedly stabbed. *See, e.g., Mahn v. State*, 714 So.2d 391 (Fla. 1998); *Williamson v. State*, 681 So.2d 688, 698 (Fla. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1561, 137 L.Ed.2d 708 (1997); *Finney v. State*, 660 So.2d 674, 685 (Fla. 1995); *Barwick v. State*, 660 So.2d 685, 696 (Fla. 1995); *Pittman v. State*, 646 So.2d 167, 173 (Fla. 1994); *Campbell v. State*, 571 So.2d 415 (Fla. 1990); *Hardwick v. State*, 521 So.2d 1071, 1076 (Fla. 1988); *Nibert v. State*, 508 So.2d 1 (Fla. 1987); *Johnston v. State*, 497 So.2d 863, 871 (Fla.1986)

Accord, Guzman v. State, 721 So.2d 1155, 1159 (Fla. 1998)(adding that "the intention of the killer to inflict pain on the victim is not a necessary element of the aggravator. As previously noted, the HAC aggravator may be applied to torturous murders where the

[15]Cheshire also was a jury override case governed by the principles of Tedder v. State, 322 So.2d 908 (Fla. 1975) and its progeny.

killer was utterly indifferent to the suffering of another". Id. at 1160). See also Merck v. State, 664 So.2d 939, 943 (Fla. 1995); Derrick v. State, 641 So.2d 378, 381 (Fla. 1994); Atwater v. State, 626 So.2d 1325, 1329 (Fla. 1993).

Nevertheless, despite Spencer, Walker and Pooler, Butler argues the "mitigating nature" of a domestic battery. In Garron v. State, 528 So.2d 353 (Fla. 1988) this Court reversed the conviction for multiple error for improper prosecutorial argument and improper use of similar fact evidence. The Court also found that all four aggravators were invalid. In rejecting the CCP aggravator the Court described the shooting of victim Tina as "a spontaneous reaction" in a passionate intra-family quarrel. In Wilson v. State, 493 So.2d 1019 (Fla. 1986) the Court concluded that the killing was the result of a heated domestic confrontation and "most likely upon reflection of a short duration." Id. at 1033. In Blakely v. State, 561 So.2d 560 (Fla. 1990) this Court found the death penalty imposed disproportionate. The homicide was the result of a long standing domestic dispute; the defendant and his wife were deeply in debt and frequently fought over money and had conflicts over the children. In contrast the instant case does not even factually resemble that kind of excessive domestic argument. Here, appellant did not even live on the premises; Butler moved out to a motel after the victim ended their relationship. And while witnesses mentioned that appellant and the victim previously had

broken up and gotten back together they also described appellant as being his usual fun-loving self the night of the homicide. There was no fight here that degenerated into a homicide; instead a simple premeditated killing as Butler attempted to establish an alibi with his friends.

Moreover, Dr. Maher's testimony in carefully defined hypothetical parameter and not presented for jury evaluation (he did not review the extensive material in the case) only noted that the presence of multiple stab wounds suggests the repetitive behavior that people with obsessive compulsive disorder do (Vol. X, R. 1737). Maher admitted that Butler maintained his innocence of the crime, did not quantify the amount of cocaine taken that night and did not indicate he used so much cocaine he didn't know what he was doing. Butler otherwise showed no indication of an obsessive personality (R. 1740-1741). Dr. Maher's attempt to describe the brutal premeditated killing of the diminutive Leslie Fleming by appellant who then discarded inculpatory evidence in a dumpster and sought the presence of others to be able to furnish an alibi as comparable to those with OCD repeatedly washing their hands or checking to see if the doors are locked is ludicrous.

Finally, nothing in the remaining asserted mitigation is sufficient to override the considered judgment of the eleven to one jury recommendation and the trial judge's sentencing order. The trial court gave some weight to the fact that Butler was reared

without his mother after noting that appellant was not abused or the recipient of violence. The assertion of a troubled childhood was refuted by the testimony of appellant's father. The trial court rejected appellant's "hard work" as a mitigator since the hard work consisted of the illegal activity of hustling cocaine. The court declined to find that Butler was a loving and good father since such a person would not support his children by selling cocaine or leave the mother of his children mutilated in a pool of blood for the children to see [and appellant testified his six year old daughter who identified him as the perpetrator was a liar - Vol. XVI, R. 1079]. The court gave some weight to appellant's being a loving and good son, gave slight weight to defendant's being well thought of by neighbors and co-workers although the court file was devoid of letters or notes in support of him and slight weight to Butler's long term substance abuse problem (Vol. V, R. 833-835).

This Court should reject the meritless claim that imposition of a sentence of death in the instant case would be a disproportionate sanction.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Kevin Briggs, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33831-9000, this _____ day of April, 2000.

COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

HARRY BUTLER,

Appellant,

vs. **CASE NO. SC95158**

STATE OF FLORIDA,

Appellee.

_____/

INDEX TO EXHIBITS

I. Journal of Forensic Sciences, Volume 40, Number 1, January 1995, pages 45-54.

II. Lola C. Young Probation Violation Report Form, dated May 15, 1998.