IN THE SUPREME COURT OF FLORIDA

JOHN BRUCE VINING,

Appellant,

v. CASE NO. 75,915

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The state takes issue with appellant's statement that the clerk distributed copies of Vining's "request for disposition of indictment" under the Interstate Agreement on Detainers to the assigned judge and to the State Attorney's Office. The deputy clerk had no knowledge or recollection as to whether this was sent to the judge or State Attorney. The judge never saw it. The Assistant State Attorney had a file copy but did not know when it was received or where it came from (R 1681-1693; 2344). The state's motion for an extension of time to try Vining was not made after the time limits of the IAD in view of the fact that the same was tolled, as is argued in Point I herein.

SUMMARY OF ARGUMENTS

I. The trial court did not err in denying Vining's motion to dismiss based on an alleged violation of the Interstate Agreement on Detainers where the court and prosecutor were never properly served under the IAD and the extensive motion practice by defense counsel tolled the time limits for bringing Vining to trial. The purpose of the act would not be served by releasing a condemned killer to the custody of another state to be "rehabilitated" for far lesser crimes.

II. The defendant was not sentenced to death based on non-record information not presented in open court in violation of Gardner v. Florida, 430 U.S. 349 (Fla. 1977), as letters in the record reveal that counsel were aware of the trial judge's undertaking and the death sentence was not imposed on the basis of such information which was not confidential or detrimental to Vining's position as was the case in Gardner. The matter is waived for purposes of appellate review, in any event, as no objection to the viewing of such materials was ever raised below by defense counsel.

III. The trial court did not err in allowing the testimony of witnesses who had undergone progressive relaxation as there was no suggestiveness involved in the procedure and the procedure did not elicit additional information of a substantial nature not already known.

IV. The trial court did not improperly restrict voir dire of prospective jurors but only prohibited questioning as to their personal feelings which was not relevant, in the first instance,

to a proper sentencing determination. The court did not improperly deny challenges for cause where such jurors indicated that they could put aside their personal feelings and return an advisory recommendation based on the law and the instructions of the judge.

V. The trial court properly found the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner and instructed the jury on the same. Vining planned to murder Caruso before the crime began. He met the victim for the sole purpose of getting her jewelry and could simply have robbed her in the parking lot where they met. Rather than leave witnesses behind, however, he lured the victim into his automobile whereby they would be alone and executed her, disposing of her body in an isolated spot.

VI. Neither the Florida nor the United States Constitution requires the state to notify defendants of the aggravating factors that the state intends to prove. Hitchcock v. State, 413 So.2d 741, 746 (Fla. 1982).

VII. The trial court did not err in rejecting proffered nonstatutory mitigating factors. Vining's age of fifty-seven years was not a mitigating factor as no link was demonstrated between his age and some other characteristic of the defendant or the crime. Vining suffered no substantial childhood difficulties from the alcoholism of his mother and such factor was properly not found to be mitigating. That Vining was a good student, athlete and member of the Methodist Youth Fellowship was not found to be mitigating and properly so, in light of the gravity

of his offense and the fact that such proposed mitigation was remote from the time of such offense. There was no evidence that alcohol had anything to do with the commission of crimes and the trial judge properly rejected the proposed mitigation that Vining was an alleged alcoholic. The fact that Vining saved his wife's life was properly rejected as mitigation as being too remote and the circumstances too problematical. Both Vining and his first wife were drinkers, had a troubled marriage, and she was in the process of committing suicide when he saved her life. Vining's childhood stuttering was not found to be mitigating as it was not proven to be a substantial impediment. Little weight was properly given to the fact that Vining had a good military history as he benefitted from his service and did not perform beyond the call of duty.

VIII. Vining was not denied a fair jury recommendation due to the prosecutor's argument. Explaining the nature of a statutory aggravating factor is not the equivalent of expanding the list of statutory aggravating factors. Nothing in the record points to the finding of the factor that the murder was committed during the course of a felony based on the fact that the murder was a stranger-killing. Testimony by victims about prior crimes has long been held to be admissible and the jury could well have concluded that the prior victim suffered considerable agony without the prosecutor's comment as to her composure while testifying. The prosecutor did not argue for the death penalty based on race and economic status but argued the obvious, that Vining's background rather than mitigating the crime reflected a

defendant who had every advantage. The prosecutor did not improperly comment on the failure of Vining to present witnesses where Vining claimed to be a good father based on the testimony of only two of his children. The prosecutor did not diminish the jury's sense of responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). He simply exhorted them to return an advisory sentence based on the law, not on personal feelings.

IX. Section 921.141, Florida Statutes (1987) is constitutional on its face and as applied under prevailing case law further discussed within the argument section of the brief.

I. THE TRIAL COURT DID NOT ERR IN DENYING VINING'S MOTION TO DISMISS BASED ON AN ALLEGED VIOLATION OF THE INTERSTATE AGREEMENT ON DETAINERS.

Appellant argues that the trial court erred in denying his motion to discharge based on time violations in bringing him to trial under the Interstate Agreement on Detainers.

Pursuant to subsection (3)(a) of section 941.45, Florida Statutes (1987), a defendant must be brought to trial within 180 days after his request for final disposition is received by Florida officials. Subsection (b) requires the prisoner to give written notice of the place of his imprisonment and request for final disposition to the warden or other official having custody of him who shall promptly forward it together with a certificate indicating the term of commitment, time served and remaining to be served, good time, time of parole eligibility, and any decisions of the state parole agency relating to the prisoner to

the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

In the present case, the Georgia prison officials mailed the request by certified mail return receipt requested to the Orange County Sheriff, where it was received on July 5, 1989. The Orange County Sheriff mailed the request to the clerk of the court, where it was stamped in on July 6, 1989. A deputy clerk who had been in the office about a month wrote on the request "refer /Judge Baker, SA Intake, SA Div. 17, Extradition." She has no personal knowledge or recollection of what was sent to the judge or the State Attorney. The practice was to send the court file to the judge with a message. Judge Baker does not recall ever seeing the file or the request for disposition. A copy found its way to the State Attorney's file but there is no receipt in the file indicating when it was received or where it came from (R 1681-1693; 2343-2344). Judge Baker found that neither the court nor the state had actual notice of the request (R 2345). The judge noted that a different administrative response would have been invoked if the request for disposition had been properly sent by registered or certified mail which must be signed for in the courts and prosecuting attorney's offices (R 2345). The court denied the motion for discharge ruling that the request for disposition was not served on the court or appropriate prosecuting official in the manner required by section 941.45 (R 2346).

A line of cases have held that where lack of notice was not due to any action or inaction on the part of Florida officials,

Florida is not precluded from proceeding against a defendant. See, Parker v. State, 539 So.2d 1168 (Fla. 1st DCA 1989); Welch v. State, 528 So.2d 1236 (Fla. 1st DCA 1988); Coit v. State, 440 So.2d 409 (Fla. 1st DCA 1983); Williams v. State, 426 So.2d 1121 (Fla. 1st DCA 1983); see also, Burns v. State, 523 So.2d 605 (Fla. 4th DCA 1988). Some courts have held that strict compliance with subsection 3(b) of section 941.45 is not required when the prisoner has done everything possible but in the cases where substantial compliance with the act has been found both the prosecutor and the court have had actual notice, something sorely lacking in this case. See, e.g., State v. Roberts, 427 So.2d 787 (Fla. 2d DCA 1983); Casper v. Ryan, 822 F.2d 1283 (3rd Cir. 1987). The trial judge was clearly unaware of the request. No receipt was contained in the prosecutor's file so as to conclude that he was put on notice or properly served. The Sheriff is clearly not an "appropriate prosecuting official" under subsection 3(b). The appropriate prosecuting official was not put on the customary alert he was entitled to under the act by having to sign for certified or registered mail and has no idea how the request even got into the file. The requirements of the act clearly contemplate having appropriate officials put on alert rather than having a request wend its way through a beleaguered criminal justice system whereby harried clerks determine whether convicted murders should be set free. Had it come to even the clerk's office by registered mail an alert would have been given and it probably would have been properly processed by a head clerk rather than falling into the hands of an inexperienced one.

Since the IAD is a statutory set of procedural rules which clearly do not rise to the level of constitutionally guaranteed rights, see, Camp v. United States, 587 F.2d 397 (8th Cir. 1978), it is not unfair to charge Vining with the failure of the sending authorities to carry out their obligations under the agreement, especially where Vining never made a specific request to be tried within 180 days (R 2200). See, Browning v. Foltz, 837 F.2d 276, 283 (6th Cir. 1988). It is clear that "a prisoner cannot sit idly by and then claim that he was improperly detained under the agreement. United States v. O'Bryant, 775 F.2d 1528, 1533 (11th Cir. 1985).

After failing to provide adequate notice under the act, Vining sat idly by and stood mute while the trial date was fixed beyond the period specified in the Interstate Agreement on Detainers (R 2345; 2209-2210). A defendant should not be heard to complain where he acquiesces in fixing a trial date beyond the period specified in the Interstate Agreement on Detainers. Toro v. State, 479 So.2d 299 (Fla. 3rd DCA 1985); contra, State v. Edwards, 509 So.2d 1161 (Fla. 5th DCA 1987); Brown v. Wolff, 706 F.2d 902 (9th Cir. 1983). If a waiver cannot be found from such silence, it is clear that a prisoner may waive his IAD rights if he affirmatively requests to be treated in a manner contrary to the procedures prescribed by the IAD. See, United States v. Black, 609 F.2d 1330, 1334 (9th Cir. 1979). The filing of multiple motions on behalf of a defendant have been found to toll the time limits under the IAD. United States v. Nesbitt, 852 F.2d 1502, 1516 (7th Cir. 1988). Defense counsel in this case

filed over twenty motions, some requiring the testimony of witnesses, for example, on the issue of hypnotically-refreshed testimony, but set no hearings before the court until the week before the scheduled trial date, although hearing time was available throughout the period the case was awaiting trial (R 2343). The Speedy Trial Act of 1974, which involves constitutional rights, as opposed to the IAD, excludes from the computation of time limits a defendant's involvement in pretrial motions which includes the entire period between the filing of the motion and the conclusion of hearing. United States v. Mastrangelo, 733 F.2d 793, 796 (11th Cir. 1984). Logic and fairness do not call for a harsher interpretation of the provisions of the IAD. Under subsections (3)(a) and (4)(c) of section 941.45, the court may grant any necessary or reasonable continuance. Such continuance was properly granted in this case to enable the state to obtain reports of experts in regard to hair samples and handwriting exemplars of the defendant (R 2417). The samples were timely submitted by the state and due diligence was exercised. The time limits of the IAD were tolled by defense motion practice and it has not been demonstrated that the granting of such continuance which further tolled the time limitations of the IAD was an abuse of discretion.

The lodging of a detainer does not require the immediate presence of the prisoner. A detainer merely puts the officials of the institution in which the prisoner is incarcerated on notice that the prisoner is wanted in another jurisdiction for trial upon his release from prison. Further action must be taken

by the receiving state in order to obtain the prisoner. United States v. Mauro, 436 U.S. 338, 358 (1978). Other than lodging a detainer (R 2337) the record does not reflect any affirmative efforts on the part of the state to secure custody of Vining and temporary custody was accepted pursuant to Vining's request (R 2338). No reason is given why the shorter deadline of 120 days should be applied. Even in the event that it is applicable it is subject to the same tolling periods discussed above.

Even assuming arguendo that the provisions of the IAD were violated in this case dismissal of the indictment is not warranted under the clearly intended purpose of the IAD and the circumstances of this case. The IAD amounts to nothing more than a statutory set of procedural rules which clearly do not rise to the level of constitutionally guaranteed rights. Moreover, the sanctions contained in the IAD have nothing to do with preserving a fair trial but are instead intended only to prevent excessive interference with a prisoner's rehabilitation in the state prisoner system. Camp v. United States, 587 F.2d 397, 400 (8th Cir. 1978). No allegations are made that Vining did not receive a speedy trial under Florida Law. There is no doubt that Vining, a mentally sound white collar worker, coldly calculated to dispose of Georgia Caruso for filthy lucre, to which he was evidently accustomed. He has been properly sentenced to death for his act. There will be no rehabilitation for John Bruce Vining. It would be absolutely absurd to set him free because the states have compacted so as to not interfere with each others rehabilitative programs and to promote prisoner rehabilitation.

The IAD does not envision such a situation. No authority has been cited to even demonstrate that the condemned would fall under the purview of the act or even have a right to be rehabilitated before being executed. While it may be true that at the time the motion for discharge was filed and ruled upon Vining was not a condemned murderer, the fact remains that this court is now acutely aware of such fact. Considering Vining's silence and willingness to litigate motions outside the time parameters of the IAD it cannot be said that he had a real interest in being expeditiously returned to Georgia. In view of his death sentence it cannot be said that Georgia authorities would be keenly interested in spending tax dollars to rehabilitate Vining or that such rehabilitation would even be possible in view of his deeds in Florida. A harmless error analysis under such circumstances is entirely appropriate to avoid the anomalous result that a convicted murder condemned to death goes free in order to be timely rehabilitated for far lesser crimes.

> II. THE DEFENDANT WAS NOT SENTENCED TO DEATH BASED ON INFORMATION NOT PRESENTED IN OPEN COURT IN VIOLATION OF GARDNER V. FLORIDA, THE RIGHT TO DUE PROCESS OF LAW, TO CONFRONT WITNESSES AND TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

Appellant cites and emphasizes the following part of the sentencing order in support of his claim that the dictates of Gardner v. Florida, 430 U.S. 349 (Fla. 1977), have been violated.

> As the judge presiding at the guilt phase and the advisory sentence phase of the jury trial I was present for all of the testimony and evidence introduced during both phases of trial. Also, I have read all of the depositions transcribed and filed with the clerk of the court. I read a copy of the medical examiner's report and discussed it with him. I obtained copies of the Seminole County estate file on Georgia Dianne Caruso, deceased, and checked the claims filed in the estate which described jewelry consigned to the deceased at the time of her death, as corresponding to some of the jewelry appraised for her shortly before her disappearance.

(R 26300) (Appendix C) (emphasis added).

It is the appellant's position that this ex parte investigation by the trial judge constitutes reversible error. Citing Porter v. State, 400 So.2d 5, 7 (Fla. 1987), and Harvard v. State, 375 So.2d 833, 835 (Fla. 1978), appellant argues that the ruling in Gardner has been extended to a deposition or any other information considered by the court in the sentencing process which is not presented in open court.

Appellant also complains that the sentencing judge improperly considered the fact that "Gail Fleming was rescued as she lay helpless, with a gun pointed at her head, beside a vertical grave that had been dug for her in her presence," as there is no mention of Fleming's rescue in the penalty phase testimony and such information had to be gleaned from the depositions of the co-defendant and various law enforcement officers (R 2634).

While appellant admits that the comparison of claims in the probate estate file was not relevant to the sentencing decision

at the same time he invokes Booth v. Maryland, 482 U.S. 496 (1987), to demonstrate great prejudice.

Appellant further complains that the depositions of Vining's children and ex-wife influenced the court to reject nonstatutory mitigating factors which were uncontradicted at the penalty phase hearing.

Appellant argues that Vining himself must personally accede to the judge's actions thereby precluding a harmless error analysis. Such analysis is also alleged to be precluded by the inability of this court to review what material the trial judge considered from the probate record and the judge's ex parte discussions with the medical examiner and/or his independent investigation(s) at the scene of the alleged abduction.

In Gardner v. Florida, 430 U.S. 349 (1977), the United States Supreme Court vacated the death sentence of the petitioner and remanded the case, holding that the petitioner had been denied due process of law as the death sentence was imposed, at least in part, on the basis of confidential information which was in the presentence report but which was not disclosed to the petitioner or his counsel, so that petitioner had no opportunity to deny or explain the information. It was possible that full disclosure, followed by explanation or argument by defense counsel could have caused the trial judge to accept the jury's advisory verdict that a life sentence be imposed. In Porter v. State, 400 So.2d 5 (Fla. 1981), this court extended the Gardner ruling to a deposition or any information considered by the court in the sentencing process which is not presented in open court.

There are many distinguishing features between the present case and the factual scenario in Gardner: 1) In Gardner the state did not urge that the objection had been waived and two members of this court considered the point on appeal, see, Gardner, 430 U.S. at 361; 2) confidential information relevant to sentencing was involved in the Gardner case; 3) such information was not disclosed to petitioner or his counsel; 4) the judge rejected the advisory recommendation of life, disagreeing with the jury that there were mitigating circumstances; 5) the death sentence was imposed in part on the basis of the confidential information and 6) this court's reviewing function was impaired by lack of a record on appeal disclosing the considerations which motivated the death sentence.

In the present case, the state herewith strongly argues that any belated objection to undisclosed matter is waived. It is clear from the record in this case that the trial judge did not consider such matters ex parte. In a letter to the state and defense counsel dated March 1, 1990, Judge Baker indicated that he had discussed with both parties his decision to speak with the medical examiner to determine that the autopsy report was the only written report on the deceased (R 2575). In a letter dated March 14, 1990, he indicated that he attempted to obtain depositions not in evidence and probate records of the deceased victim Georgia Caruso (R 2622). No objection to the viewing of such materials was ever raised below by defense counsel at the penalty phase, sentencing, or at any time prior thereto. This was not assigned as error on appeal in the statement of judicial

acts to be reviewed. The state would question the ethics of now raising such issue. The letters of the trial judge and the record demonstrate clear knowledge on the part of defense counsel of the judge's undertaking. A reviewing court will not consider matters raised for the first time on appeal. The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system and it places the trial judge on notice that error may have been committed and provides him the opportunity to correct it at an early stage of the proceedings. Castor v. State, 365 So.2d 701 (Fla. 1978). This is hardly a case where counsel had no notice that non-record material was being gathered and such fact was later discovered post-conviction. Due to lack of objection and acquiescence and tacit agreement by defense counsel, there is no Gardner issue in this case. That appellate counsel may not have a meeting of the mind with trial counsel does mot create an appellate issue.

Unlike the situation in Gardner, counsel's omission may be deemed an effective waiver, as there is record support to show that counsel made a tactical decision which was within the realm of counsel to make. It was clear to everyone below that the judge had read depositions and was encouraged to do so in order to rule on the Williams [1] rule motion made by the defense in the penalty phase concerning the offenses committed by Vining in Georgia. Defense counsel argued based on a deposition that the Georgia detective could not testify to the facts of that case (R

[1] Williams v. State, 110 So.2d 654 (Fla. 1959).

1959; 1986; 1990). Defense counsel also argued that "There was no evidence whatsoever of an abduction. There was no evidence as to what location she was killed in. We know that the cause of death was a gunshot wound to the head that was fatal. But we really don't know enough about how she died, when she died, where she died to apply the aggravator of heinous, atrocious and cruel." (R 1898). Counsel had nothing to lose by agreeing to allow the court to confirm that the autopsy report was the only written report by the medical examiner. A toxicological report, had it existed, could have indicated, perhaps, that the deceased had been drinking or had been drugged, which could have demonstrated lack of terror as to this factor or caused residual doubt of guilt. The court, in fact, ruled that this factor could not be proven in this case for legal and factual reasons and it was not submitted to the jury, and was not considered as an aggravating factor (R 2635). Counsel was aware of the judge's inquiry and had nothing to lose by the existence of further reports and everything to gain since death by gunshot wound had already been established. The defense did not plan on arguing residual doubt of guilt (R 1924). At the time Caruso met Vining she put a six carat pear shaped diamond, a three carat ring with two carats of smaller stones underneath it and some loose diamonds (R 102). The six carat diamond was worth twenty-five thousand dollars (R 1156). Both of these items were appraised on the day of the murder. Caruso had also been consigned from Mark Ryan a 1.13 carat diamond (R 1218). This was one of the diamonds that she had been carrying that day as it was sold to Daniel's

Jewelers by Vining and recovered (R 1222-1230). The state proved its case as to murder and armed robbery. The defense would not have been at all harmed if the judge had discovered that no claims were made upon the estate from the consignees or that the jewelry appraised did not match that which she had been consigned. Such discovery could have possibly formed the basis for a motion for a new trial or a post conviction motion as it would tend to show she could have been alive after the transaction with Vining and cast doubt upon the fact of an armed robbery. It would seem that the judge's actions could only have benefitted the defense, who was well aware of them.

In Gardner confidential information relevant to sentencing was involved and the trial judge did not state on the record the substance of any information in the confidential portion of the presentence report that he might have considered material. 430 U.S. at 356. In the present case, the parties knew what the judge was doing and were advised of the results of his undertaking. The parties, themselves, argued from the depositions and thereby expected the judge to be familiar with the same. Contact with the medical examiner did not prove to be fruitful as far as further reports, which was the basis for the contact, and the parties were so advised. They were aware, as well, of the judge's intent in regard to the probate records. Most people who die leave creditors behind and the victim sympathy considerations of Booth v. Maryland, 482 U.S. 496 (1987), are not apparent in this case. Nothing came of the judge's trip to the Jamestown Shopping Center and his letter

indicates it was undertaken out of mere curiosity (R 2622). The findings of fact do not reflect that he ever did, in fact, go to the shopping center or that it played any role in sentencing. This is simply not a case involving "confidential" information or secret, sensitive disclosures concerning Vining's background or character never disseminated to the parties. The accuracy of the court's findings was never contested and was susceptible to duplicative efforts by both parties. Counsel was hardly denied an opportunity to comment on facts now alleged to have influenced the sentencing decision.

In Gardner, the judge rejected the advisory recommendation of life, disagreeing with the jury that there were mitigating circumstances. Two dissenters on the Supreme Court of Florida regarded the evidence as sufficient to establish a mitigating circumstance as a matter of law. 430 U.S. at 352. In the present case the advisory sentencing jury returned an interrogatory verdict indicating factors found in aggravation (R 2613). The judge found the same factors in aggravation despite knowledge of extraneous factors (R 2634) and found the existence of mitigating factors so it cannot be said that the death sentence rests on an erroneous factual predicate.

Moreover, in the present case, unlike the situation in Gardner, there is no basis to believe that the death sentence was even imposed on the basis of this information. The judge's actions in this case were set forth as a sort of preamble to his actual findings of fact (R 2630). None of these facts played a role in his findings in aggravation and mitigation. Contrary to

appellant's assertion the facts of the Gail Fleming abduction were before the court notwithstanding deposition testimony. Detective Ferguson testified she was found near a deep hole with her head and hair wrapped in duct tape (R 1964-1965). Fleming testified that they had threatened her with a gun, (R 1999) pulled over in a wooded area, took out shovels (R 2004) and marched her to the straight-up-and-down hole dug for her (R 2005). These facts did not have to be gleaned from a deposition. The court's proper rejection of proffered nonstatutory mitigation is discussed elsewhere herein and is clearly based on an evaluation of penalty phase testimony and evolving law.

This court's reviewing function is not impaired, as it was in Gardner, by lack of a record on appeal disclosing the considerations which motivated the death sentence. The depositions and judge's letters are before the court. Should the court desire more information it has the option to direct an order to the trial judge inquiring as to whether in weighing the aggravating and mnitigating circumstances of the case he considered information which the appellant had no opportunity to deny or explain. See, Ford v. State, 374 So.2d 496, 503 (Fla. 1979); Enmund v. State, 399 So.2d 1362, 1371 (Fla. 1981).

III. THE TRIAL COURT DID NOT ERR IN ALLOWING THE TESTIMONY OF WITNESSES WHO HAD UNDERGONE PROGRESSIVE RELAXATION WHICH DID NOT ELICIT ADDITIONAL INFORMATION.

On December 8, 1989, the defense filed a motion to suppress tainted testimony and evidence seeking to exclude all evidence

and testimony of Joann Ward, Ellen Zaffis, Kevin Donner and Denise Vietti after the point that they were hypnotized by Lieutenant Jimmie Watson of the Orange County Sheriff's Office. The motion alleged that Ward was hypnotized on December 17, 1987, Zaffis and Donner on December 21, 1987, and Vietti on December 29, 1987. Following the hypnotic session Ward, Zaffis and Donner met with the police and an artist's sketch was made of the suspect. Ward and Zaffis were subsequently shown photographic line-ups containing a picture of Vining. Donner provided a written statement on December 22, 1987 (R 2278-2281).

On the same day a motion was filed to prohibit the in-court identification of Vining by these witnesses whose memory had been hypnotically refreshed (R 2294-2295).

On December 15, 1989, a motion was filed to prohibit the state from calling as witnesses the hypnotist and Investigator Neil McDonald who had met with the hypnotized witnesses to do an artist's sketch. His testimony and the sketch were alleged to be inadmissible (R 2299-2300).

A hearing was held on the motions on January 16-19, 1990. Lieutenant Jimmie Watson testified that he was asked by Detective Dan Nazarchuk to interview potential witnesses to elicit as much information as he could concerning their observations of a possible suspect and his vehicle. Lieutenant Watson has practiced hypnosis for at least twenty-five years and during the past fifteen years has worked limitedly as a forensic hypnotist with the Orange County Sheriff's Office. He has hypnotized over two thousand people (R 1728-1729).

Lieutenant Watson testified that he uses a procedure called "relax and recall" which is a process of hypnosis but is also a process in and of itself. The procedure is not aimed at retention aspects of the memory but is concerned with eliminating barriers to recall such as tension, anxiety, intrusive thoughts, and the inability to focus attention, and enhancing recall by having the subject relax as much as possible (R 1729-30). He can relax a person and not place them under hypnosis. Major management classes and seminars and the Navy teach "progress relaxation" which is the same thing as relax and recall. In order to get a person to relax so that the person can recall he brings the subject to a relaxed environment, establishes a rapport and gains the subject's confidence. The next step is to have the person consciously relax the muscles. He has a ball and chain that is referred to as Chevault's pendulum and uses it for focus and gaining the person's confidence (R 1732). He has them hold the pendulum and as he suggests that it will go in a circle, it will go in a circle and as he suggests it will go in the opposite direction, it will go in the opposite direction. The pendulum is generally used to test susceptibility to hypnosis but he uses it as a point of focus and to establish rapport with the person. It is possible to use the pendulum and not place the person under hypnosis. Just because the person is relaxed does not mean the person is under hypnosis (R 1732). His intent was to eliminate, as much as possible, the barriers to recall and thereby enhance recall when he met with witnesses Joann Ward, Ellen Zaffis and Kevin Donner (R 1733). It was his initial

intent when he met with Denise Vietti but, seeing no alternatives, a decision was made to attempt hypnosis per se. In a lot of cases it doesn't take much more at the point of progress relaxation, except the suggestion of hypnosis, itself, to induce the person into a hypnotic state. He usually has them put their hands on their thighs and suggests that the hands rise and as they do the person goes into hypnosis. In addition to that he has them count forward or backward and suggests with each regressing and progressing number that the person will go deeper and deeper into a stage of complete relaxation, which state is termed hypnosis. In his opinion the difference between relax and recall and hypnosis is the intent and what he is trying to do with the person (R 1734). In relax and recall he does not suggest anything and only asks them if they can tell him something about the subject. At no time when he spoke to Joann Ward, Ellen Zaffis or Kevin Donner did he suggest anything about the defendant's features or characteristics, clothing or the car involved, and had no knowledge of what these things look like. He was taught to use open-ended questioning not only in relax and recall but also in hypnosis (R 1735). The protocol was a compromise between full blown hypnosis and relax and recall. His intent was relaxation (R 1736). He didn't observe any evidence of hypnosis in these witnesses (R 1737). His protocol in these cases would be to tell the detectives they would have to be present as it is their responsibility to record or note the sessions. The detectives did not discuss with him what information they had gotten from the witnesses prior to these

sessions. He instructed the detectives to get every bit of information they could prior to his getting involved (R 1738). In his opinion the definition of hypnosis is a hypered state of suggestibility (R 1739).

Joann Ward gave a written statement to the Winter Park Police Department regarding Georgia Caruso's disappearance on the evening of November 18, 1987, the same day Caruso disappeared. About a month later she gave an oral statement to the Orange County Sheriff's Office (R 1742). She told the authorities that Caruso was selling some jewelry to a gentleman, and they had to meet with him and go down to the gem lab in Winter Park to have the jewelry appraised that he was interested in purchasing. She took Caruso down there. The gentleman followed them in his car. She parked in front of the toy store, and the gentleman and Caruso went into the gem lab. She waited for them outside. They came out and Caruso said that the gentleman had decided to purchase the rings, that they were going to go to the bank, he was going to pay for the jewelry, she was going to put the money in a safety deposit box, hand the rings over to him, and then come back to the shop afterwards. She advised Ward to go on back to the shop. Ward did, in fact, go back to the shop. It was the last time she saw Georgia Caruso (R 1743). That same evening, November 18, 1987, the Winter Park Police Department asked her to make a composite drawing which she did (R 1744). The oral statement she gave to the Orange County Sheriff's Office was tape-recorded. After giving the oral statement she met with Lieutenant Watson who asked her to relax and recall what happened

on November 18, 1987. She never went to sleep and was not in any type of trance-like state (R 1745). While she was talking with Lieutenant Watson she was fully conscious of where she was (R 1748) and her surroundings (R 1749). She was just relaxed. Although she does not know what hypnosis is she doesn't think she was under hypnosis (R 1749). Lieutenant Watson never suggested to her a description of a person, vehicle or location and never coerced her into saying something that she hadn't already said to either the Winter Park Police Department or in her taped description to the Orange County Sheriff's Office. Watson just asked her to recall what had happened on that particular day (R 1747). She did not give any different information after she spoke to Lieutenant Watson than what she had previously given the Orange and Winter Park detectives. The CB antenna was placed in the center of the trunk and they asked her exactly where in the center of the trunk. She just said where it was, in the top center of the trunk. She had also given that information to the Winter Park Police Department and to Orange County prior to talking to Lieutenant Watson (R 1748). On cross-examination she indicated that she had met with Detective Neal McDonald after her interview with Watson and he showed her a number of photographs and asked her to pick out some features and an artist's drawing was done from her statements to him. She gave him a rating as to how close it looked to the man she saw with Georgia Caruso (R 1754). Detective Nazarchuk came to her shop with a photo line-up afterwards (R 1755). She indicated that in the interview with Lieutenant Watson the ball and chain was her focal point (R 1760).

Ellen M. Zaffis testified that she went to the Winter Park Police Department on November 18, 1987 and gave a statement which she felt sure was reduced to writing. On December 21, 1987 she met with Orange County Sheriff's detectives and gave a statement (R 1763-1764). She gave the same information to Orange County deputies as she previously gave to the Winter Park Police Department, which included the time of the appraisal, date, description of the person and clothing. After giving the statement she met with Lieutenant Watson. She does not feel that she was placed under hypnosis because she does not believe in it and because she was fully aware of her surroundings, who she was speaking with and what she was speaking about (R 1765-1766). At no time did Lieutenant Watson induce her into a state of sleep or trance. He explained to her that they would be working with an artist to do a sketch and that she should try to recall as many physical features and things as she possibly could, such as specifics about clothing, tatoos, speech impediment, lisp or any kind of identification characteristics (R 1766). She does not recall Lieutenant Watson using a pendulum. He never suggested in any way what type of person or car they were looking for and never suggested anything to her regarding descriptions. He never coerced her into saying anything she didn't remember and she actually did most of the talking. After speaking to him she did not give any different information than what she had previously given the Orange County detectives or the Winter Park Police Department (R 1767). After the session with Lieutenant Watson she met with the artist to do a sketch (R 1769). Kevin Donner

and two police officers were in the room. A composite of a suspect that was last seen with Georgia Caruso was made (R 1764). At a later time Detective Nazarchuk came out to see her and showed her a number of pictures (R 1770) and she chose one of those pictures as the person she saw with Georgia Caruso (R 1771).

It was the defense position that the state could introduce into evidence statements made to the Winter Park Police Department and statements taken from the witnesses by the Sheriff's Office prior to their sessions with Lieutenant Watson but anything occurring afterwards would be tainted and any in-court identification by a witness of Vining should not be allowed and the state should be prohibited from calling Lieutenant Watson or relying on any testimony from Investigator McDonald who did the composite sketch (R 1775). Defense counsel argued that a level of hypnosis had been induced in these witnesses by a biased party, Lieutenant Watson, who works for the Sheriff's Office and is not a qualified professional (R 1779).

The state argued that the witnesses were never placed under hypnosis but were only asked to relax and recall what happened (R 1775). Hypnosis is a hypered state of suggestibility. Lieutenant Watson did not suggest anything to the witnesses and his intent was not to hypnotize them with the exception of Denise Vietti. None of the witnesses claimed their state of awareness was altered (R 1776). Chevault's pendulum is not used to place a person under hypnosis (R 1777).

Relying on the legal definition of hypnosis set out by this court in Stokes v. State, 548 So.2d 188, 190 (Fla. 1989) as "an altered state of awareness or perception during which the subject is placed in an artificially induced state of sleep or trance through a series of relaxation and concentration techniques employed by the hypnotist" the trial judge found that the witnesses in this case were not hypnotized. It did not appear to the judge from the testimony that the witnesses had achieved an altered state of awareness or any artificially induced sleep or trance but appeared to have been relaxed, concentrating and attempting to recall, which the judge felt was not hypnosis. He stated "If you relax and concentrate, you can't testify? That doesn't make any sense." (R 1780-1782). The trial judge denied the motion to suppress and to prohibit the in-court identification of Vining (R 2406; 2405; 1782). The court was puzzled as to why the hypnotist would be called at trial and never heard of using a composite at trial (R 1782-1784). The state indicated it would only call the hypnotist and Investigator McDonald in rebuttal (R 1785). The judge then granted the motion to prohibit the state from calling the hypnotist and Investigator McDonald as witnesses except for possible use in rebuttal (R 2407; 1785).

At trial Joann Ward described Vining, the automobile she had observed him in, and made an in-court identification of Vining as the person she had last seen Caruso with, without objection (R 1010; 1023; 1044). Ellen Zaffis also described Vining and his actions (R 1076-1083). Prior to her in-court

identification the defense renewed its objection to the state calling Joann Ward, Ellen Zaffis and Kevin Donner for in-court identifications. The court indicated that the defense did not have to renew its objection as to each witness and reiterated its prior ruling (R 1085). The state noted that a proffer would have to be done prior to any testimony of Kevin Donner as the court never ruled on this issue as to Donner (R 1086). Zaffis made an in-court identification of Vining as "George Williams", the person she saw with Caruso (R 1086-1087).

The proffer of Kevin Thomas Donner revealed that he spoke with Detective Nazarchuk and gave a statement. He then met with Lieutenant Watson, who specifically told him that he was not being hypnotized (R 1129). He was not put into a state of hypnosis but went through a relaxation exercise for recall. Another detective, Ellen Zaffis and his roommate were there. They were in a room and he told them to sit comfortably in a chair with their hands on their arms, hanging loosely, and to close their eyes. He told them to go through what happened on November 18th. He rolled a ball in front of him for about ten seconds. Donner testified that he was one hundred per cent aware of what was going on around him and did not go into a trance or state of sleep. It did not change his memory whatsoever and he didn't recall anything different about features or anything that he had given earlier in statements (R 1116-1132).

The court distinguished this case from "mesmerizing", a sleep or trance-like state popularized years ago in carnivals and vaudeville acts. From the testimony of the witnesses the trial

judge deduced that they were in a harmless state of concentration which acted only as an aid to relaxation. He perceived no mind-altering experience that would make the witnesses susceptible to suggestion in the manner described in Stokes v. State, 548 So.2d 188 (Fla. 1989) (R 1139). He noted that the procedure was a subclass of mental procedure used in psychiatry and psychology (R 1141). He found that the testimony should not be excluded under the rationale of Stokes (R 1141). Donner subsequently testified as to the description of the man accompanying Georgia Caruso to the gem lab and identified Vining in court as the man who had accompanied Caruso (R 1154-1157).

There is no question that a witness who has actually been hypnotized may testify to statements made before the hypnotic session, if they are properly recorded. Bundy v. State, 471 So.2d 9, 18 (Fla. 1985); Stokes v. State, 548 So.2d 188, 196 (Fla. 1989). Prior to progress relaxation Joann Ward and Ellen Zaffis gave statements to the Winter Park Police Department and later to the Orange County Sheriff's Department which contained the same information. Kevin Donner's proffer also indicates that he gave a statement, as well, to Winter Park authorities, and apparently a later one to Orange County authorities (R 1116-1132; 3531-3536). Assuming that the practice used by Lieutenant Watson could be considered to have been hypnotism, it is clear that the majority of the testimony of Ward, Zaffis and Donner was admissible. Indeed, what was objected to below was only post-hypnotic information which would arguably include references to photo line-ups and in-court identifications (R 1779).

Even if the procedure used upon the witnesses could be considered to have been hypnosis the trial court correctly ruled such identification testimony was admissible. Winter Park authorities already had information about Vining's age, height, weight and hair (R 3496). These witnesses observed Vining to such a degree that they were able to make a composite drawing of Vining the evening of the murder for the Winter Park Police Department long before the progress relaxation (R 1744). The deposition of Investigator Arthur King reflects that he did a composite drawing of the suspect with Ellen Zaffis, and Kevin Donner and Joann Ward agreed that it looked like the man they saw (R 2837-2839; 2883). This composite was given to the Orange County Sheriff's Office and a flyer was made up (R 3496). No allegations were made at trial and are not made on direct appeal as to what additional information was obtained by virtue of hypnosis that altered previous descriptions of Vining or forevermore rendered Vining unidentifiable to these witnesses. No discrepancy between the Winter Park composite and the allegedly "post-hypnotic" composite by Investigator McDonald is even alleged. It is not even argued that Vining's appearance in the photo line-up or in the courtroom does not correspond to these witnesses' descriptions. Obviously it does. No additional details or characteristics are set forth as the result of hypnotism. It is Vining's burden to concisely state exactly what it is that should have been suppressed and why. It is not the state's burden to demonstrate total pre-hypnotic admissibility. By all accounts the "hypnotic" session was an informational bust.

No additional relevant information regarding either the events or Vining's appearance was obtained. Joann Ward, Ellen Zaffis and Kevin Donner all testified in proffer that after speaking with Lieutenant Watson they did not give any different information than they had previously given the Winter Park and Orange County detectives (R 1748-1767). Donner testified that the session did not change his memory whatsoever and he didn't recall anything different about features or anything that he had given in earlier statements (R 1116-1132). This is largely substantiated by their deposition testimony. Ward was only able to indicate that the dark pants the subject wore were brown after the session (R 2706). Donner only recalled that he had previously seen the man on Park Avenue at another jewelry store (R 2890). Detectives Riggs T. Gay and Dan Nazarchuk of the Orange County Sheriff's Office indicated Ward didn't give any additional information at all (R 2740; 3512). Lieutenant Watson indicated that he wasn't at all happy with the outcome of the interviews and was told that they had not gotten any significant information (R 3596). They were basically seeking information about the car and were hoping to get a tag number (R 2739). In the present case the court is not faced with a witness whose memory has been "refreshed" or "enhanced" through state-sponsored hypnosis. This is simply not a case of hypnotically refreshed recall testimony, properly understood. The witnesses testified they were fully conscious and not in a sleep or trance-like state. The session did not ultimately add to or change the way the witnesses recalled the events of November 18, 1987 or change essential descriptions of

the man seen. The witnesses' descriptions remained substantially consistent from the time of the initial statements up to and including the in-court descriptions. Detective Nazarchuk's notes from the "hypnotic" session of the questioning of Lieutenant Watson reflect he only asked the witness to describe what was seen (R 3512). The witnesses recall no suggestions or pressures form Lieutenant Watson. One of the problems leading many courts to declare hypnotically aided testimony inadmissible per se is that suggestions from the hypnotist or creations of the subject in response to pressure from the hypnotist may be so firmly incorporated into the subjects' memory that it is impossible to undermine them by cross examination. However, this obviously did not happen here. The trial testimony was based on the witnesses own recollections unaffected by the allegedly "hypnotic" experiment. A case on all fours is Bundy v. State, 455 So.2d 330 (Fla. 1984), herein called Bundy I. A Chi Omega house resident returned home from a date, entered by the back door and saw Bundy standing at the front door with a club in his right hand and his left hand on the doorknob. She described him to her roommate and gave a description to one of the officers dispatched to the scene. She later met with officers and again described the man and an artist made sketches. A week later she was placed under hypnosis, which by all accounts involved suggestive questioning as opposed to the questioning in the present case. During the hypnosis session she said she had seen brown hair hanging out of the back of the man's ski cap. This and a reference to the man's eyebrows were the only factual elements obtained through hypnosis

that had not already been learned from her previous description. At trial she testified that after the hypnosis session she did not remember seeing the brown hair or eyebrows on the night of the crime. This court held that hypnotically refreshed recall testimony had not been offered where the witness did not through hypnosis add to or change her essential description of the suspect at the time of the crime and that the testimony was not subject to being excluded. The court concluded that under such circumstances the fact that the hypnosis took place was a matter relating only to the weight of the testimony and not to its admissibility. 455 So.2d at 342. From all accounts, in the present case no suggestiveness was ever injected into the hypnotic process and nothing of additional significance which would render identification of Vining inaccurate in any way was obtained. Cross-examination was quite possible and the defense could have attempted to attack the credibility of these witnesses on the basis that they were hypnotized although counsel probably thought better it after taking depositions, especially when it could not even be articulated what new information was obtained as a result of hypnosis. The same result in this case should be reached as in Bundy, I.

The foregoing arguments were made in the event that this court should conclude that these witnesses were, in fact, hypnotized. The state's position and that of the trial judge below is that the process undergone by these witnesses is something far less than hypnosis and all testimony before and after is admissible. What occurred below does not at all fit the

definition of hypnosis set out in Stokes, as an artificially induced state of sleep or trance. If it does, then the admissibility of hypnotically refreshed testimony should be reconsidered as such a simple state of relaxation would make no one more susceptible to suggestion or result in an increased desire to please the questioner by invention any more than any other situation in which another party obviously hopes to elicit information, such as citizen/interrogator, priest/penitent psychiatrist/patient encounters. In fact, it is more logical that an anxious person who wants to get such questioning over with would confabulate and improvise. As Judge Baker pointed out, it would make no sense to preclude the testimony of a person who has simply been relaxed. Such a per se rule would preclude anyone from testifying who meditates, says the rosary, or simply seeks to relieve stress. Something more is needed to reach a point of inadmissibility and that is suggestibility/suggestiveness. That point was never reached in this case. In a similar case, People v. Gray, 154 A.D.2d 478 (N.Y. 1989), progressive relaxation was employed on a witness who was fully conscious during the interview. The court held that the state's burden of proving that the prehypnotic identification was reliable was met as the subject was confident in his prehypnotic recollection of the perpetrator and there were no substantial additions or changes in the description following the session. 154 A.D.2d at 482. The court further found that the dangers of suggestiveness or confabulation were not present as the posthypnotic description did not yield any significant

changes in the account of the incident or in the appearance of the assailant and the session was conducted in a neutral environment without suggestive questioning so that the defendant was not denied his right of cross-examination. The same result should be reached in this case.

IV. THE TRIAL COURT DID NOT IMPROPERLY RESTRICT VOIR DIRE OF PROSPECTIVE JURORS OR IMPROPERLY DENY CHALLENGES FOR CAUSE.

It is the appellant's fourth contention that he was categorically prohibited from inquiring into the jurors' personal beliefs as to mitigation and/or mercy which denied him a meaningful voir dire of the prospective venire, violating his right to an impartial trial, due process and effective assistance of counsel. The jurors [2] filled out questionnaires prior to voir dire (R 2375-2404; 2418-2444). Question 9 asked "Do you think the death penalty should always be imposed if a defendant is convicted of first degree murder? Please explain." Ten prospective jurors answered affirmatively (Wishauer, Conway, Coppock, Derrico, Money, Crow, Piper, Martin, Parsons and Curran). Peremptory challenges were exercised to excuse two of these prospective jurors, Conway (Juror 63) (R 881) and Martin (Juror 435). Piper (Juror 439) and Money (Juror 615) ultimately became jurors/alternates after defense counsel exhausted the peremptory challenges and a request for more was denied (R 885-87; 1656). No allegations are made that the defense was

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[2] Those who actually served as jurors were: John Ward, Paulette Clark, Alan McNair, Vera Sigler, Betty White, Jasper Holland, Florence Calabro, Nancy Tatro, Diana Bridges, Andrew Hamre, Joyce Piper, Linda Micciche, Bernice Money, Mary Ann Moreno and Ralph E. Smith, Jr. The last three named jurors served as alternates.

prohibited from inquiring into the personal beliefs of prospective jurors Conway and Martin and Juror Piper. The defense sought to explore alternate juror Money's position on the concept of mercy and mitigation and now complains that the court, after objection by the state, would not let her explain "why" she would not necessarily vote for death in the second part after having found the defendant guilty of first degree murder in the first part (R 725). Appellant further complains that he was hampered in trying to explore the personal feelings of prospective jurors Starling, Clay and Hamm about mitigation and the death penalty (R 258-60; 350; 502-63).

To secure the right to a fair and impartial jury a voir direct examination of the prospective jurors must be conducted that is sufficient to reveal any potential bias. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). The trial court generally has broad discretion to choose the most effective method of conducting voir dire and to determine the questions to be asked. Ham v. South Carolina, 409 U.S. 524, 527 (1973). No abuse of discretion can be demonstrated in this case.

Of the ten jurors who indicated on the preliminary questionnaire that the death penalty should always be imposed upon conviction for first degree murder only two survived voir dire to ultimately serve as a juror and alternate juror. The questioning was obviously intense and comprehensive enough to allow eight prospective jurors to be stricken. Questioning of

prospective juror Conway [3] was comprehensive enough to reveal

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[3] The questionnaire of prospective juror #63, James A. Conway, reveals that his feelings regarding the death penalty depend on the crime and the way it is carried out. He does not believe that it deters. He believes it is used randomly and doesn't think there is an even enough application. He believes that it should always be imposed if a defendant is convicted of first degree murder. He holds no religious beliefs for or against the death penalty. His feelings about the death penalty would not prevent him from being a fair and impartial juror. If the evidence and the law was such that the death penalty was appropriate in this case he could vote to impose the death penalty. He does not know if he would be able to consider a sentence less than death for a person who was convicted of first degree murder (R 2393). On voir dire Mr. Conway explained that writing is a poor medium for him and it is hard for him to convey ideas in pencil or pen (R 407). The judge explained to him that the case involved a capital felony and described the bifurcated proceedings to follow, including aggravating and mitigating circumstances (R 406). Mr. Conway explained that he does not view the death penalty as a force for deterrence or revenge but as a final solution (R 407). It ensures that a person like Charles Manson would never be a threat (R 408) as it is a way to make sure that it never happens again (R 408). He believes there are instances where the death penalty is not applied equally to all (R 409). He is in favor of the death penalty (R 409). He indicated that he could be wrong about his belief as to unequal application of the death penalty as it is based on information obtained from the media (R 410). He further indicated that he could make a decision as to what sentence he thought the judge should give the defendant if he was convicted based on aggravating and mitigating factors rather than personal feelings (R 413). He felt that he could do it very easily (R 413). He indicated that he would follow the law and if he found that the state had not proved aggravating factors or that the mitigating factors outweighed the aggravating factors he would return a verdict of life because that is his duty, under the law. But at the same time if the aggravating factors were proved beyond a reasonable doubt he would have the courage of his conviction to vote for a recommendation of death (R 414). After having the difference between premeditated and felony murder explained to him he indicated that if the state proved the facts beyond a reasonable doubt that proved either premeditated or felony murder he could vote for first degree murder under either a premeditation or felony murder theory (R 418). Upon examination by defense counsel he clarified his statement on the questionnaire that the death penalty should always be imposed in a first degree murder case explaining that his mindset was that if he walked up and shot somebody they are just as dead as if he had planned it twenty minutes ago (R 419). Upon further questioning he indicated that he did not feel that if the jurors decided upon a first degree murder conviction that there was only

that he believed the death penalty was not a deterrent but a final solution as to each particular defendant and he believed in the death penalty. Defense counsel obviously felt that he simply would not be a strong juror for their side (R 881). No allegation is made that the defense was prohibited from inquiring into this juror's personal beliefs. The questioning of Juror Martin [4] was comprehensive enough to allow defense counsel to

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one penalty, electrocution. He indicated that he would have to go with the flow of the case and that there is no standard penalty (R 420). He does not believe that the death penalty should always be imposed if a defendant is convicted of first degree murder (R 421). His personal feeling is that there should just be one punishment for first degree murder and that punishment should be whatever the law dictates and he has no moral problem with capital punishment, for or against (R 421). He further indicated that "even though I believe in a concept of capital punishment morally, I really don't know whether I could sit there and judge a man. You know, that's a great unknown to me. You're asking me could I personally put the finger on somebody to kill them." (R 422). He indicated that it would bother him more to impose the death sentence than a life sentence (R 423). He indicated that there was nothing in his experience or everyday feelings that would impair his ability in this case to make a fair and just decision on whether or not life or death is the proper penalty (R 424). The court inquired as to whether Mr. Conway of the "Nietsche philosophy" was to be stricken. The reference to Nietsche was perhaps because of Conway's remark that the death penalty was a "final solution." Defense counsel Cashman indicated that the defense would strike Conway and defense counsel Sims joined in, indicating that "we believe that what doesn't make us strong, kills us." (R 881).

[4] Prospective juror #435, Ms. Martin teaches school at Oakridge High School (R 513). She indicated in her questionnaire that she had knowledge of the case in that she had heard or read that a woman had an appointment to show diamonds, never returned home and was found murdered. The only opinion that she formed about the case is that the woman should have had someone else along with her. She indicated that she believed in the death penalty and felt that it was used randomly. She indicated that she thought that the death penalty should always be imposed if a defendant is convicted of first degree murder. She holds no religious beliefs for or against the death penalty. Her feelings about the death penalty would not prevent her from being a fair and impartial juror. If the evidence and the law was such that the death penalty was appropriate in the case, she could

formulate a challenge for cause (R 629). No allegation is made

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vote to impose the death penalty. She indicated that if she convicted someone of first degree murder she would not be able to consider a sentence less than death for that person (R 2433). Upon questioning in voir dire by the state Ms. Martin indicated that she had heard about the case on TV (R 613). She has no clear memory of what was on TV at that time in 1987, she just remembered that the woman was missing and had been found (R 614). She indicated that she would base her verdict on evidence presented in the court and not on what she had heard before (R 615). She indicated that she thought she would follow the law given by the court as to what she could consider in making a recommendation to the court as to the penalty. Even though she may have certain beliefs in regard to the death penalty, she would go by what the court told her as far as what she could consider. She indicated that she thought she was capable of doing that as she is an objective person (R 617). She would consider the aggravating and mitigating factors as given to her by the court. If she felt the mitigating outweighed the aggravating then she would vote for life (R 619). She would follow the law and vote for life if the state did not prove the aggravating factors beyond a reasonable doubt. She would make a decision based upon what she was told and would follow the law (R 620). Upon further questioning by defense counsel she acknowledged that on the questionnaire she indicated that if she had convicted someone of first degree murder she could not consider a sentence of less than death. She further indicated that within her definition of first degree murder she thought the death penalty should always imposed if someone is convicted of first degree murder (R 621). Upon being reminded of the instructions as to the penalty phase however, she indicated that she would go by whatever the law said was supposed to be done and would look at the facts impartially (R 622). What changed her mind from when she filled out the questionnaire is the instructions as to what she was supposed to according to the law. At the time of filling out the questionnaire she did not understand that certain circumstances can require a life penalty or death penalty for first degree murder (R 622). She indicated that she would not automatically vote for death upon a finding of first degree murder but was objective enough and intelligent enough to separate those circumstances calling for a recommendation of a life sentence and those calling for death (R 624). She would look at the situation but she could not say what she would do in that circumstance until she was actually confronted with it (R 625). She reiterated that even though she may be inclined toward the death penalty she could be impartial (R 625). She could not envision a situation where she would not be impartial although she read what had happened in the paper she did not form any opinion about the guilt or innocence of the suspect (R 626). All she had read in the paper was that the suspect had been arrested and the circumstances were that the victim was supposedly showing him jewelry. The only pictures she

that the defense was prohibited from inquiring into this juror's personal beliefs. No allegation is made that the questioning of Juror Piper [5] was inadequate and she was not challenged. Only

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saw in the paper were those of the victim when she was first missing. She had not seen anything recently in the news about it (R 627). Defense counsel subsequently moved to strike Ms. Martin for cause as she could not state unequivocally that she could be fair and has very strong personal feelings about the death penalty. She had answered on the questionnaire that it should always be imposed if someone was convicted of first degree murder and that she couldn't in fact consider a sentence of less than death if she had convicted someone of first degree murder (R 628). The court denied the motion to strike for cause because the trial judge did not remember anything she said that would justify that conclusion (R 629). The court reconsidered the motion to strike Wanda Jackson for cause as it had misgivings about her and struck her for cause, giving the defense one more preemptory challenge. The defense then struck Ms. Martin from the jury (R 887).

[5] Juror #439, Joyce Piper indicated on the questionnaire that she had heard about the case although she didn't remember any particulars other than the lady that was killed was a diamond dealer. She had formed no opinions about the case. She indicated that she was for the death penalty and that it was used randomly because circumstances prevent the death penalty. She further indicated that she thought that the death penalty should always be imposed if the defendant is convicted of first degree murder. She holds no religious beliefs for or against the death penalty. She does not feel that her feelings about the death penalty would prevent her from being a fair and impartial juror. If the evidence and the law was such that the death penalty was appropriate in this case she could vote to impose it if she was absolutely sure of guilt. She also indicated she could vote for a sentence less than death if the person were convicted of first degree murder (R 2431). Upon questioning on voir dire she indicated that she was a legal secretary at the Naval Training System Center and had served on a jury before as an alternate (R 633). Defense counsel asked perfunctory questions of Juror Piper. Counsel knew people at the army project off of Tradeport Drive and inquired as to whether that was where Juror Piper's husband worked with the army. Counsel ascertained that she had only been a legal secretary for about a year and a half and that she liked it (R 634). She was questioned as to her knowledge of the case and indicated that she just vaguely remembered from the time period that it probably happened and had probably heard about it from TV, the newspaper or the radio or a little bit of each. She did not remember seeing anything recently about it (R 635). Upon later questioning she indicated that it made her very nervous to be in court probably because of the magnitude of the

the questioning of Alternate Juror Money [6] is challenged. Ms.

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task that was set forth for her (R 867-868). Nevertheless, she indicated that she would try her best (R 869). She ultimately became the twelfth juror (R 888). She was not challenged for cause or peremptorily.

[6] Alternate Juror #615, Bernice M. Money indicated that she had not seen, heard or read anything about the case and had formed no opinions. She indicated that her feelings about the death penalty were "half and half." She felt that the death penalty was used too seldom. She also felt that the death penalty should always be imposed if a defendant has been found guilty of first degree murder. She claims to hold not religious beliefs for or against the death penalty. She further indicated that her feelings about the death penalty would not prevent her from being a fair and impartial juror and that she would "give her true feelings in accordance with the evidence." If the evidence and the law was such that the death penalty was appropriate in this case she indicated that she could vote to impose the death penalty. She also indicated that if she convicted someone of first degree murder she might be able to consider a sentence of less than death for that person (R 2422). Upon questioning during voir dire she indicated that she had heard of the term "premeditated murder" but was not sure what it was (R 531). She acceded to the prosecutor's definition of it as "an intentional planned killing" (R 532). She indicated that she would follow the judge's rules to the best of her ability and base a recommendation to him as to punishment only on what he said that she can consider. She did not feel there was anything in her background that would interfere with her following the judge's rules. Defense counsel questioned Ms. Money as to the fact that her feelings about the death penalty were "half and half." She explained that she would not make her decision until all the evidence was in and she had weighed it (R 723). She agrees with the death penalty in some cases and disagrees that it should be applied in others. She explained her answer on the questionnaire that she "may be" able to vote a life sentence, indicating that such decision would depend upon the evidence and how she weighed it. She would not be able to decide upon a life sentence until she heard the evidence but indicated that she would consider it to the best of her ability (R 724). She indicated that the fact that she found someone guilty of first degree murder in the first part of the case did not necessarily mean that she was going to vote for death in the second part. Defense counsel then asked her "tell me why not." The state objected arguing the jurors' personal reasons don't matter. The court agreed and felt that was not a proper question (R 725). Defense counsel indicated that she was just trying to form a question and was talking about the evidence and wanted to make sure that everyone knew that it was a two part procedure (R 725). The court told defense counsel to ask her about it. Upon further questioning the juror indicated that after she had found someone guilty of first degree

Money indicaated that the fact that she found someone guilty of first degree murder in the guilt/innocence phase did not necessarily mean that she was going to vote for death in the penalty phase. Defense counsel was precluded from asking her "why not?" The trial judge felt that it was not a proper question (R 725). Defense counsel indicated that she wanted to make sure that the prospective juror knew there was a two-part procedure and the trial judge told her to ask her about that. Upon further questioning she indicated that if she found someone guilty of first degree murder she would, nevertheless, look at the evidence in the penalty phase in order to determine whether to vote for a life or death sentence and that her feelings would not even enter into it (R 726). It is quite clear that the trial court can control the form of questioning and that defense counsel's open-ended question would evoke an answer based on extraneous personal ideas while the ultimate issue was whether she would follow the law as instructed by the judge in the penalty phase. Proper questioning revealed that this juror would not automatically vote for death upon conviction of first degree murder. While it is true that defense counsel was denied an

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murder it was possible for her to come in and look at the other evidence that would be presented in the way of the sentencing or penalty phase of the trial and use that to vote for possibly a life or possibly a death sentence. When asked whether the fact that she thought if somebody is found guilty of first degree murder they should always get the death penalty would impair her ability to possibly vote life when the evidence showed that life would be an appropriate sentence, she indicated that the only things that would impair her ability would be the evidence "period." She indicated that in a decision like that her feelings would not even enter into it (R 726). She ultimately became the third alternate juror (R 891).

additional peremptory challenge, such challenge would not have been used to strike this juror but to strike prospective juror Nancy Tatro (R 887). Counsel was evidently satisfied enough with the questioning and the answer of this alternate juror to decide not to challenge her. It should be noted that at the time of filling out the questionnaire no explanation had been given to the prospective jurors as to the existence and weighing of aggravating and mitigating factors and they could well have believed that the death penalty was, in fact, reserved for first degree murders.

The questioning of prospective juror Starling [7] was comprehensive enough to convince defense counsel that her strong

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[7] Prospective Juror #42 Dolores Starling indicated in her questionnaire that she had heard or read about the case and knew that the victim had made an appointment to meet a man and show him diamonds that he wanted to buy and left her shop with several thousand dollars worth and never returned. She believed that they found the Cadillac shortly thereafter and that the defendant was apprehended in another state. She did not form any opinion about the case because she was not interested. She believes in the death penalty and believes that when sentenced the death penalty is too seldom carried out. She believes that the death penalty should always be imposed if the defendant is convicted of first degree murder unless life with no possible parole was the only other alternative. She holds no religious beliefs for or against the death penalty and her feelings would not prevent her from being a fair and impartial juror. If the evidence and the law was such that the death penalty was appropriate, she could vote to impose it. If she convicted someone of first degree murder, the only sentence less than death she could consider imposing would be life without parole (R 2377). Upon questioning during voir dire she indicated that she knew several other jurors (R 27). She indicated such fact would not "outweigh her ability to be subjective." (R 29). She read the news of the murder continuously as she happened to be at a place where the people knew the victim, who had done nails or some form of beauty things, and from that point she followed it when it was in the papers (R 68). She does not remember any specifics about the man arrested. She saw the victim's picture in the newspaper (R 69). She indicated that despite her immediate exposure she felt that she was intelligent enough to weigh the evidence and make a

personal feelings might influence her vote and to convince the

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judgment based on what was presented to her (R 70). She had not read anything about the case recently (R 71). She did not feel that she would be affected but could not absolutely say for sure until she was actually in the situation (R 73). She committed herself to not letting such prior knowledge take a part in her vote and doing her duty (R 74). During further voir dire Judge Baker made a statement for the record that he had run into Juror Starling the last night (R 242). He indicated that Ms. Starling and her husband were at a art show at the historical society museum at which he also attended as they were showing the paintings of a friend of his, that he grew up with, a Pete Hurt (R 243). Judge Baker also knows her husband who is an attorney named Bruce Starling (R 244). Although she indicated on the questionnaire that she would want the death penalty unless there was a sentence of life with no possible parole, after having it explained to her that her determination should be based on the evidence and aggravating and mitigating circumstances, she indicated that in spite of her personal feelings she could make a determination based on the evidence (R 245). If she felt the death penalty was not applicable because the state had not proved the aggravating circumstances, she could follow the law and recommend life even though that life sentence does not preclude parole. If she did not believe the state had proved the aggravating factors, then she would vote for the death penalty (R 248-249). She further indicated that because someone is killed in the act of a robbery, she did not believe that it is any less of a murder than if it is premeditated (R 256). She indicated upon questioning by defense counsel that in order to vote for life she would have to be convinced that there was something unusual about the murder that was not premeditated (R 257). She admitted that in a murder case her mind is inclined to a death penalty unless something changes it. She indicated that she felt that the existence of mitigating circumstances would make the murder less worthy of the death sentence (R 258). Defense counsel inquired of her as to what circumstance would make her vote for life. The state objected because this is a matter that is covered as a matter of law and personal opinions do not apply (R 258). The court concluded that defense counsel was not entitled to the juror's personal feelings (R 259). Upon further questioning she indicated that she would be going into the second phase with the mind set that death was probably appropriate although she would not like to think that it would impair her sitting as a juror for the second phase (R 260). She indicated that she would like to say that she would be able to put aside her personal feelings if she were a juror in the second phase of the case but could not say definitely because she feels very strongly about this. She indicated that it was a fair statement that she would probably be impaired based upon her strong personal feelings and would come in with a mind set that in a murder case the death sentence is appropriate (R 261). Upon questioning by the state again she indicated that she thought she

trial judge to strike her for cause (R 272-273). Prospective juror Clay [8] was stricken on peremptory challenge by the state

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could follow instructions even though she may have come in here with a feeling that first degree murder inclined her toward a death sentence and essentially vote for life if the state did not prove aggravating factors beyond a reasonable doubt. She indicated that if she took an oath she would do that and would listen to whatever mitigating factors were allowed in by the court and the defense chose to present (R 264). She indicated that she felt that she consider those fairly in determining what alternative sentence she would recommend and would follow the judge's instruction on reaching a recommendation as to the penalty. She indicated that she thought she would be a fair juror because she is intelligent enough to recognize that it is important to listen to the evidence and make a fair decision (R 265). Upon further questioning by defense counsel she indicated that she has always had strong feelings in favor of the death penalty. She does not think that it is fair that the burden of proof for mitigating circumstances is not that of beyond a reasonable doubt while that is the burden of proof of aggravating circumstances although she indicated that rather than having that influence her decision, she would have to look at what was presented and base it on that (R 266). She indicated that she could follow instructions such as that. She further indicated that without her consciously thinking that she was unfair she could be unfair because her beliefs are very strong although she didn't think that she would trying to be unfair (R 268). She indicated she could follow the law and would follow the instructions but when they get to the point where her beliefs come in, her actions may be affected by her beliefs and in the event of a conflict, she would follow the law. She indicated that she would not be deliberately trying to be unfair but would be trying deliberately to follow the law (R 271). Upon questioning by the court she indicated that she would follow the law that the judge told her to follow but in an effort to be very honest indicated that she still had very strong feelings on what she thought was right but if those feelings were not a choice, then she would be obliged to accept the law (R 272). Defense counsel moved to strike Ms. Starling for cause as she stated she had strong personal feelings and would only try to follow the law and indicated the possibility that she would be impaired and unfair (R 273). The court disqualified her for cause (R 274).

[8] Prospective juror #57, Margaret Clay indicated on her questionnaire that she had heard or read that the victim was dead a long time before they found the man that they thought killed her and that she had formed no opinion about the case from reading this or hearing it. She feels that after the jury decides as to the guilt or innocence of the defendant, the judge should decide the penalty. She feels that imposition of a sentence is dragged out for years. She does not think that the

(R 884). The state's objection to defense counsel's question to

death penalty should always be imposed following a conviction of first degree murder as circumstances can have an effect on whether the death penalty should be imposed. She holds no religious beliefs for or against the death penalty and indicated that her feelings about the death penalty would not prevent her from being a fair and impartial juror. If the evidence and the law was such that the death penalty was appropriate she could vote to impose it and likewise she could consider a sentence less than death for that person (R 2393). Upon further questioning during voir dire she indicated that she probably saw news of the case on TV at the time the body was found. She did not know Georgia Caruso. She probably saw pictures of the victim on TV or in the paper. She does not remember seeing pictures of the accused (R 89). She has not heard or read anything of the case within the last four months. She indicated that she had not believed the defendant to be guilty until it was proven to her and did not know that he really did it. She probably read Vining's name in the paper as the one who did it but she does not remember. She does not remember how long ago it was either. The only thing she had actually heard that she had remembered was that the victim met some man and went off with him in a car although she did not know what kind it was (R 91). She talked about the disappearance with her husband (R 92). She indicated that she would be able to disregard any information or memories that came back to her during trial and go only on what the state has presented in court (R 94). She indicated that she thought that the judge should impose the penalty and actually thought that that was how the proceeding ran but indicated that she now understood that she would be advising the judge as to the penalty. She indicated that she could vote for either life or the death penalty in the electric chair depending on whether it was premeditated (R 346). She also indicated that she could return a verdict based on felony murder (R 347). She indicated that if the state put on a case that shows aggravating factors, she would be able to recommend the death penalty (R 348). She would be able to follow the law. Upon further questioning by defense counsel she indicated that she now understood that she would have to decide on the penalty if she were chosen as a juror (R 349). Defense counsel inquired of her as to whether she would go into the penalty phase leaning one way or the other as to sentence. The state objected and the court sustained the objection. She clarified her answer on the questionnaire and indicated she felt that imposition of penalty dragged on for ten years or so because of reprieves. She has no idea whose fault that is and indicated that she would not hold that against defense counsel or Vining, and that it would not enter into her verdict when she had to decide upon a sentence (R 351). She reiterated that if the state proved its case beyond a reasonable doubt in the penalty phase and the court instructed her on that, she would be able to impose the death penalty and follow the law and if the law subscribes that the death penalty should be

prospective juror Hamm [9] "would you require me to give you a

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imposed, she would be able to do that (R 352). She indicated that she may have worked at the bank with the wife of H. D. Martin, of the sheriff's office and may have met him years ago. She indicated, however, that she could sit in judgment of such testimony fairly and impartially (R 792). She indicated that she graduated from high school and took banking courses, did not know any lawyers and had never been a victim of a crime. Ms. Clay was subsequently peremptorily stricken from the jury by the state (R 884).

[9] Prospective juror #70 Larry C. Hamm indicated on his questionnaire that he had heard or read that the woman was found dead and that she was a diamond dealer but he formed no opinion about the case. He indicated that he is in favor of the death penalty but does not feel that it is used too often, too seldom or randomly. He does not think that the death penalty should always be imposed upon a conviction of first degree murder as there are varying circumstances on individual cases that a blanket philosophy would not be practical. He holds no religious beliefs for or against the death penalty and his feelings about it would not prevent him from being a fair and impartial juror. If the evidence and the law was such that the death penalty was appropriate in this case he could vote to impose it. He also would be able to consider a sentence less than death for that person (R 2386). Upon questioning during voir dire Mr. Hamm indicated that he had learned of the case through the newspaper but did not recall reading about it more than once. He does not recall any article dealing with who the suspect was or who it was that they had arrested or anything about the details after arrest. He has not heard or read anything about the case in the last four months (R 110). He indicated that he would base his verdict on what he had heard in the courtroom and not what he may have read in the paper (R 111). Upon questioning by defense counsel he indicated that he recalled that the victim was found in Apopka and that foul play was suspected. He assumed that it was a theft related situation with the diamonds (R 112-113). He understood that you don't vote your personal feelings about the death penalty but on the criteria (R 500). He indicated that he would do that in this case. Upon questioning by defense counsel he indicated that he believed the death penalty was a valid principle but he would have to hear the facts as far as what penalty would fit the crime (R 501). From a scale of one to ten his belief in the death penalty would fall as a number eight. He indicated that it would not be difficult for him to vote in favor of a life sentence depending on the facts nor would it be difficult for him to have someone executed although he said that that would be a very thoughtful process (R 502). Defense counsel inquired of Mr. Hamm "would you require me to give you a reason to vote for life?" The state objected in that the question asked the potential juror to make a commitment and the court sustained the objection. Defense counsel asked no further questions of Mr.

reason to vote for life?" was well taken (R 502-503) as trying to get the juror to make a commitment to vote for life and implying that such vote was proper in the absence of a reason even where the state proved aggravating factors beyond a reasonable doubt and there were no mitigating factors or factors of very little weight. Prospective juror Hamm was peremptorily stricken by defense counsel (R 883). Although this prospective juror indicated he could follow the law in the penalty phase and put away his personal feelings and was not excludable as a matter of law he indicated to defense counsel that on a scale of one to ten the strength of his belief in the death penalty was an "eight." Counsel asked no further questions of this juror after the court sustained the state's objection (R 503). Counsel obviously felt that she had heard enough from this juror to target him for a peremptory strike.

Appellant further complains the denial of challenges for cause of prospective jurors News, Martin and Holland was error as the record does not show these jurors were impartial and Vining was required to present proof to overcome the jurors' personal bias in favor of the death penalty. Appellant contends that although several of the jurors challenged for cause stated that they could set aside their preconceived ideas and be fair and impartial, their inconsistent responses and equivocal assertions

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Hamm (R 503). Upon further general questioning in voir dire Mr. Hamm indicated that he graduated from high school and was in air craft maintenance and did not know any of the lawyers and had never been involved in a crime or been the victim of one. He came from West Palm Beach and grew up in New Jersey (R 844). The defense subsequently peremptorily struck Mr. Hamm from the jury (R 883).

establish a reasonable doubt that they could be fair and impartial. Appellant argues that he has complied with the requirements needed to preserve for appellate review the denial of a challenge of a juror for cause as after exhausting all peremptory challenges he requested additional challenges to remove prospective jurors Tatro and Martin who had previously been unsuccessfully challenged for cause and was, in effect, granted an additional peremptory challenge when the judge excused prospective juror Jackson for cause who had previously been challenged for cause but had to be stricken peremptorily. Appellant then peremptorily struck prospective juror Martin and requested an additional peremptory challenge to excuse Tatro, which was denied.

Prospective juror News was a retired Philadelphia police officer with thirty-eight years experience in law enforcement (R 225). He believes in the death penalty as a deterrent to murder, but he couldn't say that he would have a hard time recommending a life sentence and would judge the case on the evidence presented (R 225-226). He stated unequivocally that if the facts were there he could vote for a life sentence (R 228). Because he could not "envision a scenario where that would happen" by no means indicates that he could not return a life recommendation. Upon prompting by defense counsel he would not even make the generalization based on his experience that people who are convicted of first degree murder generally deserve the death penalty. He further indicated that his experience as a policeman would not impede him in determining guilt or innocence or in

recommending a sentence (R 229). He stated he could listen to the evidence and consider both the aggravating and the mitigating factors and make a determination as to the penalty based on the actual facts that he had heard (R 230-231). He indicated that his state of mind would not cause him to automatically vote for death if the defendant were found guilty but he would wait and hear the facts. He could consider both possible sentences equally and vote for life if that was appropriate (R 231-232). Mr. News had previously answered affirmatively to Question 12 of the preliminary questionnaire which asked "If the evidence and the law was such that the death penalty was appropriate in this case, could you vote to impose the death penalty?" In response to Question 13 "If you convicted someone of first degree murder, would you be able to consider a sentence less than death for that person?" Mr. News indicated "I don't know." (R 2378). The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court. Lusk v. State, 446 So.2d 1038, 1041 (Fla.), cert. denied, 469 U.S. 873 (1984). Deciding whether a prospective juror meets the Lusk test is within a trial court's discretion based upon what the court hears and observes. Pentecost v. State, 545 So.2d 861 (Fla. 1989); see, Reed v. State, 560 So.2d 203 (Fla.), cert. denied, 111 S.Ct. 230 (1990). Believing in the death penalty as a general principle does not mean it will be automatically applied and the record does not reflect such inclination on the part of this juror. In response

to Question 12 he indicated he could vote to impose the death penalty "if the evidence and the law was such that it was appropriate." His response that he "didn't know" if he could impose a sentence less than death upon conviction of first degree murder to Question 13 was entirely appropriate as the prospective jurors were given no facts and this question, as opposed to Question 12, did not indicate that a life sentence was even appropriate under the evidence and the law. Juror News' competency was thoroughly established upon questioning during voir dire and any doubts as to such competency were the product of the inartful drafting of questions not the juror's particular mind set.

Questioning during voir dire of prospective juror Martin revealed that her answer on the preliminary questionnaire that the death penalty should be imposed upon convictions for first degree murder was based on her laymen's belief that such penalty flowed from a first degree murder conviction (R 620-624). After being made aware of the existence of aggravating and mitigating factors in the penalty phase and the weighing of the same she indicated she would consider such factors and if the state failed to prove the aggravating factors beyond a reasonable doubt or if the mitigating outweighed the aggravating she would follow the law and vote for life (R 619-620). Even though she is inclined toward the death penalty she could look at the situation and be impartial (R 625). Prospective juror Holland clearly indicated that he could follow the judge's instructions (R 661) and could impose a sentence less than death if the state didn't prove

aggravating factors (R 664-665). Defense counsel apparently confused the prospective juror by pointing out all the lesser-included offenses then inquiring open-endedly as to whether he would vote death for a premeditated or felony murder, then suggesting he could not vote for life in such cases (R 665-668). Nevertheless the prospective juror indicated there would be a lot of variables involved and he could vote for something other than death if appropriate (R 666-667). He indicated he could vote either way and his decision would be based on the judge's charges and the law (R 668). He felt that the death penalty was appropriate in some areas and not in others and he was not personally set on voting for the death penalty and would feel just as comfortable not voting for death (R 672). The trial court did not abuse its discretion in refusing to excuse these persons for cause.

Under federal law, the defendant must show that a biased juror was seated. Ross v. Oklahoma, 108 S.Ct. 2273 (1988). Under Florida law, "[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." Pentecost v. State, 545 So.2d 861, 863 n.1 (Fla. 1989). In Trotter v. State, 16 F.L.W. S17 (Fla. Dec. 20, 1990), the trial court refused to excuse prospective jurors for cause. He exhausted his peremptory challenges and was denied an additional one. His request for an additional peremptory challenge was not made in connection with a particular venireperson but was a general request for a challenge that could be exercised in the future. He failed to object to

any venireperson who was ultimately seated. This court found that he had failed to establish his claims as he stood by silently while an objectionable juror was seated. Id. In Penn v. State, No. 74,123, Slip op. p.5 (Fla. Jan. 15, 1991), such a claim was found to be without merit as Penn never objected to any of the jurors after exhausting his peremptories and did not allege, let alone demonstrate, that an incompetent juror sat on his jury. In the present case, defense counsel indicated preliminarily to the court that she generally uses all her challenges and would probably ask for extra (R 465). Juror Tatro was unsuccessfully challenged for cause and ultimately served as a juror. An additional peremptory challenge was requested to strike Ms. Tatro, which was denied (R 887). No formal objection was ever made to Ms. Tatro actually serving as a juror after the request for the additional peremptory challenge was denied and no allegations renewed or newly-articulated as to her competency to serve as a juror. It is clear that there were no viable grounds to challenge her for cause. She indicated her belief in the deterrent effect of capital punishment would not enter into her deliberations on a verdict (R 604). She would not always vote for death if she convicted someone of first degree murder (R 605) and could consider a sentence less than death based on the circumstances and would not put everyone to death just because they killed someone (R 606-607). She can envision circumstances calling for a life sentence (R 607). She could follow the judge's instructions regarding aggravating and mitigating circumstances without her personal feelings being involved (R

608). Had counsel seriously chosen to eliminate this juror it would have behooved her to have formally objected to her serving on the jury and to have enunciated grounds for incompetency to serve.

V. THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER AND INSTRUCTED THE JURY ON THE SAME.

Appellant's fifth contention, simply stated, is that the evidence is inadequate to establish that he planned to murder Caruso before the crime began in accordance with the court's most recent pronouncement in Thompson v. State, 565 So.2d 1311 (Fla. 1990). Assuming that Vining planned to rob Caruso of jewelry the CCP requirement that the murder be planned in advance is not satisfied. The premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. Appellant contends that the evidence suggests that only an armed robbery was intended and Caruso struggled with Vining or tried to escape when confronted with a gun and was shot at the time of the robbery. He further argues that because mitigation was found to exist by the trial court and because the invalidation of this factor affected the weighing analysis performed by the trial judge and jury the death sentence must be reversed and the matter remanded for a new penalty phase before a jury.

The aggravating circumstance that the crime was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification, ordinarily has applied

in those murders which are characterized as executions or contract murders, although that description has not been intended to be all inclusive. Cannady v. State, 427 So.2d 723 (Fla. 1983). Simple premeditation of the type necessary to support a conviction for first degree murder is not sufficient to sustain a finding that a killing was committed in a cold, calculated and premeditated manner. Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988). A heightened form of premeditation is required which can be demonstrated by the manner of the killing. Id. To achieve this heightened level of premeditation, the evidence must indicate that a defendant's actions were accomplished in a calculated manner, i.e., by a careful plan or prearranged design to kill. Rogers v. State, 311 So.2d 526, 533 (Fla. 1987). That a murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification can be proven by such facts as advanced procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. Swafford v. State, 533 So.2d 270 (Fla. 1988). Thus, this factor has been found and affirmed on appeal in similar cases where a defendant planned a robbery in advance and planned to leave no witnesses see, Remeta v. State, 522 So.2d 825 (Fla. 1988), and where the defendant lured the victim from home and had obtained a shotgun before meeting with the victim and executed the victim with a shot to the head. See, Koon v. State, 513 So.2d 1253 (Fla. 1987).

The evidence in the present case certainly indicates that the defendant's actions were accomplished in a calculated manner,

i.e., by a careful plan or a prearranged design to kill. Vining picked out apparent victims from newspaper ads in an elaborate scheme in which he pretended to be the buyer of jewels. It is apparent from the testimony of intended victim Joseph Taylor that the scheme involved a pretended purchase of diamonds whereby Vining, using a false name, used an appraisal as a ruse to lure the victims to parking lots or other areas so that they could accompany him in his car to the designated jeweler whereby, as demonstrated in the present case, they would ultimately be kidnapped and killed, in an isolated place. This was not a spur-of-the-moment killing carried out upon impulse or a robbery that got out of hand. Compare Cf. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987). This is a crime that was planned well in advance. Vining met Georgia Caruso for the sole purpose of getting her jewelry and knew that he would have an encounter with her in order to take the jewelry from her. Vining could have robbed Caruso when she and Ward met him at the parking lot. That he didn't certainly evidences a concern with leaving behind witnesses to his robbery. After luring Ms. Caruso into his automobile whereby they would be alone, Vining still could simply have robbed her and shoved her out of the car or dropped her off anywhere along the way. There was no need to continue to an isolated spot unless Vining intended to eliminate Georgia Caruso as a witness. He had obviously obtained a weapon before meeting with Caruso and then executed her with two shots to the head (R 975). The only conclusion that can be drawn from this evidence is that Vining did not want Georgia Caruso to raise an alarm

after the robbery and coldly, calculatedly and premeditatedly executed her. In Bryan v. State, 532 So.2d 744 (Fla. 1988), the victim was robbed of his wallet and car keys but nevertheless kidnapped and taken to a distant and isolated area for the murder. This court held that the only conclusion that could be drawn from the evidence is that appellant, who was a wanted bank robber, did not want the victim to raise an alarm after the robbery and coldly calculated that he must be murdered and his body disposed of to avoid detection. The same result should be reached in this case.

Even in the event this aggravating factor should be stricken by this court the sentence need not be vacated. In a weighing state, when a reviewing court strikes one or more of the aggravating factors on which the sentencer relies, the reviewing court may, consistent with the Constitution, reweigh the remaining evidence or conduct a harmless error analysis. Clemmons v. Mississippi, 494 U.S. ___, ___ (1990). "Following Clemmons, a reviewing court is not compelled to remand. It may instead reweigh the evidence or conduct a harmless error analysis based on what the sentencer actually found." Parker v. Dugger, No. 89-5961, Slip op. p. 8 (1991). Upon striking of this factor, three strong factors in aggravation remain: 1) the murder was committed while under sentence of imprisonment; 2) the murder was committed during the commission of a robbery; and 3) prior conviction of a felony involving the use or threat of violence. These factors all taken together show a cruel career criminal. That he was once a child, served in the military, married, had

children and is now aging hardly mitigates the gravity of his offense and if his life was as ordinary as portrayed reflects a capacity for leading a double life. Quite simply, death is the appropriate sentence for John Bruce Vining, Sr. Considering his history it is hard to imagine that any crime he committed would not be coldly calculated.

There is clearly a legal basis to support the finding of this aggravating factor and this court should not substitute its judgment for that of the trial court. Occhicone v. State, 15 F.L.W. S531, S532 (Fla. Oct. 11, 1990).

VI. NEITHER THE FLORIDA NOR THE UNITED STATES CONSTITUTION REQUIRES THE STATE TO NOTIFY DEFENDANTS OF THE AGGRAVATING FACTORS THAT THE STATE INTENDS TO PROVE AS NOTICE IS PROVIDED PURSUANT TO SECTION 921.141(5) FLORIDA STATUTES WHICH SETS OUT THE AGGRAVATING FACTORS TO BE CONSIDERED.

It is Vining's sixth contention that he has been denied due process of law guaranteed under Article I, Sections 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution by the failure of the state to provide notice as to which statutory aggravating factors it would rely upon in seeking the death penalty. He argues that by the time a defendant learns at the end of the penalty phase that a particular aggravating factor was being fleshed out by a particular state witness during trial it is simply too late and the defendant has lost the right to meaningfully confront the witness and to present evidence in his own behalf to rebut the statutory aggravating factor in a truly

meaningful fashion. In his opinion to say that the aggravating factors are limited to those specified in statutes does not satisfy the notice requirement, as all crimes are contained in statutes.

Section 921.141(5), Florida Statutes (1987), sets out the aggravating factors to be considered in determining the propriety of the death sentence. The statutory language limits aggravating factors to those listed. Thus, there is no reason to require the state to notify defendants of the aggravating factors that the state intends to prove. Hitchcock v. State, 413 So.2d 741, 746 (Fla. 1982). Vining's contention is not new and has been previously disposed of adversely to him. See, Preston v. State, 444 So.2d 939, 945 (Fla. 1984); Johnson v. State, 438 So.2d 774, 779 (Fla. 1983); Tafero v. State, 403 So.2d 355, 361 (Fla. 1981); Sireci v. State, 399 So.2d 964, 971 (Fla. 1981); Ruffin v. State, 397 So.2d 277, 283 (Fla. 1981); Clark v. State, 379 So.2d 97 (Fla. 1979); Menendez v. State, 368 So.2d 1278, 1282 n.21 (Fla. 1979); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). In view of the long line of cases rejecting this claim on the grounds that the statute itself provides notice, the suggestion that the court, without independent analysis, has simply jumped on the bandwagon of a default case, Spinkellink, is incondite.

The reasoning of the court in the long line of cases rejecting this claim is proper. The aggravating circumstances pursuant to Florida Statute 921.141(5), at the time of trial in this case, are set out as follows:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

From a simple perusal of the statute alone a defendant could quickly deduce from personal knowledge whether he was under sentence of imprisonment or previously convicted of a capital or violent felony. From either personal knowledge or discovery a defendant is certainly knowledgeable as to whether the

circumstances of the crime created a great risk of death to many; involved an underlying felony; were based on an intent to avoid or escape custody, to financially proffer or to disrupt government function or the enforcement of laws. The manner of killing is hardly a secret so as to preclude the preparation of legal argument as to whether the crime was especially heinous, atrocious or cruel or committed in a cold, calculated and premeditated manner.

This simply is not the either/or situation involved in a case where costs are imposed against an indigent defendant without prior notice or where a conviction and sentence are affirmed on appeal based on an uncharged offense, and the cases cited by appellant are inapposite. A capital defense attorney may correctly presume that there will be a second bifurcated sentencing proceeding in which the state will seek to have factors in aggravation found and prepare for the same with guidance from the statute and armed with the facts of the case. No post penalty phase motion was ever filed by counsel indicating an actual hindrance in performance based on lack of notice. No reason has been presented to warrant overruling established precedent on this issue.

VII. THE TRIAL COURT DID NOT ERR IN REJECTING PROFFERED NONSTATUTORY MITIGATING FACTORS.

It is Vining's seventh contention that the trial court erred in rejecting as nonstatutory mitigation his age of fifty-seven years, because Vining would be at least 85 years old before even becoming eligible for parole and because of the

deterioration of the ability to control himself, probably occasioned by alcoholism; the fact that Vining's mother was an alcoholic; the fact that Vining was a good student, athlete, and member of Methodist Youth Fellowship; the fact that Vining was an alcoholic; and the fact that Vining had previously saved his wife's life. He argues that the failure to find and afford weight to these factors due to their remoteness renders imposition of the death penalty arbitrary and capricious under the Eighth and Fourteenth Amendments. Vining further complains that the factors found to exist by the court, stuttering as a child and service in the United States Air Force were improperly attributed little weight.

In regard to the proposed mitigating factors, the sentencing order reflects the following thoughts of Judge Baker:

> At the time of the murder, defendant John Bruce Vining was 57 years old. The defendant's memorandum argues this should "weigh heavily" because of defendant's blindness in one eye and other medical problems. Every living person is of some age. When age has been considered as a mitigating factor it has usually been the youth of the defendant, for children have a special status in our society. Perhaps old age would be a mitigating factor. Perhaps comparison of ages would sometimes be a factor. In this case, the victim was 39 when she was killed. Defendant's age is not a mitigating factor in this case.
>
> Defendant stuttered as a child. Any affliction should be considered, but this was not proven to have been a substantial impediment and is not a mitigating factor.
>
> Defendant's mother was an alcoholic. It is obvious from defense counsel's

evidence at the advisory sentence in this case as well as the reported opinions of other cases and from several of the statutory criteria that "genealogical" principles, in the very broad sense of generative, hereditary, congenital conditions, as well as exogenous conditions, such as family problems, may be considered. There is ample precedent for considering childhood deprivation or sufferings as mitigating. The evidence did not show any substantial childhood difficulties from John Bruce Vining's mother, father, brothers, or others. This was not considered as a mitigating factor.

Defendant was a good student, an athlete and a member of Methodist Youth Fellowship. These were argued to be inferences from school records from over 35 years ago and were not considered to be mitigating factors.

Defendant had a good military history. Our country respects those who have served in our military, and defendant's record shows he served honorably until retired due to his loss of vision in one eye. The loss of eyesight was due to a nerve infection unrelated to military activity. Military service should not be disregarded as a factor in mitigation. Little weight was given to this part of defendant's history because it appears his military service ended over 30 years ago, involved no sacrifice, and the evidence suggests his military service was a government job, providing training and experience, regular employment, and defendant received a pension from it as well as other benefits of being retired from the military.

Defendant was an alcoholic. A preponderance of the evidence indicates John Bruce Vining was a frequent drinker, that he sometimes drank to excess, and it interfered with his family life. Some would say this showed defendant to be an alcoholic. There is no evidence that alcohol had anything to

> do with the crimes in this case. There is no evidence the defendant was under the influence of alcohol when he committed these crimes. It was not considered to be a mitigating factor.
>
> Defendant saved his wife's life. Roxanne Vining, daughter of defendant, testified to her recollection from her childhood of her father running into a lake to rescue his wife. Roxanne believes her mother was trying to drown herself at that moment. This was not considered as a mitigating factor because it was too remote, and the circumstances were too problematical.

(R 2631-2633).

In Campbell v. State, 16 F.L.W. S1 (Fla. Dec. 13, 1990), this court set forth guidelines for the uniform application of mitigating circumstances:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having

> no weight. To be sustained, the trial court's final decision in the weighing process must be supported by sufficient competent evidence in the record. (citations omitted).

16 F.L.W. at S2.

In footnote 3 the court indicated that "as with statutory mitigating circumstances, proposed nonstatutory circumstances should generally be dealt with as categories of related conduct rather than as individual acts." Id. at S2. In footnote 4 the court indicated that the question of whether a proposed factor is mitigating in nature is a question of law. The court adopted the broad definition of a mitigating circumstance set forth in Lockett v. Ohio, 438 U.S. 586, 604 (1978), as "any aspect of a defendant's character or record and any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death. The court then set forth a non-inclusive list of valid nonstatutory mitigating circumstances:

> 1) Abused or deprived childhood
> 2) Contribution to community or society as evidenced by an exemplary work, military, family, or other record.
> 3) Remorse and potential for rehabilitation; good prison record
> 4) Disparate treatment of an equally culpable codefendant
> 5) Charitable or humanitarian deeds.

Id., In footnote 5 the court indicated that whether a proposed mitigating circumstance has been reasonably established by the greater weight of the evidence is a question of fact and the court's finding will be presumed correct and upheld on review if supported by sufficient competent evidence in the record. Id. In Nibert v. State, 16 F.L.W. S3, S4 (Fla. Dec. 13, 1990), this

court held that where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however, provided that the record contains competent substantial evidence to support the trial court's rejection of these mitigating circumstances. "A trial court's discretion will not be disturbed if the record contains positive evidence to refute evidence of the mitigating circumstance." Kight v. State, 512 So.2d 922, 933 (Fla. 1987). This court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law. Pardo v. State, 563 So.2d 77, 80 (Fla. 1990). The standards for the application of mitigating circumstances, as set out by this court, have been more than met in this case.

Judge Baker found that Vining's age of fifty-seven years was not a mitigating factor in this case. He was correct as a matter of law. As his order indicated "every living person is of some age." (R 2631-2633). In order for age to be considered in mitigation or be deemed mitigating in nature as a matter of law there must be a link between age and some other characteristic of the defendant or the crime. Echols v. State, 484 So.2d 568 (Fla.

1985). Vining is not so young as to be able to be rehabilitated and not so old so that the gravity of the offense could be explained as the result of impaired or diminishing capacities as quite a bit of mental acumen was involved in Vining's scheme. Examining Vining's age in a nonstatutory context should also not result in a finding of his age as mitigation. The fact that he will be elderly at the time of eligibility for parole neither reflects on his character nor diminishes the gravity of the offense and is outweighed by the retributive value of capital punishment in this particular case. See, Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984). It was never established below by the greater weight of the evidence that with age and alcohol Vining suffered a deterioration in the ability to control himself. Such argument would be better made in the context of a crime of passion not where, as here, Vining was in control enough of his senses to persuade a guileless victim that he was a wealthy buyer of diamonds. The lower court properly declined to find age as a mitigating factor.

Judge Baker found that the alcoholism of Vining's mother was not a mitigating factor as the evidence did not show any substantial childhood difficulties from it. This assessment is factually correct. Vining's brother Edward C. Vining, Jr. testified in the penalty phase that Vining did not have anything more than normal troubles as a child (R 2016). The mother's drinking did not mean she didn't care for her children, love them or show support to them and the children did not suffer from parental neglect (R 2026). Vining's father was a successful

lawyer who provided well for his family and was president of the Florida Bar in 1928 (R 2024). On occasion when the mother was under the influence the father would come home from work and care for the children (R 2027). The Vining brothers appear to be successful members of the community, one being an attorney, and another a Captain for Pan American World Airlines (R 2015; 2037). Vining himself graduated from the University of Miami (R 2019). As a matter of law, a defendant's actions in committing murder must be significantly influenced by his childhood experience so as to justify its use as a mitigating circumstance. See, Lara v. State, 464 So.2d 1173 (Fla. 1985).

Judge Baker rejected as mitigating factors the proposed mitigation that Vining was a good student, athlete and member of the Methodist Youth Fellowship because they were argued as "inferences" from school records over thirty-five years ago. A glance at Defense Exhibit 1 proves Judge Baker's reasoning to be sound. The transcript from the University of Gainesville reveals no great intellectual prowess, is riddled with C's, contains three D's and two E's which are failures. The transcript from preparatory school indicates that he failed English and Algebra in high school. No standard scholastic transcript or record indicates that Vining was an athlete and member of the Methodist Youth Fellowship. Such is only averred by Vining himself in his application for admission to the University of Florida.

Judge Baker rejected as a mitigating factor the proposed mitigation that Vining was an alleged alcoholic as there was no evidence that alcohol had anything to do with the crimes in this

case or that Vining was under the influence of alcohol when he committed these crimes. This was proper. The evidence was insufficient to establish beyond mere implication that Vining suffered from alcohol dependency. The only evidence remotely touching on the issue was from a lay witness, Vining's ex-wife who testified that he drank the first ten years of their marriage, then stopped when it caused difficulties, then resumed drinking after they had been in Orlando a couple of years (R 2013). See, Hardwick v. State, 521 So.2d 1071 (Fla. 1988). There was no indication that alcohol impaired Vining's reasoning in constructing a carefully planned confrontation with the victim based on a ruse in order to rob and kill her.

Judge Baker properly rejected the fact that Vining had saved his wife's life as mitigation as being too "remote" and the circumstances too "problematical." His first wife was an alcoholic and Vining himself was a drinker (R 2021). His ex-wife went into the lake with thoughts of suicide after she had been drinking. They were divorced shortly after. A desperate scenario from a failed marriage of unknown circumstances does not qualify as the type of humanitarian act that could mitigate Vining's sentence. That he is willing to save those he marries gives him no license to kill strangers for pecuniary gain.

Contrary to Vining's assertions the sentencing judge did not find childhood stuttering to be a mitigating factor because it was not proven to be a substantial impediment. It did not prevent him from graduating from college and raising two families. In Defense Exhibit 1 Vining indicates in an

application for admission to college that he had "made miscellaneous speeches" and had "received an award in dramatics." What is not a hindrance to past achievement cannot be blamed as the cause of a fall from grace.

Judge Baker gave little weight to the fact that Vining had a good military history as his service ended thirty years ago and Vining received many benefits, including a pension, in return for his efforts. Vining was not a war hero or veteran of a war so that it could be said he performed some service for his country beyond the call of duty. This factor does not have to be considered mitigating in the first instance, see, Rutherford v. State, 545 So.2d 853 (Fla. 1989), and it was well within Judge Baker's discretion to afford it little weight.

VIII. VINING WAS NOT DENIED A FAIR JURY RECOMMENDATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS DUE TO THE PROSECUTOR'S ARGUMENT.

Appellant complains that the prosecutor expanded on the list of statutory aggravating factors by contending that they deserved more weight because of non-statutory considerations and allegedly argued that the statutory aggravating factor of a "capital felony committed while the defendant was engaged in the commission, attempt or flight from committing a robbery" should weigh heavily because this murder was committed upon a victim unknown to the defendant, setting out the following colloquy in support of his contention.

> (Prosecutor): In fact, your own verdict, which is here admitted into evidence so you can see it again, you found that this defendant was by

> unanimous vote guilty of felony murder. Is that a weighty circumstance? Yes, yes, it is a weighty circumstance. Why I would argue to you it is? Because in those kinds of cases felony murder is present just as the robbery in this case. They stand out different from other kinds of murders.
>
> Many murders you have victims who knew defendants, they knew each other. And while there is no justification for that killing because they had known each other something had happened between the two; some bad blood, some bad experience. But people who commit felony murder often times pick people who they don't know, who have never done anything to them.

The objection was overruled. (R 2131-32).

Appellant also complains that when arguing the facts surrounding Vining's prior conviction of a violent felony (the abduction of Gail Flemming), the prosecutor emphasized the effect that the incident had on Ms. Flemming, that her suffering should be weighed when that aggravating factor was applied, and sets out the following colloquy in support of this contention.

> (Prosecutor): You saw and heard Gail Flemming. You saw her composure or lack of it on the stand for an act that was committed on her a year and a half ago and you can only --

The objection was overruled (R 2138; 2140-41).

The prosecutor is alleged to have then addressed Vining's financial situation as being a basis for imposition of the death penalty. The following colloquy was set out in support of this contention.

> (Prosecutor): You must compare the aggravating circumstances against the

> mitigating and determine what weight each carries. Now, there is one bit of Edward Vining's testimony that I do want to mention to you. Sometimes people say the prosecutor's ask for the death penalty only on defendants who are poor.
>
> I have not brought you a case against a poor --
>
> A poor, underprivileged, uneducated or racial or sexual minority defendant. What you have in evidence from the testimony of Edward Vining is that this defendant was raised in a family of some wealth. Lived in a nice neighborhood in Miami; went to good schools, all white schools; who is educated with a college degree; who has some -- achieved some notoriety not being underprivileged. And said he has a plague he presented to you as being a person who was elected to a water district board or something like that. This is not a poor black man, not a woman. He came to his crimes from every advantage. He has three brothers. One's a doctor, one a lawyer, once a captain with Pan Am, all who succeeded in life from that background.

The trial court overruled defense counsel's objection (R 2153-54).

Appellant also argues that the prosecutor commented on Vining's failure to present certain witnesses, thereby shifting the burden of proof to the defense and sets out the following colloquy in support of such argument.

> PROSECUTOR: Now, against this backdrop of what the State has presented in the way of aggravating circumstances, what has the defendant -- what great things in his life has he done? What shining example has he been or conversely what terrible plight has his life dealt him? What sickness or mental deficiency or what does he offer to mitigate what would otherwise be called for as a death sentence? Two of his four children

> testified. Essence of what I heard is that they liked him as children and he was a good provider. They're his oldest children. We didn't hear from the youngest, but the oldest.
>
> PROSECUTOR: What we have in evidence before you is not only what he was twenty years ago but what he has been since that time. They did not present to you testimony of what he was like as a father during the last --

(R 2148-2149). Defense objections were overruled (R 2147-2149).

Appellant also complains that the prosecutor denigrated the role of the jury by arguing that the reason statutory aggravating factors exist is to take from the jurors the individual responsibility of deciding which factors warrant imposition of the death penalty (R 2123-26). The following colloquy was set out in support of such contention.

> Now, I ask you to do one thing for me, please. Use a legal, logical standard, not one of emotional or rhetoric to base your decision on. Look at the aggravating circumstances, see if you found we've proved them beyond every reasonable doubt. Because if we have then the law requires certain things of you. Look at the mitigating and see whether they're there and what weight you want to give them and whether they outweigh the aggravation. If they do, vote life. But if they don't then you have to decide according to law and not personal feelings. If you return a verdict recommending a sentence of death it's not because - it should not be because you want to, it's because you have to. Because the law requires it.

(R 2154-55).

Appellant concludes that the foregoing arguments of the prosecutor denied Vining a fair recommendation by a jury. The

jury was thus permitted to consider non-statutory aggravating circumstances under the guise of weighing statutory aggravating factors in violation of the dictates of Furman v. Georgia, 408 U.S. 238 (1972), due process and equal protection of the law. Consideration of the suffering of Gail Flemming in reference to imposition of as sentence for the murder of Georgia Caruso is similarly argued to be a denial of due process and a violation of the Eighth Amendment and Booth v. Maryland, 482 U.S. 496 (1987). Appellant concludes that because the improper prosecutorial argument cannot be said beyond a reasonable doubt not to have affected the jury's recommendation in this cause, the death penalty must be reversed and the matter remanded for a new penalty proceeding.

Appellant's first premise is erroneous. Explaining the nature or import of a statutory aggravating factor is not the equivalent of expanding the list of statutory aggravating factors. Nothing precludes the prosecutor or defense counsel from arguing the weightiness or lack thereof of an aggravating factor.

The fact that a murder occurs during the course of a felony is a very aggravating factor. The voice of the community, as heard in the legislature by the enumeration of this factor, condemns the killing of innocents, who by virtue of nothing more than their mere presence at a certain location, forfeit their lives in the course of the criminal endeavor of another. Quite often, these incidents involve stranger-killings, especially in the context of a robbery. Georgia Caruso was a stranger to

Vining. These crimes are distinguishable from crimes resulting from domestic violence or arising from the heat of passion which are the result of an emotional response, as opposed to the felony murder situation in which a cognitive willingness to do whatever is necessary to successfully complete the crime is evidenced. The prosecutor's argument was not off base. In any event, nothing in the record points to the finding of a nonstatutory aggravating factor. The jury found the defendant guilty of an armed robbery with a firearm. There was a substantial basis for the jury to consider this factor in aggravation aside from any consideration of the fact that the victim was a stranger. The findings of fact in support of the death sentence indicate that the sentencing judge did not take such fact into consideration (R 2635).

Testimony by the victims, or others, about prior crimes is admissible if the defendant is given the opportunity to confront the witness. Rhodes v. State, 547 So.2d 1201 (Fla. 1989). "[B]ecause a jury cannot be expected to make a decision in a vacuum, it must be made aware of the underlying facts." Chandler v. State, 524 So.2d 701, 703 (Fla. 1988). Because a jury can attach varying weight to this aggravating factor such details are important to the concept of individualized sentencing. This court indicated in Lucas v. State, 568 So.2d 18, 21 (Fla. 1990), that such testimony was not the type of victim impact evidence prohibited by Booth v. Maryland, 482 U.S. 496 (1987). Testimony concerning the events which resulted in the conviction has long been held admissible so the judge and jury can take into

consideration the character of the defendant when determining whether the death penalty is called for in his or her particular case. Elledge v. State, 346 So.2d 998 (Fla. 1977). Because such ruling has been applied across the board to all death penalty cases involving this aggravating factor a defendant cannot complain of nonstatutory aggravation. The concept of individualized sentencing cuts in both directions. In the Georgia case the testimony of Detective Owen Ferguson established that Vining and his cohort abducted the victim and taped her head and hair with duct tape. The skin pulled loose from her eyelids upon removal. She was taken to a deep vertical hole, presumably her own gravesite (R 1963-1965). The jury could well have concluded from these facts alone, without the prosecutor's remark about the witness' composure while testifying, that the victim suffered considerable agony. This evidence is relevant, however, to the character of the defendant and neither Booth nor the past decisions of this court have held the details of prior crimes to be inadmissible. This case, unlike the situation in Booth, does not involve either the emotional distress of the victim's family or the victim's personal characteristics. It involves a defendant unlucky enough to have left a surviving victim. It involves the particular circumstances of a past crime, each and every incident of which a defendant should be held accountable for. Cf. Smith v. Dugger, 565 So.2d 1293 (Fla. 1990). The sentencing outcome was not affected in this case because the prosecutor's remark was superfluous commentary; the trial judge's findings of fact do not reflect consideration of the victim's

lack of composure (R 2634); and the prosecutor's comment was not critical to the finding of aggravation because there was a certified judgment evidencing the convictions for kidnapping and aggravated assault with a handgun (R 1956). See, Buenoano v. State, 527 So.2d 194, 199 (Fla. 1988).

The prosecutor hardly argued for the death penalty based on race and economic status. He argued the obvious: that Vining's background, rather than mitigating the crime reflected a defendant who had every advantagae and offered no excuse for embracing a life of crime. The proper exercise of closing argument is to review evidence and to explicate those inferences which may reasonably be drawn from the evidence. Bertolotti v. State, 476 So.2d 130 (Fla. 1985).

The prosecutor did not improperly comment on the failure of Vining to present witnesses. The thrust of the prosecutor's argument was that the offered mitigation, that he was a good father, was too remote in time to be compelling, in view of what Vining had ultimately become and his criminal history. Such history would certainly have impacted more dramatically upon Vining's younger children. Vining voluntarily sought to offer this evidence as mitigating, relying on facts that could be elicited only from witnesses not equally available to the state. A witness is not equally available when there is a special relationship between the defendant and the witness. State v. Michaels, 454 So.2d 560, 562 (Fla. 1984). This sort of relationship exists between Vining and all his children. That he chose not to call them all should be susceptible to comment. The

evidence was not such to support the finding that Vining was good father, in any event. Vining was divorced from is first wife who drank (R 2044). Vining drank during his second marriage, which also ended in divorce (R 2013-2014). He set no example for any of his children by his past crimes of forgery, kidnapping and assault, no less the commission of the present murder and robbery. All rational minded persons could agree that it takes more to be a good father than being nice to children or supporting them with ill-gotten gains.

The record reflects that the prosecutor did not diminish the jurors sense of responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). He simply exhorted them to return an advisory sentence based on the law not on whim or personal feelings. Moreover, an objection was never raised below on the basis of Caldwell, so this issue is not preserved for appeal. Reed v. State, 560 So.2d 203, 206 (Fla. 1990). Appellant also neglects to point out that the trial judge instructed the jurors, upon objection, not to be misled by the argument of counsel or accept any explanation from counsel as to their role, as they would receive instructions from the court (R 2155). They were subsequently instructed in accordance with Florida law (R 2169).

IX. SECTION 921.141, FLORIDA STATUTES, (1987) IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The claims presented in this point are done so in a boiler plate and summary fashion and deserve no extended discussion. Appellant's complaint that by narrowing the definition of

aggravating factors on appeal this court violates the doctrine of separation of powers is without merit. It is the job of this court to interpret the law. This statutory scheme has been upheld by the United States Supreme Court. See, Proffitt v. Florida, 428 U.S. 242 (1976). The application of limiting constructions by state appellate courts has also been approved. See Walton v. Arizona, 110 S.Ct. 3047 (1990). Appellant's remaining claims have been roundly rejected by this court. See, Robinson v. State, 16 F.L.W. S107 (Fla. Jan. 15, 1991); Gunsby v. State, 16 F.L.W. S114 (Fla. Jan. 15, 1991); Stano v. State, 460 So.2d 890 (Fla. 1984).

CONCLUSION

For the above and foregoing reasons the appellee respectfully prays this honorable court affirm the conviction and sentence of the trial court .

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail to Larry B. Henderson, Esquire, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 1st day of February, 1991.

Margene A. Roper
Of Counsel