IN THE SUPREME COURT OF FLORIDA

ALVIN LEROY MORTON

Appellant,

vs. **CASE NO. SC95171**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State generally accepts appellant's statement of the case and facts as accurate, but adds the following.

The prior sworn deposition testimony of Timothy Kane, who was fourteen at the time of the murders, was considered by the trial court prior to sentencing the appellant. (R. 189, V-7, 794). He recounted the following about appellant's role: "He [appellant] was a leader. I mean, as far as he was the oldest and he was the one that this was all his idea. This was...He was doing this here." (R. 201). Kane testified that he had previously observed the sawed off shotgun and knife used in the murders in appellant's bedroom. (R. 221). After noting that the front door was kicked in Kane testified about what transpired in the victims' house. (R. 203).

Once inside the victims' house, the male victim came out asking what's going on. Appellant told the man to get down on the ground. (R. 204). Then he heard a different voice, a female voice, Kane testified: "It turned out to be the lady. She came out and she was hysterical. She didn't know what was going on." Id. Appellant laid her on the ground the same way. Kane explained: "The guy was helping her down, you know, because she didn't know what was going on." (R. 204). Appellant and the man on the ground began talking, Kane testified: "[T]elling him, you know, don't hurt us, take anything you want, just leave us alone. And there was a

conversation there, I mean. And he was standing up over him with a gun. And he walked around and started talking to Bobby in the doorway." (R. 205). "They were saying just don't hurt us, please just leave. We won't call the police. Just leave." (R. 220). Kane explained the victims tried to get up off the floor. Kane testified: "And the woman started trying to get up. And Alvin had kicked her in the leg. And Bobby [Garner] had some type of pipe or something and hit him in the head and laid back down on the ground." (R. 206). Shortly after that, Kane looked out toward the window and heard a gun blast. (R. 206). Kane testified he observed the following after turning back around: "When I turned around I seen him poised over the man and he tried swinging it at the lady. And I guess it jammed or something because he [appellant] threw it on the ground and grabbed the knife and started stabbing her." (R. 207-208). While Garner brought the knife to the house, Kane testified he knew that it was the appellant who "used the knife." (R. 207). Kane explained: "...when I turned around I seen him standing over and the gun...I guess the gun jammed because he threw it down and she started screaming and he started kicking her and jumping on her and stuff, and that's when Alvin grabbed the knife and started stabbing her." (R. 207). Kane testified Garner was jumping on her while appellant had the knife. (R. 207). According to Kane, the woman began screaming as soon as the gun went off. She was stabbed in a matter

of seconds after the gunshot. However, it seemed like she was moving for a while after the stabbing began. (R. 208). When asked to estimate how long she was moving after being stabbed, Kane testified he could not give an accurate estimate. (R. 208-209). Kane testified that appellant's back was to him as he was stabbing her but he did see her move: "I seen movement. I seen thrashing. I seen Garner kicking on her and he was stabbing on her. That's all I could really make out, really. It wasn't clear." (R. 218). Eventually, however, the woman stopped moving. (R. 209).

After the murder they left the victims' house but appellant told Kane "I couldn't go home." (R. 212). Kane testified: "He said he knew where I lived. There wasn't no sense in leaving, you know." (R. 212). Kane explained that he was afraid of appellant even before they went into the victim's house. Kane testified: "He was like a bully type, you know. He was bigger than me, you know. He picked on everybody. But, I mean, it was just like...I don't know, you know, what really caused it. He just intimidated, you know, at the time." (R. 212). Kane testified that he was now serving a life sentence with a minimum mandatory sentence for his role in the victims' murders. (R. 215). Kane testified that he was not promised anything by the State in exchange for his statement. (R. 217).

SUMMARY OF THE ARGUMENT

ISSUE I--The lower court did not simply adopt the prior sentencing order in this case. Differences between the sentencing order entered after re-sentencing and the order previously entered indicate that the trial court gave appropriate, individualized attention to sentencing the appellant. The facts in the order appellant objects to as unsupported were either fully supported by the evidence introduced during re-sentencing or de minimus facts which had no impact upon the sentence in this case.

ISSUE II--The prosecutor's unobjected to comments in closing argument were neither unethical nor improper. The prosecutor's comments in this case generally addressed witness credibility and the evidence introduced during re-sentencing. None of the comments either alone or combined rise to the level of fundamental error.

ISSUE III--The trial court in this case considered the testimony presented regarding appellant's mental state. The problem for the appellant is that an antisocial personality disorder is not a mitigating circumstance in this case. An antisocial personality is not a favorable character trait that militates against imposition of the death penalty. Nor can it be said that the unfavorable characteristics possessed by someone with this disorder, and appellant in particular, in any way excuses or ameliorates his criminal misconduct.

ISSUE IV--The weight to be given the mitigating factors of appellant's age and childhood abuse were within the discretion of the trial court below. The evidence introduced during the penalty phase supports the trial court's decision to accord these factors little weight. In any case, given the number of unchallenged and weighty aggravators in this case, it cannot be said the failure to accord each of these non-statutory mitigating circumstances additional weight would result in a different sentence.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT FAILED TO CONDUCT AN INDEPENDENT SENTENCING HEARING AND INSTEAD RELIED UPON THE PRIOR SENTENCING ORDER? (STATED BY APPELLEE)

Appellant argues that the trial court improperly relied upon the previous sentencing order in reaching an appropriate sentence in this case. Appellant reaches this conclusion not from any particular language or statement from the Honorable Judge Beach, who heard all the evidence presented on resentencing, but instead, notes the apparent similarity between the two orders. The sentencing orders were no doubt similar, the facts presented by the State largely mirrored those presented by the State during the first penalty phase. The mitigation evidence presented by the defense was also very similar. And, the jury's verdict was the same as in the first sentencing, 11-1, in favor of death. Appellant's claim is speculative and must be rejected on appeal.

First, the trial court was no doubt aware that appellant's resentencing was an entirely new proceeding. While noting the prior sentence of death and this Court's opinion on direct appeal, the trial court did not state it relied in anyway upon the prior death sentence or sentencing order. Nor does appellant even allege that without utilizing the prior sentencing order that the trial court would not have found any aggravators or would have given certain mitigators any additional weight. In fact, the items

recited in the order on resentencing and objected to as unsupported by the appellant were either fully supported by the evidence introduced during re-sentencing or de minimis facts which had no impact upon the sentence in this case.

As appellant notes in his brief, several differences exist between the prior sentencing order and the order entered by Judge Beach in this case, (Appellant's Brief at 40 n.9). Based upon this record, there is no reason to believe that the Honorable Judge Beach impermissibly relied upon the prior sentencing order and thereby denied appellant an appropriate individualized sentencing decision. Contrary to appellant's argument on appeal, the trial judge did not rely upon any material "unproven 'facts'" in the sentencing order. (Appellant's Brief at 44). As demonstrated below, the facts contained in the sentencing order generally have support in the evidence introduced during re-sentencing.

While evidence of the manhunt or search for the appellant is missing, ample evidence supported the trial court's conclusion to give appellant's voluntary confession little weight. Appellant did not come out when the police first arrived at his house but hid in the attic and successfully eluded capture.[1] (V-3, 230-231, 254-255). After committing the murders and telling others about his accomplishment, appellant threatened to do the same to anyone in the group if "we told anybody." (V-4, 307). Appellant also

[1]Kane and Garner came out of the house but appellant was not apprehended until the next day. (V-3, 231-232).

admitted he went back to the victims' house and lit two fires in the house in order to destroy "evidence." (V-3, 261). Finally, appellant killed the victims, at least in part, to prevent them from identifying him. (V-4, 286, 330)(Appellant "said they had the old man to the ground and the old man was begging for his life. He wanted to give them money, that the old lady would write him a check, and he said no, he didn't want money or whatever. He said I won't call the cops. And he said yeah, that's what they all say, and he shot him.") Given the overwhelming evidence of appellant's desire to escape punishment for his crimes, the trial court was entitled to give appellant's confession little weight as a nonstatutory mitigating factor.

Appellant also takes issue with the fact the trial court's sentencing order reflects that extra ammunition, (four rounds) was carried when the crime was committed. (Appellant's Brief at 41). As for carrying extra ammunition, specifically four rounds, the trial court probably gleaned this information from an exhibit which was marked and identified-–but not admitted--prior to the resentencing proceeding. (V-1, 33). Evidence recovered from under the trailer of Bobby Garner's residence included a pair of gloves, the shotgun, and the knife used in the murders. (V-3, 238-239). The prosecutor argued in closing: "...Ask yourselves, folks, why would you saw off a shotgun, to conceal it, wrap it in some kind of blue towel, load it, have a lot of ammunition? Why would you go to

their house armed with this, if not intending to kill somebody?" (V-7, 713). Defense counsel did not dispute this assertion regarding extra ammunition in his own closing. That appellant carried extra ammunition was not a significant or apparently contested fact below.

As for any expression that the killings would produce a "rush," ample evidence supported a finding that appellant thought it would be cool or fun to kill his intended victims. Appellant's sister in a sworn statement stated that appellant "was bragging about what he was going to do." (V-5, 516). Victoria Fitch was in the car with appellant in January and heard appellant state "he was going–he wanted to kill someone." (V-4, 348). After the murders, appellant told Madden: "You should have been there, it was cool, there was blood and brains everywhere." (V-4, 308). And, after committing the murders, appellant told Madden he did it for the fun of it. (V-4, 323). When asked to recount appellant's demeanor when he was explaining the elderly victim's murder with a knife, Whitcomb testified: "He was excited, like it was funny." (V-4, 291). Thus, ample evidence suggested that appellant was excited about committing the murders. That the word "rush" did not specifically appear in the resentencing transcript is of no consequence.

As for evidence regarding bringing back a body part as a "trophy," evidence introduced during re-sentencing supported this

finding. Appellant told Jeff Madden before the murders that he would bring back either a “finger” or a “head” as a memento. (V-4, 290). Appellant did as promised, he and his cohorts brought back part of Mr. Weisser’s finger to show their friends. (V-4, 284-285).

Appellant takes issue with the fact that the trial court’s order mentioned that appellant and his cohorts “ransacked” the house looking for valuables. However, in closing argument, defense counsel conceded that the during the course of a burglary aggravator was established. (V-7, 750-751). In his taped confession appellant admitted that he and his cohorts looked around for “anything.” (V-3, 249). Inclusion of the word “ransacking” in the trial court’s order does not suggest the lower court failed to give appropriate, individualized attention to sentencing the appellant. Appellant and his cohorts clearly rummaged around the victims’ house looking for valuables. Admittedly, it appears no evidence was introduced to suggest this search for valuables only ended when they heard a passing car, this “fact” is of no consequence. It was not used to support any aggravating factor.

Appellant and his counsel were given a copy of the order during the sentencing hearing and were present when the order was read in open court, but failed to object to any information contained in the trial court’s order. (V-7, 809). Moreover, several significant differences between the orders exist which

support a finding that the trial court gave appropriate, individualized attention to appellant's sentence. For example, in addition to the differences noted in appellant's brief (Appellant's Brief at 40, n. 9), in finding the murders were committed in order to prevent or avoid lawful arrest, the trial court found that "as further evidence of Defendant's desire to avoid arrest for these murders he caused fires to be set in the victim's house in an effort to conceal the murders." (V-1, 154-155). A finding not made in the first sentencing proceeding by the Honorable Craig C. Villanti. Moreover, under the avoiding arrest aggravator for the murder of Madeline Weisser, the trial court also found as evidence to avoid arrest "he caused fires to be set in the victim's house in an effort to conceal the murders." (V-1, 157). Again, this was a fact not articulated in the first sentencing order.

Nonetheless, even if appellant can establish the trial court utilized the prior order as some type of guideline or template, he cannot establish any prejudice based upon this record. He fails to allege that relying upon the prior order had any impact on the finding and weighing of any aggravators or mitigators in this case. As noted above, each of the aggravators and mitigators found by the trial court has ample support in the evidence presented on re-sentencing. Thus, any error in this case was clearly harmless. Remand for a new sentencing order would only result in a waste of

time and valuable judicial resources.[2] See generally Zack v. State, 25 Fla.L.Weekly S19, S22 (Fla. 2000)("If there is no reasonable possibility that the error contributed to the sentence, the Court should affirm.")(citing State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986)).

In Huff v. State, 495 So.2d 145, 151-152 (Fla. 1986) this Court held it was error for the trial court to take judicial notice of the record in the first trial after remand for a new trial. This Court observed that in addition to taking judicial notice of the record in the first trial, the trial court "essentially adopted the sentencing phase findings of the trial court in Huff I" and simply provided a supplemental finding of facts. 495 So.2d at 151. Although finding error, this Court determined that such error did not require reversal of the death sentences where reliance upon evidence in the first trial only resulted in a finding of the pecuniary gain aggravator and one mitigating factor. Striking each factor, given the remaining strong aggravators did not require reversal of the death sentences imposed in Huff. The evidence introduced in the second trial fully supported a finding that the murders were cold, calculated and premeditated and were heinous,

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[2]While appellant suggests the appropriate remedy would be to conduct an entirely new sentencing proceeding, the error he complains about has nothing to do with the jury or the jury's recommendation. Consequently, assuming, error, the remedy is simply to have the trial court review the record and enter an order without relying upon or using the prior sentencing order. See generally Davis v. State, 648 So.2d 107, 108 (Fla. 1994).

atrocious or cruel. Huff, 495 So.2d at 153.

Sub judice the argument for finding such error harmless is even more compelling than in Huff. While in Huff reliance upon the prior trial record resulted in finding an additional aggravator, in this case, appellant can cite no aggravator which was improperly based solely upon the prior sentencing order. Indeed, overwhelming evidence introduced during re-sentencing supports finding each of the aggravators found by the trial court. And, it cannot be credibly argued that a single mitigating factor would be found or given additional weight but for the trial court's apparent reliance upon the prior sentencing order.

In conclusion, while appellant mentions facts recited in the sentencing order which he claims were not supported by the evidence, he failed to identify any **significant** facts which could have had an impact upon appellant's sentence. Appellant is not entitled to remand for another hearing before the trial court.[3] See generally State v. Rucker, 613 So.2d 460, 462 (Fla. 1993)(remand for resentencing based upon failure to find convictions were not pardoned or set aside would amount to nothing

[3]Appellant's claim that the trial court's error is tantamount to a failure to provide contemporaneous written findings is without merit. The trial court did provide a contemporaneous written sentencing order. Moreover, remand for imposition of life with a minimum mandatory twenty five years would penalize the people of the State of Florida for an error their representative in this proceeding, the prosecutor, had no part in creating. In any case, as argued above, remand for entry of a new sentencing order is not required in this case.

more than "legal churning" where defendant did not allege that his prior convictions had in fact, been set aside.); Rogers v. State, 511 So.2d 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988)(A reversal of a sentence is warranted only if correction of the errors could reasonably result in a different sentence).

ISSUE II

WHETHER THE PROSECUTOR'S UNOBJECTED TO COMMENTS IN CLOSING ARGUMENT CONSTITUTE FUNDAMENTAL ERROR? (STATED BY APPELLEE).

Appellant next complains that the prosecutor's comments in closing argument were so prejudicial that they constitute fundamental error. The State disagrees.

Appellant was represented by two experienced defense attorneys at the time of trial. They were in the best position to gauge the impact of the prosecutor's comments and the jurors' reaction to them. It speaks volumes about the strength of appellant's claim on appeal that none of the comments he now objects to on appeal were objected to by counsel below.

A. Standard Of Review

Of course, this Court has determined that failing to raise a contemporaneous objection to the prosecutor's comments waives any claim concerning the comments for appellate review. McDonald v. State, 743 So.2d 501, 505 (Fla. 1999); Chandler v. State, 702 So.2d 186, 191 (Fla. 1997). See Section 924.051 (1)(b), Fla. Stat.

(1996)("'Preserved' means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor."). Recognizing the procedural bar to his claim, appellant nonetheless asserts that the comments in this case may be reviewed for fundamental error.

Addressing the application of fundamental error, this Court has stated the following:

> The Florida cases are extremely wary in permitting the fundamental error rule to be the 'open sesame' for consideration of alleged trial errors not properly preserved. Instances where the rule has been permitted by the appellate Courts to apply seem to be categorized into three classes of cases: (1) where an involved statute is alleged to be unconstitutional, **(2) where the issue reaches down into the very legality of the trial itself to the extent that the verdict could not have been obtained without the assistance of the error alleged, and** (3) where a serious question exists as to jurisdiction of the trial court.

State v. Smith, 240 So.2d 807, 810 (Fla. 1970)(quoting Gibson v. State, 194 So.2d 19 (Fla. 2d DCA 1967))(emphasis added). Further, this Court has stated that "for an error to be so fundamental "that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." State v. Johnson, 616 So.2d 1, 3 (Fla. 1993)(citing D'Oleo-Valdez v. State, 531 So.2d 1347 (Fla. 1988); Ray v. State, 403 So.2d 956 (Fla. 1981)). See also Ashford v.

State, 274 So. 2d 517, 518 (Fla. 1973)(observing that an "Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly.") (citation omitted).

B. The Prosecutor's Closing Argument Was Not Improper And Certainly Did Not Rise To The Level Of Fundamental Error

Appellant employs a shotgun approach on appeal, laying down an array of comments in his brief in the hope that one or more will strike the target of "fundamental error." However, as long ago recognized by this Court, a prosecutor is the advocate for the State and "has the duty, not only to present evidence in support of the charge, but likewise the duty to advocate with all his talent, vigor and persuasion, the acceptance by the jury of such evidence." Robles v. State, 210 So.2d 441 (Fla. 1968). Moreover, this Court has observed that attorneys are allowed "wide latitude" in closing arguments. Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982), cert. denied, 459 U.S. 882 (1982)(string cites omitted). "Logical inferences may be drawn and counsel is allowed to advance all legitimate arguments." Id. And, even if an isolated comment in this case was objectionable, no comment approaches the level of severity required to be considered fundamental error.[4]

[4]Appellate counsel repeatedly asserts that the prosecutor's argument was unethical in this case. (Appellant's Brief at 37, 53, 55, 58, 60). The State notes that few prosecutors have the time and luxury of a well thought out script to utilize during closing argument. Given the dynamics of a trial and closing argument in particular, mistakes and misstatements can and do occur. For that reason the jury is advised that their decision must rest on the evidence introduced during the proceeding and the law as instructed by the trial court. (V-7, 779, 780). None of the comments in this

Appellant first argues the prosecutor referred to facts that were not admitted into evidence from Angela Morton's prior sworn statement. (Appellant's Brief at 49-50). The problem with appellant's argument on appeal is that trial counsel did not object to the prior statement when it was used during cross-examination of Angela. The information was properly identified by the prosecutor in closing argument as having been elicited during cross-examination–i.e., "Recall the questions that I asked of her on cross-examination[]" (V-7, 712). Consequently, the prosecutor's argument was a fair comment upon testimony which was actually introduced during the penalty phase.

The sworn prior statement referred to by the prosecutor was made in January 1992 and recorded by a court reporter. Angela admitted her recollection of the facts was better in 1992 than when she testified on resentencing, some seven years later. (V-5, 515). Appellant told Angela the following: "He was going to break into a house that had a satellite and a swimming pool and steal stuff, and if the old people caused anything he would kill them, then he would burn down the house so there would be no evidence." (V-5, 517). After hearing her prior statement, Angela admitted the following: "I remember bits and pieces of that. Yes." (V-5, 517). Angela specifically recalled that appellant offered her a TV and a VCR if she participated. Angela, however, declined the offer. Id.

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case even come close to the level of fundamental error, much less a breach of professional ethics.

Aside from being a comment based upon unobjected to testimony introduced during the sentencing proceeding, Angela's statement itself would have been admissible even if defense counsel had lodged a hearsay objection.[5] In Rodriguez v. State, 25 Fla.L.Weekly S89 (Fla. February 3, 2000), this Court took a step back from Morton with regard to admission of prior inconsistent statements in the penalty phase. In finding a prior inconsistent statement admissible as substantive evidence in the guilt phase, this Court observed: "...[U]nder section 921.141(1), hearsay evidence is admissible in the penalty phase so long as it is relevant and the defendant has the opportunity to rebut it." Rodriguez,25 Fla.L.Weekly at S95. This Court noted that the defendant had an opportunity to rebut the witness's testimony "regarding why her pretrial statements differed from her trial testimony." This Court receded "from both Morton and Dudley to the extent they hold that a prior inconsistent statement cannot be used as substantive evidence in a penalty phase proceeding." Id. However, this Court observed that it still would have reversed Morton for a new penalty phase proceeding based upon the extent of the impeachment and the confusing manner in which this testimony was presented in the prosecutor's closing argument, finding the

[5]While appellant complains that the prosecutor never asked the lower court to admit the prior inconsistent statement into evidence, this was because appellant never raised an objection to Angela's prior statement. Had an objection been lodged, the prosecutor certainly could have asked that the statement be considered as substantive evidence during the penalty phase.

prejudicial nature of the statements far outweighed their probative value.

Sub judice, the appellant cannot establish error, let alone fundamental error based upon the prosecutor's brief reference to Angela Morton's prior statement. As noted above, the prosecutor was entitled to comment upon the evidence introduced during re-sentencing. Moreover, even if appellant had lodged an objection, as in Rodriguez, Angela's prior statement could properly be considered as substantive evidence. The circumstances under which it was made showed its reliability and the defendant was given a fair opportunity to confront or rebut this testimony. See Zack v. State, 25 Fla.L.Weekly S19, S23 (Fla. 2000)(hearsay testimony from Fletcher in the penalty phase that a treatment center in Oklahoma would not have anything to do with the defendant because he would not "conform to any treatment program" was properly admitted where the defendant "had an opportunity to cross-examine Fletcher."). Angela admitted that her recollection in 1992 was better than it was some seven years later when she testified on re-sentencing. She was present and available to be examined by the appellant regarding her recollection. And, she obviously had no motive to fabricate her prior statement, as she clearly did not want to harm her brother. Finally, after hearing the statement in court, Angela admitted she remembered "bits and pieces" of the information

contained in her previous statement.[6] Based upon this record, the prosecutor's unobjected to reference to Angela's prior inconsistent statement elicited on cross-examination was entirely proper.

Next, appellant complains that the prosecutor misled the jury by claiming that the evidence of childhood abuse in this case was not mitigating. (Appellant's Brief at 54). However, this statement was made in a larger discussion of the evidence and was not at all improper. It was simply the prosecutor's view of the evidence in this case; that evidence of childhood abuse, while presented during re-sentencing, was deserving of little or no weight.

The prosecutor first informed the jury that they will be instructed that anything in appellant's background may be considered in mitigation then moved on to show why childhood abuse should be given little, if any, weight in this case. The prosecutor argued:

...

> And remember, the Judge is going to tell you, and rightly so, that mitigation is anything about his background. She could come in here and tell you anything about his background and anything you find about his background is mitigation. It doesn't matter. Anything.
>
> What did you find out from Mrs. Stacy that's

[6]Unlike Morton, during closing argument in this case the prosecutor correctly identified the information in the prior statement as having been elicited on cross-examination. Appellant has neither shown that the prosecutor's argument relied to a great extent upon prior inconsistent statements as in Morton nor has he shown a substantial likelihood that the jury would be confused by the single reference to Angela's prior statement.

> mitigation here? What mitigates all of these? What? That he had a tough life. He had a tough life? Yeah, sure, he had a tough life.
>
> Angela had a tougher life. She was the second witness called. She had an even tougher life. Why? She was sexually abused by this monster. So she had a tough life.
>
> But you know what, folks? She had a tough life, but when she was told by this defendant that he's going to break into this house with the satellite dish and the pool, that he was going to kill the occupants and then he was going to burn the house down, a week before all this occurred, and that he said to Angela I'd like you to drive me there and I'll give you a TV set and a stereo, you know what she said? No. I'm not going to do it.
>
> This girl that had the same upbringing, the same difficult life, moving all over the place. Remember the longest place they lived in was six months? All the same moves. Right? All of that, she makes the right choice. She says no, I'm not going with you.
>
> So how is what Mrs. Stacy and Angela Morton, how is what they tell us mitigation? How does that outweigh this? What good did he do? What good did he do? Granted, from zero to eight it was tough. When Mr. Stacey came into the household it was pretty easy. It was easy street. Right? How many jobs did he hold? He held a job for a week.
>
> Is that mitigation, folks? Is that mitigation? The fact that a child was abused when he was a little child? Well, see now, Counsel knows that's not mitigation, the fact that when he was five or six or seven he was hit with a fork on the top of the head, that he was thrown into a lake.
>
> ...

(V-7, 726-727).

In Jones v. Butler, 864 F.2d 348, 360 (5th Cir. 1988), the Fifth Circuit held that the following argument was not improper:

> We can't refuse to give criminals the sentence that they deserve based on the fact that their families will be hurt...The fact that the families are hurt doesn't lessen what they've done and it should not lessen the penalty. We cannot excuse the criminal actions of someone because they drink. We cannot excuse somebody's criminal actions because he's a good babysitter...This is not acceptable

mitigating circumstances, in the state's opinion.

The court noted that "[r]ead in context, she [the prosecutor] was arguing not that the jury could not find mercy and intoxication mitigating circumstances, but that they should not do so here." Jones, 864 F.2d at 360. Also, the Fifth Circuit noted that "the court properly instructed the jury to consider any mitigating circumstances before deciding to impose a sentence of death." Id.

As the prosecutor in this case began his discussion by correctly telling the jury they could consider anything in appellant's background as mitigation, it was not improper for the prosecutor to argue why the evidence of childhood abuse should be discounted in this case. In concluding his argument, the prosecutor asked the jury: "...And are there any mitigating factors and have they outweighed on a scale, do they outweigh the aggravating factors? Does the fact that this defendant had a tough life in his early childhood outweigh all of what he did on January 26th of 1992?" (V-7, 743). As an advocate for the State, the prosecutor was simply fulfilling his duty. As in Jones, the prosecutor may certainly argue why the proposed mitigators do not excuse the defendant's criminal misconduct. The comment as a whole was neither misleading nor improper. And, it certainly does not rise to the level of fundamental error which would excuse the lack of an objection to this comment below.

Next, appellant complains that the prosecutor improperly

attacked the credibility of defense witness Ms. Pisters. In closing argument, the prosecutor merely repeated her admission on cross-examination that she was opposed to capital punishment. One proper function of closing argument is to point out any facts elicited during the proceeding which have a bearing on witness credibility and bias. That Ms. Pisters opposed capital punishment is a fact that the jury was entitled to consider in evaluating her testimony in this capital case.

The prosecutor's argument was not improper. He did not use vituperative characterizations of Ms. Pisters in his argument. And, far more damaging to Ms. Pister's credibility were the following observations by the prosecutor:

> ...so, you know what she tells you? She tells you that the unattached child is predisposed to be a murderer. Isn't that what she told you? The unattached child is predisposed to do all of what Alvin Morton did. He had no choice in the matter. If you are an unattached, unbonded male child, look what's going to happen to you.
>
> Does that comport with common sense? Does that seem reasonable? Well, what does she tell us? She tells us, first of all, that she never got any police reports, she never got any depositions, she never got sworn testimony. She had known Mr. Urson beforehand from HRS. She doesn't do criminal cases, she's never testified in a murder case. That she is retained by the defense. She's asked to go see Alvin Morton, to talk with him, and she's given some newspaper clippings.
>
> And what did she say on cross-examination? That's just as good as sworn testimony, newspaper clippings. Who are you tying to kid? Didn't in jury selection all of us talk about newspaper clippings and said you can't rely on them? Why? They're not accurate. And then if they were accurate, hey, we could pass out a newspaper to all of you folks and it will take 10, 15 minutes to resolve this case. But yet, she's telling you folks that

those newspaper clippings suffice for her.

...

(V-7, 727-728). Also, the prosecutor noted that Ms. Pisters was not a doctor of psychology or a doctor of psychiatry, but a social worker who was not a specialist in forensics. (V-7, 730).

Rather than object to the prosecutor's argument, defense counsel chose to address the prosecutor's comments on Ms. Pisters in his own argument. Defense counsel stated: "Did you really believe that because she has an opposition to the death penalty that she testified falsely? Did you believe she wasn't telling the truth? Did you believe that she didn't get enough background?" (V-7, 763). In declining to reverse a conviction based upon clearly improper argument, the Supreme Court in Darden v. Wainwright, 477 U.S. 168, 91 L.Ed.2d 144, 106 S.Ct. 2464 (1986) noted the following: "Defense counsel were able to use the opportunity for rebuttal very effectively, turning much of the prosecutors' closing argument against them by placing many of the prosecutors' comments and actions in a light that was more likely to engender strong disapproval than result in inflamed passions against petitioner."[7] [note omitted]. See also Anderson v. State, 467 So.2d 781, 787 (Fla. 3d DCA 1985)(noting that experienced

[7]The prosecutor's argument in this case pales in comparison to the vituperative comments addressed by the Court in Darden. 477 U.S. at 179-181, 91 L.Ed.2d 156-157. Nonetheless, given the strength of the State's case and the opportunity for rebuttal, the Darden Court did not find that the comments warranted reversal of the defendant's conviction.

defense attorneys "contend that inflammatory-type arguments often boomerang against the prosecutor in the eyes of the jury, **and are best handled in rebuttal** or by ignoring the arguments altogether.")(emphasis added). The prosecutor's argument in this case was effectively countered by defense counsel in his own closing.

Appellant also takes issue with the prosecutor's argument concerning his failure to cooperate with the State's expert, Dr. Gonzalez. (Appellant's Brief at 56). The prosecutor did not comment upon appellant's exercise of his right to remain silent. Instead, the prosecutor pointed out that appellant told Dr. Gonzalez that he did not recall any details of the victims' murders. The prosecutor was entitled to point out that appellant recalled details surrounding the murders during his interview with the defense expert, Ms Pisters (V-6, 560-561), but claimed not to recall the murders when interviewed by the State expert, Dr. Gonzalez. (V-7, 740). This was not a comment upon his right to remain silent, but a comment regarding his failure to cooperate with the State's expert. And, the prejudicial impact, if any, of this comment was minimal in light of appellant's confession which was admitted into evidence during the resentencing–i.e., appellant did not exercise his right to remain silent in this case.

Appellant's reliance upon Estelle v. Smith, 451 U.S. 454 (1981), is misplaced. In Smith, the Court stated that "[a]

criminal defendant, **who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence**, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." 451 U.S. at 468 (emphasis added). Smith does not apply *sub judice* because the defense opened the door to such evidence by having appellant examined by mental health experts and using such testimony during the penalty phase. See Buchanan v. Kentucky, 483 U.S. 402, 97 L.Ed.2d 336, 107 S.Ct. 2906 (1987) (noting that Smith provides that where a defendant plans to use psychiatric evidence the defendant waives the Fifth Amendment privilege so that the state may rebut that evidence).

Finally, appellant complains that the prosecutor improperly argued that the people of the State of Florida have a right to the death penalty in this case. (Appellant's Brief at 58). The prosecutor's argument was not in any way improper. The comment at issue was simply the prosecutor's view of the evidence in this case, i.e: "...that the only recommendation here, the only recommendation that's consistent with the evidence and consistent with justice, is that this defendant deserves the death penalty for what he did to Mr. Bowers and Mrs. Weisser." (V-7, 746). See Spencer v. State, 133 So.2d 729, 731 (Fla. 1961)(Prosecutors' "discussion of the evidence, so long as they remain within the limits of the record, is not to be condemned merely because they

appeal to the jury to 'perform their public duty' by bringing in a verdict of guilty.").

Urbin v. State, 714 So.2d 411, 421 (Fla. 1998), provides little support for appellant's argument on appeal. In Urbin, the prosecutor asserted that "any juror's vote for a life sentence would be irresponsible and a violation of the juror's lawful duty." The prosecutor also argued that he was afraid that some of the jurors "may be tempted to take the easy way out, to not weigh the aggravating circumstances and the mitigating circumstances and not want to fully carry out your responsibility and just vote for life.'" Urbin, 714 So.2d at 421. Further, the prosecutor argued: "'Im going to ask you not to be swayed by pity or sympathy. I'm going to ask you what pity, what sympathy, what mercy did the defendant show Jason Hicks. I'm going to ask you to follow the law I'm going to ask you to do your duty.'" Id. The State notes that this Court had already decided to reverse appellant's sentence in Urbin based upon its decision to strike the cold, calculated, and premeditated aggravator, when it went on to discuss the prosecutor's comments.

The single comment in this case, tied to the evidence presented during resentencing, did not approach either the number or level of severity of the comments condemned by this Court in Urbin. Instead, the prosecutor asked the jury to come back with a recommendation consistent with the evidence and justice, which is,

of course, the lawful function of the jury. Moreover, this Court's decision to condemn the prosecutor's penalty phase argument in Urbin must be viewed in light of the jury's life recommendation on one murder, and close 7-5 vote on the second murder. In this case, death was recommended for each murder by an 11-1 vote.

In conclusion, none of the comments cited by the appellant denied him the right to fair sentencing hearing. Appellant's objections to the prosecutor's closing argument were not preserved for review by proper objection below. See Sims v. State, 681 So.2d 1112, 1116-17 (Fla. 1996)(claimed errors when prosecutor referred to defendant as a liar, accused defense counsel of misleading the jury, and bolstered his attacks on Sims' credibility by expressing his personal views and knowledge of extra-record matters, not properly before the Court on appeal without an objection)(citing Craig v. State, 510 So.2d 857, 864 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988)). And, the prosecutor's comments in this case generally addressed witness credibility and the evidence adduced during re-sentencing. Appellant has not established fundamental error requiring reversal of his death sentences. See Hopkins v. State, 632 So.2d 1372, 1374 (Fla. 1994)("[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process.").

This was not a close case. The jury vote in favor of the

death penalty was 11-1. Appellant's contention that the complained of comments might have altered the results in this case flies in the face of reality. Appellant's sentence is supported by several uncontested and weighty aggravators. Appellant was the leader and primary actor of a group which planned and carried out the premeditated slaughter of two innocent people in their own home.

ISSUE III

WHETHER THE LOWER COURT ERRED IN REFUSING TO FIND APPELLANT'S ANTISOCIAL PERSONALITY DISORDER A MITIGATING FACTOR UNDER THE CIRCUMSTANCES OF THIS CASE? (STATED BY APPELLEE).

A. Anti-Social Personality Disorder Was Not A Non-Statutory Mitigating Factor In This Case

Appellee acknowledges that the testimony of defense witnesses Ms. Pisters and Dr. Delbeato and state rebuttal witness Dr. Gonzalez agree that Morton has an anti-social personality, i.e., that he is a sociopath or what was formerly called a psychopath. Appellee disagrees with the contention that the lower court erred reversibly in failing to mention it as a mitigating factor. Appellee submits that it is not mitigating any more than that it could be said that being "evil" merits characterization as mitigation. See Carter v. State, 576 So.2d 1291, 1292-1293 (Fla. 1989), cert. denied, 502 U.S. 879 (1989) ("Only one expert believed

Carter was mentally retarded, while one believed that Carter was sociopathic, a condition that cannot be considered in mitigation".{emphasis supplied}).[8] The concurring opinion of Mr. Justice Thomas in Graham v. Collins, 506 US 461, 500, 122 L.Ed. 2d 260, 291 (1993) observed that:

> Every month, defendants who claim a special victimization file with this Court petitions for certiorari that ask us to declare that some new class of evidence has mitigation relevance "beyond the scope" of the State's sentencing criteria. It may be evidence of voluntary intoxication or of drug use. Or even – astonishingly–-evidence that the defendant suffers from chronic "antisocial personality disorder"–that is, that he is a sociopath. See Pet for Cert in Demouchette v. Collins, OT 1992, No 92-5914, p 4, cert denied, 505 U.S. 1246, 120 L.Ed.2d 952, 113 S.Ct. 27 (1992).

In Harris v. Pulley, 885 F.2d 1354 (9th Cir. 1988), cert. denied, 493 US 1051 (1993), the court explained that a personality disorder such as antisocial personality disorder was to be distinguished from a mental disorder such as psychosis or neurosis:

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[8]This Court's decisions cited in appellant's brief do not compel a contrary result to that urged by the state here. In Marquard v. State, 641 So.2d 54 (Fla. 1994) this Court affirmed the sentence of death after noting in footnote 2 of the opinion that the trial judge had found a number of nonstatutory mitigating factors including either a personality disorder not otherwise specified or an antisocial personality. This Court neither approved nor disapproved the finding. In Robinson v. State, 684 So.2d 175 (Fla. 1996) the Court remanded for a new penalty phase hearing before the judge because of the failure to consider and weigh all available mitigating evidence in the record; thereafter, the trial court again imposed a sentence of death after finding personality disorders among the eighteen nonstatutory mitigators found and this Court affirmed the judgment and sentence of death (despite the presence of two mental health statutory mitigating factors). Robinson v. State, 24 Fla.L.Weekly S393 (Fla. 1999).

A personality disorder is not analogous to 'the incurable and dangerous mental illness' of a person diagnosed as suffering from paranoid schizophrenia and hallucinations." (Id. at 1382)

This interaction between general social attitudes and what seems appropriate for medical diagnosis is suggestive that what is classified as a mental disorder by the American Psychiatric Association is not necessarily a condition that a state is constitutionally required to take into account in assessing punishment. In the case of the condition described as an antisocial personality there is a substantial tension between the implications of its being seen as a "can't help" characteristic and what are the frequent accompaniments of that condition.

The disorder, the American Psychiatric Association observes, often leads to 'many years of institutionalization, more commonly penal, than medical'. DSM-III., p. 318. In adulthood, those with this condition are marked by a 'failure to accept social norms with respect to lawful behavior. Id. Zant suggested that 'mental illness' might actually militate in favor of a penalty less than death. The 'mental disorder' of such antisocial personality is not 'mental illness' in the sense used by Zant. For the ordinary citizen it would, to say the least, be paradoxical that a person who was likely not to accept social norms with respect to lawful behavior should be treated more kindly than the person who was law-abiding.

The paradox is all the stronger when it is the view of the American Psychiatric Association that persons with this condition are capable of understanding the consequences of their actions and are willing to perform or not perform particular volitional acts. We may go further and say that it is difficult to suppose that there are any persons who commit the kind of vicious crime for which the death penalty is now imposed in this country who do not possess one or more of the personality disorders or one or more of the neuroses recognized as mental disorders by the American Psychiatric Association. To hold that each of these conditions must be a mitigating factor when the death penalty is considered would be to undermine the death penalty under the guise of acknowledging that what the American Psychiatric Association finds to be a mental disorder must be treated as a factor that calls for less severe punishment than death. We cannot say that the evolving standards of decency that have characterized

> interpretation of the eighth amendment require a state to conform its scheme of capital punishment to such a norm.

Id. at 1383. See also Weeks v. Jones, 26 F.3d 1030, 1035 n.4 (11th Cir. 1994)("The final diagnosis that Weeks was not suffering from a thought disorder and that he had an antisocial personality is significant. Antisocial personality disorder has been held not to be mitigating as a matter of law.")(citing Harris, 885 F.2d 1354, 1383.)

The Harris court is undoubtedly correct. A review of the most current edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), describes Antisocial Personality Disorder's essential feature as "a pervasive pattern of disregard for, and violation of, the rights of others" (p. 645). Such individuals fail to conform to social norms with respect to lawful behavior; they disregard the wishes, rights or feelings of others. They are frequently deceitful and manipulative in order to gain personal profit or pleasure. They may repeatedly lie, use an alias, con others or malinger. Individuals with this disorder tend to be irritable and aggressive and may repeatedly get into physical fights or commit acts of physical assault. They tend to be consistently and extremely irresponsible, show little remorse for the consequences of their acts. They may be indifferent to or provide a superficial rationalization for having hurt, mistreated or stolen from someone. These individuals may blame the victims for being foolish, helpless, or deserving their fate. They

generally fail to compensate or make amends for their behavior. They may believe that everyone is out to “help number one” and that one should stop at nothing to avoid being pushed around (p.646). Individuals with antisocial personality disorder frequently lack empathy and tend to be callous, cynical, and contemptuous of the feelings, rights and suffering of others. They may spend many years in penal institutions (p. 647).

The diagnostic criteria for APD includes a pervasive pattern of disregard for and violation of the rights of others as indicate by three or more of the following:

> (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest
> (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure
> (3) impulsivity or failure to plan ahead
> (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults
> (5) reckless disregard for safety of self or others
> (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations
> (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated ,or stolen from another (pp. 649-650)

Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982), does not mandate consideration of antisocial personality disorder as a mitigating circumstance. The 5-4, majority in Eddings concluded that the trial court employed the wrong standard in analyzing the proposed mitigating factors of the defendant’s age (16), emotional immaturity, violent childhood and emotional

disturbance. While at least part of the appellant's mental and severe emotional disturbance was described as antisocial personality disorder, the Court did not specifically mandate consideration of this disorder as a significant mitigating factor. In fact, the Court lumped the proposed mitigators together, stating:

> In some cases, such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.

Eddings, 455 U.S. at 115. The Court reversed the defendant's sentence because it concluded "it is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact, rather he found that *as a matter of law* he was unable even to consider the evidence." Eddings, 455 U.S. at 113. The Court did not specifically state that antisocial personality disorder is a mitigating circumstance that must be accepted as such in every case.

The strong dissent in Eddings noted that the majority stretched to conclude the trial court employed the wrong legal standard in reversing the defendant's sentence. And, the dissent noted that the "emotional disturbance" primarily consisted of antisocial personality disorder, which, was hardly mitigating:

> Dr. Dietsche defined "antisocial personalities" as individuals without "the usual type of companions" or "loyalties," who are "[f]requently ... very impulsive,"

> showing "little in the line of responsibility "or concern for the needs or wants of others," and "hav[ing] little in the line of guilt or remorse." Id. at 137-138. Although the Court describes Dietsche's testimony as indicating that "approximately 30% of youths suffering from such a disorder grew out of it as they aged," ante, at 107, 71 L.Ed.2d at 6, Dietsche was in fact describing a study which he thought had subsequently been discredited. App 139-141. Even that study, however, concluded that most of those who "grew out of" the disorder by the age of 35 or 40 were "more of a con-artist type" and "not...the assaultive type." Ibid. A more recent study estimated that only 20% of socio pathic persons were "treatable," id., at 141, in this study, only 9 of 255 initial participants were successfully treated, after "literally...thousands of hours of therapy." Id., at 142. Thus, characterization of Eddings as a "sociopath" may connote little more than that he is egocentric, concerned only with his own desires and unremorseful, has a propensity for criminal conduct, and is unlikely to respond well to conventional psychiatric treatment–hardly significant "mitigating" factors. See Blocker v. United States, 110 U.S. App DC 41, 48-49, and nn 11, 12, 288 F.2d 853, 860-861, and n 11, 12 91961)(Burger, J., concurring in the result). While the court speaks of Eddings' "severe emotional disturbance," ante at 115, 71 L.Ed.2d, at 11; see also ante, at 116, 71 L.Ed.2d, at 11, it appears to be referring primarily to the testimony that Eddings was a sociopath, and to Dr. Gagliano's rather fantastic speculation concerning Eddings' dissociation at the time of the crime, see n 4, supra. The Court's opinion exemplifies the proposition that the very occurrence of the crime functions as a powerful impetus to search for a theory to explain it. See Szasz, Psychiatry, Ethics, and the Criminal Law, 58 Colum. L. Rev. 183, 190-191 (1958).

Eddings, 455 U.S. at 126 n.8 (Burger, Chief Justice, dissenting). In fact, the Supreme Court has recognized that defense counsel can make a reasonable strategic decision not to present psychiatric testimony where introducing such testimony would reveal a diagnosis of "sociopathic type personality." Darden v. Wainwright, 477 U.S. 168, 186, 91 L.Ed.2d 144, 160, 106 S.Ct. 2464 (1986). Antisocial

personality disorder is not a favorable diagnosis or a trait that serves to lessen the criminal culpability of a defendant.

The testimony below supports this conclusion. Dr. Gonzalez testified that appellant suffered from no major mental illness or thought disorder. (V-6, 627-628). For example, Dr. Gonzalez testified that in his interview, appellant admitted vandalizing a house and stealing his mother's car at age 14, drilled a hole in a turtle, never did the work at school -he was too lazy- and he skipped school a lot (although he possessed more than average intelligence). (V-7, 667-668). When asked about one of his co-defendants Bobby Garner, Morton replied that he would have done the same to Garner as Garner did to him (everybody for himself). Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired. (V-7, 671) Ms. Pister stated that her examination of appellant revealed no mental illness. (V-6, 592). The witness has treated other people with similar life experiences as appellant who did not commit crimes. (V-7, 674-675). There was nothing in Morton's background which would have compelled him to commit this murder; he had the intellect to make intelligent decisions and choices (V-7, 675). None of the traits mentioned by Ms. Pisters would have prevented appellant from being a law abiding citizen. (V-7, 676).

Appellant's younger sister exposed to the same dysfunctional

family seemed to be a very solid citizen, despite sexual and physical abuse (V-6, 677). Dr. Gonzalez found nothing about the appellant that would suggest any regret, any remorse or any conscience. (V-7, 679) The witness also explained selective amnesia whereby a person chooses to remember what they want to remember and chooses to forget what they want to forget. (V-7, 690-91). And, Dr. Gonzalez found that appellant was not under the influence or domination of another person at the time he committed these crimes: "It was to the contrary, he was probably the leader." (V-6, 625-626). In fact, from all the reports it appears that appellant was the leader of the group. (V-6, 632). Appellant liked to associate with younger individuals because they were less rejecting and easier to manipulate. (V-6, 633). Dr. Gonzalez testified that in the DSM-IV, antisocial personality is listed as a disorder, along the same line as alcoholism and tobacco addiction. (V-6, 629-630).

None of this proffered testimony is mitigating in nature. See e.g. Satcher v. Pruett, 126 F.3d 561, 572 (4th Cir. 1997), cert. denied, 522 U.S. 1010 (1998)(finding counsel was not ineffective for failing to conduct further investigation into defendant's mental condition where the "initial experts found no psychiatric or neurological disorders but found that Satcher had an antisocial personality disorder that might make him a 'future danger.'"); Matheson v. King, 751 F.2d 1432, 1439-1440 (5th Cir. 1985)(finding

counsel made a reasonable strategic decision to omit presentation of mental impairment where such evidence would have opened the door to evidence that the defendant was a violent sociopath).[9] Mitigating factors have been defined as "factors that, in fairness or in the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crimes committed." Consalvo v. State, 697 So.2d 805, 819 (Fla. 1996), cert. denied, 523 U.S. 1109 (1997); Jones v. State, 652 So.2d 346, 351 (Fla. 1995); see also Brown v. State, 526 So.2d 903, 908 (Fla. 1988)("Mitigating evidence is not limited to the facts surrounding the crime but can be anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant.") In a murder prosecution, it is within trial court's discretion to decide whether proposed mitigator has been established and whether it is truly mitigating in nature. Banks v. State, 700 So.2d 363, 368 (Fla. 1997), cert. denied, 523 U.S. 1026 (1998)(no abuse of discretion in rejecting defendant's religious activities as mitigating in nature). Thus, the trial court could not commit reversible error here since being a sociopath is not a mitigating factor.

(B) Any Failure To Consider Appellant's Antisocial Personality As A Non-Statutory Mitigator In This Case Was Harmless Error

[9]These cases illustrate that an antisocial personality disorder is generally such an unfavorable diagnosis that defense attorneys sometimes make tactical decisions not to present evidence in order to prevent the State from revealing such a diagnosis.

But even if this Court were to reject the foregoing analysis, affirmance would still be required. In the sentencing order, the trial court articulated what had been proposed and considered. The defendant's age of nineteen -while a mitigating factor- was given little weight because his I.Q. was normal, he was not retarded and the emotional age was consistent with the chronological age. (V-1, 158). The court considered and gave some weight to the mitigator that Morton had no significant history of prior criminal history. The court declined to find that the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired because the "credible expert and lay testimony clearly established that the Defendant could and did appreciate the criminality of his conduct on the night of these crimes." (V-1, 158). As to mitigation regarding count 2, the murder of Madeline Weisser, the court found that the contention that Morton was only an accomplice, that the offense was committed by another and that his participation was relatively minor was not established by credible evidence, including Morton's own confession. As to non-statutory mitigation, the court explained:

> ...the evidence clearly reveals that the Defendant was a product of a highly dysfunctional family at least through age eight. The Defendant did not bond with his family and had minimum physical contact with his mother during the first four weeks of his life. Moreover, this family moved in and out of the state on a regular basis, disrupting any stable home and social life. The Defendant was repeatedly physically abused by his

> alcoholic father. This abuse stopped at about age eight when the mother took refuge at a shelter, divorced, and later remarried, thereby providing a substitute stable father figure for the Defendant. The Defendant's sister, Angela Morton, also sustained sexual abuse in the presence of the Defendant by the same alcoholic father. However, this sibling has never been arrested for any crime and has led a normal productive life. While the Court has considered the Defendant's turbulent childhood as a possible mitigating circumstance, there has been no showing that this experience caused the Defendant to have a diminished capacity to know right from wrong or not know the seriousness and grave consequences of his acts and, therefore, the Court gives little weight to his childhood experience in deciding to impose the death penalty." (V-1, 159-160).

Finally, the court explained that each of the aggravators, standing alone, would suffice to outweigh the paucity of mitigation found in Morton's twenty-six years of life. (V-1, 160). Clearly, the court considered and gave effect to the underlying factors that comprised appellant's makeup - even if it did not attach itself to the sociopathic label. The result would not be different had the court added it and this Court has recognized that some error under Campbell v. State 571 So.2d 415 (Fla. 1990) can be harmless. See Cook v. State, 581 So.2d 141, 144 (Fla. 1991), cert. denied, 502 U.S. 890 (1991)(after finding the death sentence proportionate since the defendant rather than his accomplices killed the victims, Court concluded that sentence of death would stand even if the sentencing order had contained findings that each of the non-statutory mitigating circumstances had been proven); Thomas v. State, 693 So.2d 951, 953 (Fla. 1997)(trial court's sentencing order which failed to mention evidence that defendant was a

"delightful young man", "very loving" with a "lot of good in him" constituted harmless error because the evidence in aggravation was massive in counterpoint to the relatively minor mitigation); 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), cert. denied, 133 L.Ed.2d 766 (1996)(any error in articulating particular mitigating circumstances was harmless); 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).

The failure to find or mention Antisocial Personality Disorder or being a sociopath is harmless beyond a reasonable doubt, especially after considering the massive aggravation present here. The trial court found a total of eight aggravating factors, three with respect to victim John Bowers and five with respect to victim Madeline Weisser in this double homicide. Specifically, regarding victim Bowers, the court found (a) cold, calculated and

premeditated without pretense of moral or legal justification as Morton thought about and discussed committing this murder for several days beforehand to the point of apparent obsession; he considered and solicited suggestions of what proof would be needed to establish the murder, such as a human body part as trophy; the careful planning was demonstrated in selecting a victim who lived only with his elderly mother in an isolated area across the street from a vacant dwelling which served as headquarters for a preliminary stakeout and/or dry run; arranging for the phone lines to be cut in carrying out the preordained plan under cover of darkness; rushing into the dwelling while heavily armed with a sawed-off shotgun and rambo-style knife; concealing the shotgun in a towel and the getaway bikes in nearby brush; having worn gloves to avoid leaving fingerprints and having expressed a hope that the killing would produce a rush. (V-1, 153-154).

The court also found (b) that the homicide was committed while engaged in the commission or attempt to commit a robbery and/or burglary. The court found (c) homicide committed for the dominant purpose of avoiding or preventing a lawful arrest; it was not an impulsive killing. The killing occurred immediately after victim begged for his life urging he wouldn't inform on Morton and appellant remarked, "That's what they all say..." Then he pulled the trigger of the shotgun against the victim's neck. Appellant later admitted he had no choice but to kill since the victim turned

and looked at him. Morton also caused fires to be set in an effort to destroy evidence. (V-1, 154-155). As to victim Madeline Weisser, the court found (a) HAC since the evidence showed she was repeatedly kicked and stomped on before and during repeated stabbing with a rambo-styled knife before the final bone-crunching incision was inflicted. The victim sustained numerous significant and painful defensive wounds (a portion of her fingers were almost slashed off). She was stabbed eight times in the throat and neck and survived several minutes in a paralyzed state after her spinal cord was severed. The victim was aware of her imminent and torturous death. Appellant's confession revealed he was aware of the pain the knife would cause when used since he made a preliminary attempt to shoot the victim to minimize the pain but the gun jammed. He then stabbed her. (V-1, 155). The court also found (b) a prior conviction of a capital felony, i.e., the conviction of the murder of John Bowers and (c) the homicide was committed in a cold, calculated and premeditated manner without moral or legal justification (as earlier explained in the order pertaining to victim Bowers). Similarly, the court found (d) homicide during the attempt to commit a burglary/robbery and (e) committed for the dominant purpose to avoid or prevent a lawful arrest (V-1, 156-157).

In light of this extremely brutal, double homicide- each supported by multiple aggravators - and the near unanimous (11-1)

jury recommendation after the jury was fully exposed to the "sociopath mitigation," there can be no reasonable doubt that a different result would obtain had the trial court chosen to add whatever infinitesimal weight could have been appropriate to the scales to decide the correct sentence in this case. Appellant's claim must be rejected.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY ASSIGNING LITTLE WEIGHT TO THE MITIGATING FACTORS OF APPELLANT'S ABUSIVE CHILDHOOD AND HIS AGE AT THE TIME OF THE OFFENSE? (STATED BY APPELLEE).

As his final claim of error, Morton claims that although the trial court found the nonstatutory mitigating circumstances of Morton's abused childhood and age, the trial court abused its discretion in failing to accord sufficient weight to these circumstances. The State disagrees.

A. Standard Of Review

The trial court in this did not ignore the proposed mitigating factors, and in fact, found them to exist. Appellant only takes issue with the weight the trial court chose to assign to the mitigating factors. As such, the appellant must show the trial court clearly abused its discretion before this Court will find error. See Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991), cert.

denied, 502 U.S. 843 (1991)(resolution of factual conflicts is solely the responsibility and duty of the trial judge and as appellate court we have no authority to reweigh that evidence); Zeigler v. State, 580 So. 2d 127, 130 (Fla. 1991), cert. denied, 502 U.S. 946 (1991) (no error in weight trial judge assigned to mitigating evidence; judge could properly consider witnesses' relationship to defendant and their personal knowledge of his actions in deciding what weight to give their testimony). In Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980), this Court defined an abuse of discretion review as follows:

> If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

B. The Trial Court Did Not Abuse Its Discretion In Giving Appellant's Age And Abusive Childhood Little Weight

(i) Age

This Court has recognized that age is a "fact" and that every "murderer has one." Echols v. State, 484 So.2d 568, 575 (Fla. 1985). Furthermore, this Court has said there is "no *per se* rule which pinpoints a particular age as an automatic factor in mitigation." Peek v. State, 395 So.2d 492, 498 (Fla. 1980), cert. denied, 451 U.S. 964 (1981). For example, in Garcia v. State, 492 So.2d 360, 367 (Fla. 1986) this Court stated that the defendant's

age of twenty, without more, was not significant mitigation.

The trial court's decision to give appellant's age of nineteen minimal weight is supported by the evidence. Appellant was of mid-average intelligence and was able to distinguish between right and wrong. (V-6, 616, V-7, 671, 675). While he did not finish high school, it was not because of any learning defect. Appellant was simply lazy and thought that his teachers were stupid. (V-6, 559).

Appellant was the oldest member of the group and clearly the leader and driving force behind the murders. (V-4, 374-375, V-6, 598-599, V-6, 632). Appellant liked to associate with younger people because they were less rejecting and easier to manipulate.[10] (V-6, 633). Even defense expert Dr. Delbeato testified that he found no evidence of extreme mental or emotional disturbance nor was there any evidence to suggest he was being dominated by another individual. (V-6, 625-626). Nor was there any evidence of any major mental illness or thought disorder. (V-6, 628-629). This evidence supports the trial court's decision to give appellant's age little weight as a mitigating circumstance.

As the prosecutor aptly argued below, appellant's age was not

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[10]Appellant was the leader and primary actor in a group that planned and perpetrated the home invasion double murder. Appellant spurred the group on and called another person "chicken" as he decided not to participate in appellant's criminal scheme. (V-4, 385, 393, 395, 395, 410). Timothy Kane, now serving a life sentence, was fourteen at the time of the murders. He recounted the following about appellant's role: "He [appellant] was a leader. I mean, as far as he was the oldest and he was the one that this was all his idea. This was ...He was doing this here." (R. 201).

compelling mitigation in this case:

> Now, Counsel will talk to you about some other mitigating factors that you can consider, that you may feel have been proven. One is his age. His age. He was 19 at the time. Ask yourselves, is that a mitigating factor? Is that something that's going to outweigh this? He's 19.
>
> Ask yourselves, what does it mean when you're 19? Does it mean that you can go out and get a job? Does it mean you can get married? Does it mean you can do military service at 19? Are you at 19 too young to appreciate what you did, that you murdered two law-abiding citizens in their own home? Is that mitigating? Does that outweigh it?
>
> If you think that because he's 19 that's enough, he's 19, he deserves to have life in prison without parole for 25 years, then you can use that. If you feel that 19 is no big deal today, that's not mitigation, that a person at 19 should know what he's doing, should be able to be responsible for his conduct, then it's not mitigating. It's not.

(V-7, 744).

This Court's decision in Mahn v. State, 714 So.2d 391 (Fla. 1998) provides little support for appellant's argument on appeal. In Mahn this Court already determined it must reverse the death sentence and remand for resentencing after striking the cold, calculated, and premeditated aggravator before even addressing the age issue.[11] 714 So.2d at 398. In Mahn, the trial court did not

[11]Also, the death sentence for the first victim was a jury override which this Court found improper under the circumstances. The only death sentence imposed by the jury was 8-4, revealing a much closer case than the present 11-1 jury recommendation. The State also notes that the mitigating evidence of childhood abuse was much more compelling in Mahn. In Mahn, the defendant was abandoned by his father as an infant and abused by both his mother and her boyfriends. 714 So.2d at 394. In contrast, while appellant here had an abusive father present in his home until he was seven or eight, his mother was never abusive and loved her son. (V-5, 476-481). Moreover, after his father left, appellant's mother and step

find age as a mitigator; the defendant committed the murders on his twentieth birthday. 714 So.2d at 400. This Court found failure to find age a mitigating factor was an abuse of discretion where the defense proved that he was immature, establishing "inveterate drug and alcohol abuse, lifelong mental and emotional stability, poor school history, and poor employment history." Id.

In this case, unlike Mahn, the trial court did find appellant's age a mitigating factor, but simply accorded it little weight. The trial court did not find age to be a mitigating factor at all in Mahn. Further, there was no evidence in this case of long term or severe drug and alcohol abuse by the appellant. While appellant did have a poor employment history as the defendant did in Mahn, this was not because of any emotional problems or mental disability, but because appellant was spoiled and his needs were met by his family. And, leaving school was not the result of turmoil in his family life or learning disabilities, he simply did not like school. Thus, this Court's decision in Mahn provides little, if any, support for appellant's position on appeal.

In Shellito v. State, 701 So.2d 837, 843 (Fla. 1997), cert. denied, 523 U.S. 1084 (1997), this Court upheld the trial court's decision to afford appellant's age little weight where the defendant was one month shy of his nineteenth birthday at the time of the murder. This Court stated: "Because the trial judge was in

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father apparently provided a stable and loving home environment.

the best position to judge Shellito's emotional and maturity level, on this record we will not second-guess his decision to accept Shellito's age in mitigation but assign it only slight weight." See also Merck v. State, 664 So.2d 939, 942 (Fla. 1995)(trial court properly rejected as mitigating factor the defendant's age of nineteen).

(ii) Abusive Childhood

As for the non-statutory mitigating factor of appellant's child abuse and dysfunctional family life, the trial court found, as follows:

> As to factors 3(a) and 3(c) above, the evidence clearly reveals that the Defendant was a product of a highly dysfunctional family at least through age eight. The Defendant did not bond with his family and had minimal physical contact with his mother during the first four weeks of his life. Moreover, this family moved in and out of the state on a regular basis, disrupting any stable home and social life. The Defendant was repeatedly physically abused by his alcoholic father. This abuse stopped at about age eight when the mother took refuge at a shelter, divorced, and later remarried, thereby providing a substitute stable father figure for the Defendant. The Defendant's sister, Angela Morton, also sustained sexual abuse in the presence of the Defendant by the same alcoholic father.[12] However, this sibling has never been arrested for any crime and has led a normal productive life. While the Court has considered the Defendant's turbulent childhood as a possible mitigating circumstance, there has been no showing that this experience caused the Defendant to have diminished capacity to know right from wrong or not know the seriousness and grave consequences of his acts and, therefore, the Court gives little weight too his childhood experience in deciding to impose the death penalty.

[12]Angela denied that appellant was in the room when she was sexually abused. (V-5, 505-514).

...

(V-1, 159-160).

In Lucas v. State, 568 So.2d 18, 23 (Fla. 1990), this Court observed:

> "Mitigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt." Eutzy v. State, 458 So. 2d 755, 759 (Fla. 1984), cert. denied, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985). We, as a reviewing court, not a fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in any particular case. Hudson v. State, 538 So. 2d 829 (Fla.), cert. denied, ___ U.S. ____, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989); Brown v. Wainwright, 392 So. 2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

As noted, above, the court considered the evidence of Morton's abusive childhood as nonstatutory mitigating evidence but, gave it little weight in the weighing process. This is clearly a matter within the trial court's discretion. Gunsby, 574 So. 2d at 1090. In Barwick v. State, 660 So.2d 685 (Fla. 1995), cert. denied, 133 L.Ed.2d 766 (1996), this Court rejected an even stronger claim by a defendant regarding childhood abuse. This Court found that failure to find childhood abuse as a mitigating factor was not error, stating:

> Barwick claims that the court erred in its findings regarding several mitigating and aggravating circumstances. First, he claims that the court erred in rejecting child abuse as a nonstatutory mitigator. With respect to this mitigator, the trial judge found:
>
> > The evidence establishes that the defendant was abused as a child by his father and grew up in a dysfunctional family. The evidence also established that the defendant's siblings

> were likewise abused and they apparently grew up to be responsible persons. Two of the siblings had the unfortunate experience of being compelled to testify against their brother. While there are doubtless numerous cases where the abuse received by children influence their actions in adult life and result in or contribute to criminal behavior. [sic] The Court does not find in this case that the abuse received by the defendant as a child is a mitigating circumstance.

We have held that a trial court must find as a mitigator each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. Campbell v. State, 571 So.2d 415, 419 (Fla.1990). We have also expressly recognized an abused or deprived childhood as one factor that is mitigating in nature. Id. at 419 n. 4. In addition, the judge here recognized that the evidence established that Barwick was abused as a child. Consequently, this abuse was an appropriate mitigating circumstance for the court to consider.

Although the trial judge stated that he did not consider Barwick's history of child abuse a mitigating factor, we find that the sentencing order indicates that the judge properly considered evidence of abuse in imposing the death sentence. The sentencing order provides:

> The Court has considered and weighed each of the applicable aggravating circumstances and each of the statutory and non-statutory mitigating circumstances that are established by the evidence or on which there has been any significant evidence produced as they relate to the murder charge.

This statement indicates that the trial judge weighed the factor as ultimately required by our decision in Campbell. We therefore conclude that the trial judge sufficiently considered the mitigating evidence presented on this factor. Any error in articulating the particular mitigating circumstance was harmless. See Armstrong v. State, 642 So.2d 730 (Fla. 1994).

Barwick, 660 So.2d at 695-697.

The trial court in the instant case gave appellant's childhood abuse and dysfunctional family even more consideration than the court in Barwick. The mitigating factor was evaluated and considered but given little weight. In Barwick, the abuse was evaluated and considered, but apparently rejected as a mitigating factor. Nonetheless, this Court in Barwick, found that the trial court at least considered the abuse and any error in articulating the proposed mitigator was harmless.

Appellant recognizes that this Court has previously upheld a trial court's decision to give childhood abuse little weight as a non-statutory mitigator. (Appellant's Brief at 75). See e.g. Williamson v. State, 681 So.2d 688, 698 (Fla. 1996), cert. denied, 137 L.Ed.2d 708 (1997); Jones v. State, 648 So.2d 669, 680 (Fla. 1994). Nonetheless, appellant apparently wants this Court to articulate a *per se* rule that where evidence of childhood abuse is presented, this mitigating factor must be found and given great weight. This has never been the law in the State of Florida. See e.g. Ellis v. State, 622 So.2d 991, 1001 (Fla. 1993)(weight to be accorded mitigating factors is within the discretion of the trial court). Depending upon the evidence presented, the weight to be given this mitigating factor, like any other, is within the discretion of the trial court. Appellant has not provided any compelling reason to depart from this precedent and conclude as a matter of law that childhood abuse must be given great weight in

every case it is established, i.e, completely eliminating the trial court's discretion.

While many may come from dysfunctional families, very few people grow up to be cold blooded killers. Moreover, in addition to his sister growing up in the same abusive environment, including sexual abuse which appellant never had to endure, she chose not to participate in appellant's murderous scheme. And, while appellant's father was abusive, his mother was apparently loving and attentive. The abuse ended at the age of eight and appellant was provided a stable home life after that period. Thus, while early abuse certainly can have deleterious effect on a child's development, the majority of appellant's life at the time he chose to commit these murders had been spent in a stable and supportive family atmosphere. (The abuse ended when appellant was eight; he committed these murders at the age of nineteen).

Appellant apparently argues that the court gave undue weight to the fact that Morton's sister was subjected to equal or more abuse and was living a normal life without committing crimes in rejecting Morton's claim that the senseless murder of two helpless victims was mitigated by his childhood. This Court has charged trial judges with the responsibility to consider and weigh evidence presented in mitigation. If a fact is presented to the court that either explains or refutes evidence presented in mitigation, then the trial court is required to consider how such evidence impacts

on whether the factor has been established and, if established, the weight it should be given. Evidence that Angela Morton was able to rise above the experiences of her early years is no different than any other evidence that diminishes the weight afforded a particular factor in consideration of the sentence. See Barwick, 660 So.2d at 695 (trial judge sufficiently considered the abused childhood, where evidence established that the defendant's siblings were likewise abused and they apparently grew up to be responsible persons); Williamson, 681 So.2d at 698 (no abuse of discretion in only giving some weight to childhood abuse and dysfunctional family where defendant's "siblings became productive members of society despite a similar upbringing."). Based upon this record, appellant has not established the trial court abused its discretion in assigning only little weight in mitigation to appellant's childhood abuse.

C. Harmless Error

In light of the unchallenged and weighty aggravators existing in this brutal home invasion double murder, any error in weighing appellant's age or childhood abuse was clearly harmless in this case. This was not a case where the judge did not consider age or childhood abuse as mitigating factors, he found the mitigators to exist but accorded them little weight. Even if it was error for the trial court not to give age and appellant's abused childhood more weight, the mitigation was so insubstantial given the facts

and circumstances of this case, that any such error must be deemed harmless. See Wickham v. State, 593 So.2d 191, 194 (Fla. 1991).

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State respectfully asks this Honorable Court to affirm the judgment and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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