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IN THE SUPREME COURT OF FLORIDA

DAN PATRICK HAUSER,

Appellant,

v. Case No. 87,580

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee generally accepts Appellant's Statement of the Case and Facts, subject to the following additions or clarifications:

The addendum of probable cause, which was accepted as the factual basis for the plea, indicates that Appellant Hauser checked into the EconoLodge Motel in Fort Walton Beach on December 31, 1994, and that he was assigned Room 223 (RI 3)[1]. At this time, Hauser was alone, and was driving a new black Nissan pick-up truck bearing a North Carolina dealer's tag; Appellant provided a North Carolina address upon registration (RI 3-4). The victim in this case, Melanie Rodrigues, worked as an exotic dancer at Sammy's on the Island, an establishment .4 miles from the EconoLodge, and she was last seen at her place of employment between 2 and 2:30 a.m. on the morning of January 1, 1995 (RI 3-4).

At approximately this time, James Melton, the manager of the EconoLodge, observed a vehicle pull up next to Hauser's black truck, and saw one of the occupants open the door of that truck; the vehicle which drove up was later identified as belonging to the victim (RI 4). The occupants of the vehicle then went to Hauser's

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[1] The four volumes of record in this case are not consecutively paginated. Accordingly, (RI_) represents a citation to the first volume, whereas (RII_) represents a citation to the second volume etc.

room, and played the television so loudly that Melton had to tell them to turn it down (RI 4). Hauser checked out of the room at around mid morning on January 1, 1995, and left in the black Nissan, traveling to California (RI 16). The victim's car was left behind, and, on January 3, 1995, her nude body was found under the bed in Room 223 (RI 3). The pathologist stated that the victim had died through strangulation, and a number of her personal belongings were found under the body, as well as a cigarette pack with Hauser's fingerprint upon it (RI 3-8).

Hauser was arrested in Nevada on February 10, 1995, on an unrelated theft charge (RI 5). After being advised of his rights under Miranda v. Arizona, **384 U.S. 436, 16 L. Ed.** 2d 694, 86 S. Ct. 1602 (1966), Appellant stated that he had consumed a great deal of alcohol on New Year's Eve and that he did not recall the latter part of the evening (RI 5). A search of Hauser's Nissan revealed that it was stolen (there were three sets of license plates from three different states inside) and further revealed a number of items belonging to the victim, including keys to her home and vehicle and a pair of undergarments (RI 5-7). Hauser claimed that the undergarments belonged to a woman whom he had met in Louisiana, but he offered no explanation as to the presence of the keys (RI 6-7).

At the penalty proceeding on February 6, 1996, the state called two primary witnesses - the pathologist and Investigator Griggs. Griggs testified that he had met with Hauser at the Okaloosa County Jail on December 12, 1995, at Hauser's invitation; Appellant was awaiting sentencing in this case, having already entered his plea of nolo contendere on November 21, 1995 (RIII 22); Hauser filled out a written request form, stating that he wished Griggs to come and see him (RIII 19-21; RI 74-5). Griggs testified that, upon his arrival, Hauser handed him an envelope, with his name written upon it, stating, 'I've got something I want you to read." (RIII 22). Griggs opened the envelope and found a written statement inside (RIII 23). In summary, Hauser's written statement presented the following:

In his written statement, Appellant wrote that he had gone to all of the strip clubs in the Fort Walton Beach area, spending most of his time at Sammy's on the Island (RI 76). Hauser stated that he had noticed one particular girl working there, "Satin," who seemed "new and a little uneasy," and stated that he knew "if there was going to be anyone who I could get back to the room this would be the one," as she was "small, easy to overpower and new yet still making money.* (RI 76). Accordingly, Hauser "kept up with what

she was doing," and, indeed, paid her to dance for him several times.

At around 2 a.m., Hauser suggested to "Satin" that she come back to his hotel room "if she would like to make a couple hundred dollars." (RI 76). The two then met at a nearby store, and the victim then drove Appellant back to the EconoLodge in her vehicle. He stated that they parked next to his truck, and that he had immediately opened the door to the truck and checked the alarm. The two then went up to his room, where they played music so loudly that the manager complained. The victim then took her clothes off and danced for Hauser, and, after a while, the two had sex. After repeating these activities, the victim announced that she had to leave, and Hauser stated that he stood up and asked her to give him a hug, thinking, 'This is my last chance, if I want to kill her, I am going to have to do it now." (RI 76-7).

Accordingly, as the two were pulling apart, Hauser put his hands around the victim's neck and threw her down on the bed. Pinning her arms with his elbows, he started to strangle her slowly; Appellant stated, "I put only enough pressure so she could not scream, I wanted to watch the fear in her eyes." Hauser kept up this "cat and mouse" game, allowing the victim to take a breath, and then continuing to strangle her. Finally, Appellant thought to

himself, ". . . this is it," and put as much pressure on the victim's neck as he could, and 'held it until she gave this shake and her body tensed up and went limp." He did not let go for a while, and then put his ear to her chest to make sure he could not hear a heartbeat. When he was sure that she was dead, he put her body on the floor and, eventually underneath the bed and box spring, thinking "there would be no way to see the body." (RI 77-8).

Hauser stated that he then went around the room and collected the victim's belongings, putting most of them underneath the other bed. Appellant specifically admitted going through her jeans "to look for her cash", and removing $85 from her pants. Hauser likewise searched the victim's vehicle "for anything of value", and took a jacket and "camel can cooler." Appellant waited until the next morning to check out and then headed west, stating, 'My hands were so sore for around 6 days it was hard to hold things." (RI 77-9).

After presenting Griggs with this written statement, Appellant and Griggs 'had a general conversation," which the investigator tape-recorded (RIII 324); as noted in the Initial Brief, Appellant has maintained that he should have been advised of his rights under Miranda v. Arizona. In his oral statement, Hauser stated that he

was making this statement of his "free will" and had not been coerced (RI 83). He acknowledged that he had prepared the prior written statement. Hauser stated during this conversation with Griggs that he had previously had the urge to kill, but had never acted upon it; he stated that he had this urge for 'maybe a couple of years" and that, this time, "all the wrong things happened" (R I 85). Appellant stated that he had gotten no satisfaction from the event and reiterated that his hands had ached for six days; he said that the murder was "nothing like what I expected." (RI 88). Appellant stated that he "guessed" that he had choked the victim as a "power thing", "because [he] could." (RI 90). At the conclusion of the statement, Hauser reiterated that no threats or promises had been made and that the statement was "totally my free will." When asked if he realized that some of the statement could 'wind up" in court at his sentencing proceeding, Hauser replied, "Oh yeah, I am totally aware of it." (RI 90-2).

In aggravation, the court found three (3) aggravating circumstances - that the homicide had committed for pecuniary gain, under §921.141(5)(f) Fla. Stat. (1995), that the homicide was especially heinous, atrocious and cruel, under §921.141(5)(h) Fla. Stat. (1995), and that the homicide had been committed in a cold,

calculated and premeditated manner, under §921.141(5)(i) Fla. Stat., (1995). The sentencer's findings were as follows:

> **A. AGGRAVATING FACTORS**
>
> 1. The crime for which the defendant is to be sentenced was committed for pecuniary gain.
>
> The Defendant, in his letter, makes four separate references to his intent to benefit financially from this crime.
>
> a. "I knew Satin had to have cash, I had given her around $100 to $150 during the night."
>
> b. 'She was small, easy to overpower and new, yet still making money."
>
> c. "I went through her things to look for cash, I found $85 in her jeans, so I pulled the bed over her and went through the rest of her things."
>
> d. "I looked through her car for anything of value and took a jacket and a camel can cooler. I put these things in my truck then went back to the room to wait until around 9:00 o'clock A.M. to check out."
>
> These excerpts from the Defendant's hand-written letter clearly establish that the Defendant targeted this particular victim with the intent to steal. He freely admits to stealing $85 from her clothes and taking a jacket from her car. Therefore, this crime was committed for pecuniary gain. This aggravating circumstance was proved beyond a reasonable doubt.

2. The crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner.

The Defendant's hand-written statement proves that the Defendant's plan to murder the victim was predesigned after careful, calm and cool reflection, and two specific portions of his statement prove that the Defendant's intent to kill was not a spontaneous, spur of the moment decision:

a. "After watching her for awhile I knew if there was going to be anyone who I could get back to my room this would be the one. She was small, easy to overpower and new, yet still making money."

b. "So I stood up at the end of the bed and asked her to give me hug, I was standing there in front of her thinking this is my last chance, if I want to kill her I am going to have to do it now."

The Defendant's taped statement also makes further reference to his predesigned plan to kill. At one point in his taped interview he states that around four or five o'clock P.M. that day he decided to kill someone. That was approximately ten hours prior to the actual murder.

On page 5 of the transcript the Defendant indicates that he has had the urge to kill for quite some time, but that the circumstances were never just right but in Melanie Rodriguez he "found some one that naive, small" and the circumstances were right to satisfy his urge to kill. Mr Hauser killed Melanie Rodriguez as a result of his long standing plan to kill somebody. There was absolutely no pretense of moral or legal justification, and the murder was committed in order to allow the Defendant

to experience the "satisfaction" of a killing (page 8, transcript). This aggravating circumstance was proved beyond a reasonable doubt.

3. The crime for which the Defendant is to be sentenced was especially heinous, atrocious and cruel.

The Medical Examiner testified at the sentencing hearing that Melanie Rodriguez died as a result of strangulation. That testimony further indicated that the victim in a case of this nature would remain conscious an absolute minimum of twenty seconds after the blood has been completely shut off to the brain. However, the Defendant's statement indicates that the Defendant deliberately prolonged Melanie's death by initially applying just enough pressure on her neck so that she could not scream, then applying additional pressure until she almost lost consciousness, then allowing her to breathe, and then finally applying enough pressure to cause her death. The Defendant's handwritten, detailed explanation of why he killed her in this manner was so that he could "watch the fear in her eyes." Based upon the Defendant's own horrible description of Melanie's death, it is obvious that she was conscious throughout the ordeal and surely knew of her impending doom as the Defendant meticulously tortured the life out of her. This murder was indeed a conscienceless, pitiless crime which was unnecessarily torturous to the victim. The Medical Examiner's testimony supports the Defendant's description of the death. This aggravating factor has been proved beyond a reasonable doubt. (RI 120-2).

SUMMARY OF THE ARGUMENT

Appellant Hauser entered a plea of nolo contendere to the instant murder, waived a sentencing jury, and, further, waived the presentation of mitigation. On appeal, his counsel raises three claims relating to the death sentence. Appellant initially argues that the sentencing judge failed to consider and weigh all mitigation of record before imposing sentence; Appellee disagrees, and would contend that the sentencing order in this case is in total accord with this Court's precedents. Appellant next argues that the sentencing judge should not have considered his tape-recorded statement to a police officer, because such had not been preceded by Miranda warnings. It is the State's position that such warnings were not required, and that, further, reversible error has not been demonstrated, in that the oral statement was largely cumulative to Hauser's written statement which was, unquestionably, properly admitted. Finally, no basis exists for this Court to recede from its holding in Hamblen v. State, 527 so. 2d 800 (Fla. 1988), and the instant sentence of death is proportionate in all respects.

ARGUMENT

POINT ON APPEAL

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO HAUSER'S SENTENCE OF DEATH; THE SENTENCER PROPERLY WEIGHED ALL MITIGATION, HARMFUL ERROR HAS NOT BEEN DEMONSTRATED AS TO THE ADMISSION OF HAUSER'S TAPE-RECORDED STATEMENT AND NO REASON EXISTS FOR THIS COURT TO RECEDE FROM HAMBLEN v. STATE, 527 So. 2d 800 (Fla. 1988).

As his sole point on appeal, Hauser raises a tripartite attack upon his sentence of death, contending: (1) that the sentencing judge failed to properly evaluate, consider and weigh mitigating circumstances set forth in the record; (2) that his tape-recorded statement was improperly admitted and (3) that this Court should recede from Hamblen v. State, 527 So. 2d 800 (Fla. 1988). Each of these matters will now be addressed.

A. The Sentencer Properly Weighed The Mitigating Evidence Set Forth In The Record

Appellant initially contends that the sentencing judge violated such precedents of this Court as Campbell v. State, 571 So. 2d 415 (Fla. 1990) and Farr v. State, 621 So. 2d 1368 (Fla. 1993), by failing to properly consider the mitigation available in the record, and maintains that reversal for resentencing is required. Appellee disagrees.

The record in this case indicates, of course, that Dan Hauser waived the presentation of mitigation (RI11 35-37). His attorney, in accordance with Koon v. State, 619 So. 2d 246, 250 (Fla. 1993), then stated for the record the mitigation which his office had investigated, 'at least five nonstatutory and one statutory item of mitigation." (RI11 35). Counsel stated that Hauser had no significant criminal history and that, as such, the mitigator under §921.141(6)(a) Fla. Stat. (1995) applied (RIII 38). As to nonstatutory mitigation, counsel stated that, if allowed, he would present evidence regarding: (1) Hauser's good conduct while in jail (including the fact that he declined to participate in an escape attempt); (2) Hauser's cooperation with law enforcement; (3) Hauser's alleged consumption of alcohol and/or drugs at the time of the incident and (4) Hauser's alleged mental and emotional health problems and history (RI11 38-9). Counsel also proffered a letter from Appellant's mother, in which she declined to provide background information requested by the Public Defender, in order to honor her son's wishes (RI 93).

Judge Barron asked Hauser's attorney if, in light of the reference to Hauser's past emotional mental health problems, counsel had noticed anything about Hauser which would suggest that he did not fully understand the proceedings or the consequences of

his actions (RI11 40). Defense counsel stated that he had had Hauser examined by a psychologist on two different occasions, and that the expert's reports did not indicate any mental or emotional problems which could effect Appellant's competency. (RIII 40-1). The court then stated that it accepted the proffered matters related by defense counsel and would provide them due consideration in determining the sentence (RI11 41-2). At the conclusion of the proceedings, defense counsel stated that Hauser wished to waive any presentence investigation report, but the judge ruled that he needed input from all sources, given the serious nature of the decision before him, and ordered the preparation of a PSI (RI11 51-2).

The presentence investigation report indicates that Hauser has prior convictions from Oregon for theft, worthless checks and weapons charges, as well as a felony conviction in Colorado; Hauser likewise has a worthless check conviction from Okaloosa County (RI 102-6). He never married or fathered any children, and served in the military for approximately six months, before receiving a general discharge; according to the PSI, Hauser had been unable to adjust to the military and had been at a community mental health center which determined that his problems "did not warrant disposition through medical channels." (RI 108-9). The only

specific reference to any history of mental illness was Hauser's examination by Dr. Larson during the pendency of the instant prosecution (RI 109). As to alcohol or substance abuse, the report indicated that Hauser stated that he had been drinking alcohol since he was twelve-years-old and had consumed a six pack on a regular basis since age sixteen; likewise, Hauser stated that had used cocaine for two years beginning in 1983, and that he had also used other psychotropic drugs (RI 109). The PSI likewise reveals that Hauser ran away from home several times and that he has received his GED (RI 110).

Defense counsel sent the court a letter, dated March 1, 1996, in which he contended that the aggravating circumstances proposed by the State had not been established by the evidence (RI 115-16). As to mitigation, counsel stated that the defense "would rely upon those matters proffered at the penalty hearing on February 6, 1996," including the statutory factor relating to lack of criminal history and the nonstatutory factors relating to Hauser's good conduct in jail, cooperation with the police, remorse, alcoholic consumption at the time of the offense and alleged history of emotional and mental health problems (RI 116).

At the sentencing hearing of March 4, 1996, defense counsel stated that this letter had been written against his client's

wishes, and that, indeed, Appellant wanted the judge to disregard the document; Judge Barron stated that he would consider Appellant's request (RIV 9). At the conclusion of the hearing, the judge formally sentenced Hauser to death. In addition to finding three aggravating circumstances, the court stated that it had considered the mitigation proffered by defense counsel 'as if evidence had been presented in support thereof" (RIV 18); the court found, however, that these factors were outweighed by the aggravation (RI 122-3). The court specifically addressed the proffered nonstatutory mitigator relating to Hauser's consumption of alcohol and/or drugs on the night of the murder, and found as follows:

> As to the fourth mitigating factor, that the Defendant was under the influence of drugs or alcohol at the time of commission of the crime, the Court would state that if evidence had been presented to the Court tending to establish this mitigating factor, to the extent to convince the Court that due to the use of drugs and/or alcohol, the Defendant **was** unaware of his actions or unable to control his actions, or unable to remember the events of that evening, this mitigating factor would be given substantial weight by this Court. However, the Defendant's hand-written statement and taped recorded interview would tend to indicate to the Court that the Defendant had a total recollection of very specific events throughout the course of the day, up to and including the moment of the murder. In reviewing the Defendant's detailed

> statement, it would appear that the Defendant's use of alcohol and/or drugs on that date did not affect his ability to remember very specific and vivid details and to perform this act in a cool, calm, calculated manner and would certainly not be sufficient to outweigh any of the aggravating factors listed herein. (RI 122-3).

In light of the above, it is clear that the trial court fully complied with the requirements of Koon and Durocher v. State, 604 So. 2d 810 (Fla. 1992), as well as Campbell v. State, to the extent that such precedent is applicable to situations such as that sub judice. Despite Hauser's desire to waive all mitigation, Judge Barron directed defense counsel to proffer the mitigation which his investigation had revealed, and, indeed, the judge accepted such as 'proven." Likewise, the judge's determination that whatever drugs or alcohol Hauser had consumed on the night of the murder did not rise to the level of mitigation so as to outweigh any of the aggravators was correct. As the court noted in its order, Hauser's detailed recall of the incident, as well as his purposeful conduct at that time, militated strongly against any suggestion of impairment. See e.g., Johnson, 608 So. 2d 4,(Fla. 1992) ("There was too much purposeful for the court to have given any significant weight to Johnson's alleged drug intoxication, a self-imposed disability that the facts show not to have been a

mitigator in this case."). Likewise, given Hauser's recall of the incident and his purposeful conduct, it is difficult to see how his unnamed 'mental and emotional problems" could have played any significant role in mitigating his conduct at the time of the murder. See Arbeleaz v. State, 626 So. 2d 169, 177-8 (Fla. 1993) (not error for trial court to have rejected defendant's epilepsy as mitigating factor, given the fact that there was no evidence that it played any part in the murder).

Appellate counsel's primary complaint is that the sentencing judge, although not formally required to order a PSI, see Farr v. State 656 So. 2d 448 (Fla. 1995), Allen v. State, 662 So. 2d 323, 330 (Fla. 1995), failed to specifically address the contents of such document in his sentencing order. Appellee would contend that opposing counsel greatly overstates the mitigation nature or value of the information contained in that report, and would further suggest that any error was harmless under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); additionally, although the judge did not expressly refer to the PSI, his acceptance of Hauser's unspecified "emotional and mental health problems since fourteen-years of age" (RI 123) can certainly be read as a weighing of the matters contained in the report. Cf. Bonifay v State, 21 Fla. L. Weekly S301 (Fla. July 11, 1996).

The report, as noted, sets forth a rather lengthy nonviolent criminal history (which is not mitigating) and notes that, although Hauser could not adjust to the military, whatever problems he had 'did not warrant disposition through medical channels"; Hauser was discharged, because it was felt that he would probably become an extremely disruptive influence, and because he lacked motivation and could not adjust to military life (RI 108). The mitigating value of this seems questionable, and the only indicia of "mental illness" contained in the report relates to Hauser's discharge and his having been evaluated by the defense expert in this case (RI 108). During the plea colloquy, defense counsel specifically stated that he had Hauser examined twice by a mental health expert, and that the expert had found "no mental illness, defect, or infirmity" (RII 5); the expert's report is not included in the record on appeal.

The most that can be said is that the PSI indicates that, in the past, Hauser consumed drugs and alcohol, and, in 1988, was placed in a drug treatment program (RI 108). Hauser, however, committed the instant offense on the first day of 1995, and was twenty-four-years old at the time. As noted above, and as was expressly found by the sentencer, Hauser was not impaired due to any intoxicant at the time of the murder, and any failure by the

sentencer to consider the fact that, in the past, he had used intoxicants was surely harmless beyond a reasonable doubt. See e.g., Wuornos v. State, 676 So. 2d 966, 971-2 (Fla. 1995) (sentencer's failure to consider mental mitigation identified in expert's report, harmless error, where defendant failed to present a case for mitigation, and effectively conceded that no case for mitigation existed, and where strong valid aggravating circumstances existed); Wuornos v. State, 644 So. 2d 1000, 1019 (Fla. 1994)(sentencer's failure to find defendant's alcoholism and mental disturbance as mitigation harmless, where weight was slight compared with case for aggravation); Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991) (sentencer's failure to weigh evidence regarding defendant's abused childhood, alcoholism and extensive history of hospitalization for mental illness harmless error, in light of, inter alia, very strong case for aggravation). In sentencing Hauser to death, Judge Barron essentially gave the defendant the benefit of every doubt, and accepted as proven Appellant's lack of significant criminal history, remorse, cooperation with law enforcement and unspecified mental and emotional health problems. Reversible error has not been demonstrated, and the instant sentence of death should be affirmed in all respects.

B. Admission Into Evidence Of Hauser's Recorded Statement Was Not Reversible Error

Appellate counsel next contends that Judge Barron committed reversible error in admitting into evidence, and considering, Hauser's tape-recorded statement to Investigator Griggs, in that Hauser should have been advised of his rights under Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602. Appellate counsel also contends that Hauser's Fifth and Sixth Amendment rights to counsel were violated, and that admission of his statement likewise violated the Florida Constitution (Initial Brief at 23). Inasmuch as trial counsel's sole objection below related to the lack of Miranda warnings (RI11 25-30) (no formal motion to suppress having been filed), the only matter presently before this Court is whether a technical Miranda violation occurred. See e.g., Terry v. State, 668 So. 2d 954, 961 (Fla. 1996) (". . , in order for an argument to be cognizable on appeal, it must be the specific contention asserted as the legal ground for objection, exception, or motion below."); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (same); Rodriguez v. State, 609 So. 2d 493, 499 (Fla. 1992) ("It is well established that the specific legal ground upon which a claim is based must be raised at trial and a claim different than that raised below will not be heard on appeal"); Forrester v. State

565 So, 2d 391, 393 (Fla. 1st DCA 1990) (defendant did not preserve claim relating to state constitution where such was not presented in the trial court).

As to the merits of Appellant's Miranda claim, it should initially be noted that cases relied upon by Hauser on appeal - Kina v. State, 353 So. 2d 180 (Fla. 3d DCA 1977), Meehan v. State, 397 so. 2d 1214 (Fla. 2d DCA 1981) and Landenberger v. State 519 So. 2d 712 (Fla. 1st DCA 1988) - are completely inapposite and have nothing to do with the question before this Court - whether a defendant, who is in custody and who has already entered a plea of nolo contendere, must be advised of his Miranda rights when he voluntarily initiates contact with the authorities. Appellee respectfully submits that the answer to this question is in the negative, and that it would not further any of the interests protected by Miranda to suppress the instant voluntary statement.

By its express terms, Miranda applies to custodial interrogation, which the Court defined as "questioning initiated by law enforcement officers after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way." Id., 384 U.S. at 445. In the Miranda decision itself, the Court reaffirmed that volunteered statements of any kind, which were freely and voluntarily made, were "not affected by our ruling

today." Id. 384 U.S. at 479. The Court has consistently emphasized that the scope of Miranda is not unlimited, see Roberts v. United States, 445 U.S. 552, 561-2, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980) (Miranda "exception" does not apply outside the context of the "inherently coerced custodial interrogations for which it was designed"), and expressly held, in Illinois v. Perkins, 496 U.S. 292, 298, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990), that it rejected the argument that Miranda warnings were required 'whenever a suspect is in custody in a technical sense and converses with someone who happens to be government agent."

The United States Supreme Court made clear in Perkins that the key consideration in determining whether Miranda warnings were necessary was the presence or absence of compulsion or coercion, in that the warnings were meant to preserve the defendant's rights "during incommunicado interrogation . . . in a police-dominated atmosphere," such atmosphere generating "inherently compelling pressures which work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely." Id., 496 U.S. at 297. The Court succinctly stated that the premise of Miranda was "that the danger of coercion results from the interaction of custody and official interrogation" and reaffirmed that statements which were freely and voluntarily made without any

compelling influences were, of course, admissible. Id., 496 U.S. at 298. The Court further provided that while the Miranda doctrine required strict enforcement, such must take place 'only in those types of situations in which the concerns that powered the decision are implicated." Id., 496 U.S. at 297.

Hauser has failed to demonstrate that the situation sub judice is one of those situations. Although Hauser was incarcerated, he initiated the conversation with Investigator Griggs, and stated several times that such initiation had occurred as a result of his "free will" (RI 83, 92); he likewise stated that he was "totally aware" that the statement given could 'wind up in court at [his] sentencing hearing" (RI 92). The record in this case reflects a complete absence of "compulsion" or *coercion," and, instead, reflects an individual who chose to speak with the authorities of his own volition; Hauser's preparation of a written statement, which he provided to Griggs, is likewise totally antithetical to any notion that he was not acting of his own free will. Although Hauser was incarcerated, and had indeed already entered his plea of nolo contendere to this offense, he had been in jail for several months, and there is no reason to believe that he felt any inherent or internal pressure to suddenly admit his culpability. Further, courts have held that an already incarcerated defendant is not

necessarily 'in custody" at all times for purposes of Miranda, and that additional restraint must be placed upon his liberty at the time of any statement, in order to trigger the necessity for warnings. See e.g., Garcia v. Singletary, 13 F.3d 1487 (11th Cir), cert. denied, ___ U.S. ___, 115 S. Ct. 276, 130 L. Ed. 2d 193 (1994); United States v. Turner, 28 F.3d 981 (9th Cir. 1994), cert. denied, ___ U.S. ___, 115 s. ct. 1117, 130 L. Ed. 2d 1081 (1995); United States v. Menzer, 29 F.3d 1223 (7th Cir.), cert. denied, ___ U.S. , 115 s. ct. 575, 130 L. Ed. 2d 422 (1994). The record in this case fails to demonstrate the existence of any "additional restraint", or, indeed, any of the "prerequisites" for Miranda.

The factual situation in this case would seem to be most comparable to that in Christmas v. State, 632 So. 2d 1368 (Fla. 1994). In such case, the defendant, during a recess in his trial, made inculpatory statement to two of the bailiffs who had been guarding him. On appeal to this Court, Christmas contended that the bailiffs should have advised him of his Miranda rights. This Court disagreed, noting, inter alia, that Christmas himself had initiated the conversation with the bailiffs, and held

> When, however, a defendant voluntarily initiates a conversation with the law enforcement officers in which a defendant provides information about that defendant's

> case, Miranda warnings are not required. Christmas, 632 So. 2d at 1370.

This Court further held that, although the bailiffs had, at times, questioned Christmas, such questions were not asked "as a result of circumstances in which mutually reinforcing pressures were present so as to weaken Christmas's will," such that Miranda warnings were required. Appellant makes no attempt to distinguish Christmas and it plainly applies. See also Christopher v. State, 583 So. 2d 642 (Fla. 1991) (Miranda warnings not required in regard to statement which defendant volunteered to police officers during transfer back to Florida); Baxter v. Thomas, 45 F. 3d 1501, 1510 (11th Cir.), cert. denied, ___ U.S. ___, 116 S. Ct. 385, 133 L. Ed. 2d 307 (1995) (officers not required to advise defendant of Miranda rights where defendant initiated contact and chose to discuss case). On the basis of these precedents, no error has been demonstrated.

To the extent, however, that this Court perceives any error, such was clearly harmless beyond a reasonable doubt under State v. DiGuilio. It is beyond dispute that the erroneous admission of statements obtained in violation of Miranda can be harmless, see Thompson v. State, 595 So. 2d 16, 18 (Fla. 1992), and, indeed, such is the case sub judice; there has been, and could be, no claim that Hauser's statements were involuntary, given his repeated assertions

that he was speaking of his own free will, as well as his acknowledgment that he knew that his statement could be admitted at sentencing (RI 83, 92). Hauser's primary admissions concerning this homicide were not contained in his tape-recorded statement to Investigator Griggs, but rather, as demonstrated, were contained in the written statement which he had prepared beforehand. No valid basis has been asserted for suppression of this document (It cannot seriously be suggested that the authorities were obliged to advise Hauser of his Miranda rights as, in his own jail cell, he sua sponte chose to write this document), and it was Hauser's written statement which provided the basis for the sentencer's findings in aggravation and mitigation.

The sentencing order makes no reference at all to the tape-recorded statement, in regard to the findings of the pecuniary gain and heinous, atrocious and cruel aggravating factors, and, to the contrary, makes express reliance upon the written statement (RI 120-2). The finding of the cold, calculated and premeditated aggravating circumstance makes reference to both statements, but Appellee would contend that the reference to the oral statement can be considered surplusage. See e.g., Johnson v. State, 465 So. 2d 499, 506 (Fla. 1985) (even if defendant's statement should have been suppressed due to absence of constitutional warnings,

aggravating circumstance could still be upheld, where aggravator had independent factual basis); Rutherford, 545 So. 2d 853, 856 (Fla. 1989) (court's reliance upon impermissible matter in sentencing finding could be treated as surplusage). Here, Hauser's cold plan and prearranged design, as well as his heightened premeditation, was well evidenced in his written statement, as he set forth how he had "sized up" his potential victim, and suppression of the tape-recorded statement would not result in the striking of the cold, calculated and premeditated aggravating factor.

Likewise, although the sentencing order makes reference to both the oral and written statements in its discussion of the proposed mitigator relating to intoxication, any reference to the oral statement would, again, be surplusage, as the written statement sets forth a sufficient basis to reject this finding. See e.g., Lockhart v. State, 655 So. 2d 69, 74 (Fla. 1995) (court's impermissible consideration of extra-record matter in rejecting mitigation harmless *error).* Again, Hauser's complete recall and purposeful action at the time of the murder were more than sufficiently reflected in his written statement, so as to make any consideration of the oral statement unnecessary. Any error in the sentencer's consideration of Hauser's tape-recorded statement was

harmless, as the factors in aggravation and mitigation are essentially independent of that matter, and are otherwise properly supported by the record. The instant sentence of death should be affirmed in all respects.

C. No Basis Exists For This Court To Recede From Hamblen v. State, 527 So. 2d 800 (Fla. 1988), And The Instant Death Sentence Is Proportionate

As his final claim for relief, appellate counsel asks this Court to recede from Hamblen v. State, 527 So. 2d 800 (Fla. 1988), suggesting that a proper proportionality analysis cannot be performed in a case such as this, in which the defendant waives the presentation of mitigation. Appellee disagrees, and would note that this Court has consistently adhered to its ruling in Hamblen, and rejected arguments comparable to those proposed sub judice. See e.g., Anderson v. State, 574 So. 2d 87 (Fla. 1991); Pettit v. State, 591 So. 2d 618 (Fla. 1992); Durocher, supra; Clark v. State, 613 So. 2d 412 (Fla. 1992); Henry v. State, 613 So. 2d 429 (Fla. 1992); Lockhart, supra; Farr, supra; Allen, supra. Nothing in this record indicates that any different course is required. As noted, the sentencing court fully complied with this Court's precedents in considering and weighing all the mitigation of record, and this Court may properly review the instant sentence of death for proportionality.

It is the State's position that Hauser's death sentence is proportionate. The sentence is supported by three valid aggravating circumstances (none of which is even attacked on appeal), and the sentencing judge found one statutory mitigating circumstance relating to Appellant's lack of violent criminal history, and further credited him with other nonstatutory mitigation. Despite this mitigation, this is a crime for which the death penalty is more than appropriate. Hauser went out to the various adult entertainment emporia in the Fort Walton Beach area, looking for a victim. He chose the victim in this case because she was small and unsure of herself, as well as the fact that she had money. He enticed her back to his room and murdered her in a torturous fashion, choking and releasing her, so that he could savor her terror. He then took everything of value which he could find, and fled across the country. The instant sentence of death should be affirmed in all respects. See. e.g., Johnson, supra, (defendant abducts an exotic dancer, strangles her and steals her valuables); Stano v. State, 473 So. 2d 1282 (Fla. 1985) (defendant abducts victim and tortures her by strangling and reviving her); Haliburton v. State, 561 So. 2d 248 (Fla. 1990) (defendant stabs victim to death because he wanted to see if he could kill someone); Foster v. State, 654 So. 2d 112 (Fla. 1995) (death sentence

appropriate where three aggravating circumstances present, including commission during robbery, heinous, atrocious **and cruel**, and cold, calculated and premeditated).

CONCLUSION

WHEREFORE, for the above mentioned reasons, the instant conviction and sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. William C. McLain, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 8th day of November 1996.

RICHARD B. MARTELL
Chief, Capital Appeals