IN THE SUPREME COURT OF FLORIDA

GARY RAY BOWLES,

Appellant,

vs. CASE NO. 96,~~472~~ 732

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

AMENDED ANSWER BRIEF OF APPELLEE

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STATEMENT CERTIFYING SIZE AND STYLE OF TYPE

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STATEMENT OF THE CASE

The State accepts Bowles' statement of the case subject to the following supplementation and clarification.

Bowles was indicted in December of 1994 for the first degree murder and robbery of Walter Hinton (1T 3-5). He pled guilty and a penalty proceeding was conducted as to the murder count. A jury recommended death by a vote of 10-2, and the trial court sentenced Bowles to death. Bowles v. State, 716 So.2d 769, 770 (Fla. 1998). On appeal, this Court found error in the State's presentation of evidence and argument concerning Bowles' relationships with homosexual men and his alleged hatred of homosexuals resulting from the adverse effects of his own homosexual behavior on his relationships with women. This Court agreed that, as a general proposition, the State may prove motive for committing murder even in a "sentencing-only" proceeding, but concluded that the State had failed to establish any causal connection between Bowles' alleged hatred of homosexuals and the murder in this case of a man who happened to be a homosexual. Id. at 773. Without such connection, this Court held, Bowles' attitude towards homosexuals was not relevant either *to* motive or CCP. Ibid. Thus, this Court reversed

the death sentence and remanded for a new sentencing proceeding before a jury. Ibid.

By the time resentencing occurred, Bowles had pled guilty to the murders of two other homosexuals. Bowles' counsel filed a motion to preclude the use of these murder convictions to establish the prior violent/capital felony aggravating circumstance (1T 90-95, 2T 146-52). Defense counsel noted that these murders had been "originally excluded from consideration by the [circuit] court's ruling on a motion to prohibit the use of other crimes, acts, or wrongs under the Williams' Rule in the original penalty phase" (2T 148). Counsel argued that, because the State had "caused" the reversal of the prior sentencing, the state should "not be able to use convictions that were obtained after the fact" *to* establish a prior violent/capital felony aggravator that did not exist at, the time of the original sentencing proceeding (2T 148). The court denied the motion, "based on existing law" (1T 96, 2T 172).

Defense counsel also objected to the State being allowed to use these prior murders as "Williams Rule" evidence to establish the CCP aggravator, contending that the court's prior Williams' Rule determination excluding the extrinsic murders and its prior finding that the CCP aggravator was not applicable should "still hold today" (2T 15, 5T 478, 7T 915-19). The court disagreed that its prior Williams' Rule finding was binding, noting that its prior ruling was based on the court's conclusion that, although the

extrinsic murders were relevant, their "prejudicial value would outweigh the probative value'' because Bowles had not then been convicted of any of the extrinsic murders (2T 16). Since Bowles had now been convicted of two extrinsic: murders, the "analysis is not the same" (2T 1.6). Further, the Court concluded that it was not precluded from finding CCP in this case merely because it had not found the aggravator previously, as the the State now had "new" evidence of CCP it had not been allowed to present previously.[1] The Court overruled the defense objection to giving any CCP instruction (5T 953), and also declined defense counsel's special requested instruction as to CCP (1T 37).

The resentencing jury recommended death unanimously (1T 52, 8T 1079). The trial court issued a 16-page sentencing order in support of its decision to impose a death sentence (1T 104-119). The court found five independent aggravators (after merging pecuniary gain into the contemporaneous commission of a robbery):

1. The prior violent/capital **felony aggravator,** established by proof of convictions for:

a. Sexual battery and aggravated battery, Hillsborough County in 1982; Bowles raped and brutally beat his girlfriend.

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[1] Defense counsel conceded that precedent from this Court "would probably allow the State to put in more evidence of CCP" (7T 919).

b. Robbery, Volusia county 1991; Bowles pushed a woman down and stole her purse.

c. First degree murder, armed robbery, and burglary of a dwelling with a battery, Volusia County, committed on March 15, 1994; described by the court as "eerily similar to this case;" Bowles had been invited by the victim to move into his home; the victim argued with Bowles about calls he had made to a woman; later, Bowles hit the victim from behind with a lamp, strangled the victim, and stuffed a rag into his mouth; the victim suffered blunt trauma to the head and a fractured neck during his struggle; Bowles stole the victims credit card, money, keys and wallet, and fled the scene.

d. First degree murder, Nassau County, committed May 19, 1994; this victim also allowed Bowles to move in with him; following a violent argument, Bowles hit the victim on the head with a candy dish, beat him and shot him; Bowles also strangled the victim and tied a towel over his mouth; the victims' injuries included head injuries, a gunshot wound to the chest, and a fractured hyoid bone.

2. The **murder was committed during** the **commission of or attempt to commit robbery;** established by Bowles' statements to police and the fact that, after the murder, the victim's watch, car keys, car and stereo equipment were missing from the home, and

Bowles was seen driving the victim's car and wearing his watch. The pecuniary gain aggravatos was also found, but merged into this one.

3. The murder **was heinous, atrocious** or **cruel;** established hy evidence that Bowles' had dropped a 40 pound cement stepping stone on the victim's head, fracturing the victim's skull but not rendering him unconscious; during the struggle which ensued, the victim sustained five broken ribs and numerous scrapes and abrasions; his helix bone and hyoid bone were also fractured when Bowles strangled him; Bowles then stuffed toilet. paper and a rag down the victim's throat, blocking his airway and causing his death.

4. **The murder was cold, calculated and premeditated;** established by evidence that Bowles had picked up a 40 pound stone, brought it inside the trailer and hit the victim on the head as he lay sleeping; in the court's view, the similarity between this murder and the Volusia County murder eliminates any doubt that Bowles intended to kill and not just to injure when he retrieved the stone, and the length of time that had passed between retrieving the stone and using it established heightened premeditation.

5. **The murder was committed while the** defendant **was on** felony **probation;** established by evidence that Rowles was on probation for the 1991 robbery he committed in Volusia county.[2]

The court gave "tremendous" weight to the prior violent/capital felony convictions, "great" weight to the CCP and *HRC* aggravators, "significant" weight to the finding that the murder was motivated by pecuniary gain, and "some'" weight to the fact that Rowles was on probation at the time of the offense (1T113-14).

The court rejected the two statutory mitigators contended for by the defense, i.e., extreme emotional disturbance and substantially diminished capacity to appreciate the criminality of his acts (1T 114-116). The court concluded from the evidence that although Bowles had consumed alcohol and smoked marijuana the day of the crime, his ability to function and to appreciate the criminality of his acts were not substantially diminished; indeed, he appeared to have been "minimally" affected. Further, although

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[2] Bowles states in his brief that the trial court merged this aggravator into the prior violent/capital felony aggravator. Initial Brief at 3. This is incorrect. The court's finding as to this aggravator makes no mention of any merger of this circumstance with the prior violent/capital felony aggravator; further, the court explicitly stated in conclusion that it had found *"five* separate aggravating factors" (emphasis supplied), explaining in a footnote that it had merged two aggravators: the engaged in the commission of a robbery aggravator and the pecuniary gain aqgravator (1T 113).

accepting that Bowles was an alcoholic, that fact alone failed, in the courts' view, to establish extreme emotional disturbance.

The court did give "significant" weight to evidence that Bowles had an abusive childhood, and "some" weight to his history *of* alcoholism and absence of a father figure (1T 116-18). The court gave "little" weight to Bowles' lack of education, his cooperation with police in this and other cases, and his plea of guilty in this and other cases (1T 118). The court also gave "little" weight to Bowle's use of intoxicants at the time of the murder; in the court's view, the frequency with which Bowles had used this explanation when confronted with his violent behavior caused the court "to give this factor less weight as mitigation and more weight as a convenient, but poor excuse" (1T 118). Finally, the court gave no weight to the circumstances which caused Bowles to leave home or his circumstances after he left home, as no evidence was presented to support such mitigation (1T 118).

The court concluded that the aggravating circumstances proved beyond a reasonable doubt "overwhelmingly" outweighed the mitigating circumstances reasonably established by the evidence (1T 118).

STATEMENT OF THE FACTS

The State will offer its own statement of the facts.

In November of 1994, the victim, Walter Jammelle Hinton ("Jay" to his family), lived in a mobile home an Coral Drive in Duval

County (5T 489, 500). At that time, his sister Belinda was engaged to William Logan (the two have since married) (5T 499-500). On Wednesday, November 16, Belinda had talked to her brother on the telephone and they had agreed to yet together Friday evening, November 18, because that was her birthday (5T 501-02). The next day, shortly after 8:00 p.m., William Logan stopped by the victim's home to repay money he owed him (5T 489). Lights were on inside the home, but no one answered Logan's knock on the door, and the victim's Cadillac was not there (5T 48990).

On Saturday, November 19, Logan and the victim's sister drove by twice, once in the morning and once in the evening; the lights were still on in the trailer, but there was still no answer and there was still no car there (5T 490, 502-03). Belinda testified that the victim had missed her birthday on November 18, and that she was getting worried, especially after she found out that her brother had not shown up for work on the 17th or 18th (5T 501-02). They returned Sunday after church; this time, Logan broke into the trailer by a back window (5T 491, 504). He immediately noticed an odor (5T 494). In the victim's bedroom, he saw a wallet and papers thrown on the bed; the bed itself had been stripped and the covers piled on the floor (5T 494-95). Logan felt the covers, felt something hard, lifted the covers and saw a body (5T 496). He left, and he and Belinda went to a neighbor's house to call the police (5T 497).

Logan testified that he had met a man going by the name Tim Whitfield at the victim's trailer a week before the murder; he identified the defendant as the person he knew as Tim Whitfield (5T 498).

Sandra Teays lived near the victim and had known him for 13-14 years (5T 566-67). The victim sometimes allowed people to stay with him; in November of 1994, a woman named Joan was staying in the victim's trailer (5T 567). There was also a man staying there at the time, who Ms. Teays knew as "Tim" (5T 567). She identified the defendant as the man she knew as Tim (5T 567-68). Teays testified that, earlier in the same week[3] the victim had been murdered, "Tim" had come to her house, complaining that the victim, who he described as a "son-of-a-bitch," had "kicked him out" and that he had just gotten out of jail (5T 568). The defendant told her that the victim had caught him "fooling around" with Joan and also that there was some money missing (5T 569). The following day, however, they were together again and everything seemed to be okay (5T 569-70). The witness last saw the victim alive the evening of November 16, 1994, when he came by her house to pick up her cousin Ricky Smith to take him to the Amtrak station; she did not. see the defendant that day (5T 570-71).

Richard Smith testified for the defense he had known the victim for eight years, having met him through his cousin Sandy

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[3] Her testimony is not clear as to the exact day.

Teays (7T 841). During the week before the victim's death, Smith was in Jacksonville and saw the defendant, who he knew as Tim Whitfield, every day (7T 844, 851). Smith saw the defendant drink heavily "at times," and saw him intoxicated "at times" (7T 845). On the evening of November 16, 1994 (Wednesday), the victim picked Smith up to take him to the AMTRAK station; his train was scheduled to leave at 8:30 (7T 846). As they were leaving the trailer park, they saw the defendant walking and gave him a ride (7T 847). The defendant had been drinking moderately (7T 847). They bought a 12-pack of beer and some fried chicken (7T 848). The defendant drank half the 12 pack and Smith drank the rest; the victim drank nothing because he was driving (7T 849). All three, however, smoked marijuana (7T 848-49). By the time they got to the station, the defendant, in Smith's opinion, was intoxicated, about a ten on a scale of one to ten (7T 850). On cross-examination, Smith testified that Bowles and the victim were not fighting; everything seemed fine (7T 856). Although intoxicated, Bowles could carry on a coherent and rational conversation (7T 856-58).

James Sutton lived across the street from the victim (5T 572). At some point, the victim introduced Sutton to the victim's roommate, "Tim" (5T 574). Sutton identified the defendant as the person he had known as "Tim" (5T 573). On late Thursday evening *or* very early Friday morning of the week that the victim had been

killed, Sutton saw the defendant driving the victim's Cadillac (5T 575).

Jennifer Moye testified that she had met the defendant, at a day labor pool (5T 578). She knew him as Tim Whitfield ((5T 578). She had been an acquaintance of the defendant, off and on, for a couple of years (5T 579). She often saw him when he had been drinking, but he was not always drinking or drunk when she saw him (5T 580-81, 590, 594). Moye lived "on the beach" (5T 577). On Friday evening, November 18, she was ill, and Bowles took her to the victim's trailer on Coral Drive so she would not have to sleep outdoors (5T 581, 592). He was driving a Cadillac (5T 582). They each had "about a sip of Vodka" and she went to bed (5T 583). He gave her the bottle the next morning and took her back to the beach (5T 583-84). They returned to the trailer the following evening (5T 584); again she had a "shot" and went to sleep ((5T 594). Rowles was not intoxicated either day or she would not have gotten into the car with him (5T 594). The second evening, Bowles showed her a watch he claimed his roommate had given him (5T 586). She was sick during this time, and there was no "partying" and no "sexual activity" (5T 593).

Police began their homicide investigation on November 20 (6T 610). Other than where William Logan had broken in through a back window, there was no sign of forced entry (6T 610). There was an impression in the dirt by the front door where a concrete stepping

stone had been removed (5T 512, 6T 613). There was some dirt on a lamp table in the living room indicating that the stepping stone had been laid on the table at some point (6T 613). The stone itself was found lying on the bed in the bedroom, while the victim's body was found in the bathroom, covered with sheets and blankets from the bed (5T 513, 522, 6T 613). There was blood on the underside of the stone, and blood on the bathroom floor arid on the bed covers (5T 540, 519, 521-23). A vanity had been forced open; inside was some toilet tissue (6T 614). A stereo appeared to be missing; all that remained were severed wires and some cassette tapes (6T 612). Police found some "little Vodka bottles'" and three or four beer bottles (6T 615-16). Police also discovered a pay stub for a Timothy Whitfield (6T 617). The victim's car was missing, but was later recovered from a parking lot on Beach Boulevard in south Jacksonville (6T 619).

Dr. Arruza conducted the autopsy. The victim had a Laceration and abrasions on the right upper side of his face; underneath those injuries Dr. Arruza found that the skull had been fractured from the middle of the forehead across the orbital ridge to the upper cheekbone, "all the way to the root of the teeth" (5T 541, 553). There was, however, no corresponding injury to the brain (5T 541). These injuries were consistent with the victim having been hit with the concrete stepping stone found on the victim's bed (5T 553-54). Since there was no injury *to* the brain, the victim would not have

died immediately, or even been rendered unconscious (5T 554, 558). He was, however, stunned "probably for a second" by the blow (5T 559).

A rag, or washcloth, had been stuffed into the victim's mouth; it was bloody (5T 542). Dr. Arruza removed the rag, and discovered that behind the ray wet paper had been stuffed all the way to the back of the mouth (5T 550). Asked how far back into the mouth this wet tissue was, Dr. Arruza said it was at least as far as you could "stick your finger'' (5T 557).

When Dr. Arruza examined the neck, she discovered that the victim's "hylick" [sic] bone was fractured, as was his "trichoide cartilage" that is just below the Adam's apple.[4] This, and the hemorrhage of the neck muscle she also observed, indicated that the victim had been manually strangled (5T 550).

In addition, the victim had five fractured ribs and various scrapes and abrasions on his right arm and left knee (5T 550-51).

Dr. Arruza testified that the evidence was consistent with the victim having first been hit in the head with the stepping stone, having thereafter struggled with his assailant, and then having been manually strangled (5T 555). Strangulation can result in unconsciousness in 30 to 45 seconds with continuous pressure; however, it is difficult to apply continuous pressure to a

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[4] In his sentencing order, the trial judge stated that the victim's "helix" bone was broken (1T 109).

struggling victim, so it probably took longer in this case to achieve the unconsciousness of the victim; it would have taken as long as the victim kept fighting back, and could very well. have taken several minutes (5T 556, 562-63). Furthermore, it takes considerably longer to kill someone than to render them unconscious. If the pressure had been released immediately after the victim was rendered unconscious, he would have come to (5T 562-63). The tissue and the rag stuffed down the victim's throat would permanently have prevented him from breathing and, thus, from waking up (5T 557). It was logical to assume from all the circumstances that the victim was first manually strangled to unconsciousness and then the tissue and rag was stuffed down his throat, causing his death (5T 560).

Bowles was arrested at a Jacksonville Beach labor pool on November 22 (5T 597-98). He was carrying identification showing him to be Timothy Whitfield (6T 605).

Bowles was interrogated by homicide detective J. P. Collins, after being advised of his rights ((6T 621). Collins testified that Bowles was not then under the influence of alcohol or drugs (6T 632-33). Bowles signed the rights form as "Timothy Whitfield" (6T 621). He initially denied having murdered Walter Hinton, but, after being confronted with inconsistencies in his story and asked who he really was, he admitted he was Gary Ray Bowles (6T 627-28),

and then admitted killing Mr. Hinton (6T 633). Ultimately, Bowles signed a written statement, in which he stated:

> I, Gary Ray Bowles, met Jay [Hinton] at Jacksonville Beach . . . (early in November of '94). Jay drove up to the boardwalk area where I was and asked if I wanted to yet high and smoke a joint. I got into Jay's car and we smoked a joint. We talked for a while, and then he got a room at the Travel Inn on Arlington Road. We stayed one night there, and then Jay left for Georgia, Atlanta, for a while. I called Jay back a couple days later at Mary Joe's . . . (Jay had given me the number) . . . . And Jay came and picked me up at Jax Beach, and we drove to Macon, Georgia, where we spent the night. The next day, Jay rented a U-Haul truck and picked up his possessions and drove to Jax after seeing his mom, spend night and had dinner. Then drove to Jax and unloaded everything into the trailer at 13748 Coral Drive. . . .
>
> I stayed with Jay for approximately two weeks. Everything was okay until Sharon Ann showed up on Friday 11/11/94 . . . . I moved in on Saturday, November 12th of '94. I got fresh with Sharon Ann, which upset Jay. Jay found out through Sharon that I was fresh with her and got jealous and told me to leave. Jay drove me to Jacksonville Beach and dropped me off near Eight Til Late and Burger King and I got a quart of beer. I was arrested for drinking beer in public by Jax Beach Police Department. I got out of jail November 14th of '94, Monday, and went back to tho trailer to pick up my clothes.
>
> Kick drove up in Sandy's car but Jay wasn't home from work. Rick and I went to Sandy's house until Jay got home arid I walked back to the trailer, Jay said I could stay there until the end of the month. Tuesday, November 15 of '94, I stayed at the trailer while Jay was at work, On Wednesday, November 16th of '94, I again stayed at: the trailer drinking beer. Jay came back from work and

picked up Rick from Sandy's, bought some pot for Rick and both came back to the trailer.

We partied until Rick had to yo to the train station. Jay, Rick and I drove to the train station and dropped Rick off. Jay and I drove back to the trailer. Jay went to bed and I stayed up drinking a quart of Magnum beer. Something snapped inside of me. I went outside and picked up one concrete block and brought it inside. I put it down on a table and thought for a few minutes. I then picked up the block and went into Jay's room where he was sleeping. I raised the block over my head and dropped it on his head. Jay fell off the bed - foot of the bed and I choked him with my arm. Jay was struggling a little. I then stuffed a rag - a maroon rag into Jay's mouth while sitting or kneeling on Jay's side. I then covered Jay up with bedspread and sheets, walked out of the room closing the door.

I then went to - drove away in Jay's car. I met a girl, . . . November 17th, '94, named Ginger near the Ritz at Jax Beach, and drove back to Jay's trailer, where Ginger and I partied and then went to sleep. We left the next morning, November 18th of '94. I picked Ginger back up again at the Ritz and went back to the trailer and spent the night. The next morning I dropped Ginger back off at the Ritz, November 19th of '94. I then left Jay's car at Scotty's parking lot off Beach Boulevard and walked away.

The last couple of days I stayed at the Golden Sea Motel at Jacksonville Reach. I was at the labor pool this morning, 11/22/94, when the police picked me up,

(6T 635-38)(prosecutor/witness comments and colloquy omitted).

On the same day Bowles gave the above statement, he was also interrogated by FBI agent Dennis Reagan (6T 642-43). Bowles' statement to him about the Hinton murder was essentially consistent

with the statement he had given to local police, as recounted above (6T 654-55). He told Reagan that he had drunk four quarts of malt liquor the evening of the murder (6T 656), but had not had a drink in a couple of days and was shaking from withdrawal symptoms (6T 662). Reagan testified, however, that he could not tell. that Rowles was shaking (6T 662). Bowles also told Reagan that he had wanted to get money from Hinton so he could leave the scene (6T 656). In fact, the victim had no money, so Bowles had been unable to leave (6T 657). Additionally, Bowles confessed to having killed Albert Morris in Nassau County and to having killed John Roberts in Daytona Reach (6T 661).

Tampa police officer Jan Edenfield testified about Bowles' battery of his girlfriend, Wesley Blease, in 1982 (6T 681 et seq) At the time, Blease was 21 years old (6T 682). Edenfield visited her in the hospital. She had been severely beaten around the face; she had black and blue marks around her neck that looked "almost like fingerprint impressions;" her eyes were swollen shut, and she had what appeared to be a bite mark on her sight breast (6T 682). Doctors found tearing and lacerations inside her vagina arid her rectum (6T 688). She remained in the hospital for over two weeks (6T 688). Edendfield went to the scene of the battery - a motel room (6T 688). She observed bloodstains in a chair, blood spatters in the bathroom on the shower curtain arid on the walls, blood spatters on the bed and on the wall *five feet* above the bed, and a

large amount of blood on a plastic sheet covering the bed (6T 688). Edenfield interrogated Bowles, who admitted beating the victim (6T 691).

Forrest Currie of the Holly Hill police department testified about a strong armed robbery Bowles committed in 1991 (6T 696 et seq). Bowles and the victim had been on a date; upon their return to the victim's home, Bowles pushed her down, took her wallet and fled (6T 700). Bowles was apprehended shortly thereafter (6T 698). During a search of his person, police found $67 and a pair of sunglasses identified by the victim as having been hers (6T 701).

Daytona police officer Thomas Youngman testified about the murder of John Roberts, a 59 year old white male who lived in a one story, two bedroom home in Daytona Beach (6T 773 et seq). Youngman was called to the scene of the crime on March 15, 1994 (6T 774). Police found no evidence of forced entry except where someone had to break in to find the victim (6T 775). Roberts' body was found on the floor of the living room, next to a couch (6T 775). A towel had been stuffed in his mouth (6T 776). A glass lamp was shattered and glass from the lamp was all over the living room (6T 775). The victim's coffee table was broken (6T 775). The victim's wallet, car keys arid car were all missing (6T 776). The victim's car eventually was recovered in Georgia (6T 777). Bowles' fingerprints were found at the scene, as were papers belonging to him (6T 776).

An autopsy was conducted; the victim had **been** strangled and beaten about the head (6T 777). There were defensive wounds to his hands, including one finger that was almost completely severed (6T 778). It appeared that the victim had been sitting on his couch, that his assailant had removed the lamp shade from the lamp, placed the shade on the floor, and then struck the victim several times on the head (6T 778). From the blood all around and the broken coffee table, it appeared that a struggle had ensued (6T 778).

Bowles eventually was interrogated about this murder. Rowles stated that he had been living with a woman named Mary Long. She left town; Roberts told Bowles he could stay with him, so he took his clothes over to Roberts' house and went to the beach, where he drank and shot pool (6T 782-83). Bowles had known Roberts for a couple of weeks (61'789). Upon his return from the beach, he got into an argument with Roberts about Mary Long (6T 782). Roberts told him he did not want him *to* run up his phone bill and did not want Bowles to be involved with her (6T 786); if Bowles was going to be involved with a woman, he couldn't stay there (6T 789). Bowles claimed he "just snapped" (6T 789); he picked up a lamp from the kitchen, remove the shade so he could "grip" it better, and then hit the victim with it as he sat on the couch (6T 782-84). The victim fell across the coffee table, breaking it (6T 785). Then Rowles "proceeded to choke him and struggle with him, and when I seen that he was no longer moving or struggling with me I

proceeded to gather up all my belongings and steal his money, his wallet, and I put everything in his car and I headed to my mother's house in Branson, Missouri" (6T 782). Bowles explained that by "struggling" he meant that the victim was trying to get away; Bowles said that he had both hands around the victim's neck when he was choking him (6T 785). He claimed not to remember putting anything in the victim's mouth (6T 786). Asked why he had committed this murder, Bowles answered, "I guess my intention was to rob him" (6T 786).

Tommy Reeves, under Sheriff of Nassau County, testified about the murder of Albert Morris, a 37 year old white male (6T 738 et seq). Reeves went to the scene of the crime, a trailer outside of Hilliard, Florida, on May 19, 1994 (6T 739-40). Reeves found Morris lying face down on the floor of his living room, a turkish towel in his mouth and tied to the back of his head (6T 740). A heavy glass candy dish lay broken on the floor, and a 12 gauge shotgun lying nearby had one spent shell in it (6T 740-41). The victim's pockets were inside out, and his wallet, credit card and ear keys were missing (6T 741-42), as was his car (61' 748).

The victim died from a single gunshot wound to the chest, but he had also been beaten on the head and strangled (6T 748-49). Blood was spattered on the wall. and there were pools of blood on the floor (6T 749).

There was no evidence of a forced entry except where the victim's father had broken into the back door after the victim failed to show up for work and failed to answer his telephone (6T 741-42). Police learned from neighbors, and Bowles later admitted, that Bowles had been living with the victim for a week and a half to two weeks (6T 743). He had indicated to the victim that he was a construction worker and was supposed to do some repair work to the victim's trailer (6T 752).

Bowles was interrogated about this crime on November 22, 1994 (6T 752) (the day he was arrested for the Hinton murder). Bowles confessed. He stated that he had met Morris at a gay bar in Jacksonville about a month before the murder, or about mid-April of 1994 (6T 756) (which would have been about a month after he had murdered Mr. Roberts). Bowles began staying at the victim's home, feeding his goats and taking care of his yard (6T 756). After a couple of weeks, Morris got "jealous and possessive," and they got into a fight one evening at a bar (6T 756-57). That fight continued after they left that bar and went to another (6T 757). They were ejected from that bar and returned to Morris' trailer (6T 757). They continued fighting; according to Bowles, the victim got a knife and tried to stab him with it, but Bowles took it from him and stabbed Morris "in his upper body somewhere" (6T 757).[5] Morris

[5] Examination of the victim's body during the autopsy revealed no evidence that he had been stabbed (6T '749); although Bowles did not admit hitting the victim on the head with the candy

kept coming at him, so Bowles grabbed a shotgun and shot him once, got his "shit and got in his car arid hauled ass" (6T 758). He went to the Wal-Mart in Jacksonville and tried to use the victim's credit card, but got nervous when they started asking "all kinds of questions," and took off (6T 759). He parked the car in some "little subdivision" and hitchhiked to the beach (6T 759).

Bowles' mother and brother testified on his behalf about his childhood, which they described as good at first, but abusive after the mother married the first of a couple of bad step-fathers when Bowles was 7-8 years old. Although they testified that Bowles began drinking, smoking pot and huffing glue when he was 11 years old, the mother also testified that she had only seen him intoxicated once and that he had never told her that he had an alcohol or drug problem (7T 889-90). She also testified that, right. before the defendant had **left** home, he had hit her husband over the head with a rock, and he and two other boys had almost killed him (7T 889). The mother and brother have had minimal contact with the defendant since he was 13 years old (7T 839, 888).

No psychological or psychiatric expert testimony was presented in mitigation.

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dish, the evidence noted previously indicated he had.

SUMMARY OF THE ARGUMENT

Twelve issues are raised on this appeal:

(1) It is well settled that the State may exercise its peremptory challenges against prospective jurors opposed to the death penalty but not excludable for cause.

(2) The State presented sufficient evidence at the original sentencing to establish aggravating factors and to support a death sentence. Therefore, under this Court's precedents, resentencing is not only allowed, but may proceed in every respect as an entirely new proceeding; the State is not barred from submitting evidence in aggravation not available at the original sentencing, or in resubmitting aggravators not found previously. Bowles' attempt to distinguish this Court's precedents based on an allegation of deliberate prosecutorial misconduct at the original sentencing fails; no precedent supports his legal theory, and there is no factual support for his claim that the prosecutor purposely presented "illegal" evidence.

(3) The trial court's extensive findings concerning the HAC aggravator are supported by the record and justify the court's conclusion that this murder was heinous, atrocious or cruel. Bowles waited until the victim was asleep, went outside, picked up a 40-pound stone, dropped it on the victim's head to stun him, and then, while the victim struggled for his life, breaking five ribs arid sustaining numerous bruises and contusions in the process,

down his throat and a rag into his mouth to finish killing him. The evidence does not support Bowles' contention that the victim's struggle was "feeble" or that he died quickly.

(4) The standard HAC instruction given in this case has been repeatedly approved by this Court.

(5) Contrary to Bowles' contention, the revised standard CCP jury instruction delivered in this case is neither unconstitutionally vague nor misleading.

(6) The evidence, including Bowles' theft of the victim's car and watch, *and* his own statement of his reason for committing this murder, supports the trial court's conclusion that this murder was committed for pecuniary gain.

(7) & (9) In these two issues, which the State has argued together, Bowles complains **the** trial court erred in rejecting **the** two statutory mental mitigators and failed properly to weigh and consider nonstatutory mitigation. Contrary to Bowles' contention that the trial court gave little or no weight to evidence that Bowles was abused as a child, the trial court in fact gave "significant" weight to this proposed nonstatutory mitigator. The court did reject the two statutory mental mitigators of extreme emotional disturbance and diminished capacity; the court determined that, although Bowles was an alcoholic, that fact alone did not establish statutory mitigation, and the evidence showed that Bowles was minimally affected by his consumption of alcohol and marijuana

the day of the murder. In light *of* the demonstrably purposeful conduct exhibited by Bowles during and after the murder, as well as the absence of any expert testimony tying Bowles' drug or alcohol use or abuse *to* any alleged emotional disturbance or diminished capacity, the trial court was justified in rejecting the statutory mental mitigators, The court did give weight, albeit "little" weight, to Bowles' drug and alcohol use as nonstatutory mitigation; but it is well settled that the weight yiven to mitigation is within the trial court's discretion. Bowles cannot establish abuse of discretion by reporting fanciful and greatly exaggerated "facts" about the extent of his problems. The trial court fully considered, thoughtfully analyzed and expressly evaluated Bowles' proffered mitigation, and the court's conclusions are supported by the record.

(8) The jury instruction delivered in this case ax to victim impact evidence fully comported with this Court's precedents,

(10) & (11) In these two issues, Bowles argues that the standard penalty instructions delivered by the trial court were insufficient to guide the jury; he contends **the** court should have defined mitigating circumstances, told the jury its consideration was not a mere counting process, and enumerated specific non-statutory mitigating circumstances. As he concedes, however, this Court has consistently held that such instructions are unnecessary and that the standard instructions are sufficient; the State cannot.

agree with Bowles' assertion that these precedents are "unprincipled" or need to be re-examined,

(12) The trial court did not err in allowing a police officer to give hearsay testimony about cuts and lacerations to the vagina and rectum suffered by the victim of one of Bowles' prior violent felonies. Hearsay is generally admissible at the penalty phase to acquaint the jury with the facts of prior violent felonies, Furthermore, any error would be harmless in view of the testimony about the facts of this crime and of other, even more violent crimes, admitted without objection, and, as well, the numerous other aggravating circumstances established by the evidence.

ARGUMENT

ISSUE I

THE STATE MAY PROPERLY EXERCISE ITS PEREMPTORY CHALLENGES TO STRIKE PROSPECTIVE JURORS WHO ARE OPPOSED TO THE DEATH PENALTY, BUT NOT EXCLUDABLE FOR CAUSE

Bowles argues here that the state constitutionally should not be allowed to challenge peremptorily a prospective juror whose feelings against the death penalty do not rise to the level sufficient to support a challenge for cause.

This claim may be disposed of summarily. First of all, Bowles has failed to demonstrate how he preserved at trial the constitutional issue he now attempts to raise. The portions of the trial record cited by Bowles' appellate counsel in his brief do not show that trial counsel raised a constitutional objection to the State's exercise of peremptory challenges against persons who were reluctant to impose a death sentence. San Martin v. State, '705 So.2d 1337, 1343 (Fla. 1997). An appellate objection is not preserved unless it is the same objection as was raised at trial, Steinhorst v. State, 412 So.2d *332* (Fla. 1982)

Second, the issue is without merit. Bowles concedes that every federal court that has considered this claim has rejected it, except for one district court that was reversed on appeal. Further, this Court has consistently rejected such claims. See, e.g., San Martin v. State, 717 So.2d 462, 467-68 (Fla. 1998); San

Martin v. State, supra at 1343 (both parties have the right to peremptorily strike persons thought to be inclined against their interests; thus, state may properly exercise its peremptory challenges to strike prospective jurors who ace opposed to the death penalty but not subject to challenges for cause). Bowles has presented no sufficient basis for overturning this recent precedent.[6] The State would note that the defense enjoys the corollary right to exercise peremptory challenges against persons who strongly *favor* the death penalty in murder cases, but riot to the extent of being excludable for cause. Bowles has not explained how allowing the parties to strike jurors who are either overly "soft" or overly "hard" on imposing death impermissibly skews the jury venire.

ISSUE II

UNDER THIS COURT'S CLEAN SLATE RULE, THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO INTRODUCE IN AGGRAVATION FOR THE FIRST TIME AT THIS RESENTENCING HEARING EVIDENCE OF TWO PRIOR SIMILAR MURDERS FOR WHICH THE DEFENDANT HAS NOW BEEN CONVICTED

Bowles contends here that the State should not have been allowed in this resentencing proceeding to introduce two prior murders in aggravation that were not admissible at the original. sentencing proceedings because at the time of the original

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[6] The State objects to Bowles' reliance on extra-record hearsay like the newspaper and magazine articles he cites. Initial Brief at 25. If Bowles had wanted to present evidence on this issue, he should have done so at trial.

sentencing proceedings Bowles had not been convicted of these prior murders. Bowles' appellate counsel acknowledges in his typically colorful way that "he is rowing upstream with a stiff wind in his face on this issue," in light of the "clean slate" rule of Preston v. State, 607 So.2d 404 (Fla. 1992), but argues in that Preston should not apply in this case because the State "deliberately" presented illegal evidence in the original sentencing "knowing" that, if reversed for such misconduct, the State would have stronger evidence to present, on resentencing.

The State would rely on Preston. The evidence presented at the previous sentencing was sufficient to establish aggravating factors and sufficient to support a death sentence. Moreover, the jury and the judge agreed that a death sentence was appropriate. Thus, there was no "acquittal" of the death sentence, and there is no double jeopardy prohibition to a "clean slate" resentencing. Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986). Thus, the State is "not barred from resubmitting the aggravating factors not found by the judge in the original penalty phase proceeding." Preston, supra at 408. As this Court stated in Preston:

> The basic premise of the sentencing procedure is that the sentencer must consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine the appropriate punishment. *See* Section 921.141 (1), Fla.Stat. (1989). This is only accomplished by allowing a

> resentencing to proceed in every respect as an entirely new proceeding.

Id. at 409.

Bowles' argument that Preston should not apply in this case because the State "deliberately" created error in the original sentencing hearing faces several hurdles. First, he can cite no authority for rejecting Preston's "clean slate" rule where the prosecutor has erred deliberately rather than through poor judgment, ignorance or mistake. Secondly, despite having raised this issue below, Bowles has presented no evidence that any prosecutorial error in the original sentencing was the product of deliberate misconduct rather than of a good-faith, albeit mistaken, view of what this Court might deem properly admissible in that sentencing proceeding. Not only is there no evidence of any strategy on the part of the State to cause a resentencing, but Bowles cannot demonstrate why the State would have expected to have a stronger case for death by the time of any resentencing. Thirdly, the State's allegedly deliberate strategy would have required the connivance of the trial judge, who at the original sentencing proceeding *allowed* the State to present the homosexual hatred/motive evidence which led to this Court's reversal, It bears noting that this Court's reversal was premised on "the trial court's error," 716 So.2d at 773, not on "State" error.

The fact that this Court reversed, arid even that it reversed unanimously, does not mean that the State had no arguable basis for

presenting the evidence it presented at the first hearing. While this Court ultimately disagreed with the State's arguments as to the admissibility of this evidence, the introduction of that evidence was riot part of a "deliberate" strategy by the State to screw up the first sentencing so it could resentence him with stronger evidence, and no evidence or reasonable inference from the circumstances supports Bowles' phantasmagorical claim that the State deliberately created error, Bowles has shown no reason for this Court not to apply Preston's clean slate rule in this case, and it would be a manifest injustice (and an undeserved windfall to this defendant) to exclude such unquestionably reliable and probative evidence bearing on the question of his proper sentence.

ISSUE III

THIS MURDER WAS HEINOUS, ATROCIOUS OR CRUEL, AND THE TRIAL COURT DID NOT ERR BY SO FINDING

Bowles contends the murder he committed was not heinous, atrocious or cruel, and that the trial court erred in finding it to be so. He contends that the victim was never fully awake or aware, that he presented at most only a feeble resistance to the defendant's assault, that unconsciousness came "mercifully quick, within seconds," and that the victim "literally never knew what hit him." Initial brief at 36-37. These factual assertions, however, are belied by the record, and were rejected by the trial court. The State would suggest that this Court's determination of the sufficiency of the evidence to support the trial court's HAC

findings should begin with what the trial court found, and not with appellate counsel's own fanciful reading of the record. The trial court found:

> While Mr. Hinton was sleeping, the Defendant went outside the mobile home and lifted from the ground a 40-pound cement stepping stone and brought it inside. He placed the stepping stone on a table in the living room area, sat down and thought for a few moments. He then entered Mr. Hinton's bedroom and dropped the cement stepping stone on Mr. Hinton's face. Mr. Hinton sustained a skull fracture which extended on the right side of his face across his cheek to the roots of his teeth. Despite the force of this blow, Mr. Hinton did not die or lose complete consciousness. In an effort to save his life, Mr. Hinton struggled with the Defendant. The Medical Examiner observed on Mr. Hinton's body five (5) broken ribs, abrasions to the front and back of his right forearm, and more abrasions on the outside of his left knee. These findings corroborate the Defendant's statement that Mr. Hinton continued to struggle for his life after the Defendant dropped the 40-pound stone on his face.
>
> The findings of the Medical Examiner also corroborate the Defendant's statement that he then choked Mr. Hinton with his hands. Mr. Hinton had hemorrhaging on the right side of his neck. The helix bone, a "U" shaped bone found at the top of the neck, and the hyoid bone located underneath his Adam's **Apple** were fractured. Toilet paper was stuffed down his throat and a rag was placed over the paper which protruded from his mouth. The Medical Examiner "logically assumed" that Mr. Hinton was strangled to death or to unconsciousness and these items were then stuffed down his throat blocking his airway and resulting in his death.
>
> The Defendant argues in his Memorandum that although the intensity of the struggle

> was great and resulted in suffering by Mr. Hinton, there is no evidence that the Defendant intended to do anything but to kill by whatever means were at hand. He further argues that he did not set out to strangle, choke, or beat Mr. Hinton to death. Lastly, he argues that he was intoxicated, which he suggests negates the finding that he intended to cause pain.
>
> This Court finds that Mr. Bowles was, as he argues, prepared to take the life of Walter Hinton by any means available. Although this Court cannot determine if Mr. Bowles enjoyed the suffering of Walter Hinton, he was certainly indifferent and determined to take his life. Since the Defendant could not have known with certainty whether crushing Walter Hinton's face with a 40-pound stepping stone would take his life, he was prepared to inflict further suffering. This is just what he had been prepared to do only months earlier when he took the life of Mr. Roberts in Volusia County.
>
> Finally, the fact that Mr. Hinton was likely unconscious when the toilet paper and rag were stuffed down his throat, does not bar a finding that the Defendant's conduct was consciousless, pitiless, heinous, atrocious and cruel. Without a struggle, the Defendant's efforts to strangle Mr. Hinton would have, according to the medical examiner, taken at least 30 to 45 seconds before a loss of consciousness. With a struggle, Mr. Hinton would have endured the fright, pain, and fear of being strangled for an even longer period.
>
> The Court finds beyond a reasonable doubt that this aggravator has been proved.

(1T 108-11).

It should be noted first, that while Bowles' appellate counsel describes the victim's struggle as "feeble" and his suffering as so minimal as to be inconsequential, his trial counsel conceded that

the "intensity of the struggle was great and resulted in suffering by Mr. Hinton" (1T 62-3). Trial counsel's argument was *not* that the victim did not suffer, but only that Bowles did not ***intend*** that he suffer.

Secondly, although Bowles argues on appeal that the trial court "rejected the defendant's argument that Hinton was unconscious when the rag and toilet paper were stuffed down his throat," Initial brief at 33, in fact, the trial court found that it was "likely" that Hinton was unconscious at that point. But this occurred only after Bowles had strangled the victim into unconsciousness.

The testimony of the medical examiner was that would take a *minimum* of *30* to 45 seconds to manually strangle someone to unconsciousness with "continuous pressure," which is difficult to apply if the victim is struggling. The fact that Hinton suffered five broken ribs and numerous abrasions and contusions indicates, as trial counsel conceded, a "great" struggle, not the "minimal" one appellate counsel describes. Given the intensity of the struggle, it is likely that the victim was conscious for greatly in excess of 30 to 45 seconds, and could have been conscious for several minutes. Furthermore, even 30 to 45 seconds is an appreciable and significant amount of time for the victim to have suffered and to have contemplated his death, and the State strongly disagrees with Bowles' argument to the contrary.

The State also disagrees with Bowles' argument that the victim was not conscious enough to have suffered. The intensity of the his struggle belies any contention that he was unconscious or only semiconscious during the attack.

As for Bowles' argument, presented in his sentencing memorandum at trial (1T 62), that he did not intend to inflict suffering, because he thought dropping the stone on the victim's head would immediately kill the him, the State would respond that the two prior murders suffice to contradict any argument that Bowles thought that Hinton would die immediately from the blow to his head. Bowles' *modus operandi* is to first strike his intended victim on the head with a heavy object in order to stun him, then *to* strangle him to unconsciousness (in one case he also shot the victim), and then to stuff a raq in his mouth. If Hinton had died immediately from the blow to his head, he would have been the first of Bowles' victim's to die in that manner. It seems much more reasonable to infer that Bowles *knew* from past experience that Hinton would *not* die from the blow to the head, and was prepared in advance to take further action to accomplish his intended task.

Furthermore, the intent to inflict pain is not a necessary element of the HAC aggravator. Even if Bowles did not intend in advance to inflict pain, he certainly was, as the trial court found, "indifferent" to the suffering he caused, and the means and manner in which Hinton's death was brought about justify the HAC

finding. Brown v. State, 721 So.2d 274, 277 (Fla. 1998) ("Unlike the cold, calculated and premeditated aggravator, which pertains specifically to the state of mind, intent and motivation of the defendant, the HAC aggravator focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death."); Guzman v. State, 721 So.2d 1155, 1160 (Fla. 1998) ("The intention of the killer *to* inflict pain on the victim is not a necessary element the [HAC] aggravator."); Mahn v. State, 714 So.2d 391, 399 (Fla. 1998) (Mahn's contention that HAC did not apply because he did not deliberately inflict pain rejected).

In fact, the strangulation alone would have justified the trial court's finding of the HAC aygravator. As Rowles concedes, this Court's case law establishes that "strangulation creates a prima facie case for this aggravating factor." Initial Brief at .35 (citing Orme v. State, 677 So.2d 258 (Fla. 1996)). Bowles attempts to distinguish this precedent by arguing that Hinton was only semiconscious while being strangled, noting that he was asleep when first attacked, that he had consumed alcohol and marijuana before going to bed and that he was stunned when struck on the head by a 40 pound stone. The evidence, however, including Bowles' own statement to police and also the testimony of his witness Richard Smith, indicates that the victim had drunk very little that evening. Smith testified that Hinton did not drink with the other

two because he was driving (7T 849). Bowles told police that Hinton went to bed as soon as they returned from taking Smith to the train station, while he (Bowles) stayed up drinking (6T 637).[7] Furthermore, the medical examiner testified specifically that Hinton was *not* rendered unconscious by the blow to the head and would only have been stunned for a second or so. The intensity of the victim's struggle after he was struck in the head belies any suggestion that he was barely conscious during the struggle, and also belies any suggestion that he was strangled into unconsciousness in a matter of just a few seconds.

Although it can never be known just exactly how long it took Bowles to strangle Hinton into unconsciousness, it is clear from the evidence that it took more than the few seconds Bowles argues for, and probably took several minutes, given the intensity of the struggle as shown by the bruises, abrasions and broken ribs the victim suffered during the struggle. This Court has "affirmed a trial court's finding of heinous, atrocious, or cruel under similar circumstances." Mansfield v. State, 758 So.2d 636 (Fla. 2000). See, also, Hildwin v. Dugger, 727 So.2d 193, 196 (Fla. 1998) ("This Court has consistently upheld the HAC aggravator where a conscious

[7] Bowles points out in a footnote that Hinton's blood alcohol level was .06 when measured *four days after his death.* Initial Brief at 36, fn. 9. There is no testimony in the record as to what this means, or how accurately such a belated test might indicate blood alcohol level *at the time of death.* Thus, the significance of this finding can only be a matter of speculation.

victim was strangled."); Robertson v. State, 699 So.2d 1343, 1347 (Fla. 1997) (same).

Walter Hinton was brutally beaten and strangled to death after a violent struggle. This murder was heinous, atrocious and cruel, as the trial court properly found in its thoughtful, thorough and carefully reasoned order.[8]

ISSUE IV

THE TRIAL COURT DID NOT ERR IN DELIVERING THE STANDARD HAC JURY INSTRUCTION RATHER THAN THE PROPOSED INSTRUCTION REQUESTED BY THE DEFENDANT

Bowles contends the trial court erred in rejecting his request to instruct the jury that, in order to establish the HAC aggravator, the State must prove not only that the manner in which the murder was committed caused "great pain," but also that "it was the defendant's intention and desire to kill in that manner." Initial Brief at 38 (citing 1T 33). Bowles concedes that precedent is against him on this issue. Orme v. State, 677 So.2d 258, 263 (Fla. 1996). See also, Brown, Guzman, and Mahn, supra.

The standard HAC instruction given in this case (8R 1065) is the same instruction this Court approved in Hall v. State, 614 So.2d 473, 478 (Fla. 1993). Since that time, this Court has

[8] Although the trial court's finding seems plainly correct to the State, in an abundance of caution, the State would contend in the alternative that any error in the trial court's HAC finding would be harmless in view of the extensive, powerful aggravation found in addition to HAC.

consistently rejected claims that either the HAC aggravator or our present HAC instruction *is* constitutionally deficient. Nelson v. State, 748 So.2d 237, 245-46 (Fla. 1999); Walker v. State, 707 So.2d 300, 316 (Fla, 1997); Chandler v. State, *702* So.2d 186, 201 (Fla. 1997). The trial court did not err by giving this instruction in this case, and rejecting Bowles' proposed instruction.

Bowles' contention that the court's instructions created an "irrebuttable presumption" that a strangulation murder is HAC is unsupported by any rational argument. The standard HAC instruction itself, it must be noted, does not even mention strangulation. Nor does it preclude a defendant from arguing his mental state in mitigation. Bowles says that this Court's language in State v. Dixon, *283* So.2d 1 (Fla. 1973) supports his contention that he should be allowed to present evidence and argument concerning his mental state. The State would note that the instruction given in this case is essentially verbatim to the quoted language of Dixon. Thus, it is difficult to understand why the HAC instruction given in this case would somehow have precluded what the language in Dixon supposedly authorizes, The State does not see how the instruction given in any way restricted either Bowles' presentation of intoxication or other mental health evidence in mitigation, or his argument about these matters.

Bowles also complains about the sufficiency *of* the trial court's consideration of intoxication in its sentencing order, claiming the court "never mentioned how . . . Bowles' alcohol and drug abuse on the night of the murder specifically affected his mental abilities." Initial Brief at 41. Since this is addressed more directly in Issue VII of Appellant's Brief, the State will defer extended discussion to its response to that issue. Suffice to say here that the court ***did*** mention how Bowles' alcohol and drug abuse affected his mental abilities on the night of the murder: in the court's considered opinion, Bowles was "minimally affected" (1T 115-16).

No error has been shown here.[9]

ISSUE V

THE STANDARD CCP JURY INSTRUCTION DELIVERED BY THE COURT WAS NOT ERRONEOUS FOR ANY REASON URGED ON APPEAL

Bowles contends here that the trial court erred by instructing the jury on the cold, calculated, and premeditated aggravator using the language of Jackson v. State, 648 So.2d 85, 95 n. 8 (Fla. 1994) rather than the revised instruction approved by this Court in Standard Jury Instructions in Criminal Cases, 665 So.2d 21.2 (Fla. 1995). The latter instruction, he contends, was an "attempted

[9] Any instructional error would be harmless in any event because this murder was HAC by any standard, and also because the case is otherwise highly aggravated.

cure" for a deficiency in the original Jackson instruction, but was "not in place" in this trial.

This issue is utterly meritless.[10] Although the State does not agree that the original proposed instruction in Jackson was in any way constitutionally inadequate, the trial court did not give that instruction, but instead gave the revised standard jury instruction that Bowles now argues the court should have given, as even a cursory examination of the records shows. Compare 1T 1066 with 665 So.2d 213-14. No error has been shown here.[11]

ISSUE VI

THE TRIAL COURT PROPERLY FOUND THAT BOWLES COMMITTED MURDER DURING THE COURSE OF A ROBBERY AND FOR PECUNIARY GAIN

Bowles contends the trial court erred in finding that the murder was committed during the commission of or attempt to commit a robbery and for the purpose of pecuniary gain. Although conceding that the evidence shows he took the victim's car and

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[10] Bowles also has failed to demonstrate that his present argument has been preserved for appeal. He has not cited to any portion of the trial record where his trial counsel objected to the language of the CCP jury instruction or requested an alternative or supplemental CCP instruction. In fact, trial counsel did request a special CCP instruction (1T 35), but that requested instruction is not, insofar as the State can tell, the one appellate counsel is now arguing should have been given. In any event, the trial court did not err in giving the standard CCP instruction.

Any error would be harmless in any event, because this crime was CCP by any standard and also because it is a highly aggravated murder with or without the CCP aggravator.

watch following the murder, he contends the theft may have been an afterthought rather than the motive for the murder.

It should be noted that the during-the-commission-of-a-robbery aggravator, unlike the pecuniary gain aggravator, does not explicitly require a pecuniary motive. The pecuniary gain aggravator is defined as being present when the "capital felony was committed *for* pecuniary gain." Section 921.141 (f), Fla. Stat. (1999) (emphasis supplied). Thus, by definition, pecuniary gain must be a reason for committing the murder. The during-the-commission-of-a-robbery aggravator, on the other hand, is established by evidence showing simply that the "capital felony was committed *while* the defendant *was engaged . . . in* the commission of, or an attempt to commit, . . . any: robbery." Section 921.141 (d), Fla. Stat. (1999). The aggravator on its face merely requires the contemporaneous commission of a robbery or attempted robbery, not a pecuniary motive for the murder. It should be noted that proving a pecuniary motive does not necessarily establish the commission of a separate crime in addition to murder; for example, the defendant might be an heir, or the beneficiary of a life insurance policy, or next in line for a promotion, etc. - matters all perfectly legitimate of themselves; absent a pecuniary motive for the murder, a defendant's mere status as a potential beneficiary cannot be aggravating. On the other hand, proof that a defendant committed murder while he was engaged in the commission

of a robbery or attempted robbery necessarily establishes that he has committed a serious felony in addition to murder. Thus, the murder in the latter case is aggravated not by proof merely of pecuniary gain, but by proof of the commission of an independent serious crime.

Language similar to the so-called felony-murder aggravator is contained in the felony murder statute, Section 782.04 (1)(a)(2), Fla. Stat. (1999), and this language has been consistently interpreted by Florida Courts to mean that a robbery/murder is felony murder so long as the murder and the robbery were part of the same criminal episode. See, e.g., Young v. State, 579 So.2d 721 (Fla. 1991); Roberts v. State, 510 So.2d 885 (Fla. 1987). Thus, the crime of felony murder may be established without demonstrating that the robbery was the motive for the murder, in contrast with the pecuniary gain aggravator, which requires proof of a pecuniary motive. See, e.g., Scull v. State, 533 So.2d 1137 (Fla. 1988) (although property could have been taken as an afterthought, thus precluding application of the pecuniary gain factor, Scull's robbery conviction was left intact).

The crime of robbery is defined as the taking of money or property, "when in the course of the taking there is the use of force, violence, assault, or putting in fear." Section 812.13 (1), Fla. Stat, (1999). The phrase "in the course of the taking" is further defined to include any act that "occurs either prior to,

contemporaneous with, or subsequent *to* the taking of the property . . . if it and the act of taking constitute a continuous series of acts or events." Section 812.13 (3)(b), Fla. Stat. (1999).

In fact, the standard penalty-phase jury instructions delivered to the jury in this case, concerning the commission-of-a-robbery aggravator, incorporated these very principles (8T 1063-64).

Regardless of Bowles' motive for committing murder, then, it is the State's contention that the in-the-commission-of-a-robbery aggravator applies whether or not the theft was an afterthought, since the theft was accomplished as the result of Bowles' having used deadly force against the owner of the property. The pecuniary-gain cases cited by Bowles in his brief do not compel a contrary conclusion.

Should this Court disagree, however, the aggravator still was proven, because the trial court found, and the record supports the finding, that Bowles ***did*** have a pecuniary motive for committing murder, even if that pecuniary motive may riot have been his sole motive. Finney v. State, 660 So.2d 674 (Fla. 1995) (pecuniary gain ayyravator applies so long as the murder was motivated, at least in part, by desire for pecuniary gain). As the trial court noted, Bowles' own statements establish his pecuniary motive. Agent Reagan testified:

> Q. Did he talk about in his mind, the defendant, in terms of when he killed the victim in terms of his attempt to get money?
>
> A. Yes, he wanted to get money from Mr. Hinton so he could flee the - leave the scene.

(6T 656). Bowles argues, however, that he did not leave the scene and there is no evidence he took "anything, including Hinton's credit cards from the trailer." Initial Brief at 54. However, Bowles definitely had the victim's watch and car, and neither of those items were at the victim's trailer when the victim's body was discovered. Thus, it is incorrect to say there is no evidence that Bowles took "anything." Furthermore, there was no evidence that Hinton had any credit cards to take (6T 641), and the defendant himself explained that he couldn't leave town because he discovered the victim had no money (6T 656).[12] However disappointed Bowles ultimately may have been with his "take" in this case, the fact remains that the trial court was justified in concluding that Bowles committed murder for the purpose of pecuniary gain. Shellito v. State, 701 So.2d 837 (Fla. 1997)(pecuniary gain factor properly found even though victim had no money where facts reflect that defendant initiated the criminal episode for pecuniary gain); Porter v. State, 429 So.2d 293, 296 (Fla. 1983) (pecuniary gain

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[12] It bears noting that during two previous murders, Bowles had stolen the victim's car and money and/or credit cards. On one occasion, he had used these proceeds to leave the state; on the other, Bowles apparently abandoned the victim's car after unsuccessfully attempting to use the victim's credit card at a Wal-Mart.

properly found even though defendant threw away property he stole from murder victims); Fitzpatrick v. State, 437 So.2d 1072, 1078 (Fla. 1983) (pecuniary gain may be found even though "the robbery was never completed so long as there was an attempt").

The trial court did not err in rejecting Bowles' contention that the theft was an afterthought and not a motive for the murder, or in finding that the murder was committed during a robbery or attempted robbery and for pecuniary gain.[13]

ISSUES VII AND IX

THE TRIAL COURT DID NOT ERR IN ITS CONSIDERATION OF BOWLES' DRUG AND ALCOHOL USE THE NIGHT OF THE MURDER OR OF THE ABUSE BOWLES SUFFERED AS A CHILD, NOR IN REJECTING THE TWO STATUTORY MENTAL MITIGATORS PROPOSED BY THE DEFENDANT

The State has combined its responsive argument to Bowles' seventh and ninth issues, as they are interrelated, and to a large extent the same evidence is cited by Bowles in his argument as to both of these issues.

Before addressing the primary issue of the extent to which Bowles' drinking and drugging should have been found mitigating, the State would note that, although the caption to Bowles' seventh issue states that the trial court gave "little or no weight" to evidence that Bowles was "severely abused as a child," Initial

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[13] Again, although it seems clear to the State that there was no error here, the State would argue, in the alternative, that any error in finding robbery and/or pecuniary gain would be harmless in this extremely aggravated murder case.

Brief at 56, in fact the trial court gave "significant" weight to "the evidence regarding the Defendant's abusive childhood and the severe abuse endured by his mother which he witnessed as a child" (1T 117).

It is true, as Bowles states, that the trial court gave no weight "to the circumstances which caused the Defendant to leave home or his circumstances after he left home," finding that as "to the latter, no evidence was presented" (1T 118). In fact, Bowles left home after he nearly beat his step-father to death, and, as the trial court stated, we have no evidence about his circumstances after he left home, since his mother and brother have had virtually no communication with him since. All we know is that in 1982, Bowles was convicted for the first of a series of violent crimes. The trial court did not err in concluding that Bowles' violent behavior was entitled to no mitigating weight.

Turning to the alcohol and drug evidence, the trial court gave "little weight" to Bowles' use of intoxicants and drugs at the time of the murder. This finding as to non-statutory mitigation must be considered in conjunction with the court's analysis, and ultimate rejection, of the two proposed statutory mental health mitigators. The court found:

> 1. <u>The defendant suffered from extreme emotional disturbance at the time of the murder</u>.
>
> The defendant asserts that evidence of his drinking and abusive childhood requires

the finding that at the time of Mr. Hinton's murder, he was suffering from an extreme emotional disturbance. His theory, unsupported by expert testimony, is that the rage within him was unleashed by the use of alcohol and drugs. He argues that the 1982 prior violent felony in which he raped and battered his girlfriend, and Mr. Hinton's murder, can only be explained in the context of an underlying emotional disturbance.

The Court finds that the Defendant is an alcoholic and has been using drugs and alcohol since his youth, and that many members of his family and extended family are alcoholics. However, this evidence does not support a finding of this mitigator unless being an alcoholic, standing alone, meets the definition of an extreme emotional disturbance. If so, then the Court would find this statutory mitigator to have been met by the evidence, but entitled to little weight.

2. The capacity of the Defendant to appreciate the criminality of his acts, was, at the time of the homicide, substantially diminished.

The defendant contends that his level intoxication at the time of the murder substantially reduced his ability to apreciate the criminality of his conduct. On the day of the murder he had been drinking heavily. He drank six beers on his way to the train station with Mr. Hinton and Mr. Smith. He also smoked marijuana. When he returned to Mr. Hinton's home, he continued to drink. Although the Court finds that the Defendant was under the influence of drugs and alcohol at the time of the murder, the greater weight of the evidence does not sustain a finding that his ability to appreciate the criminality of his acts was substantially diminished.

To commit this crime, the Defendant waited for Mr. Hinton to fall asleep. He needed a hard object to overpower Mr. Hinton. He thought of a stepping stone outside, which was embedded in the ground. He had to lift

> this heavy object and bring it inside. He then had to enter quietly into Mr. Hinton's room. He had to aim the stone so it fell squarely on Mr. Hinton's head. He had to fend off Mr. Hinton's efforts to save his life. He was able to think, act, and react in order to commit this murder, despite being under the influence of drugs and alcohol. When he was arrested approximately six days later, he was able to relate with clarity and detail how he had killed Mr. Hinton. His only omission was how he stuffed toilet paper down Mr. Hinton's throat. He was also able to tell of events leading up to, and following, the murder. These facts prove to the Court that although he had ingested a substantial amount of alcohol and smoked marijuana, his ability to appreciate the criminality of his conduct was not substantially diminished.
>
> The Defendant also argues that there was nothing in his "post-murder actions" to indicate that he was acting in a normal, sober manner. After the killing, he was able to drive a car, purchase additional liquor, pick up a woman on the beach and bring her back to the mobile home where he committed the murder. He was also sufficiently alert to keep her from the room in which Mr. Hinton's dead body lay covered in sheets. These events do not describe an individual whose ability to function and appreciate the criminality of his acts were substantially diminished. On the contrary, this evidence strongly suggests that Mr. Bowles was minimally affected by alcohol and drugs, despite his extensive use. The Court has given no weight to this factor.

(1T 114-16). After making these findings as to the proposed statutory mitigators, and having concluded that Bowles was minimally affected by his consumption of alcohol and drugs at the time of the crime, the trial court addressed the claim that his

drug and alcohol use at the time of the crime was nonstatutorily mitigating:

> The Court has also given little weight to the defendant's use of intoxicants and drugs at the time of the murder. The frequency with which the Defendant has used this as an explanation to law enforcement officers, when confronted about his violent actions, causes the court to give this factor less weight as mitigation and more weight as a convenient, but poor excuse.

(1T 118).

Bowles contends the trial court erred in rejecting his proposed statutory mental mitigators because they were supported by competent and uncontroverted evidence. In these circumstances, Bowles argues, the trial court *must* find the proposed mitigation. The State, however, disagrees that the evidence was uncontroverted or even especially competent.

First of all, as the trial court noted, Bowles put on *no* expert testimony, mental health or otherwise. Thus, we have no expert testimony tying Bowles' alleged alcoholism or his marijuana and alcohol use at the time of the crime to any alleged emotional disturbance or diminished capacity. Although such expert testimony may not be essential, its absence is suspect. Cf. Shellito v. State, supra, 701 So.2d at 844 (noting that defendant had "presented no medical or other expert testimony to support his claims of organic brain damage or other impairment"). Furthermore, although the trial court gave Bowles the benefit of the doubt in

concluding that he is an alcoholic, and although there certainly is evidence in this record that Bowles drank heavily at times, there is no direct evidence that he is an alcoholic or that he has had a "life-long" problem with alcohol. Initial Brief at 66. In fact, we know little about his life from the time Bowles left home at age 13 until shortly before this murder except that we know he has committed a number of violent crimes. The only two witnesses who testified about Bowles' drinking habits at or around the time of the crime, Richard Smith and Jennifer Moye, agreed that while they had seen the defendant drinking and drunk, he was not always drinking when they saw him, and not always drunk when he had been drinking (6T 580, 7T 845). Furthermore, Moye, who was with Bowles on two evenings following the murder, testified that he was not intoxicated or drinking heavily at that time (5T 593-94).[14]

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[14] Many of the "facts" argued by Bowles' appellate counsel are not "facts" at all, but speculation unsupported by testimony. For example, counsel says that since Bowles' brother had used drugs since he was a child and had tried them all, "Bowles has undoubtedly done the same." Initial Brief at 67. Maybe he has, and maybe he has not; but there is no actual evidence one way or the other. Likewise, there is no direct evidence, but only appellate counsel's conjecture, that "while others may have drunk beer or smoked marijuana for the pleasure or 'buzz' it gave, Bowles was an addict who drunk [sic] to get drunk." Initial Brief at 67. Also conjecture is counsel's statement that Bowles "must have lived a life of perpetual homelessness." Ibid. In fact, we know that he was living with a girlfriend in 1982, and served time in prison thereafter. We also know that in 1994, Bowles lived with at least one woman and with three different homosexual men. Past that, we don't know where or how Bowles lived. Other "facts" have minimal support in the record, like appellate counsel's statement that Bowles went into withdrawal "when deprived of the booze," which is supported only by Bowles' self-serving statement to FBI agent

But even giving the defendant the benefit of the doubt on the question of whether or not he is an alcoholic, as the trial court did, the fact remains that Bowles has presented *no* evidence of any nexus between his status as an alcoholic and his claim that he suffered *extreme* emotional disturbance *at the time of the murder.* The trial court did not err in rejecting statutory mental mitigation based on Bowles' alleged alcoholism.

Nor did the trial court err in rejecting Bowles' contention that the mental mitigators apply because he was intoxicated at the time of the crime. In light of the purposeful conduct by this defendant during and after the commission of this crime, the trial court was justified in concluding that Bowles was minimally affected by his ingestion of alcohol and marijuana, and in rejecting any claim of *substantial* impairment.

In Johnson v. State, 608 So.2d 4 (Fla. 1992), this Court reviewed a trial court's rejection of a proposed drug-abuse mitigator in which the trial court had found:

Reagan that he was shaking from lack of alcohol, which Reagan could not confirm by his own observation of the defendant. There is absolutely no other evidence in this record that Bowles was physically addicted to alcohol. Finally, other "facts" are greatly exaggerated, like counsel's assertion that "virtually every time someone saw the defendant he was either drinking or staggering from its effects," or that Bowles suffered from an "extraordinary" number of beatings as a child, being whipped and beaten "daily, weekly, monthly, and into eternity," or that "terror, torture and torment" were the staples of his early life, or that his mother and stepfathers were "perpetually" drunk. Initial Brief at 58, 66.

> There is evidence tending to show that the defendant was under the influence of drugs at the time of the alleged offenses. *There is also evidence to show that the defendant had been a regular drug user.* However, the evidence also shows that he clearly was not under extreme mental or emotional disturbance because of the use of these drugs based on observations of him after and before the murders. Based on his actions and physical events that took place during the course of the commission of these crimes, it is clear that the defendant knew and understood his actions and that his actions although they may have been enhanced by the use of drugs, were not such as to place him under the influence to the extent of causing any extreme mental or emotional disturbance. . .
>
> *The defendant in this case used drugs on a large scale whether he needed to or not.* He apparently depended on drugs to attain a state of euphoria. However, this desire to feel good perhaps reached a point where his inhibitions were or may have been lowered cannot be said to be a contributing factor in committing the crimes in this case. Euphoria notwithstanding, the defendant knew what he was doing and was able to distinguish right from wrong as well as the criminality of his conduct. It is the Court's opinion that there is not mitigating circumstances under this condition.

608 So.2d at 12 (emphasis supplied). This Court affirmed the trial court's rejection of proposed mitigation, stating:

> While voluntary intoxication or drug use might be a mitigator, whether it actually is depends upon the particular facts of a case. Here, the evidence showed less and less drug influence on Johnson's actions as the night's events progressed and support the trial court's findings. There was too much purposeful conduct for the court to have given any significant weight to Johnson's alleged drug intoxication, a self-imposed disability

> that the facts show not to have been a mitigator in this case.

608 So.2d at 13.

As in Johnson, the evidence in this case is replete with purposeful conduct by Bowles, who waited until the victim was asleep, went outside to retrieve a 40 pound stepping stone, brought it inside, rested it on a table before going into the victim's bedroom and dropping it the stone on his head, overpowering the victim as he struggled against his assailant, choking the victim into unconsciousness, stuffing tissue down his throat and a rag into his mouth so he would die, covering the body, taking the victim's watch, car keys and car, and later abandoning the car. In addition, the conclusion that this was purposeful, planned, and coherent action is supported by the fact that Bowles had committed two similar crimes earlier in the year (also after drinking) using the same or similar means of attack, and was traveling under an assumed name to make his apprehension more difficult.

Although the trial court rejected Bowles' proffered statutory mitigators, the court did not completely reject Bowles' use of intoxicants as *nonstatutory* mitigation, although the court did give little weight to this factor. Bowles complains about the amount of weight the court gave his nonstatutory mitigation, but it is well settled that the weight given to mitigation is within the trial court's discretion. Bonifay v. State, 680 So.2d 413 (Fla. 1996). The record supports the trial court's determination that Bowles was

minimally affected by the intoxicants he consumed the night of the murder. Furthermore, it was appropriate for the court to consider that the defendant routinely had used the I-was-intoxicated excuse for his many other violent crimes, and to conclude that it was largely a "convenient, but poor excuse."

It is clear that the trial court fully considered, thoughtfully analyzed, and expressly evaluated in its written sentencing order each of Bowles' proffered mitigating circumstances. In conducting this evaluation, the trial court is not required to find every proposed mitigator; instead, the trial court must "determine whether [the proffered mitigator] is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." Campbell v. State, 571 So.2d 415, 419 (Fla. 1990). As this Court has noted, there are "no hard and fast rules about what must be found in mitigation in any particular case . . . . Because each case is unique, determining what evidence might mitigate each individual's sentence must remain with the trial court's discretion." Lucas v. State, 568 So.2d 18 (Fla. 1990). So long as the trial court conducts a "thoughtful and comprehensive analysis," Walker v. State, 707 So.2d 300, 319 (Fla. 1997), of the defendant's proffered mitigators, the trial court's "determination of lack of mitigation will stand absent a palpable abuse of discretion." Foster v. State, 654 So.2d 112 (Fla. 1995). Accord, e.g., Bonifay v. State, supra (decision

as to whether a mitigating circumstance has been established, and the weight to be given to it if is established, are matters within the trial court's discretion); Wyatt v. State, 641 So.2d 355 (Fla. 1994) (decision whether any mitigating circumstances had been established was within trial court's discretion); Arbelaez v. State, 626 So.2d 169 (Fla. 1993) (trial court has broad discretion in determining applicability of mitigating circumstances).[15]

Bowles is not entitled to appellate relief as to his sentence merely because he disagrees with the judgment of the trial court.

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[15] These cases are fully consistent with constitutional standards requiring "individualized sentencing." The premise explicitly underlying the United States Supreme Court's decisions in Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) and McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), which struck down unanimity requirements as to juries' mitigation findings, is that reasonable persons can differ both as to what circumstances are mitigating at all and, as well, as to the weight to be given to such circumstances. Thus, each juror must be allowed to determine for himself or herself what is mitigating. So long as the sentencer is not precluded as a matter of law from giving effect to proffered mitigation, the "requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 494 U.S. 299, 307, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). The Constitution "does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer." Harris v. Alabama, 513 U.S. 504, 115 S.Ct. 1031, 130 L.Ed.2d 1004, 1014 (1995). In fact, the Court's decisions "suggest that complete jury discretion is constitutionally permissible." Buchanan v. Angelone, ___ U.S. ___, 118 S.Ct. 757, 761-62, 139 L.Ed.2d 702 (1998). See, also, Burger v. Kemp, 483 U.S. 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) ("mitigation may be in the eye of the beholder"); Tuilaepa v. California, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750, 767 (1994) (Souter, J., concurring) ("refusing to characterize ambiguous evidence as mitigating or aggravating is . . . constitutionally permissible").

Lucas v. State, supra. He must show an abuse of the trial court's broad discretion. Ibid. He has failed to do so.

If the trial court erred at all in its consideration of mitigating circumstances, any such error would be harmless in light of the overwhelming aggravation and overall minimal mitigation offered in this case. Bowles has failed to demonstrate any reversible error here.

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN GIVING THE VICTIM IMPACT JURY INSTRUCTION OF THE TYPE SPECIFICALLY APPROVED BY THIS COURT

Here, Bowles contends that the trial court's instruction as to victim impact evidence was erroneous because it failed to help the jury how to consider this evidence.[16] He claims the court "read"

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[16] Bowles' appellate counsel quotes a requested instruction by trial counsel (Initial Brief at 60), but insofar as the State can discern, appellate counsel does not contend that the trial court should have given the requested instruction, nor suggest that this requested instruction would have cured the deficiency he sees with the instruction given, which is that, in his view, the instruction given fails to tell the jury how to use victim impact evidence. Initial Brief at 61. The State would note that the requested instruction does not appear tell the jury how to use victim impact evidence and, in fact, does not even mention victim impact evidence.

In any event, the State would suggest that the requested instruction is inconsistent with Gregg v. Georgia, 428 U.S. 153, 183, 96 S.Ct. 2909 (1976) ("capital punishment is an expression of society's *moral outrage* at particularly offensive conduct) (emphasis supplied) and Payne v. Tennessee, 501 U.S. 808, 826, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (nothing unfair about allowing jury to consider evidence that "poignantly" illustrates the harm caused by defendant). According to the Merriam Webster Dictionary, "poignant" means: "1. painfully affecting the feelings; 2. deeply moving."

the instruction this Court approved in Alston v. State, 723 So.2d 148, 160 (Fla. 1998), in which the trial court had told the jury, "you shall not consider the victim impact evidence as an aggravating circumstance, but the victim impact evidence may be considered by you in making your decision in this matter." Actually the court in this case did not read this instruction, but gave a similar one:

> You have heard evidence concerning the victim in this case, Walter Hinton, by Jan Simpson, . . . Gay Abner Logan and Norma Cole. I instruct you that, although you are entitled to hear this evidence, you may consider this evidence, but you are not to consider it as an aggravating circumstance or weigh it as an aggravating circumstance when you determine whether to recommend a life sentence or a death sentence.

(7T 1067-68). Although this instruction was not identical to the one in Alston, it similarly comports with this Court's decisions in Windom v. State, 656 So.2d 432 438 (Fla. 1995) and Bonifay v. State, 680 So.2d 413 (Fla. 1996), which delineate the purpose and proper scope of victim impact testimony. Like the similar instruction this Court considered in Kearse v. State, No. SC90310 (Fla. June 29, 2000), "the instruction given helped to guide the jury's consideration of the victim impact evidence, including that the evidence could not be viewed as an aggravating circumstance" (Slip opinion at 28).

Bowles has not demonstrated any error.

ISSUES X AND XI

THE TRIAL COURT'S INSTRUCTIONS CONCERNING MITIGATION WERE SUFFICIENT; BOWLES' REQUESTED INSTRUCTIONS WERE PROPERLY REFUSED

Bowles contends in these two issues that the standard penalty phase instructions delivered by the trial court were insufficient to guide the jury in its consideration of mitigating factors. He contends the court should have defined mitigating circumstances, explained to the jury that the procedure to be followed is not a mere counting process, and enumerated specific non-statutory mitigating circumstances. He concedes that this Court repeatedly has declined to require such instructions. See, e.g., Davis v. State, 698 So.2d 1182, 1192 (Fla. 1997) (this Court has "repeatedly ruled that the standard jury instructions are sufficient" and so trial court "acted within its discretion to deny a special instruction"); Shellito v. State, 701 So.2d 837, 842 (Fla. 1997) ("This Court has repeatedly determined that clarifying instructions on mitigating evidence are not required"); Finney v. State, 660 So.2d 674 (Fla. 1995) (this Court has repeatedly rejected claim that trial court must give specific instructions on non-statutory mitigating circumstances urged by defendant); Gamble v. State, 659 So.2d 242 (Fla. 1995) (this Court has repeatedly upheld validity of standard jury instructions; trial court need not define mitigating circumstances for jury); Ferrell v. State, 653 So.2d 367 (Fla. 1995) (standard instructions sufficient; trial court need not tell

jury that death penalty is reserved for most aggravated and least mitigated murders, tell jury that each juror should individually consider mitigation evidence, provide definition of mitigating circumstances, or specify non-statutory mitigating circumstances); Jones v. State, 652 So.2d 346 (Fla. 1995) (nonstatutory mitigators need not be specified in charge); Jones v. State, 612 So.2d 1370 (Fla. 1992) (standard instruction on nonstatutory mitigators is sufficient; no need to give separate instructions on individual items of nonstatutory mitigation); Robinson v. State, 574 So.2d 108 (Fla. 1991) (no error in refusing to instruct jury on specific nonstatutory mitigating circumstances; standard instruction on nonstatutory mitigation does not denigrate importance of nonstatutory mitigating circumstances); and Carter v. State, 576 So.2d 1291 (Fla. 1989) (standard instruction sufficient to alert jury to consider nonstatutory mental health evidence in mitigation). The State would rely on these precedents from this Court to contend that no error occurred here. The standard penalty phase instructions delivered by the trial court were correct and sufficient.

ISSUE XII

THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR IN ALLOWING THE POLICE OFFICER WHO WAS THE LEAD INVESTIGATOR IN THE 1982 CASE IN WHICH BOWLES HAD BRUTALLY BEATEN AND SEXUALLY ASSAULTED HIS FORMER GIRLFRIEND TO TESTIFY THAT THE VICTIM HAD SUFFERED INJURIES TO HER VAGINA AND RECTUM DURING BOWLES' ASSAULT

As noted in the State's statement of the facts, Tampa police officer Jan Edenfield testified about Bowles' battery of Wesley Blease in 1982. Edenfield testified that she had visited Blease in the hospital and personally observed that she had been severely beaten about the face, that she had black and blue bruises on her neck that looked almost like "fingerprint impressions," that her eyes were swollen shut, and that she had what appeared to be a bite mark on her right breast (6T 682). In addition, Edenfield testified that she had visited the crime scene and observed bloodstains in a chair, blood spatters in the bathroom on the shower curtain and on the walls, blood spatters on the bed and on the wall *five feet* above the bed, and a large quantity of blood on the plastic sheet covering the bed. Edenfield testified that the victim stayed in the hospital for over two weeks. None of this testimony was objected to. However, Bowles' trial counsel did object to the following question and answer, which came after the State had established that Edenfield had talked in detail to the victim and to the examining doctors:

> Q Upon speaking to the victim and also the doctor I would ask you the following question:

> Was there any evidence of injuries to her vaginal and rectal area?
>
> A Yes.
>
> Q Would you tell us briefly what the evidence was you are talking about and what your basis was for that?
>
> A According to the doctors they said that there was tearing and lacerations inside both the rectum and the vagina.

(6T 687-88). Bowles contends this testimony was inadmissible hearsay. He acknowledges that Florida law allows hearsay in the penalty phase of a capital trial, so long as the defendant is given a fair opportunity to rebut any hearsay statements, *see* section 921.141 (1), Fla. Stat. (1999), but contends that, under this Court's decision in Rodriguez v. State, 25 Fla. L. Weekly S89 (Fla. Feb. 3, 2000), "a police officer may not present hearsay testimony at a sentencing hearing," unless the officer's testimony is "fair or neutral to the defendant." Initial Brief at 81. Rodriguez, however, says no such thing. In Rodriguez, the State had offered a police officer witness to testify about statements the defendant allegedly had made to an informant. The State did not call the informant, even though he apparently was available to testify. This Court noted that by presenting the testimony this way, the State was presenting hearsay testimony through a credible police officer witness rather than direct evidence through a non-credible jailhouse informant, who could have been vigorously cross-examined about the statements he supposedly heard. In these circumstances,

this Court concluded, the State was allowed improperly to bolster the credibility of a less credible witness, and defendant was denied a fair opportunity to rebut the hearsay statements.

What immediately distinguishes this case is, first, that the State has not in any way bolstered the testimony of a jailhouse informant witness whose credibility might ordinarily be suspect; on the contrary, the witness was reporting what the examining doctors had told her about injuries the victim had suffered. Not only is it the case that doctors tend to be highly credible witnesses, but the subject matter involved here is relatively straightforward and objective; either the victim suffered tears and lacerations to her vagina and rectum or she did not; no judgment calls or potentially conflicting medical opinion evidence are involved. Even more significantly, however, is that the officer in this case was testifying about the facts of a prior violent felony. Bowles fails to acknowledge or even mention that this Court in Rodriguez specifically distinguished "this case from those cases in which the police officer gave hearsay testimony concerning a defendant's prior violent felonies." Id. at S94.

Moreover, as this Court also noted in Rodriguez, in many cases any error in presenting hearsay about a prior violent felony is harmless "because the certified copy of the conviction itself conclusively establishes the aggravator." Ibid. Here, the conviction itself shows that Bowles was guilty of sexual battery.

Furthermore, even if error to admit the fact that the victim suffered tears and lacerations to her vagina and rectum, such error cannot be considered prejudicial in view of the evidence admitted without objection, including Edenfield's description of the victim's other injuries and the bloody crime scene, not to mention the numerous other violent felonies Bowles had committed, and the other aggravating circumstances present in this case.

The State does not think any error occurred here, but if it did, it was harmless. No reversible error has been shown here.

CONCLUSION

Bowles has failed to demonstrate that any reversible error occurred in this case. Although he raises no issue of the proportionality of his sentence, it is clear that the murder of Jay Hinton is one of the most aggravated and least mitigated murders, considering both the crime and the defendant. See, e.g., Robinson v. State, 24 Fla.L.Weekly S393 (Fla. Aug. 19, 1999); Gamble v. State, 659 So.2d 242 (Fla. 1995); Owen v. State, 596 So.2d 985 (Fla. 1992). The extensive aggravation, weighed against the minimal mitigation, supports the death sentence imposed in this case. This Court should affirm Bowles' death sentence.

Respectfully submitted,

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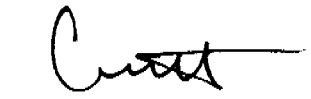
ATTORNEY GENERAL



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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. Mail to David A. Davis, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, FL 32301, this 18th day of August, 2000.

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