IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,328

MANUEL VALLE,

Appellant,

FILED
SID J. WHITE
AUG 22 1990
CLERK, SUPREME COURT
By ______ Deputy Clerk

vs.

THE STATE OF FLORIDA,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

* *

BRIEF OF APPELLEE

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CASE NO. 72,328

MANUEL VALLE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

<u>RESPONDENT'S BRIEF ON THE MERITS</u>

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STATEMENT OF THE CASE AND FACTS

Manuel Valle was charged by indictment with: first degree murder, for the killing of Luis Pena; attempted first degree murder, for the attempted killing of Gary Spell; possession of a firearm by a convicted felon; and grand theft of an automobile. (R. 41)

At his first trial, in 1978, Valle was convicted of the first degree murder, attempted murder, and possession of a firearm. Valle v. State, 394 So.2d 1004 (Fla. 1981) (Valle I). Valle had pled guilty to the automobile theft charge. Id. The death sentence was imposed for the first degree murder. Id. On appeal, this Court reversed the convictions and sentences for the murder, attempted murder and theft, and remanded the case for a new trial. Id.

At the retrial, Valle was again convicted on the three counts and again received the death penalty for the first degree murder. Valle v. State, 474 So.2d 796 (Fla. 1985). (Valle II). For the attempted murder and possession of a firearm counts, he received consecutive sentences of 30 and five years of imprisonment. (R. 2-1057) In 1985, this Court affirmed the judgment and sentence. (Valle II).

On May 5, 1986, the Supreme Court of the United States, pursuant to a petition for writ of certiorari, vacated the judgment and remanded to the Supreme Court of Florida, for further consideration in light of Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Valle v. Florida, 476 U.S. 1102, 106 S.Ct. 1943, 90 L.Ed.2d 353 (1986). On remand, this Court concluded that the trial court had erroneously excluded testimony from the sentencing phase of the trial, that Valle would be a model prisoner in the future, and the case was remanded to the trial court for a new sentencing hearing with a new jury panel. Valle v. State, 502 So.2d 1225 (Fla. 1987).

This Court in Valle II, summarized the basic facts, as adduced in the 1981 retrial, as follows:

> On April 2, 1978, Officer Luis Pena of the Coral Gables Police Department was on patrol when he stopped appellant and a companion for a traffic violation. The events that followed were witnessed by Officer Gary Spell, also of the Coral Gables Police Department. Officer Spell testified that when he arrived at the scene, appellant was sitting in the patrol car with Officer Pena. Shortly thereafter, Spell heard Pena use his radio to run a licence check on the car appellant was driving. According to Spell, appellant then walked back to his car and reached into it, approached Officer Pena and fired a single shot at him, which resulted in his death. Appellant also fired two shots at Spell and then fled. He was picked up two days later in Deerfield Beach.

Valle II, 474 So.2d at 798.

A. State's Case-in-Chief

Rebecca Little O'Dea was the police dispatcher on April 2, 1978. (R. 3780) At about 6:36 p.m., she received an incoming call from Officer Luis Pena, which call lasted, with several interruptions, until 6:45 p.m. (R. 3781) The tape of the call was played for the jurors, who were also given a transcript of the tape. (R. 3782) Officer Pena reported a traffic stop and gave the vehicle tag number and identification. (R. 3789) Pena had sought a computer check on the car and a driver's license check on the man described on the tape. (R. 3790-91) At 6:43, the operator who runs the computer check responded that the car which had been described was a Toyota, registered to Barbara Straun, and that it was not stolen. (R. 3793-94) Pena then requested that the operator reconfirm the tag number which had been checked. (R. 3794)[1] After the operator repeated the tag number, a dog could be heard barking on the tape, and a voice is heard, saying, "I'm shot. I'm

[1] The car which Pena had stopped was not a Toyota, but a Chevrolet Camaro. (R. 3799).

shot." (R. 3794) Officer Spell then called the dispatcher, indicating that he was at the scene and that Pena had been shot. (R. 3794-95)

Detective Richard Wolfe was the lead investigator on the Pena case. (R. 3928) Wolfe went to the scene of the crime, had photos taken and had latent prints taken from Pena's car. (R. 3932-37) Three of the prints were identified as Valle's. (R. 3938) Three casings were found at the scene. (R. 3936) A clipboard found in Pena's car had the name of Manuel Alvarez on it; when checked out, one of the names this led to was Felix Ruiz. (R. 3980-84) Ruiz' prints were found on the Camaro. (R. 3986) Valle was eventually located by checking Hialeah accident reports; his name was found and his prints matched those on Pena's car and the Camaro. (R. 3987-89) Officer Spell eventually identified both Valle and Ruiz in a photo lineup. (R. 3986, 3989) A projectile was also recovered in Pena's car, and a registration was found in the Camaro. (R. 3991-93)

After Valle was arrested, Wolfe advised him of his rights and obtained a statement from him. (R. 3993-4001) Wolfe took notes of the initial conversation; subsequently, a recorded statement was obtained. (R. 4001) The transcribed statement was read to the jury. (R. 4028-55) Valle was driving a car which he had stolen, when the officer stopped him in Coral Gables. (R. 4032-35) The officer asked for his license, but he did not have it. (R. 4035) Valle gave the officer the name of Manuel Alvarez. (R. 4036) Valle told the detaining officer that the car belonged to Fernando Ramos. (R. 4037) While waiting, Valle walked to the Camaro, where Ruiz was waiting. (R. 4038) Valle got some cigarettes and returned to Pena's car. (R. 4038) He then heard the radio dispatcher respond that the car was registered to Willford Straun. (R. 4039) He returned to the Camaro and told Ruiz that they would find out that the car was stolen and arrest them. (R. 4039) Valle said that

he would have to blast the officer. (R. 4039)[2] Ruiz responded, "Well, we have no choice." (R. 4039) Valle returned to Pena's car, without any gun, and Ruiz came over, but was told by Pena to go back to the Camaro. (R. 4042) After Ruiz returned to the Camaro, Valle also went back for another cigarette. (R. 4042-43) Ruiz said that he was going to make a call and he left. (R. 4043) Valle took the gun from the Camaro, returned to Pena's car and shot Pena once. (R. 4043-45) When asked why, Valle said: "To try to wound the officers so I could get away." (R. 4045) Valle shot because he had violated his probation. (R. 4046) Valle was about 3-4 feet away from Pena. (R. 4046) Valle then fired at the second officer and thought he had hit him. (R. 4047) While leaving, Valle heard shots, one of which just missed him. (R. 4049) He then drove off, and after leaving the car, took Ruiz' gun and a leather bag. (R. 4050) While walking, he ran into Ruiz. (R. 4050-51) They got a succession of rides to Valle's house. (T. 4052)

The initial statements given by Valle, prior to the transcribed statement, were also detailed in Detective Wolfe's testimony. (R. 4002-4026) Those statements were similar to the transcribed one, with a few exceptions. The initial statements contained further details about the flight after the offense. (R. 4012-25)

The court read a stipulation to the jury, which included the following facts: Valle was on probation at the time of this offense; a warrant for his arrest had previously been issued; the 1977 Camaro was stolen and Valle was convicted of its theft; Valle's fingerprints were found on Pena's car, as well as the Camaro, which was found ½ mile away; the .380

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[2] Vicente De La Vega, an interpreter, when asked to interpret this part of Valle's confession in the context of the entire confession, stated that the correct translation was, "Felix, he's looking into the car's license tag. I have to waste him, shoot him, do away with him, kill him." (R. 4103-04)

Llana pistol seized from Valle on April 4, 1978 was in operating condition and was the gun from which recovered bullets and casings had been fired. (R. 3978-80). The stipulation also described where the casings and projectiles were found. (R. 3978-80)

Officer Spell, who had been on routine patrol that evening, observed the entire incident when he stopped to say hello to Pena, who was in the midst of the traffic stop. (R. 3796-98) Spell described his observations, as well as portions of conversations which he overheard. (R. 3796-3815) His testimony was similar to the version of the offense related in Valle's confession. Spell also related how Valle shot Spell while Valle was escaping. (R. 3808-12).

Officer Edward Rodriguez, of the Deerfield Beach Police Department, described his confrontation with, and arrest of, Valle on April 4, 1978. (R. 3877-3923). After the arrest, Valle congratulated Rodriguez, because Valle said that he thought no one would recognize him and that he could get away. (R. 3889)

The defense then commenced its case-in-chief. (R. 4179) Lloyd McClendon, the accreditation manager of the Department of Corrections of New Mexico, made an evaluation of Valle, based on "available materials towards his behavior in the future where he is given a life sentence." (R. 4179-80) McClendon had interviewed Valle, first in 1981 and again in 1987. (R. 4200-4201) McClendon had been provided, and had read, depositions from investigating officers at the time of the crime, Valle's confession, depositions of corrections officials, Valle's record of criminal convictions, and Valle's prison file. (R. 4201) On the basis of the interview with Valle and the review of those materials, McClendon expressed the opinion that if Valle were given a life sentence, "he would continue the nonviolent behavior that is exhibited over the past several years on death row, that he would tend to be

an individual that would seek more answers within himself, try to grow as an individual and, in general, attempt to stay out of the mainstream." (R. 4202) He found that Valle would not be a management problem for the prison. (R. 4202) McClendon emphasized the absence of any acts of violence in Valle's prior criminal convictions. (R. 4209-10) McClendon, after the 1981 interview of Valle, had expressed the same opinion, and believed that between 1981 and 1987, Valle had exceeded his expectations. (R. 4210-11)

Defense counsel then asked McClendon whether the prison record revealed any indications that Valle had been disciplined for rule infractions. (R. 4218-19) McClendon, based upon his review of prison disciplinary reports and depositions of corrections officials, did find evidence of discipline for rule infractions. (R. 4219) Defense counsel then proceeded to have McClendon go through each disciplinary report and discuss its significance. (R. 4232-4269) The report of May 7, 1983 reflected that Valle kicked a door in the prison visitation area, while being transported there. (R. 4239)

The disciplinary report of June 10, 1986 involved Valle's loud statements to a correctional officer in the exercise yard. (R. 4246) Valle made "insubordinate comments" when told to return to the cell block after thunder and lightning commenced. (R. 4247) The disciplinary report of January 13, 1987 reflected that a prison key and money were found in Valle's cell. (R. 4249-50) McClendon did have a problem with this incident. (R. 4251) Valle had told McClendon that he won the money in a pool on a sporting event, and that the key had been given to him as collateral by someone who lost the pool, but lacked any cash.

The final disciplinary report discussed[3] was dated July 18, 1984, and involved bars being found cut on the door of Valle's cell. (R.

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[3] Other disciplinary reports included: (1) The report of October 14, 1980,

4269) McClendon examined the report, other investigation records, and statements of prison personnel. (R. 4269) Based on these reports, he was "familiar with the contraband and paraphernalia found in the area." (R. 4270) Flat steel had been cut in a manner that the upright vertical ground bar could be removed. (R. 4270) This had then been concealed with putty and painted. (R. 4271-72) A gap of 8 3/4" inches was left between vertical bars. (R. 4271) Portions of hacksaw blades, putty, and other materials were found in another cell, two cells away from Valle, at the time. (R. 4272) Based on his review of reports, this could have been done within a 60-day period, as security is randomly tested at least every 60 days. (R. 4273-74) The time needed to cut and conceal the bars would be between three and four hours. (R. 4274) The reports indicated that a paint program had been in progress, in which inmates paint cells, and Valle's cell could have been painted either by himself or other inmates, while he was in the recreational yard. (R. 4275) Despite the foregoing, McClendon did not believe that Valle would be an escape risk if given a life sentence. (R. 4284)

On cross-examination, the prosecutor asked if McClendon was aware of an incident involving violence in which Detective Toledo was involved, and McClendon said that he had read a deposition. (R. 4296) When asked if he was familiar with the fact pattern, McClendon responded: "I'm familiar with the statements made by the officer at the time. My personal opinion is that I'm not sure the fact pattern follow the statements." (R. 4296) McClendon was aware that that case arose out of a traffic infraction

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for burning a whole in a food tray (R. 4232); (2) The report of December 14, 1980, involving prison count procedures, for not standing at the door for the count of procedures (R. 4233-35); (3) The report of February 8, 1983, relating that Valle and other inmates stopped up to toilet bowls and caused overflowing through repeated flushing (R. 4237-39); (4) The report of November 12, 1984, for possessing an extra canteen coupon. (R. 4245-46).

and Officer Toledo claimed that Valle was trying to run him over while Toledo was shooting at Valle. (R. 4306) That incident preceded the killing of Officer Pena. (R. 4306) McClendon considered that incident but minimized it since Valle was not convicted of it. (R. 4307)[4]

With respect to the incident in which the cell bars had been cut, McClendon did not see it as an escape attempt "because no actions had taken place." (R. 4318) McClendon was aware that a braided rope made from bed sheets was found in Valle's cell at the same time, but McClendon concluded that it was merely an "exercise rope." (R. 4319) McClendon was also aware that a three pound towel bar in Valle's cell had been severed by a hacksaw, and that Valle had been living in that cell for two years as of that time. (R. 4320) The towel bar removed from Valle's cell was solid metal, and cemented into the wall in two places. (R. 4392) McClendon was not aware that a hat with holes and gloves with extra support in the fingertips were found in Valle's cell. (R. 4322-23) The materials he read made it unclear where those items were. (R. 4323) McClendon initially claimed to be unaware of a rubber pad being found in Valle's cell, which pad could be used to lean against barbed wire, but subsequently recalled reading about the pad, as well as rubber gloves. (R. 4323, 4393, 4398). McClendon knew that a second inmate was involved in the incident, and in that person's cell, a compass, flashlight, matching gloves, and hat were found. (R. 4323) Cardboard shims, used to represent the displaced pieces of metal, were found in both cells.

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[4] Although Valle was not convicted in that incident, the Toledo incident resulted in an affidavit of violation of probation for Valle's other convictions, and the Toledo incident did result in a revocation of a prior probation after a probation revocation hearing. (R. 11-12, 24, 32-33; S.S.R. 1-84) McClendon was aware of this. (R. 4307-08)

(R. 4386-87) Putty, used to conceal the displaced metal, was found in both cells. (R. 4390)

McClendon admitted that he was also aware of Valle's involvement in another possible prison escape attempt, this one from the Dade County Jail, while awaiting his resentencing hearing. (R. 4406) Valle had discussions with two separate individuals in the County Jail regarding the possibility of escape. (R. 4406-4407)

John Buckley, a consultant, who had been a sheriff in Massachusetts for 11 years, was deemed competent to render opinions in the area of corrections. (R. 4552, 4561, 4588) Buckley had reviewed records of Valle's case, depositions, police reports, Valle's entire criminal record and other materials. (R. 4591-92) He had also interviewed Valle several times. (R. 4592) Buckley's opinion was that Valle would be a very good prisoner and a nonviolent person, as the only violence on his record was the instant case. (R. 4593-94) Buckley found that Valle would be a "model inmate." (R. 4594) Buckley also reviewed Valle's entire prison file, including the disciplinary reports. (R. 4594) Buckley, during his interviews with Valle, wanted to see if there was any remorse on Valle's part, and Valle did indicate that he was sorry for what he had done. (R. 4597)

Defense counsel also asked Buckley numerous questions about Valle's prison disciplinary reports. He found the prison escape attempt to be "nonviolent" and a "common prison occurrence." (R. 4650-51) As it was nonviolent, it did not affect his opinion of Valle. (R. 4652) With respect to the 1987 incidents in the Dade County Jail, the reports revealed that Valle had told a prison counselor, Officer Vaughan, that he needed help, that he wanted to escape. (R. 4654) Another prison report included the statement of inmate Martinez, who reported that Valle talked about escaping. (R. 4662) Buckley did not believe that this was serious talk; rather, he found it to be

the "generalized talk of escape which is to be expected." (R. 4662, 4665) Buckley had also been furnished materials about the Officer Toledo incident. (R. 4667) Buckley discounted that incident since it had occurred 12 years earlier. (R. 4668) It did not affect his opinion of Valle, although it might have affected his opinion in 1981, when he first evaluated Valle, if he had known of it at that time. (R. 4668-69)

On cross-examination, the prosecution brought out that Buckley was opposed to the death penalty. (R. 4670) In 1981, Buckley was going to testify that Valle would be a model inmate, and he still believed that initial assessment to be correct, notwithstanding the post-1981 escape plans and other incidents. (R. 4674) Buckley opined that "lifers are the backbone of long-term institutions" as they keep the place quiet; they don't want disturbances; they don't want rule-breaking; it is their home and they are there forever. (R. 4678) Based on Buckley's attribution of such characteristics, the prosecution queried whether he knew what a life sentence was in Florida. (R. 4678) After lengthy legal arguments on this issue (R. 4678-4707), questioning resumed, and Buckley indicated that some life sentences are true life sentences and some are not. (R. 4710) Buckley's opinion would not change even if Valle's sentence was not a true life sentence.

Although Buckley had said that "lifers" are good inmates, he also noted that it was not unusual for lifers to attempt to escape, given the longevity of their sentences. (R. 4712) Buckley discounted the Officer Toledo incident since it was "just" a probation violation, without a conviction. (R. 4723) Buckley had read materials about the incident, including Toledo's deposition. (R. 4728) He related his understanding of it, on the basis of the materials he read: during a traffic stop, while identification papers were being checked, Valle's car backed up, hit the cruiser, and took off; the officer pursued and Valle's car went into dark woods; Valle's car

emerged and Toledo felt that Valle was trying to run him down. (R. 4744) Buckley said that even if he had known of this incident in 1981, it would not have changed his "non-violence" opinion of Valle, at that time. (R. 4750)

Buckley was asked whether he read of a fight between Valle and Marvin Francois, another inmate, in the prison records he reviewed. (R. 4751) Buckley initially responded that he had never heard of Francois. (R. 4756)[5] Upon reviewing the prison records in open court he recalled having read about the incident in his prior review of the prison records. (R. 4757) Buckley stated that this incident did not affect his opinion of non-violence either. (R. 4757) Buckley was then questioned about the other prison disciplinary reports. (R. 4757-66, 4772-85)

With respect to the escape incident, Buckley stated that Valle had told him that the cell was not his regular cell, although prison records showed that he had been in the cell for about two years. (R. 4774-75) Buckley stated that he remembered the following items being found in Valle's cell: two hats that pull over the face with holes in the front; gloves; a rubber pad; and a list of addresses and phone numbers. (R. 4816-17) Buckley remembered that the following items were found in the cell of the other inmate whose cell bars were simultaneously out: two hacksaw blades; cardboard "shims;" putty; a compass; a flashlight; the same type of gloves. (R. 4817-18)

Brad Fisher, a clinical forensic psychologist in the field of correctional psychology, was permitted to render opinions in the field of correctional psychology, including prisoner evaluation and classification.

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[5] During legal arguments, the prosecution noted that this incident was referred to in the Florida State Prison packet which the defense received. (R. 4752-54). The defense, after vehemently denying prior receipt of such documentation (R. 4752-53), backed off from that accusation. (R. 4754-55).

(R. 4888, 4898) Fisher had evaluated Valle in 1981 and 1987. (R. 4899) He said that past behavior is the best predictor of future behavior. (R. 4900) Relevant factors include: the severity, recency and frequency of violence patterns; whether a person is psychotic; drug usage; and family ties. (R. 4900) Fisher reviewed materials regarding the killing of Officer Pena, including police reports and Valle's confession, in addition to records of prison disciplinary reports and prior convictions. (R. 4903) Fisher also administered tests to Valle. (R. 4902-4903) Fisher did not find a pattern of prior violent behavior. (R. 4904) His initial prediction, in 1981, was that Valle would not be a person for whom you would expect violence while incarcerated. (R. 4904) At the time of the 1988 resentencing trial, Fisher looked back on the intervening years and found that Valle had not demonstrated violent behavior. (R. 4905) Thus, he considered his initial prediction accurate. (R. 4905) In making this determination, Fisher had reviewed Valle's entire Florida State Prison file as well as documents from the Dade County Jail. (R. 4905-4906) As to disciplinary reports, he restricted his consideration to those resulting in convictions or guilty pleas. (R. 4906) The disciplinary reports showed escape potential. (R. 4908) If disciplinary reports did not result in violence, he did not score them for violence. (R. 4908) He noted the Officer Toledo incident, of which he had reviewed materials. (R. 4909) Had he been aware of the incident in 1981, he would have considered it and "been more attentive about [his] opinion," and it would have "made some difference in [his] opinion if it would have been scored a violent crime," but he was not sure that it would have established a pattern of violent behavior to expect in the future." (R. 4909-10) From the perspective of 1988, the Toledo incident, which occurred in 1976, became less significant, to Fisher, as its scoring diminishes over time. (R. 4910) His opinion in 1988 was that Valle would not be violent if given a life sentence and that Valle had demonstrated this through his behavior. (R. 4912)

On cross-examination, Dr. Fisher explained that he was not making a prediction that Valle would be a model prisoner; only that he would be nonviolent. (R. 4914) Fisher agreed that limited human interaction on death row limited an inmate's ability to carry out violence on another human being. (R. 4922) He was not saying that Valle would not be an escape risk. (R. 4923) He assumed that most prisoners would try to escape. (R. 4923) A death sentence increases the motivation to escape. (R. 4923) It was established that in his 1981 report, Fisher erroneously listed for Valle's prior convictions an attempted robbery. (R. 4940-41) He had since learned that the attempted robbery was actually an attempted grand larceny. (R. 4941) Yet, even when he believed that Valle had committed a prior violent felony - the attempted robbery - he still concluded that Valle was nonviolent. (R. 4942)

Valle did not have any drug or alcohol problems. (R. 4944) Fisher discussed the various prison disciplinary reports (R. 4953-58), and while agreeing that they were becoming more frequent, maintained that they were not for violent acts. (R. 4958) He agreed that the reports pertaining to the escape attempt showed a potentially violent situation if carried out. (R. 4958-59) The Toledo incident no longer mattered to Fisher since it was too remote in time (R. 4962), even though Valle, incarcerated for the prior 10 years, had littled opportunity to carry out violent acts.

Juan Sastre testified as a character witness for Valle, stating that they were friends in school, and that Valle was a good student and athlete, who was very caring and did not engage in fights. (R. 4989-93) He had not seen Valle since 1970. (R. 4995)

Evelyn Milledge, the coordinator of the Domestic Violence Protection Unit for the Circuit Court of Dade County, is a social worker, and was permitted by the court to render opinions. (R. 4946-97, 5006, 5012-13) She interviewed Valle, and read his confession, some transcripts, some depo-

sitions and Dr. Fisher's 1981 report. (R. 5017) She interviewed Valle's relatives - his sister, ex-wife, daughter and parents. (R. 5017) Based upon these interviews, she related what she had learned of Valle's background. Valle allegedly had no emotional contact with his father. (R. 5021-22). The mother was not involved in the children's lives and there was not a lot of love at home. (R. 5024) Milledge believes all victims are affected by emotional and physical abuse. (R. 5026) The "emotional abuse" was that there was no parental companionship. (R. 5027) The children were subjected to punishment for receiving bad grades - they were made to lie down on a bed; they were hit with a belt; or they were made to kneel on dried ears or kernels of corn. (R. 5020) Milledge did not know how frequent the beatings were. (R. 5030)

Valle was not given encouragement at home and had no male role model at home, other than his father. (R. 5032-34) Valle tried to please his father, but looked at himself as deficient. (R. 5027) The "lack of communication" was indicative to Milledge of a "dysfunctional family." (R. 5035) For example, Valle's "play" activities were restricted; there were certain rooms that the children could not enter. (R. 5040)

Valle was born in Cuba. (R. 5018) The family came to Miami after Castro came to power. (R. 5040) They remained here for a year, before moving to New York. (R. 5041) Valle then felt like he was born again, free from the previous restrictions. (R. 5041) Valle learned English quickly and became athletic. (R. 5042) The parents were preoccupied with earning a living. (R. 5042) The beatings abated, but there was still no parental "sensitivity" or interest. (R. 5044) The family's subsequent return to Miami, according to Milledge, was traumatic for Valle, as New York had been good, but his father's business had folded. (R. 5045) In Miami, Valle was active in athletics, got a job while still in school, and graduated high

school in 1968. (R. 5042-49) He had met Aurora, his second wife, while in high school, but his father disapproved of her since she was Puerto Rican. (R. 5050) While still in high school, he met a man at the burger place where he worked, who interested him in the dog track. (R. 5051) Valle had a brief marriage to a Cuban girl and took a job training dogs. (R. 5051) Betting later became an addiction as he stole payroll checks from his employer to cover his bets and was caught. (R. 5052) The gambling was a problem for the first marriage. (R. 5052) His Aunt Izelle died in a plane crash. (R. 5053-55) Milledge opined that this was the most devastating event for Valle. (R. 5055) After her death, Valle began to deteriorate. (R. 5078) A 1973 job accident resulted in a partial hearing loss. (R. 5078) The years of 1975-1978 were marked by the gambling addiction, and stages of depression, guilt and self-doubt. (R. 5079) He married Aurora in 1973 and they had a daughter in 1975. (R. 5079) Valle was a devoted father and husband and tried to straighten himself out. (R. 5080) His sister Georgina was close to him. (R. 5080) Milledge opined that his criminal record was consistent with his gambling addiction. (R. 5082) Milledge opined that when Valle shot Pena, Valle thought that he (Valle) was the one who was going to be killed. (R. 5089) Valle was still close to his wife and daughter, but would not let them come to court, believing he had caused them enough pain already. (R. 5092-93) Milledge felt that Valle's "life circumstances" made him vulnerable and led to the murder. (R. 5093-94)

On cross-examination, she indicated that she was unaware of any incidents of abuse of Valle in which blood was drawn. (R. 5100) She also noted that Valle's sisters, Georgina and Carmen, who were subjected to the same upbringing, did not become involved in crime. (R. 5100) Valle's home in Cuba, until the age of 10, was a comfortable home. (R. 5101) Valle had a 1972 conviction related to his gambling problems. (R. 5119) He owed $800 to

a loan shark and he went to one of his father's clients, with a weapon, and asked for $800. (R. 5119) This episode preceded the "traumatic" death of his Aunt Izelle. (R. 5120) Valle's parents always provided shelter, support, clothing, etc. (R. 5127-28) This continued even under the difficult circumstances of the move to the United States. (R. 5127-28) The beatings to which she had previously alluded stopped by the time Valle was 10, 17 years before the murder of Pena. (R. 5129-30)

Robert Di Gracia, a consultant in the criminal justice field, was permitted by the court to give opinions as to what Valle would be like in the future. (R. 5216, 5229) Based upon a review of relevant documents and interviews with Valle, Di Gracia concluded that there was no indication of violence in the future. (R. 5229-33) On cross-examination, Di Gracia admitted that the potential for violence existed in the prison disciplinary incidents. (R. 5252) What he knew of the Officer Toledo incident would not affect his current opinion of Valle. (R. 5240-41)

Robert Castillo and Jose Ledon were character witnesses, who knew Valle in school, and noted his athletic skills and lack of fights in school. (R. 5282-92) Neither knew much of Valle since 1968.

Dr. Jethro Toomer, a psychologist, evaluated Valle in 1981 and 1987 and spoke to family members and others as part of the evaluation. (R. 5317) Toomer emphasized the importance of a person's past experiences. (R. 5315) He concluded in 1981 that Valle's behavior was the result of a culmination of a variety of "severe traumatic events," "stressors" that came together to influence his behavior. (R. 5318-19) Relevant factors included the quality and intensity of early family relationships with parents and others, and environmental factors. (R. 5319) The early family relations were allegedly traumatic because they showed a "lack of quality" and "dysfunction" within the family, as reflected in the "abuse" by the father and the moves

from Cuba to Miami, to New York, and back to Miami. (R. 5319-21) Another "traumatic" event was that subsequent to high school, Valle had a lack of "success of meeting expectations." (R. 5322) He blamed himself for the death of his aunt in the plane crash, since he bought her ticket. (R. 5324) The murder of Pena, according to Toomer, was a single, unusual event, representing the cumulation of all the above "stressors" Valle had been exposed to in his life. (R. 5326) Thus, and based on the above, Toomer believed that Valle was acting under extreme emotional distress and that Valle's ability to conform his conduct to the requirements of law was substantially impaired. (R. 5327) Between 1981 and 1987, Valle had become calmer, had a greater understanding of events, served as a translator in prison, read a lot, and continued his relation with his wife and daughter, but initiated a divorce to spare them. (R. 5345-47) Toomer believed that based on where Valle was now, if he were in the same position as at the time of the murder, he would not be violent. (R. 5347-48)

On cross-examination, the prosecution brought out that Valle had no prior history of psychiatric treatment; that there were never any physical injuries from the alleged parental abuse; that Valle's sisters did not have any problems with the law despite similar treatment. (R. 5360-66) Valle's parents still made weekly trips from Miami to Raiford to visit him. (R. 5368-67) Toomer was unaware that the episodes of abuse ended when Valle was about 10 years old. (R. 5367) Toomer was aware of the family's economic hardships after leaving Cuba and that the father had to work long hours. (R. 5368) Valle's IQ, at 127, was well above average; there was no evidence of brain damage; no evidence of a major mental disorder; and no evidence of hallucinations. (R. 5369-73) Toomer did not believe Valle was seeking to avoid jail even though Valle claimed that in his confession. (R. 5375)

With respect to the Officer Toledo incident, Toomer rejected the assumptions in Toledo's deposition since Valle gave him other explanations. (R. 5380) As to Valle's prior record, Toomer believed Valle kept committing these crimes in order to get caught and punished, even though Valle claimed he murdered Pena to avoid getting caught. (R. 5385, 5375) Valle knew, before and after the murder, that it was a crime to kill the officer. (R. 5395)

Pursuant to a defense request, prior testimony of Lester Coles, a defense witness who was incapacitated, was read to the jury. (R. 5441-45) Valle worked for Coles in 1969, training dogs, and was a "good worker". (R. 5442-43) Valle was terminated when he forged 10 checks, for about $2,300, from the business account. (R. 5443) Coles, however, was not mad at Valle. (R. 5444)

Georgina Martinez, Valle's twin sister, testified for the defense. (R. 5446, et seq.) Her testimony emphasized the beatings as a child and the lack of a good relation with the father. (R. 5450-67) She noted that in Cuba the family was well off, with a nice house, food, clothing and servants. (R. 5448) She related the manner in which the father punished the children. (R. 5450-57) She related Valle's athletic skills, the good years in New York, and the depression over Aunt Izelle's plane crash. (R. 5459-67) Their father never rewarded them for getting good grades; he always said they should do better. (R. 5460) They did not go to their high school graduation since the parents would not be there. (R. 5462) At the funeral of Izelle, their father prevented Valle from saying good bye to her by ordering a closed casket. (R. 5465) Cross-examination noted that all of the children were disciplined by the father, but only Valle had trouble with the law. (R. 5469)

Manuel Del Valle, the father, also testified. He recalled beating Valle with a belt when Valle was 5 or 6. (R. 5471) In Cuba, the family was wealthy, and the children could not play outside due to fears of kidnappers. (R. 5472) Other forms of punishment, when Valle was a child, included making him wear a dress, or forcing him to sit in a chair without sleeping for 1-2 hours. (R. 5473) On one occasion, Valle was punished for bad grades, and he was made to kneel with corns inside the knees of his trousers. (R. 5474-75) All of the children were treated the same. (R. 5475) Mr. Valle loved his son and daughters, tried to help them and believed that he was doing what was best. (R. 5475-78) Mr. Valle would not let his son become a ball player because he expected more from him. (R. 5476) Over the years, he has visited his son regularly in prison and has written often. (R. 5482) Cross-examination was brief, noting that the other children were similarly disciplined; that Mr. Valle did this out of love; and that he thought he was doing what was best. (R. 5483-87) He gave his family the best house, clothing and food that he could, and he noted the financial and work problems he encountered upon coming to this country. (R. 5485-86)

After the defense rested, the state presented two rebuttal witnesses. Lt. David Rice, a corrections officer, has been with the Florida Department of Corrections since 1978. (R. 5535-37) In July, 1984, he had the occasion to "shake down" another inmate's cell in Valle's wing, for security reasons, and noted that the cell bars were not uniform; there was a bulge in the bottom of some of the metal that shouldn't have been there. (R. 5537-39) Further investigation revealed that one bar of the cell had been cut from the ceiling to floor so that it could be removed. (R. 5540) Other cells, including Valle's, were then searched. (R. 5540) The bar on Valle's cell was similarly cut and would just slide out. (R. 5541) The towel bar in the cell is an item that is connected to the wall and set in concrete. (R. 5543) This

bar had been cut as well in Valle's cell. (R. 5544) Escape paraphernalia in Valle's cell and the other inmate's cell had the potential for violence if a breach of the bars had been attempted, since in order to get anywhere further, the escaping inmates would then have to take hostages. (R. 5545)

The state adduced further testimony from Rice to demonstrate that no one other than Valle could have cut the bar. A sergeant and two other officers are assigned to each wing; each inmate is handcuffed behind the back before removal from a cell and two officers accompanying each inmate; only one inmate is allowed out of the cell at any one time. (R. 5546-47) The method of transporting inmates to the exercise yard was also described. (R. 5547-50) For security reasons, it is necessary to remove inmates from the yard during storms. (R. 5549-50) With respect to Valle's contention that someone else cut his cell bar during painting of the cell, Rice noted that painting was done by the cell's inmate or a runner (a non-death row inmate). (R. 5550-51) If done by a runner, the level of observation by security guards is such that the runner would not have sufficient time to cut the bars. (R. 5551-52) When an inmate is removed from the cell, the cell is locked. (R. 5552) As to Valle's disciplinary report for a disturbance in the visitation area, Rice noted that this was a sensitive area, where a disruption could create major disturbances, especially since inmates are not handcuffed in this area. (R. 5554-55)

Ted Key, a rebuttal witness for the state, was a correction officer with the Florida State Prison who was currently engaged in classification of inmates. (R. 5605) The court permitted him to render opinions as to prisoner classification. (R. 5635-36) Based upon his review of Valle's prison file and disciplinary reports, he concluded that Valle had not adjusted well. (R. 5637) He found that Valle's eight disciplinary reports were substantially in excess of the inmate average for comparable periods of time.

(R. 5638-39) He noted that Florida State Prison has psychological counseling facilities and that all inmates are screened. (R. 5653) Valle never requested any psychological treatment. Id. Key also concluded that if Valle received a life sentence, he would remain in close custody due to his escape history, and he would try to escape again. (R. 5654) Valle would be an extreme escape risk if placed in the general prison population. (R. 5655)

The jury, on February 25, 1988, by a vote of 8-4, recommended that the sentence of death be imposed. (R. 6027, 882-883) On March 9, 1988, the judge heard further evidence from the defense, as Manuel Valle spoke on his own behalf (R. 6173), and his sister, Georgina Martinez, his niece, Ana Martinez, and the social worker, Ms. Milledge, addressed the court. (R. 6073, 6081, 6083) The court heard further arguments from counsel. (R. 6100-72)

On March 16, 1988, the court imposed the sentence of death. (R. 897-908, 6189-93) The court found the existence of five aggravating factors: (1) Valle was previously convicted of a felony involving the use or threat of violence to the person; (2) the killing was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (3) the killing was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; (4) the killing was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; and (5) the victim was a law enforcement officer engaged in the performance of his official duties. (R. 900-903) The second, third and fifth reasons were merged and were not treated as separate factors. Id. The court found that there was no evidence of any statutory mitigating circumstances. (R. 904-907) The court further found that the evidence did not establish any nonstatutory mitigating circumstances, or alternatively, that any such mitigating circumstances were outweighed by the aggravating factors. (R. 906-907)

Additional facts will be set forth in the argument section of this brief, where relevant.

SUMMARY OF THE ARGUMENT

I. In the absence of a proper objection, the Neil issue is not preserved for appellate review. Alternatively, the reasons volunteered by the prosecutor, in conjunction with other factors, reflect that a prima facie case was not established under Neil and that the reasons given were race neutral and valid.

II. Challenges after the swearing of the jury must be based on good cause. That was not established in this case, as the defense refused to permit the court to find out the facts relevant to juror Zollo.

III.(A). Evidence of guilt adduced at the sentencing phase was in no way excessive and was pertinent to several aggravating circumstances.

III.(B). References to Valle's prior death sentence were due solely to the defense strategy of emphasizing Valle's conduct on death row. The state's references to the same on cross-examination were proper under Teffeteller, infra.

III.(C). As defense experts expressed opinions about Valle's non-violence and considered his prison escape attempts and other incidents in conjunction with those opinions, the state could cross-examine those witnesses about matters and documents which they reviewed. Parker, infra. Limits on redirect examination of defense witnesses did not result in any abuse of discretion, as the matters had been fully and fairly explored. Similarly, the denial of surrebuttal testimony by Dr. Fisher was within the trial court's discretion. Questioning about a potential parole date became pertinent due to unsolicited and false information presented by a defense

witness. The prosecutor's questions were accurate and fully consistent with the law. Lastly, evidence of lack of remorse was not used as nonstatutory aggravating evidence, but to rebut mitigating evidence of remorse.

III.(D). The state properly attempted to impeach Dr. Toomer with a prior, sworn inconsistent statement. Examination of Toomer about his prior opinion of Valle's "insanity" was also proper, as the absurdity of that prior opinion directly related to the lack of credibility of his current opinions of Valle. The prosecutorial comments of which the Appellant complains did not improperly define mitigating circumstances and were accompanied by the judge's instructions that he, not the attorneys, instructs on the law. Most of the comments were not properly preserved for appellate review.

III.(E). Fla. Stat. § 921.141(5)(j) was not an invalid ex post facto law as that factor was inherent in other previously existing aggravating factors. The failure to instruct the jury that certain aggravating factors can be treated as a single factor was not error, as the standard instructions are adequate and as it is the court's order, not the jury's advisory sentence, which is subject to review vis-a-vis doubling.

III.(F). The Appellant's argument about "mandatory death" comments is predicated upon the erroneous proposition that a jury in Florida has absolute, unguided discretion. When a jury finds that sufficient aggravating factors exist and outweigh any mitigating factors, it must recommend death.

IV. The prosecutor's comments did not violate Booth v. Maryland, infra. If any comment did appeal to the jury's sympathy, it was not serious enough to warrant reversal of a sentencing proceeding. Bertolotti, infra.

V. Sufficient evidence was adduced that the killing was cold, calculated and premediated, especially where Valle announced his intention to kill before proceeding to do so. The lower court properly weighed the aggravating and mitigating evidence and properly concluded that insufficient evidence was adduced to establish any mitigating factors.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN FAILING TO CONDUCT A NEIL INQUIRY.

The Appellant contends that the trial court erred in failing to conduct an inquiry, pursuant to State v. Neil, 457 So.2d 481 (Fla. 1984), as to Appellant's allegations that the prosecution utilized peremptory challenges in a racially discriminatory manner. A review of the record reveals that: (1) the defense never made a proper objection under Neil and never requested a Neil inquiry; (2) the defense never established the prima facie case required under Neil; and (3) the reasons for the peremptory challenges, which were voluntarily proffered by the prosecution, were acceptable race-neutral reasons.

At the outset of voir dire, members of the initial panel were subjected to individual questioning regarding knowledge about this case and views on the death penalty. (R. 1751-2356) The court then conducted general voir dire as to the entire panel (R. 2359-2412), followed by questioning by the prosecution (R. 2413-2777), and by the defense. (R. 2778-3073) Peremptory challenges as to the initial panel were then exercised. At this time, the state exercised a peremptory challenge as to Helen Brooks, a black woman, noting that she was "wearing sun glasses, scarf pulled over her head during the entire course of the proceedings." (R. 3080) Defense counsel responded that "[s]he also reported she was freezing in the courtroom. I'm sure that

had a lot to do with the sunglasses and the cap on her head in court." (R. 3080) The state next peremptorily excused Candace Williams. (R. 3081) Defense counsel requested that the record reflect that Ms. Williams is black. (R. 3081) The prosecution stated for the record that Ms. Williams "said that [the prosecutor] gave her a headache" and that she was dressed "rather sloppily, . . . in some sort of running or jogging outfits since the first day. She is either reading something outside of this proceeding or taking notes on proceedings. She's constantly looking down and scribbling on some writing material that is in front of her which the state found extremely distracting and inattentive." (R. 3081-82) Defense counsel responded that Ms. Williams was attentive, but acknowledged that she was taking notes. (R. 3082) As of this time, defense counsel did not object to the prosecutor's use of peremptory challenges and did not request an inquiry under Neil.

The court then recalled several of the initial panel members for further questioning. (R. 3089-3128) At this time, the state peremptorily challenged John Johnson, a black man, because of his views on the death penalty, as he had stated that "'the death penalty serve no useful purpose. They should do life in prison. . . . .'" (R. 3122-23) Defense counsel requested only that the record reflect that Mr. Johnson is black. (R. 3122-23)

Fifteen new jurors were then brought in for questioning. (R. 3136) Defense counsel then noted for the court that the state's three peremptory challenges were used on blacks, but there was no objection or request for a Neil inquiry. (R. 3142-43) At the conclusion of questioning of this panel, the state peremptorily excused Rosalind Baldwin and Woodrow Clark. (R. 3629-3631) Defense counsel, without objecting, noted that Ms. Baldwin and Mr. Clark were black. (R. 3629, 3631)

Selection of the regular jury was then completed and alternates were then chosen. The state peremptorily excused Ethel Ford, a black woman, from the alternate panel, without any objection or comment from defense counsel. (R. 3632)

Subsequent to the completion of jury selection, but prior to the swearing of the jurors, the court inquired whether there were any other matters which needed to be addressed and defense counsel asserted:

> MS. GOTTLIEB [Defense Counsel]: Very quickly, in terms of jury process selection protest, in total, over the last few days we have had four individuals excused for cause as automatic death penalty. All of these individuals were white. In terms of alleged automatic life jurors, 13 were excused for cause, six of these were black, four were white, three were Hispanics. I have the names. I don't want to waste the time, if the state will stipulate to that.
>
> MR. LAESER [Prosecutor]: I think that is fair, accurate. I don't think Miss Gottlieb would mislead the Court.
>
> MS. GOTTLIEB: In terms of peremptory, the state excused eight jurors. Of these, six were black, two were hispanics.
>
> Additionally, while this defense --
>
> Do you have any problems in terms of that?
>
> MR. LAESER: That is fairly accurate. Will you be making some claim about the impropriety of the selection? So I know whether to respond, or are you putting things in the record to clear your voice.
>
> MS. GOTTLIEB: I'm claiming an impropriety in the record.
>
> MR. LAESER: Now, we need a hearing, I guess, to find out what the nature of the impropriety is and the claim.
>
> THE COURT: It would be helpful, Miss Gottlieb.
>
> MS. GOTTLIEB: Statistically, it's a problem.

THE COURT: It is. It is a statistic claim, not a person-by-person claim.

MS. GOTTLIEB: It's a person-by-person claim based on the statistics.

THE COURT: Okay.

MS. GOTTLIEB: The review as the jurors were excused.

MR. LAESER: I'm not sure I understand it because I know we have blacks and Hispanics on the present jury. What is the exact nature of the claim?

MS. GOTTLIEB: Exact nature of the claim is that six blacks were excused peremptorily by the state, two Hispanics were excused peremptorily by the state. The reasons -- one reason given was such that the state didn't approve of how these individuals were dressed. One individual, I believe, wore a cap in this sometimes cold courtroom. I don't recall the other reasons given. The defense did not believe they were well founded.

MR. LAESER: I'm really not interested in what your belief is. If somebody comes into the courtroom wearing sunglasses, that shows me exactly how much respect they have in the court system and will not sit on a jury case where I am one of the litigants.

MS. GOTTLIEB: There were others who wore sunglasses that were not excused by the state.

MR. LAESER: They were excused by the defense.

MS. GOTTLIEB: Mr. Palumbo wore sunglasses.

MR. LAESER: He was excused by the defense.

THE COURT: Any other problem of particular jurors?

MS. GOTTLIEB: Want me to name them?

MR. LAESER: I want to know who the problem is because I want --

THE COURT: If there is a problem, I want the state to be able to respond in whichever manner they wish to.

MS. BRILL: Before we do that, are you making a finding that the state has in somehow improperly excused jurors because of --

THE COURT: No. The Court is making no such finding. What the Court is doing, since Miss Gottlieb is making a record. Mr. Laeser wants to respond for the record, I've been asked to make no findings and I am making no findings but for record-keeping purposes she has some objection to the state's action and, of course, I'm giving the state an opportunity to respond in time.

MS. BRILL: What I understand, we don't have to respond unless you make a determination first.

THE COURT: I think the state wishes --

MR. LAESER: I don't mind to --

THE COURT: The State wants to respond without me asking. I'm giving them an opportunity.

MS. GOTTLIEB: In terms of peremptory challenges by the state, Judge, Juror Candace Williams -- Helen J. Brooks was a black female. Juror Rosalind Baldwin is a black female. Juror Woodrow A. Clark was a black male. Juror Ethel Ford was a black female. Juror Xiomara Pazos was a Hispanic female. Felix M. Lopez was a Hispanic male. That is eight of the nine peremptories exercised by the state.

(R. 3694-97)

The prosecution then commenced to note its reasons for the various challenges. As to Candace Williams, the prosecutor noted that in her views regarding the death penalty, she had responded, "If ordered by law to do so, I will." (R. 3698) She was also writing throughout voir dire and had complained that the prosecutor gave her a headache. (R. 3698-99) Ms. Brooks wore sunglasses and a cap and scarf pulled over her head. (R. 3699-3700) Mr. Johnson was excused because of his views on the death penalty. (R. 3700) Ms. Baldwin was challenged because members of her family had been in the prison system and represented by the Public Defender's Office. (R. 3701) She had read articles about the signing of death warrants and felt bad for those

people when she read about them. (R. 3701) Initially she did not know how she felt about the death penalty, but then she equivocated. (R. 3702)

The court then interrupted the prosecutor's statement of the reasons for challenges to commence the trial, but permitted the explanations to resume subsequently. (R. 3702-3703) The jurors were then sworn (R. 3707) and opening arguments commenced. (R. 3711) The state's first two witnesses also testified. (R. 3779, 3796) The next morning, the court permitted the explanation of the prosecution's reasons for peremptory challenges to resume. (R. 3850-56) With respect to Mr. Clark, the prosecutor noted that Clark had a son who had 30 grand theft counts being currently prosecuted by the Dade County State Attorney's Office, and that Clark was being "untruthful" about his purported relation with a police officer. (R. 3851-52) As to Ms. Ford, the prosecutor emphasized her views on the death penalty and her son's representation by the Public Defender's office. (R. 3852-53) The prosecutor also felt that her answers were untruthful as to what prison her son was at. (R. 3853) At the conclusion of the prosecutor's explanations, defense counsel addressed the court, and objected.

> . . . on the basis of [Valle's] Sixth, Eighth and 14th amendment rights, to the combination of the challenges for cause, either peremptory challenges leading to a jury that is in favor of the death penalty. I think the problem has been exacerbated by virtue of the fact that the jury's alternatives presented are the death penalty or life with a minimum mandatory 15 years, essentially, and to my knowledge an unprecedented manner in which the prosecution voir dired these jurors as to the issue of death as punishment.
>
> (R. 3856-57)

The court responded: "Same Court ruling" (R. 3857)

A. Neil issue not preserved for appeal

The exercise of a peremptory challenge is presumed to be in a nondiscriminatory manner unless the "party concerned about the other side's

use of peremptory challenges . . . demonstrate[s] on the record that the challenged persons are members of a distinct racial group and that they have been challenged solely because of their race." State v. Neil, 457 So.2d 481, 486 (Fla. 1984). Only when the defendant makes the requisite showing of the prima facie case is the court required to conduct an inquiry into the reasons for the peremptory challenges. Id. A Neil objection, as to the improper use of peremptory challenges, must be raised prior to the jury being sworn. State v. Castillo, 486 So.2d 656 (Fla. 1986).

In the instant case, defense counsel never asserted any objection which could even be remotely construed as an objection under Neil and a request for a Neil inquiry. Defense counsel never argued Neil to the trial judge. Defense counsel never requested a Neil inquiry. Defense counsel never alleged that the state was engaging in the discriminatory use of peremptory strike; defense counsel merely noted for the record that the stricken person was black. After jury selection was concluded, defense counsel addressed the court about jury selection, again without raising a Neil objection. (R. 3694-3703) Defense counsel spoke about the use of cause challenges to exclude those automatically opposing or favoring the death penalty. (R. 3694) This has nothing to do with Neil. When the prosecutor questioned the nature of defense counsel's alleged impropriety, defense counsel responded, "Statistically, it's a problem . . . . It's a person-by-person claim based on the statistics. . . The review as the jurors who were excused." (R. 3695) Again, there is no allegation of the discriminatory use of peremptory challenges and no invocation of Neil. Indeed, Neil has precious little to do with "statistics." ("We agree with Thompson that the exclusion of a number of blacks by itself is insufficient to trigger an inquiry into a party's use of peremptories." Neil, 457 So.2d at 487, n. 10). Defense counsel then questioned the previously set forth reasons for one of the state's peremptory

challenges. (R. 3695-96) The prosecution then asked the court if it was making a finding that the state somehow improperly excused jurors. (R. 3696-97) When the court responded negatively, that he was not asked to make any findings, that he was just permitting the defense to make a record, and the state an opportunity to respond, defense counsel still said nothing about Neil or any alleged discriminatory use of peremptory challenges. (R. 3696-97) The prosecution then stated its reasons for some of the peremptory challenges. (R. 3697-3703) When that explication resumed the next day, defense counsel's sole effort to explain the pending objection was that the combination of cause challenges and peremptory challenges served to result in a jury which favored the death penalty. (R. 3856-57) Not only did this uttered objection have nothing to do with Neil, but no further objection, on the basis of Neil, was ever made.

"In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." Tillman v. State, 471 So.2d 32, 35 (Fla. 1985). An attorney who wishes to present a claim that the state is violating Neil can very simply tell the judge that the state is using peremptory challenges in a discriminatory manner. That was never done in the instant case. The only objections were some ambiguous reference to "statistics" and the objection regarding the jury being biased in favor of the death penalty.

B. Absence of prima facie case

Even if the defense is deemed to have preserved the Neil claim, relief was properly denied as the defense failed to establish the requisite prima facie case under Neil. Under Neil, the defendant must "demonstrate on the record that the challenged persons are members of a distinct

racial group and that they have been challenged solely because of their race." 457 So.2d at 486. This was clarified in State v. Slappy, 522 So.2d 18, 21 (Fla. 1988):

> Unfortunately, deciding what constitutes a "likelihood" under Neil does not lend itself to precise definition. It is impossible to anticipate and articulate the many scenarios that could give rise to the inference required by Neil and Batson. We know, for example, that number alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate. ... Indeed, the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other.

A bright-line test was not adopted, as it would "cause more havoc than the imprecise standard we employ today, since racial discrimination itself is not confined to any specific number of forms or effects." Id. This Court reaffirmed the test set forth in Neil. Id. at 21-22. The Court found that "when the state engages in a pattern of excluding a minority without apparent reason, the state must be prepared to support its explanation with neutral reasons based on answers provided at voir dire or otherwise disclosed on the record itself." Id. at 23.

The facts, as set forth above, render the instant case virtually indistinguishable from Reed v. State, 15 F.L.W. S115 (Fla. Mar. 1, 1990). In Reed, the prosecutor used eight of ten peremptory strikes to excuse blacks from the jury prior to the Neil objection. 15 F.L.W. at 116. The trial court observed that two of the 12 persons seated on the panel as of the time of the objection were black and had been accepted by the state. Id. This Court noted that the defense was not questioning "the prosecutor's motivation for five of his eight challenges, and the reasons for the other three had at least some facial legitimacy." Id. This Court held:

> Given the circumstances that both the defendant and the victim were white and that two black jurors were already

> seated, we cannot say that the trial judge abused his discretion in concluding that the defense had failed to make a prima facie showing that there was a strong likelihood that the jurors were challenged because of their race.

Id. Just as two blacks were seated in Reed at the time of the objection, so, too, two blacks were already accepted and seated at the time of the alleged objection in the instant case.[6] So, too, in both cases, the defendant was white. While this latter reason does not preclude the defendant from objecting to peremptory challenges to blacks, the respective races of the challenged jurors and the defendant are relevant in the determination of whether the challenges are being exercised on the basis of race. Kibler v. State, 546 So.2d 710, 712 (Fla. 1986). Kibler explicitly held:

> Thus, a defendant of a different race than the jurors being challenged may have more difficulty convincing the trial court that 'there is a strong likelihood that they have been challenged only because of their race.' Moreover, in those cases in which the inquiry had been directed to the challenging party, the respective races of the challenged jurors and the defendant may also be relevant in the determination of whether the challenging party has met the burden of showing that the challenges were made for reasons not solely related to race.
>
> Id.

Additionally, as in Reed, the reasons given by the prosecution, as set forth above, were clearly valid, race-neutral reasons. Reed expressly permits the trial judge to consider reasons volunteered by the prosecution, in determining whether a prima facie case exists under Neil. 15 F.L.W. at 116. Also, as in Reed, when the prosecutor gave his explanations,

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[6] At the time of the alleged objection in the instant case, jury selection was already completed, but the jury was not yet sworn. Thus, the final jury is the same as the jury at the time of the alleged objection. Two blacks had been accepted as of that time for the regular panel, and one black as an alternate. (R. 6059).

defense counsel appeared to accept, without further argument, all but one (Ms. Brooks).

In the instant case, the state used eight peremptories on the regular panel (jurors Williams, Brooks, Johnson, Baldwin, Clark, Shourds, Lopez and Pazos) and one on the alternate panel (Ford). (R. 64-65, 69-70; 3080-82, 3122-23, 3628, 3631-32) Four of the eight peremptory challenges on the regular panel were for blacks, as was the peremptory challenge to the alternate.

Candace Williams, as previously noted, was excused by the state because she complained that the prosecutor gave her a headache, because she dressed sloppily for a jury trial (wearing jogging outfits), because she was constantly taking notes throughout the proceedings, and because of her views on the death penalty. (R. 3081-82, 3698) The record reflects that the prosecutor questioned her about the concept of weighing aggravating and mitigating circumstances, and after several questions, when asked for her thoughts, she responded, "I don't know. You are giving me a headache. You've got me thinking." (R. 2678) The state does not believe that it is obligated to accept jurors who complain when they are asked to think. As to her views on the death penalty, she stated: "If ordered by law to do so, I will." (R. 2726) While this obviously does not qualify for a challenge for cause, the state could certainly infer from her choice of words an element of hesitancy and a preference for not recommending the death penalty. As to her constant note taking, defense counsel acknowledged that this was occurring. (R. 3082) It is not unreasonable to infer from this that while taking notes, Ms. Williams was giving the voir dire proceedings less than her full attention. With respect to the jogging outfits, it is not unreasonable to infer that most people attribute to judicial proceedings a somewhat higher level of dignity than the casualness associated with jogging outfits.

Mr. Johnson was excused because of his views on the death penalty. (R. 3122-23, 3700) Mr. Johnson had stated that the death penalty "serves no useful purpose. If someone be punished, seemed like they should do time." (R. 2312) On another occasion, he stated that even if the aggravating factors outweighed the mitigating factors, he could not sign his name to a death recommendation. (R. 2756) Similarly, he could not think of any case where he could recommend the death penalty. (R. 2756) He later said that the Bible says "that you shall not kill. Why should I be part of maybe you can get the death penalty." (R. 2817) He continued: "Maybe, I feel like it's death but I still wouldn't want to be the one because I said death, I wouldn't want to go along with that because it's not up to me to determine whether he should be able to die. Life, I go along with, but the death part, I don't know want to go along with." (R. 2818) Regardless of what he heard, he was not going to vote for the death penalty. (R. 2820) On further questioning, he finally said that he could begrudgingly vote for the death penalty, even though he wouldn't want to. (R. 3116) The court denied a challenge for cause and the state peremptorily excused Johnson. (R. 3122) If Johnson's views of the death penalty somehow fell short of qualifying for a challenge for cause, that state's use of a peremptory challenge is clearly understandable and justifiable, given the painfully clear hostility which Johnson displayed towards the death penalty.

Ms. Baldwin was excused because members of her family had been arrested, because she equivocated about the death penalty, and because she "felt bad" for death row inmates. (R. 3701-3702) When questioned about the death penalty, she first said that she was "not sure about it." (R. 3439) She then spoke with great hesitancy about it ("I don't think one person's life substituted for another -- you know, it's not going to bring the other person back." [R. 3439-40]) On further questioning, she said that she did

not think she could ever recommend the death sentence unless it involved her or someone personally close to her. (R. 3444-45) She then modified this view to indicate that she could consider recommending it in other cases, depending upon the facts. (R. 3445) Merely because Ms. Baldwin was rehabilitated by the latter questioning does not mean that the state must accept her given her previously expressed adversity to the death penalty. Peremptory challenges are obviously intended for use in situations which fall short of cause challenges. The record also reflects that her brother had been convicted of a crime in Dade County and had served time in prison and that she had visited the prisons. (R. 3315, 3508, 3515)

As to Woodrow Clark, the prosecutor noted that his son currently was being prosecuted by the State Attorney's Office for 30 counts of grand theft. (R. 3851-52) Clark advised the judge of this in a private colloquy, as he did not want to say it in front of other jurors. (R. 3300-01) While Clark denied that it would affect him on this case, the prosecution could certainly have legitimate concerns about Clark's latent feelings for the same State Attorney's Office which was currently prosecuting his son on major charges. Clark also indicated he was friendly with a Metro Dade police officer, Amos Mechanic, with whom he played basketball on Sundays. (R. 3277-78) The prosecutor indicated that his office contacted Sergeant Mechanic, who indicated he had not seen Clark since they were in high school, thus questioning the veracity of Clark's responses. The foregoing reasons are clearly a legitimate basis for a peremptory challenge.

Helen Brooks was peremptorily excused because she wore sunglasses and had a cap and scarf pulled over her head throughout the proceedings. (R. 3080, 3699-3700) Defense counsel's response that the courtroom was cold hardly explains the sunglasses being worn in the courtroom. The Appellant suggests that this reason was a ruse because the state failed to excuse

a white juror who also wore sunglasses. What the Appellant fails to note is that the other juror with sunglasses, Mr. Palumbo, was excused by the defense for cause, because he could not hear, and the glasses were due to double vision. (R. 3696, 2441, 3099-3100) Thus, Ms. Brooks was not singled out, and the challenge was not a pretext. As to the defense contention that the courtroom was cold, while the judge did concur, the prosecutor further noted that no one else in court had caps and scarfs pulled over their heads. (R. 3700) Indeed, if the coldness of the courtroom had such an extreme and unique effect on Ms. Brooks, the prosecution could legitimately be concerned that the climate of the courtroom would distract her attentions and make her uncomfortable throughout the trial.

Lastly, Ms. Ford, the alternate, was excused because of her views on the death penalty and her son's representation by the Public Defender's Office. (R. 3852-53) The record did reflect that her son had been represented by the public defender. (R. 3357) This raises legitimate concerns that she would be sympathetic towards other public defenders, in appreciation for services rendered to her son. Her views on the death penalty also presented cause for concern. At times she said she did not think she could give the death penalty (R. 3455-56), while at times she said she thought she would follow the law. (R. 3456-57, 3460) She later said that she thought the death penalty was never justified because she did not believe in killing people. (R. 3621) After questioning by the court rehabilitated her (R. 3621-22), the court refused to strike her for cause. (R. 3623) Nevertheless, as with other jurors, her animosity towards the death penalty was a legitimate, documented concern of the prosecution, and her answers wavered, including some expressing outright refusal to consider the death penalty.

As can be seen from the foregoing, the documented reasons for the state's peremptory challenges were race-neutral. Consistent with the guidelines set forth in Slappy, supra, those individuals were not singled out for special questioning; the prosecutor's reasons bore a clear relation to the case; the challenges were based on reasons applied uniformly to other jurors; the jurors in question did have the alleged biases; and all jurors were subjected to comparable questioning. 522 So.2d at 22. Thus, as previously noted, Reed permits the reasons volunteered by the prosecutor to be considered in any determination of whether a prima facie case exists under Neil. The state would also note that as in Reed, the reasons proffered by the prosecutor as to four of the above challenges were not contested at trial. The only one that defense counsel disputed, when stated by the prosecutor, was the reason given for Ms. Brooks.

Lastly, as the prosecution had not used its 10 peremptory challenges (See Fla.R.Crim.P. 3.350(a)), the fact that a remaining challenge was not used on any of the accepted black members of the panel is yet a further factor for finding the absence of a prima facie case.

The Appellant complains that the judge did not make any finding on the record. If the Appellant's objection did raise a Neil issue, the judge's denial of relief, after having heard a lengthy recitation of reasons for the challenges, is fully consistent with a finding, as in Reed, of a lack of a prima facie case, or of the race-neutral basis for the reasons, and their support by the record.

II

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT A PEREMPTORY CHALLENGE SUBSEQUENT TO THE SWEARING OF THE JURY, BUT BEFORE ANY EVIDENCE WAS PRESENTED, WHERE THE REQUISITE GOOD CAUSE WAS NOT ESTABLISHED.

After the jury was sworn (R. 3707), but prior to the presentation of any evidence, the prosecutor advised the court that he had just learned that the deceased officer's first and ex-wife, who was sitting in the courtroom audience, recognized juror Zollo. (R. 3759-60, 3765) The ex-wife had told the prosecutor that she had once needed to borrow money from her employer, and that her employer didn't have the funds available and suggested that he would borrow from Mr. Zollo and that she would then repay her employer. (R. 3759-60) The transaction occurred about 1 1/2 - 2 years earlier[7] and the ex-wife told the prosecutor that she did not think the juror would recognize her because she looked different. (R. 3759) The prosecutor did not know whether juror Zollo even knew that the woman was related to the deceased officer. (R. 3760-61)

Defense counsel requested a peremptory challenge for Mr. Zollo. (R. 3761) The trial judge wanted to ascertain whether Mr. Zollo knew the woman and knew that she was related to the deceased officer. (R. 3763-66, 3772) The judge suggested asking Zollo whether he recognized anyone in the courtroom, but the defense objected that that would "poison" Zollo. (R. 3764) The judge then suggested asking all jurors, without singling Zollo out, whether they recognized anyone in the courtroom, but the defense still objected. (R. 3764-66) Defense counsel feared that this would highlight the presence of uniformed police officers in the courtroom, so the judge offered to remove all officers at the appropriate time. (R. 3766) When the defense rejected these alternatives, the judge said that "[f]actually there has been no good cause shown." (R. 3769) The judge continued, that "at the present time . . . . [a]ll there is is supposition." (R. 3770) Due to the absence of

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7 The victim in this case was murdered in 1978, ten years prior to the instant resentencing proceedings.

a "factual foundation," the judge denied the request to exercise a peremptory challenge. (R. 3775)

Rule 3.310, Florida Rules of Criminal Procedure, provides:

> The State or defendant may challenge an individual prospective juror before the juror is sworn to try the cause; except that the court may, for good cause, permit it to be made after the juror is sworn, but before any evidence is presented.

The Appellant has argued herein that the phrase "for good cause," permits peremptory challenges after the swearing of the jury, and "relates only to the point in time at which the basis for the peremptory challenge is known and/or reasonably available to the party seeking to use the challenge, and not to the persuasiveness of the reason underlying the desire of a party to strike the juror." (Brief of Appellant, p. 13). Thus, the Appellant asserts that the merits and factual basis for a challenge after the swearing of the jury are irrelevant. The Appellant's argument: is repudiated by the language of the rule itself; is not supported by any case law; and totally defies the exercise of common sense.

Starting with the rule itself, it should be noted that the rule provides that the court may permit a challenge, for good cause, after the swearing of the jury. The term "may" has routinely been construed to be permissive and discretionary, not mandatory. City of Miami v. Save Brickell Avenue, Inc., 426 So.2d 1100, 1105 (Fla. 3d DCA 1983); Dept. of Health and Rehabilitative Services v. Johnson, 504 So.2d 423, 425 (Fla. 5th DCA 1987); Harper v. State, 217 So.2d 591, 592 (Fla. 4th DCA 1969); Brooks v. Anastasia Mosquito Control District, 148 So.2d 64 (Fla. 1st DCA 1983).[8] Thus, the

[8] The sole exception is when a statute says that a thing may be done which is for the public benefit. Mitchell v. Duncan, 7 Fla. 13, 21 (1857). Thus, in Mitchell, a statute providing that "execution may issue against ... securities on the bond" after an "affidavit of illegality" was set aside, was deemed mandatory. Such a "public benefit" exception is inapplicable in the instant

element of discretion inherent in the language of the rule, flies in the face of the Appellant's assertions. The Appellant argues that the "good cause" language permits both peremptory and cause challenges after the swearing of the jury, because the rule applies to both peremptory and cause challenges. That argument ignores the obvious distinction built into the rule: prior to the swearing of the jury the rule permits "challenges" by the parties; after the swearing, the rule permits challenges only "for good cause." Thus, something more than the run-of-the mill peremptory challenge is required, even if it does not necessarily satisfy the normal requirements of a challenge for cause.

Pursuant to the Appellant's argument, as long as defense counsel presented a belatedly-discovered reason to the judge, the defense would be entitled to a post-swearing peremptory, regardless of the merits or factual basis for the "reason," and regardless of the frivolity of the reason. Thus, if defense counsel advised the court, after the swearing of the jury, that he wanted to exercise a peremptory challenge because he just learned that juror "X" ate an omelet for lunch, and juror X's eating habits were not previously known, the concomitant result, and reductio ad absurdum, of the Appellant's argument, is that a peremptory challenge would be mandated as to this newly discovered reason. After all, the judge cannot question the merits or factual basis of the newly discovered reason. Obviously, the Appellant's argument leads into the realm of utter nonsense, and the foregoing, and admittedly absurd, example reflects that it is clearly necessary to

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case. Mitchell also said that "[w]here a statute directs the doing of a thing for the sake of justice, the word may means the same as shall." Id. Unsubstantiated factual suppositions do not implicate "the sake of justice." As the unsubstantiated, unexplored allegations did not demonstrate that Zollo would be biased, the interests of justice are in no way involved.

permit inquiries into the merits and factual basis of the newly discovered "reason" lest the jury selection process result in a never-ending circus.

In the absence of any Florida cases discussing "good cause" in the context of post-swearing challenges, the Appellant has relied on several cases from other jurisdictions with rules similar to 3.310. See, State v. Lupino, 268 Minn. 344, 129 N.W.2d 294 (1964); In re Mendes, 153 Cal. Rptr. 831, 592 P.2d 318, 320 (Cal. 1979); State v. Jackson, 43 N.J. 148, 203 A.2d 1 (1964). None of these cases supports the Appellant's interpretation of Rule 3.310. Several distinguishing features characterize those cases. First, and most significantly, the entire "factual basis" of the matter was fully explored before the trial courts, and not left in the status of unexplored supposition. In none of these cases did defense counsel endeavor to thwart the court's exploration of the relevant facts, as was done in this case. Second, the incidents in each of those cases arose prior to the completion of jury selection. Those other states all follow procedures under which individual jurors are questioned on voir dire and then sworn, before voir dire proceeds as to the next juror. Thus, these cases involved attempts to peremptorily strike previously sworn jurors, but prior to completion of jury selection. Those cases are therefore consistent with the rule in Florida that a court cannot prohibit backstriking prior to the swearing of the entire jury. Gilliam v. State, 514 So.2d 1098 (Fla. 1987); King v. State, 461 So.2d 1370 (Fla. 4th DCA 1985). Those cases have nothing to do with situations arising after the entire jury has been sworn. Third all of those cases duly note the discretion that the trial court had in determining whether to permit the additional peremptory challenge. Since those courts are noting that discretion exists, even as to matters discovered belatedly, the discretion obviously had to apply to the nature of the proffered reason for a challenge. See also, State v. Owens, 373 N.W. 2d 313, 316 (Minn. 1985) (no abuse of

discretion in refusing a defense requested peremptory challenge when the juror in question had already been sworn and it was subsequently learned, prior to completion of jury selection, that the juror had misrepresented some answers during voir dire).

The State of New York, in § 371 of its Criminal Code, has a provision similar to Rule 3.310 ("A challenge must be taken when the juror appears, and before he is sworn; but the court may, in its discretion, for good cause, set aside a juror at any time before evidence is given in the action." Rule quoted in People v. West, 327 N.Y.S.2d 493, 496 (N.Y. App. 1971) (in dissenting opinion). The New York Court of Appeals, in People v. Harris, 57 N.Y.2d 335, 442 N.E.2d 1205 (1982), nevertheless concluded that after the swearing of the juror, only challenges for cause were permitted, and that there was no error in denying a peremptory challenge when it was discovered, after the swearing of the juror, that a prosecutor had been instrumental in obtaining the dismissal of an indictment of that juror's daughter in another case; the juror had previously said she was unaware of the disposition of the daughter's case.

In People v. Castro, 497 N.E.2d 174 (Ill. App. 1986), the court found a right to belated peremptory challenges after the juror was sworn, where a juror was discovered to have misrepresented answers in voir dire. The appellate court found that "additional inquiry was warranted." Id. at 176. So, too, in the instant case, additional inquiry would have been warranted, but was prevented by the defense. The court in Castro also found that the reason, based on full knowledge of the facts, was sufficiently serious to warrant the use of further belated peremptory challenges. Id.

Accordingly, the case law from other jurisdictions in no way supports the Appellant's contorted interpretation of Rule 3.310. However, even if the Appellant were correct, that the good cause requirement relates

solely to the discovery of the new matter and not to its merits or factual basis, the Appellant still failed to demonstrate good cause. Defense counsel, during voir dire, could have asked all prospective jurors if they knew any of the deceased officer's relatives, including his ex-wife. Defense counsel failed to ask any such questions, thereby indicating that during voir dire defense counsel did not believe that this area was of any significance to counsel's decisions on the use of peremptory challenges. When defense counsel, given the opportunity to ask questions about this during voir dire, but failed to do so, defense counsel cannot then turn around and claim good cause for the belated discovery when counsel failed to exercise due diligence. This is clearly unlike the foregoing cases in which jurors were subsequently caught after they misrepresented facts to defense counsel during voir dire, for areas which counsel did diligently explore.

III

THE DEFENDANT WAS NOT DENIED A FAIR AND RELIABLE JURY SENTENCING HEARING BY PROSECUTORIAL MISCONDUCT.

A. There was no "overkill" in the state's case-in-chief.

Prior to the resentencing hearing, the defense filed a motion in limine which argued, inter alia, that the state should be limited in the presentation of evidence of the defendant's guilt. (R. 128, 146-150) The state filed a written response to the motion. (R. 155, 165-167) The court, upon hearing the motion, initially ruled as follows:

> Anyway, it is clear that they have the right to establish the framework, his guilt, and of the aggravating circumstances they need to prove beyond a reasonable doubt. Of course I am going to let them do that.
>
> If the Court feels that this is turning into -- that they are bringing in lots and lots of witnesses that they

> absolutely do not need, obviously I am going to stop them. They are entitled to put in a certain amount of evidence which is going to be distasteful to the defense.

(R. 1284) At the outset of voir dire, the judge advised the prospective jurors that Valle had already been found guilty of first degree murder and that this proceeding was solely for sentencing. (R. 1751-52) The judge later reiterated this to the panel, and added, with approval from the defense that:

> Consequently, I will not permit the prosecution to prove guilt or the defense to contest it. You will not concern yourself with the question of Mr. Valle's guilt. Now, you should also know that Mr. Valle was previously sentenced to death in an earlier trial of this case. You are here because relevant evidence that the jury should have heard in the trial was excluded from the previous jury, through no fault of either party.

(R. 2357-58)

Subsequently, during the course of voir dire, the prosecutor asked whether panel members had difficulty accepting the fact that another panel had already determined guilt. (R. 2613-2659, 3379-3403) Many of the jurors had some problems with this concept and indicated that even though they were only there for the sentencing proceeding, they felt the need to know the facts of the crime for which they were being asked to recommend the death penalty.[9] After hearing several questions and answers about this matter, defense counsel requested that the judge instruct the jury "that they

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[9] Juror Sommerville stated, "Also, I would want to know the facts leading up to the defense, if they insisted I be on the jury." (R. 2622). She had a problem with the notion that she would hear just limited facts. (R. 2622). Juror Pazos would ignore the issue of guilt, but he "would like to know what is going on, what happened." (R. 2624). Jurors Williams and Smith both said, "give me the facts." (R. 2625-26). Juror Fiolin could accept the fact of the defendant's guilt "if the evidence is presented." (R. 2632-34). Juror Madruga had some problems with splitting the guilt and sentencing juries. (R. 2636-37). Juror Collins wanted to know all the relevant information because "I feel the first jury did and I cannot make a rational decision unless there were questions that were answered for me." (R. 2641). Other jurors made similar comments. (R. 2656, 3379).

will be hearing the facts of the case even though they won't be deciding guilt or not guilt [sic]." (R. 2627) The defense wanted to instruct the jury that no evidence was going to be excluded, even though some evidence of guilt might not be presented. (R. 2628) The judge decided to tell the jury that "the issue of guilt or innocence is not to be considered by them because that issue has been resolved, but they will have a recitation of all relevant facts concerning this case." (R. 2629-30) Defense counsel accepted this cautionary instruction by stating, "Fine." (R. 2630) The court then gave such an instruction:

> Getting back to the issue at hand, this hearing again is not over guilt or innocence and that issue has already been resolved. So, of course, you won't hear the full trial of that issue but you will hear a full recitation or presentation of all relevant facts so that you can make an intelligent decision in this case. That you will definitely hear.

(R. 2630-31) When the second venire panel was questioned about the same issue, a similar cautionary instruction was given pursuant to defense counsel's request. (R. 3399-3400) This panel was also apprised that it was not determining guilt. (R. 3399-3400, 3150-52)

Subsequent to voir dire, and during the state's case-in-chief, the defense repeatedly objected that various portions of evidence related only to the guilt phase. (R. 3667, 3870, 3967, 3752, et seq.) The judge, on several occasions, stated that the comments of the jurors, during voir dire, regarding the need to know the facts, made an impact on him.[10]

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[10] Thus, the judge said, at one point: "I had one feeling about what the jury probably had the right to hear based on the law and based on common sense at the beginning of voir dire. I had a better sense after listening to jurors for a week telling me they couldn't possibly make any intelligent decisions in a vacuum. I mean, obviously, you could understand how they felt. I actually felt the same way." (R. 3667). Similar comments were later reiterated by the judge. (R. 3871).

This Court first addressed this issue in Teffeteller v. State, 495 So.2d 744, 745 (Fla. 1988):

> One of the problems inherent in holding a resentencing proceeding is that the jury is required to render an advisory sentence of life or death without the benefit of having seen all of the evidence presented during the guilt determination.

As with the instant case, the judge in Teffeteller was concerned with a juror's reservations about not hearing all of the guilt-phase evidence, and the judge allowed the presentation of several witnesses to the murder plus one photograph of the victim. Id. The court noted "that this evidence was not used to relitigate the issue of appellant's guilt, but was used only to familiarize the jury with the underlying facts of the case." Id. The photograph was properly admitted:

> We hold that it is within the sound discretion of the trial court during resentencing proceedings to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence. We cannot expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum.

Id. (emphasis added). Similarly, in King v. State, 514 So.2d 354, 357 (Fla. 1987), the defendant complained about the state's presentation of guilt phase evidence at the resentencing hearing. The state presented several witnesses regarding the circumstances of the crimes and injuries to the victims. Id. This Court found no error, as "admissibility of evidence is within the trial court's discretion, and a reviewing court will not disturb a trial court's ruling unless an abuse of discretion is shown." Id. at 357. Although guilt was not at issue, the state "still needed to prove beyond a reasonable doubt the aggravating circumstances it felt supported a death sentence and, to this end, could present evidence rather than relying on the bare admission of the convictions." Id. at 358. See also, Chandler v. State, 534 So.2d 701, 703

(Fla. 1988) ("Because a jury cannot be expected to make a decision in a vacuum, it must be made aware of the underlying facts."); Hill v. State, 515 So.2d 176 (Fla. 1987) (collateral crime evidence not improperly introduced in resentencing proceeding).

In the instant case, the state did not engage in overkill, nor did the trial judge abuse its discretion in permitting evidence of the homicide for which the jury was recommending a sentence. The state presented six witnesses in its case-in-chief: the dispatcher, the medical examiner, the lead investigator, one of the arresting officers, an interpreter (regarding part of Valle's confession), and the officer who witnessed the killing. The state's case-in-chief occupies 325 pages of resentencing transcripts (R. 3779-4104) which exceed 4,000 pages in totality. Of the 325 pages of the state's case-in-chief, approximately 80 pages were consumed entirely by legal arguments or other non-evidentiary presentations (R. 3827-60, 3868-71, 3782-88, 3913-20, 3930-31, 3938-78, 4087-99), and another 20 pages by cross-examination. (R. 3892-3902, 4078-4087) Thus, the state's case-in-chief was hardly extensive. As noted in the Brief of Appellant, several other witnesses were presented at the prior guilt-phase trial. (Brief of Appellant, p. 18, n. 24).

The Appellant has focused on the admissibility of the dispatch tape and the medical examiner's testimony. With respect to the dispatcher's tape and transcript thereof, this evidence was highly relevant to several aggravating circumstances, in addition to furnishing the jury with the underlying facts of the case. The dispatch tape related to the aggravating circumstance that the killing was cold, calculated and premeditated, as it clearly showed that Valle was able to hear dispatched information over the radio which let him know that he was on the verge of being caught for auto theft and probation violation. The tape further showed, as it accurately reflected the time which was transpiring, that Valle had the time to go and

consult with Ruiz, during which time Valle confessed that he consciously made the decision to kill Officer Pena to avoid his own capture. The tape further relates to such obvious aggravating circumstances such as: killing to avoid arrest; disrupting the lawful exercise of a government function; and killing an officer in the performance of his duty. Nor was the state under any duty to limit its evidence to the transcript of the tape, as the transcript would not emphasize the important time factor involved (which enabled Valle to consult with Ruiz), and the transcript would not reveal how easily Valle could hear the damaging information which Pena was receiving over the radio.

With respect to the medical examiner's testimony about the cause of death, it is utterly absurd to expect a jury to recommend a sentence without knowledge of the cause of death. "Those whose work products are murdered human beings should expect to be confronted by [testimony or evidence] of their accomplishments." Teffeteller, supra, 495 So.2d at 745.

The Appellant argues that he was prejudiced by the state's comments during voir dire that not all guilt phase evidence would be produced. The Appellant mixes apples and oranges while relying on cases such as Williamson v. State, 459 So.2d 1125, 1126-27 (Fla. 3d DCA 1984), which hold, in the context of a jury deciding the issue of guilt, that it is improper to argue that other incriminating evidence exists which is not being produced. As Valle's resentencing jury was not determining the issue of guilt, it mattered little whether it knew that other evidence of guilt might exist. Since the resentencing jury was not determining guilt, it would only be reasonable for the jury to expect that some guilt phase evidence would not be presented again. If the prosecutor had asked the jury to recommend the death penalty because other evidence of aggravating circumstances existed, but was not being presented, the Appellant's argument would have a credible basis. But such was not the fact, as the prosecutor never even remotely

suggested the existence of other evidence of aggravating circumstances. Moreover, when the prosecutor made the comments in question, the court gave, and the defense accepted, the explanatory instruction that guilt was not an issue and that the jury would "hear a full recitation or presentation of all relevant facts so that you can make an intelligent decision. ..." (R. 2630-31, 3399-3400) The phrase "all relevant facts" does not necessarily mean all evidence adduced at the guilt-phase trial, but apprises the jury that it will hear all that it needs for its purposes. Given the cautionary, explanatory instruction, any complaints about the prosecutor's comments are thus beyond the scope of appellate review. Duest v. State, 462 So.2d 446, 448 (Fla. 1985).

Lastly, if guilt-phase evidence can somehow taint a sentencing jury, how would it ever be possible for the same jury to hear both the guilt and sentencing phases? Yet, as a general rule in Florida, it is required in the typical death penalty case, and no sentencing jury has yet been deemed to have been prejudiced because it actually heard the evidence of guilt.

B. Reliance Upon Prior Death Sentence

One of the principal strategies of the defense was to present testimony from psychologists and corrections consultants that if Valle received a life sentence, he would either be nonviolent in the future or a model prisoner. In the course of presenting this nonstatutory mitigating evidence, defense counsel was the first to elicit extensive testimony from defense witnesses regarding Valle's behavior on death row as an indicator of his likely future behavior. Thus, the first defense witness, Mr. McClendon, opined that Valle "would continue the nonviolent behavior that is exhibited over the past several years on death row. ..." (R. 4202) Pursuant to defense questioning, McClendon then explored and explained the numerous disciplinary reports incurred by Valle while on death row. (R. 4218-4276) Other defense

witnesses, upon questioning by defense counsel, similarly elaborated at length upon Valle's behavior while on death row. (R. 4594, 4641-67, 4900, 4906-12, 5229-33, 5345-48) The defense, having interjected Valle's death row behavior into the sentencing proceedings, and having made it a significant feature of the defense, has now perversely claimed that the state is somehow responsible for making Valle's death row behavior and prior death sentence the feature of the proceedings.

As the defense raised the issue of Valle's behavior on death row, the defense was obviously responsible for letting the jury know that Valle was previously on death row due to a prior death sentence. Indeed, defense counsel requested that the court instruct the jury on the existence of the prior death sentence and the court complied with the request. (R. 307-308, 706-707, 710-11, 2343-48, 2357-58, 3150-52) The court also instructed the venire that it would "not be permitted to give any weight whatsoever to the previous sentence." (R. 2357-58, 3150-52) Once the defense, through examination of its witnesses, explored Valle's death row conduct and its value as a predictor of future conduct, the state was clearly able to similarly explore Valle's death row conduct on cross-examination of defense witnesses and in its own rebuttal case. Buford v. State, 403 So.2d 943, 949 (Fla. 1981), cert. denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982), and 454 U.S. 1164, 102 S.Ct. 1039, 71 L.Ed.2d 320 (1982) (scope of cross-examination); Coxwell v. State, 361 So.2d 148 (Fla. 1978); Britton v. State, 414 So.2d 638 (Fla. 5th DCA 1982) (scope of rebuttal evidence).

Teffeteller, supra, in holding that a previously vacated death penalty should not play a significant role in resentencing proceedings, found that the mention of a prior sentence does not require reversal. 495 So.2d at 745. The court emphasized that there was no mention of the previous jury's recommendation, only the actual imposition of the sentence by the judge. Id.

at 747. The same holds true in the instant case. The defense in Teffeteller pursued the same strategy as in the instant case: asserting that death row behavior showed the defendant would safely live within the confines of a prison setting and explaining away death row disciplinary reports. Id. at 746. As in Teffeteller, the instant jury was admonished that the previous conviction had to be accepted and that the jury's role was limited to a recommendation on the sentence. Teffeteller concluded that the prior sentence did not improperly play a significant role in the resentencing proceeding. Due to the similarities between the instant case and Teffeteller, it must either be concluded that the prior sentence did not play a significant role in the resentencing proceeding, or alternatively, if it did play a significant role, it was solely due to the defense's strategic choices, and the defense cannot complain about an error which it caused through its own emphasis of the prior sentence and prior death row behavior. McCrae v. State, 395 So.2d 1145 (Fla. 1980); Pope v. State, 441 So.2d 1073 (Fla. 1983).

The Appellant complains that the state is responsible for emphasizing the fact that there were two prior death sentences, in 1978 and 1981. The Appellant relies on several comments or answers to questions on cross-examination, which note that there was a sentencing proceeding in 1981, that the offense occurred in 1978, and that defense experts saw Valle in 1981. (R. 4286, 4674-75, 5317, 5360, 5639) The fact that the jury became aware that a sentencing proceeding occurred in 1981 in no way leads to a conclusion that that must be a second sentencing proceeding, even though three years had elapsed since the killing. The 1981 references are fully consistent with the possibility that that was the first and only prior sentencing. Similarly, comments on voir dire about the commission of the offense in 1978 and publicity about the case in 1981 (R. 1759), in no way lead to the conclusion that there were two prior death sentences. With

respect to Dr. Toomer, the Appellant complains about matters discussed during voir dire of this witness, outside the presence of the jury, which were not heard by the jury. (R. 5301-12) Toomer's reference to interviewing Valle in 1981, once again, in no way suggests the existence of two prior death sentences. (R. 5317, 5360) Moreover, to whatever extent the defense is complaining that it was improper to refer to the fact that defense witnesses saw Valle in 1981, such testimony was initially elicited by defense counsel.[11] Thus, defense counsel, after eliciting from several of his own witnesses, that they saw and evaluated Valle for the first time in 1981, somehow complains on appeal that it was error for the state, on cross-examination, to make reference to anything that transpired in 1981. Under such circumstances, if any error can even remotely be found in any of this, it must either be deemed invited by the defense direct examination or harmless due to defense counsel's elicitation of comparable testimony on direct examination.

Lastly, the Appellant's attempt to suggest that these references to the prior proceeding violate Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 2 31 (1985), is absolute nonsense. The references to the prior proceeding in no way minimized the role of this sentencing jury. Those references, as noted above, were necessitated on cross-examination by the defense strategy of interjecting the issue, and the prosecutor was questioning the witnesses about previously expressed opinions and the basis of those opinions. The jury was never told, directly or indirectly, to sentence

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[11] Defense counsel brought out, on direct examination, that McClendon interviewed Valle in 1981 and reached conclusions about Valle in 1981. (R. 4210-11) Buckley volunteered during defense counsel's direct examination that he first saw Valle before his first trial. (R. 4592) Psychologist Fisher explained during defense counsel's direct examination that he evaluated Valle in 1981 and 1987. (R. 4899) Dr. Toomer, during defense counsel's direct examination, stated that he evaluated Valle in 1981 and 1987. (R. 5317)

Valle to death because a prior jury did. Not only was the jury expressly told to disregard the prior sentence, but it was also properly instructed on its role and the importance of its recommendation.

The Appellant, in a similar vein, asserts that the state derived unfair tactical advantages by virtue of the existence and/or references to the prior death sentence. The Appellant claims that the state improperly cross-examined witness Buckley about his $1500 per day witness fee, because that placed the defense in the position of having to explain to the jury, on redirect examination, that Valle had been "resentenced" in 1981 and that his testimony had been ruled inadmissible in that proceeding.

As noted by the Appellant, cross-examining experts about their fees, as a potential source of bias, is a perfectly acceptable method of impeachment. Pandula v. Fonseca, 145 Fla. 395, 199 So. 358 (1940); Langston v. King, 410 So.2d 179 (Fla. 4th DCA 1982). As to the contention that defense counsel, on redirect would have to explain that Valle had been "resentenced" in 1981 (thereby implying two prior sentencing), in order to explain why Buckley was not paid in 1981, several things must be noted. First, there was no need for defense counsel to elicit on redirect that 1981 was a "resentencing" proceeding, as opposed to a mere "sentencing" proceeding, without the implication of its being a second proceeding. Second, Buckley, on direct examination by defense counsel, had already stated that he had first seen Valle prior to his first trial. (R. 4592) Third, defense counsel had no "need" to explain any delays in Buckley's payment for 1981 services rendered, especially since the court noted that Buckley had already been paid for those services. (R. 4880) Fourth, even if the defense had to make a difficult choice as to whether to present certain explanations on redirect examination, such choices do not render the proceedings unfair, and such choices routinely exist in other contexts. Cf., Harris v. New York,

401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971) (statements obtained in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), can be used to impeach accused who testifies in contrary manner at trial, thereby creating defense dilemma of whether to present defendant's testimony at trial). Fifth, the defense had already had the court apprise the jury that Valle had previously been sentenced to death, and the court had already explained that this was reversed because evidence had improperly been excluded at the prior proceeding. (R. 2357-58, 3150-52)

The Appellant also complains that the state's cross-examination of Dr. Toomer, in which it was emphasized that he did not examine Valle until 1981, three years after the offense, created similar unfair dilemmas for the defense. The defense asserts that this forced them to choose whether to explain on redirect examination that the speed with which the first trial, in 1978, was compelled, precluded getting psychological evaluations at that time. The defense is clearly referring to a nonexistent dilemma. Whatever shortcomings may exist in evaluating defendants several years after offenses, reasons for those delays neither add to nor detract from the validity or credibility of an opinion based upon interviews years afterward. The credibility of the opinion and evaluation remains the same regardless of the reasons for the delay. Moreover, as the doctor maintained that his conclusions were still valid, the foregoing scenario did not render the trial unfair and did not taint the resentencing with any adverse consequences from the reversal of the 1978 conviction and sentence.

C. Cross-Examination of Defense Witnesses and Rebuttal

The defense, during its case-in-chief, presented several expert witnesses who stated that Valle would either be a nonviolent or model prisoner in the future, if given a life sentence. These witnesses based

their opinions upon a review of Valle's prison records, interviews with Valle, and other relevant documents.

C(1). Evidence of Valle's escape attempts

The Appellant claims that the state improperly elicited evidence of Valle's escape attempts. Lloyd McClendon, a corrections official, presented testimony, for the defense, that Valle would be nonviolent if given a life sentence, based on his behavior on death row for the past several years. (R. 4202) In reaching this opinion, McClendon had reviewed and considered the following items: depositions of investigating officers at the time of the crime, Valle's confession, "numerous depositions of corrections officials since that time," Valle's conviction record, Valle's prison file, and "available materials toward his [Valle's] behavior in the future. ..." (R. 4201, 4180) On direct examination, defense counsel questioned McClendon extensively about Valle's prison disciplinary reports, including one for the escape attempt in which a steel bar was found cut in Valle's cell, and in which a metal towel bar had been removed from concrete. (R. 4218-4276) With respect to the July 18, 1984 escape attempt, McClendon had "examined records of the DR [disciplinary report] and the DR investigation from the Florida State Prison." (R. 4269) He had read the reports and was "familiar with the contraband and paraphernalia found in the area." (R. 4270) He was aware that the vertical ground bar had been cut and could be removed. (R. 4270) He was aware of information from correctional officers that "cardboard had been used as a shim to hide the cuts." (R. 4271) He was aware of other paraphernalia found in another inmate's cell, two cells away. (R. 4272) He was also aware of putty and paint which had been used to conceal the cut bar. (R. 4274-75) All of this information was elicited by defense counsel on direct examination and McClendon was aware of all of this in reaching his conclusions about Valle.

On cross-examination, the state questioned McClendon about what he knew of this incident, based upon the materials which he had admittedly reviewed. McClendon was aware that a rope made from bed sheets was found in Valle's cell, and that the towel bar in the cell was severed by a hacksaw. (R. 4319-20) He was not familiar with the paraphernalia found two cells away: compass, flashlight, gloves, hat. (R. 4323) He was aware that cardboard was used in both cells on the bars. (R. 4386-87) He was aware that putty was found in both cells, to hold the cardboard over the cut bars for concealment. (R. 4390) Upon further questioning, he finally did recall reading about the rubber pad found in Valle's cell. (R. 4393) He also subsequently recalled references to the gloves with padding on the fingers. (R. 4398)

Questioning of defense witness Buckley followed the same pattern. He testified on direct examination, that Valle would be a model prisoner, based, in part, on Buckley's review of Valle's "entire prison file" and "a number of depositions of officers involved in the reports." (R. 4594) He then testified about the prison disciplinary reports, including his explanation of the significance of the escape attempt, which he labelled as nonviolent. (R. 4650-52) On cross-examination the state again queried about what Buckley knew about the escape attempt, based on the documents which Buckley had admittedly reviewed, and on which Buckley had based his previously expressed opinion about Valle. Thus, it was established that Buckley recalled the following items being found in Valle's cell: two hats to pull over one's face with holes in the front; gloves with fingertips and wrists, but no covering for the palms; a rubber pad; a list of addresses and phone numbers; cardboard shims; and putty. (R. 4816-18) The reports referring to these matters did not alter Buckley's opinions about Valle. (R. 4831-32).

Prosecutorial cross-examination, regarding what these witnesses knew about the escape attempt and how that affected their opinions of Valle, was proper, as it was based on documents which these experts had admittedly read and considered when formulating their opinions of Valle, and when those same documents and escape attempt were directly addressed in direct examination by the defense. Parker v. State, 476 So.2d 134, 139 (Fla. 1985), is directly dispositive. There, the defense presented a psychologist who said that Parker was passive and nonaggressive. On cross-examination, the state queried about the case history used by the psychologist in formulating his opinion and specifically about criminal offenses related by Parker. The state also asked whether the psychologist knew of other offenses committed by Parker. Such cross-examination was deemed proper:

> . . . In the instant case, the testimony of the defense expert that he based his opinion regarding appellant's nonviolent nature on the appellant's past personal and social developmental history, including a prior criminal history, opened the door for this cross-examination by the state. We find that it is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis.

476 So.2d at 139. See also, Muehleman v. State, 503 So.2d 310, 315 (Fla. 1987) (trial court properly admitted into evidence a "Juvenile Social History Report," detailing the juvenile criminal record, which became relevant when defense psychiatric witness stated that he had considered the report in formulating his opinion).

The Appellant's reliance on Hildwin v. State, 531 So.2d 124, 127-28 (Fla. 1988), is entirely misplaced, as it does not involve the scope of cross-examination of a defense expert who had previously considered and discussed the documents and incidents in question and based his opinions thereon. Rather, in Hildwin, the defense presented testimony of friends and family who claimed that Hildwin was never violent in their dealings with him.

531 So.2d at 126. No experts were involved, and these defense witnesses were not offering professional opinions based on their review of massive quantities of materials. The state, on rebuttal, introduced evidence from a woman who claimed that Hildwin had sexually assaulted her. This Court held that such evidence was properly admitted, finding it sufficiently reliable, and stated:

> We hold that, during the penalty phase of a capital case, the state may rebut defense evidence of the defendant's nonviolent nature by means of direct evidence of specific acts of violence committed by the defendant, provided however, that in the absence of a conviction for any such acts, the jury shall not be told of any arrests or criminal charges arising therefrom.

531 So.2d at 128. That holding is clearly not intended to apply to cross-examination of an expert who has already testified about the incident in question and the documents providing the basis for his opinion. Indeed, Hildwin cites Parker and acknowledges Parker's holding without receding from it in any way. Id. Similarly, this Court, even subsequent to Hildwin, has still cited Muehleman, supra, approvingly. Chandler v. State, 534 So.2d 701, 703 (Fla. 1988). Thus, prosecutorial questioning of McClendon and Buckley was within the proper scope of cross-examination.

The same principles apply to testimony about Valle's behavior in the Dade County Jail. Buckley, who deemed Valle a model prisoner, had admittedly read and considered reports pertaining to incidents in the Dade County Jail, in which Valle had spoken about a desire to escape. (R. 4833-36) As these matters were previously considered by Buckley in reaching his conclusion that Valle was a model prisoner, these matters were similarly within the proper scope of cross-examination under Parker and Muehelman.

C(2). Defense Responses to State's Cross-Examination and Rebuttal

The Appellant claims that the trial court improperly limited

redirect examination of defense witnesses.

a. Redirect examination of defense witnesses

Lloyd McClendon, the corrections official who testified for the defense, had once been a death row inmate, before being paroled and pardoned and becoming a corrections official. (R. 4189-90) On cross-examination, the prosecutor elicited that in McClendon's offense, he did not plan to go in and kill the store clerk during the robbery. (R. 4408). This was done for the purpose of stressing that it would be reasonable to expect different prison behavior from inmates who calculatingly premeditate a homicide, such as Valle, as opposed to those who kill accidentally during a felony. (R. 4409, 4411-12) McClendon, however, denied that there would be any connection between the nature of the inmate's crime and the inmate's prison behavior. (R. 4411-12) On redirect examination, the defense sought to elicit details about McClendon's crime. (R. 4415-19) The state objected to this questioning and the objection was sustained. (R. 4416-19) There was never any proffer by the defense as to what McClendon would have said.

The scope of redirect examination rests within the discretion of the trial court. Yanzito v. Wagner, 244 So.2d 761 (Fla. 1st DCA 1971). See also, Johnston v. State, 497 So.2d 863, 869 (Fla. 1986) (as to limits on redirect examination, "a trial court has broad discretion in determining the proper scope of the examination of the witnesses); Maggard v. State, 399 So.2d 973, 975 (Fla. 1981) (evidentiary rulings will not be disturbed in absence of abuse of discretion). The limitation in this case did not constitute an abuse of discretion. The state, during cross-examination, sought merely to show that different behavior in prison would be expected from premeditated killers as opposed to accidental killers. The facts of McClendon's offense were not pertinent, as the question really dealt with

accidental murderers in general, as opposed to McClendon personally. Even if McClendon's offense was not an accidental killing, the same question would remain: are premeditated killers more likely to violate prison rules than accidental killers? Moreover, McClendon denied the existence of any such correlation, and the state did not produce any further evidence of such correlation. Accordingly, there was no need to rehabilitate McClendon on this point.

Additionally, this matter has not been properly preserved. The defense never proffered what it was about the facts of McClendon's killing that would have any significance. In the absence of a proffer, there is no possibility of meaningful appellate review. Salamy v. State, 509 So.2d 1201 (Fla. 1st DCA 1987); Woodson v. State, 483 So.2d 858 (Fla. 5th DCA 1986). Alternatively, any error here must be deemed harmless at it is, at best, remotely tangential to any relevant issue.

The Appellant also complains that on cross-examination of witness Buckley, the court prohibited Buckley from giving certain testimony. Buckley, on cross-examination, indicated that he was familiar with Valle's Dade County Jail records, which contained reports that Valle had discussed prison escape desires. (R. 4833-36, 4841-46) Buckley had initially spoken about this incident on direct examination, as he explained why the incident did not affect his model-prisoner opinion of Valle. (R. 4653-55) On direct examination, Buckley attempted to question the veracity of the reported incident by attributing it to a jailhouse snitch looking for a deal. (R. 4655-60) The alleged snitch was an inmate named Martinez, and the court prohibited the defense, on direct examination, from having Buckley question Martinez' credibility, since Buckley had no personal knowledge of the incident. (R. 4655-60) Buckley was permitted to testify, on direct examination, that he reviewed Martinez' statement, and did not believe that

the conversations between Martinez and Valle about escape were serious. (R. 4665) On cross-examination, the state was eliciting factual matters as to what Buckley knew about the incident from the various reports and from Martinez' statement. (R. 4845-46) After further questioning about what the reports showed, Buckley volunteered the unsolicited response that "Mr. Jose Martinez is a professional informant." (R. 4848) The court chastised Buckley, outside the presence of the jury, for volunteering this information in view of the limits that had been placed on his testimony during direct examination. (R. 4849-55; 4655-60) The basis for this became clearer when Buckley indicated that he knew Martinez was a snitch based on conversations with a Mr. Sobel at the jail. (R. 4849) Thus, Buckley was being prohibited from speaking about matters of which he had no personal knowledge; his source of information that Martinez was a snitch was not from any prison records he had reviewed, but hearsay conversations with Sobel. The court was clearly correct in prohibiting Buckley from: (a) relating matters of which he had no personal knowledge; (b) relating matters based on hearsay; and (c) expressing opinions about the credibility of Martinez. Section 90.604, Florida Statutes; §§ 90.801, 90.802, Florida Statutes.[12] See also, Holliday v. State, 389 So.2d 679 (Fla. 3d DCA 1980) (psychiatrist, as expert witness, could not testify that another person was a liar, as that invaded province of jury to determine credibility).

The Appellant also asserts that the judge ruled as inadmissible testimony regarding Martinez's "arrangements" with the state. That is a deceptively inaccurate claim. The judge ruled that the State, on

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12 Section 90.604 prohibits testimony in the absence of a basis in personal knowledge, with the exception for expert testimony under § 90.702. Although Buckley was accepted as an expert in correctional matters, his expertise did not extend to opining about the credibility of various individuals.

cross-examination, never asked any question regarding Martinez's deal with the state. (R.4851) Thus, since there was no pertinent pending question regarding Martinez's deal with the state, Mr. Buckley was not free to ramble on, unresponsively, wherever he desired. Thus, the judge then added that some of this evidence might come in at a later time, but that was "not [for] Mr. Buckley to decide on his own." (R. 4852) The judge then admonished Buckley to confine himself to the questions which were asked. (R. 4852) The sole question asked was how Buckley knew that Martinez was a professional informer. The court's limitation on Buckley was proper.

The Appellant further claims that Buckley, on redirect examination, was prohibited from answering questions about another inmate, Marvin Francois. On cross-examination, the prosecution established that Buckley had reviewed Valle's prison inmate file and had previously read of a fight between Valle and another inmate, Marvin Francois, arising from a basketball game. (R. 4756-57)[13] Buckley stated that this incident had no effect on his opinion of Valle. (R. 4757) On redirect examination, Buckley stated that based on his review of the documentation, he did not consider Valle to be at fault, and he emphasized that Francois received the prison disciplinary report[14] for the incident, and Valle did not. (R. 4862-64) The court sustained the state's objections to the following questions:

> Q. Mr. Rosenbaum [prosecutor] did not identify Mr. Francois to you as a person convicted of six first degree murders?
>
> . . .
>
> Q. Did Mr. Rosenbaum in his question telling you that Mr. Francois had about seven--[15]

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13 This testimony was admissible pursuant to Parker, supra.

14 That report was admitted into evidence. (R. 4862-63; R. 379).

15 The question apparently related to Francois' other disciplinary reports, unrelated to the fight with Valle. (R. 4885).

(R. 4862, 4864)

The judge subsequently stated that the issue of Francois' other murder convictions was "not particularly relevant" and that the Francois "incident was fairly discussed between both sides. ..." (R. 4872).

The court's limitation of redirect examination in this instance was proper and not an abuse of discretion. The Francois incident was fully explained by the reports disciplining Francois and the absence of a disciplinary report for Valle. There was no reason to permit the defense to divert this case into a trial of Francois after the one incident had been fully explained to the jury. See, Johnston, supra; Maggard, supra.[16]

C(2)(b). Surrebuttal and Dr. Fisher

The Appellant claims that the trial court erred in prohibiting surrebuttal testimony from Dr. Fisher. Ted Key, a prison classification specialist with the Florida State Prison, testified as a state rebuttal witness, and said that based on Valle's prison file and disciplinary reports, which exceeded the death row inmate average, Valle had not adjusted well. (R. 5637) Key found that if Valle received a life sentence, he would remain in "close custody" due to the escape attempt, that Valle would try to escape again, and that Valle would be an extreme escape risk if placed in the general prison population. (R. 5654-55) On cross-examination, the defense elicited that Key used a "subjective interpretation" of the inmate's history as the model regarding potential for violence in prison. (R. 5671) There were no forms or regulations for that decision. (R. 5671) Key was making his "best guess." (R. 5671) Key took into account the severity, recency or

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[16] The jury was already aware that Francois was a death row inmate - by virtue of his fight with Valle - and the jury could obviously put two and two together to realize that he was on death row for a capital offense.

frequency of violent behavior. (R. 5671) Valle's absence of violence while incarcerated for 10 years was weighted, but was of minimal significance, since Valle was generally in a locked one-man cell, with little opportunity to engage in violence. (R. 5672)

The defense sought to recall Dr. Fisher, as a surrebuttal witness, to state that Key's "subjective methods" are professionally unacceptable and that those methods are an unreliable tool for judging future dangerousness. (R. 5685, 5692-93) The judge refused to permit the recall of Fisher, noting that the defense presented four experts for three or four days; that the state presented one man for one hour; that the recall of Fisher was "totally unnecessary;" and that it was totally discretionary. (R. 5692-93)

The decision whether to permit surrebuttal testimony rests within the discretion of the trial judge. Davis v. Ivey, 93 Fla. 387, 112 So. 264, 270 (1927); Reaves v. State, 531 So.2d 401, 402 (Fla. 5th DCA 1988). There was no abuse of discretion in the instant case. Dr. Fisher had already testified at length and had elaborated upon what he deemed necessary for an adequate methodology of predicting future dangerousness. Relevant factors included: the severity, recency, and frequency of violence patterns, whether a person is psychotic; drug usage; family ties; prison disciplinary reports, convictions. (R. 4900-4902) He emphasized that "you don't use guesswork. ..." (R. 4901) Moreover, you do not simply use the existence of a disciplinary report; rather you weight the incidents based on their nature and give scores. (R. 4902) Based on Fisher's testimony during the defense case-in-chief, it was already obvious that he professionally disapproved of Key's subjective and speculative methodology.

The Appellant maintains that since Key's testimony was not anticipated, Fisher had no prior need to explain problems with Key's subjective analysis. That argument ignores that Fisher, during the defense case, had to attempt to present an adequate justification for the validity of his own method for predicting future dangerousness.[17] The Appellant's claim of surprise about Key's testimony is further specious, as Key was listed as a state witness, as a "classification specialist" at Florida State Prison (S.R. 20-21), and was fully deposed prior to the resentencing trial. (R. 5523, 5530-31) Valle's adjustment in prison was discussed at the deposition, as were Key's qualifications, background and experience. (R. 5531) The defense has asserted surprise because Key was not designated as an "expert" on the state's witness list. This ignores that Rule 3.220(a)(1)(x), Florida Rules of Criminal Procedure does not require any such designation - it requires only that any expert's reports or statements be furnished if they exist. Moreover, the defense never designated any of its witnesses, on its witness list, as experts. (S.R. 18-19)

C(3). Use of Defendant's prior record

The Appellant contends that the state improperly elicited evidence of Valle's prior record, regarding the Officer Toledo incident. As previously noted, the defense expert witnesses routinely testified that they had reviewed Valle's criminal convictions, prison records and numerous other documents in arriving at their predictions that Valle would be nonviolent in the future. On cross-examination, the state routinely asked these witnesses

[17] Fisher's need to do this during the defense's case-in-chief is further apparent from the inherently dubious value of any and all predictions of future dangerousness, notwithstanding the admissibility of such testimony. See generally, Shuman, Psychiatric and Psychological Evidence (Shepard's/McGraw-Hill 1986), § 7.06; Barefoot v. Estelle, 463 U.S. 880, 896-900, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).

whether they had reviewed matters pertaining to the Detective Toledo incident in arriving at their conclusions; what they had reviewed regarding that incident; and whether the documents that they had reviewed affected their conclusions about Valle's future nonviolence. This issue is therefore the same as the previous issue regarding evidence of Valle's escape attempts, pages 54-58, supra. This issue is similarly controlled by Parker v. State, 476 So.2d 134, 139 (Fla. 1985), as the state is permitted to question defense experts about documentation which they reviewed in reaching their opinions. See also, Muehleman, supra. As previously asserted, the Appellant's reliance on Hildwin, supra, is misplaced, since it does not pertain to cross-examination of defense experts regarding documents they reviewed in reaching their professional opinions.

This incident concerns the claim of Detective Toledo that in 1976, Valle, while on probation for earlier convictions, was stopped by Toledo for a traffic infraction, during the course of which there was a chase in which Valle attempted to run Toledo over. In 1972, Valle had been placed on probation for forgery, uttering a forged instrument and receiving stolen property. (R. 1, 5, 16) In 1976, he was charged with violating that probation for, inter alia, an aggravated assault on Detective Toledo, and resisting arrest with violence. (R. 24) Valle had a probation revocation hearing on this matter on April 25, 1978. (S.S.R. 36, et seq.) At the conclusion of the hearing, Valle's probation was revoked due to the aggravated assault on Toledo and for resisting arrest with violence. (R. 33) The probation revocation proceedings were made a part of this trial and appellate record pursuant to the request of defense counsel. (R. 6056, 3911, 4106)

Defense witnesses McClenden, Buckley, Toomer, Fisher, DiGrazia and Milledge all admitted that they were familiar with the documentation of the Officer Toledo incident, that they had reviewed it, and that they

considered it in reaching their opinions about Valle's non-violence. (R. 4296, 4306-08, 4314, 4667-69, 4807-08, 5240, 5379-81, 4909-12, 4959-62, 5122-23) As to Buckley and Fisher, it was the defense which elicited this testimony. (R. 4667-69, 4909-12) As to the others, the defense established on direct examination that they had reviewed and considered all of Valle's criminal records. Thus, Parker, supra, expressly permitted prosecutorial cross-examination regarding the Officer Toledo incident, as it was based on materials which the defense experts reviewed and considered in conjunction with their opinions of Valle's non-violence. This is all the more true where defense counsel has already elicited testimony from the witness, about this matter, on direct examination. Buford v. State, 403 So.2d 943 (Fla. 1981)(scope of cross-examination extends to entire subject matter of direct examination. The Appellant is apparently arguing that he has the right to elicit this testimony on direct examination, in anticipation of the state's cross-examination, and then prohibit the state from engaging in such cross-examination. This argument has absolutely no basis in the law; nor is there any reason for the law to utterly take leave of its senses.

The state would note that all questions presented to the defense witnesses about this incident were explicitly based on the facts as the defense witnesses knew the incident, and on the documents that they had reviewed. (R. 4729, 4743-46, 5244-46) Thus, the defense witnesses' opinions were being tested expressly on the basis of the facts of the Toledo incident which they themselves had considered; not on the basis of any facts which went beyond the documents that they had admittedly reviewed and considered.

Not only was this evidence admissible under Parker and Muehlenar, supra, without regard to Hildwin, supra, but even under the holding of Hildwin, apart from different rules regarding questioning of expert witnesses, this evidence would be admissible. Hildwin is concerned

with the reliability of evidence of a defendant's other criminal acts, when presented in the sentencing phase of a death penalty case. Thus, Hildwin restricts such evidence to evidence of convictions, established through direct evidence of specific acts of violence. 531 So.2d at 128. The evidence in the instant case was based upon probation revocation proceedings. Although this did not result in a conviction for the Toledo incident - only a probation revocation - this is obviously established through a reliable judicial proceeding, as is a conviction, and there is no reason for distinguishing between the two. And, consistent with Hildwin, the probation revocation based on the Toledo incident was established by direct evidence of the probation revocation hearing transcript. Although the transcript was not actually introduced as an exhibit, it was made a part of the trial court record (R. 4803) and all of the defense witnesses had reviewed it and admitted that Valle's probation was revoked due to this incident. Thus, the parties agreed that McClendon would testify on redirect examination that Valle's probation was revoked based upon this incident. (R. 4473-81, 4488-89) The fact that Toledo was not cross-examined at the probation revocation hearing is inconsequential, as the defense had the opportunity for such cross-examination.

The state would further note the outrageousness of the Appellant's argument. The defense chose to present experts who claimed, based on Valle's past history and behavior, that he would be nonviolent in the future. Having presented that, and having considered the Toledo incident en route to those conclusions, the defense incredibly believes that it should be able to conceal a documented, violent incident, which defense experts considered and minimized for appalling reasons.[18]

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[18] For example, two defense experts minimized it due to the passage of

C(4)(a). Significance of potential parole date

Manuel Valle has received the following sentences, which are pertinent to this issue:

1. In 1978, as a result of probation revocation proceedings, he received consecutive sentences of 5 years, 5 years and 60 days, for convictions for forgery, uttering a forged instrument and receiving stolen property, with 24 days credit for time served.

2. In 1978, he received the death penalty for the murder of Officer Pena, and consecutive sentences of 30 and 15 years for attempted murder and possession of a firearm by a convicted felon. Those convictions and sentences were reversed and remanded for new trial. Valle v. State, 394 So.2d 1004 (Fla. 1981).

3. In 1981, he again received the death penalty for the murder of Officer Pena, with credit for 3 years and 125 days, plus consecutive sentences of 30 and 5 years on the attempted murder and possession of firearm charges.

4. Valle has also pled guilty to the auto theft charge, in 1978, which was severed from the murder charge, and received a consecutive 5 year sentence.

5. The 1981 death sentence was vacated in 1987 and remanded for the resentencing which resulted in the instant death penalty.

(R. 1, 32; R1- 334-348; R2 - 1057; R. 5532-33; Valle I, Valle II, Valle III.)

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several years, even though Valle was incarcerated on death row for most of that time, with restrictions which would seriously impede any attempted violence on his part. Two experts discounted the incident because they chose to believe the explanations of the pillar of civic responsibility, Mr. Valle, as opposed to the explanations of Officer Toledo's testimony. (R. 4296, 5380-81) Not only do the defense experts predict future behavior through the use of crystal balls, but they apparently anointed themselves as the ultimate judges of witness credibility. Only a process with little concern for reaching the truth of such experts' opinions would preclude the type of cross-examination in which the state engaged.

Defense witness Buckley, who opined that Valle would be a model prisoner if given a life sentence, explained on cross-examination, that "lifers" are the backbone of long-term institutions, as they keep the place quiet; they don't want disturbances; and they don't want rule breaking, as it is their home "forever." (R. 4678) Based on the significance Buckley attached to the concept of "lifers," who remain institutionalized "forever," the prosecution queried whether Buckley knew what a life sentence was in Florida. (R. 4678) Buckley ultimately acknowledged that some Florida "lifers" are there forever and some are not. (R. 4710) The prosecutor then queried whether Buckley's opinion of Valle, as a model prisoner and "lifer" would change if Valle was hypothetically given a life sentence and became eligible for parole in 15 years from 1988, i.e., in 2003. (R. 4710-11) Buckley responded that his opinion would not change. The jury was ultimately instructed that "possible eligibility for parole cannot be considered . . . as a reason for imposing a death sentence." (R. 6000)

The Appellant claims that evidence of potential parole is inadmissible as there is no statutory aggravating factor for such a matter. Norris v. State, 429 So.2d 688, 690 (Fla. 1983); Teffeteller v. State, 439 So.2d 840, 844-45 (Fla. 1983). However, where evidence which would not support a statutory aggravating factor is adduced not as an aggravating factor, but to negate mitigating evidence, that otherwise inadmissible evidence becomes admissible. See, e.g., Agan v. State, 445 So.2d 326, 328 (Fla. 1984) (evidence of lack of remorse was not admissible as an aggravating factor, but was properly admitted to negate mitigating evidence). See also, Hildwin, supra (evidence of specific prior violent acts not resulting in convictions becomes admissible to negate mitigating evidence of defendant's nonviolence, even though otherwise inadmissible); Parker, supra.

So, too, in the instant case, the potential eligibility for parole of a Florida "lifer" directly negated the nonstatutory mitigating evidence of Buckley that a "lifer" makes a good prisoner, obeying the rules, because the prison is his home for life. Buckley's opinion was clearly subject to questioning regarding its applicability for someone who may not be incarcerated "forever," even with a life sentence. Indeed, Buckley's statement affirmatively misled the jury into believing that a life sentence did mean "forever." Thus, the prosecutor's questions were clearly within the scope of cross-examination, to negate this explanation of mitigating evidence. Buford, supra, 403 So.2d at 949.

The Appellant next claims that the prosecutor misrepresented the facts in querying about potential eligibility for parole in 15 years, in 2003. An attorney may present a hypothetical question in accordance with any reasonable theory of the effect of the evidence. Atlantic Coast Line R. Co. v. Shouse, 83 Fla. 156, 91 So. 90 (1922); Steiger v. Massachusetts Casualty Insurance Co., 273 So.2d 4, 6 (Fla. 3d DCA 1973). The defense below focused on the significance of a potential life sentence for Valle. Such a sentence, if imposed, could be either concurrent or consecutive, depending on the judge's decision. Section 921.16, Florida Statutes. If the theoretical life sentence were made concurrent with the prior 1978 and 1981 terms of imprisonment, the 10 years served on those prior sentences would become concurrent with the new life sentence, thereby meaning that the 25 year minimum mandatory sentence would relate back to 1978, and parole eligibility would commence in 2003. For example, in Brumit v. Wainwright, 290 So.2d 39, 41 (Fla. 1974), this Court held that on resentencing for a robbery offense, a defendant should receive credit not just for time previously served on the robbery conviction, but for time served on an intervening possession of firearm conviction. See also, Segal v. Wainwright, 304 So.2d 446, 448 (Fla. 1974).

This is especially true in the context of the instant case where the years spent by the defendant on death row, after his first two sentences, should be viewed as years served on the conviction for the murder of Officer Pena - i.e., individuals don't serve time on death row for non-death offenses. Consistent with this notion, the trial court, in 1981, when reimposing the death sentence, gave Valle over three years of credit for time served, expressly towards the murder conviction, obviously viewing the 3 years served on death row, from 1978-1981, as time served on the death penalty offense. (R2 - 1057) The five years on death row from 1981-1986 should be similarly treated as years served on the murder conviction. Thus, there was substantial basis, in law and fact, for the prosecutor's hypothetical question.

Alternatively, even if parole eligibility did not commence until 2013, 25 years from 1988, any such error must be deemed harmless. The concept of the question still remains the same and is still a legitimate concept. The ten year differential, even if erroneous, should not be deemed reversible, as Valle would still be subject to release in either case. Furthermore, the court provided the cautionary instruction that this should not be considered as an aggravating factor. (R. 6000) See, Greer v. Miller, 483 U.S. 756, 766 at n.8, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987).

Finally, the Appellant appears to be indirectly relitigating the trial court's denial of a petition for writ of error coram nobis, which claimed that jurors improperly considered the parole evidence as an aggravating factor. This is meritless, as matters which inhere in the verdict cannot be the basis for a challenge to the verdict. Russ v. State, 95 So.2d 594 (Fla. 1957). Misunderstanding or not following instructions are matters which inhere in the verdict. Sims v. State, 444 So.2d 922, 925 (Fla. 1985) (juror consideration of defendant not testifying); Songer v. State, 463 So.2d 229, 231 (Fla. 1983) (juror's belief that she could consider only

statutory mitigating circumstances). In all other respects as to this claim, the State relies on, and incorporates herein, the response which it filed below to the petition for writ of error coram nobis. (R. 893-896)

C(4)(b). Lack of remorse

During the State's case-in-chief, Officer Wolfe testified, on direct examination, that Valle, during his conversations with Wolfe, never expressed any remorse about what he did and was not upset about what he did. (R. 4068-69) Subsequently, defense witness McClendon testified that in his conversations with Valle, he discovered "a deep concern and shame for how he had arrived at that condition. A feeling of responsibility for having taken the life of the victim and a very deep concern over the family and friends of that victim and how they had to go through life from that point on." (R. 4203) McClendon said that this "was an element that was important to my evaluation" and that this type of remorse was not frequently discovered in his business. (R. 4203-4204) Witness Buckley testified that in interviewing Valle, he wanted to see if there was any remorse; if Valle was sorry for what he had done and could express it. (R. 4597) Valle did express his sorrow "and that's very important." (R. 4597) On cross-examination, the prosecutor elicited Buckley's response that Valle had thought about contacting Officer Pena's widow to express remorse but had been told not to do it. (R. 4856) Valle never contacted the victim's family to express remorse. (R. 4857)

Under Florida law, lack of remorse may not be considered as an aggravating circumstance or in enhancement of a proper statutory aggravating circumstance, but it may be considered to negate mitigating evidence. Pope v. State, 441 So.2d 1073 (Fla. 1983); Agan v. State, 445 So.2d 326, 328 (Fla. 1984). The Appellant herein claims, inter alia, that since the lack of remorse testimony came in through the state's case-in-chief, it was premature, and improper, since there was not yet any mitigating evidence to rebut.

This argument has not been preserved by the defense as there was no objection to the questions answered by Officer Wolfe. (R. 4068-69) While the Appellant herein correctly notes that the trial judge excused the defense from having to renew its pretrial objections (R. 3967), there was never any pretrial objection that the State was introducing this testimony prematurely, before evidence of mitigation was introduced. The only pretrial objection by the defense was that evidence of lack of remorse is per se inadmissible. (R. 1231-40, 1366-70, 10404-10, 3965-67) Indeed, the objection that the evidence was introduced prematurely could not possibly be made prior to presentation of any testimony, since it would not be known at the time that the testimony would be elicited prematurely. Even though one of the pre-testimony arguments was about whether Wolfe could refer to lack of remorse (R. 3965-67), this did not focus on any alleged premature introduction of the evidence. Indeed, defense counsel, during this colloquy, asserts that, "Our objection ... is based upon the argument in our pretrial motion in limine." (R. 3966-67) The sole argument in the pretrial motion in limine was that lack of remorse is an inadmissible aggravating circumstance. (R. 130) Thus, although the defense was excused from having to renew this objection during the trial, it was not excused from having to raise any new objections, such as the premature introduction of the evidence. This issue is therefore not preserved for appellate review. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved").

Alternatively, even if the lack of remorse evidence was premature, any error is clearly harmless. Testimony of remorse was clearly a significant factor in the opinions and evaluations of two of the defense

experts, and the lack of remorse testimony was inevitably going to come in to negate such mitigating evidence.[19] Harmlessness would be corroborated by the court's instructions that the jury consider only specified statutory aggravating circumstances, and that evidence rebutting mitigation not be considered as an aggravating circumstance or reason for imposing death. (R. 6000)

The Appellant also asserts that Valle's "silence" is not a proper basis for establishing lack of remorse. Officer Wolfe's testimony was not based on "silence," however. It was based on what Valle chose not to say during a voluntary confession. For example, in Ragland v. State, 358 So.2d 100 (Fla. 3d DCA 1978), the court held "that comment upon the failure to answer a single question" during a voluntary conversation between the defendant and police did not violate the right to remain silent. That result was approved by this Court in its prior Valle opinion. Valle v. State, 474 So.2d 796, 800 (Fla. 1985) See also, Bertolotti v. State, 476 So.2d 130, 132-33 (Fla. 1985)(noting that where guilt was already determined, comment on silence does not call into question the fairness of penalty phase trial). Thus, absence of remorse was not established by reference to Valle's exercise of any fifth amendment right.

D(1)(a). Cross-examination of Dr. Toomer regarding prior claim that he was a psychiatrist

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[19] Even if the defense witnesses refrained from mentioning remorse, cross-examination of them on this would still be proper since it would go to the basis of their opinions. Parker, supra. The witnesses could not conceal this basis for their opinions to avoid cross-examination about it as the State can cross-examine about any unstated basis for an expert's opinion. ("... it is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis."). Parker, 476 So.2d at 139. Thus, this would have come out inevitably, and rebuttal through Wolfe would have come in at the end rather than the beginning.

During voir dire of Dr. Toomer, a psychologist testifying for the defense, the prosecutor asked whether Toomer had ever made a claim, on purpose or accidentally, that he was a psychiatrist. (R. 5302) During ensuing legal arguments, outside the jury's presence, the state noted that in the 1981 proceedings, the transcript reflects that Toomer referred to himself as a psychiatrist. (R. 5303) The defense asserted that it was a typographical error. (R. 5303) The court refused to permit the prosecutor to pursue this any further. (R. 5306) The prosecutor maintained there was no basis for assuming the transcription was in error. (R. 5306) When questioning resumed, the <u>defense</u> asked if Toomer ever said he was a psychiatrist. (R. 5309) Toomer responded negatively, saying that it "was an error in a transcript from prior testimony" and that he told the prosecutor, during his deposition, that the court reporter made an error. (R. 5309)

The state had the right to examine Toomer regarding any prior inconsistent statements. Fla. Stat. § 90.608(1)(a). The defense claim that it was a typographical error did not preclude the inquiry. Indeed, the defense was aware, prior to the resentencing hearing, that the state was focusing on this, since the state had raised this matter in Toomer's pre-hearing deposition, as admitted by Toomer. (R. 5309) The defense therefore had the time from Toomer's deposition, until the end of the resentencing hearing, in which to attempt to obtain a correction of the earlier transcript from the court reporter. Similarly, if the defense believed that it was the court reporter's error, the defense could have subpoenaed the court reporter to testify. The state, on the other hand, had in its possession, a transcript with the reporter's certificate, indicating that Toomer had misrepresented his professional status. The state had no obligation to accept the defense claim of typographical error, when the defense had the power to present any necessary witnesses on this. It is certainly at least

as conceivable that Toomer carelessly interchanged the words himself. As the method of attempted impeachment was proper, and was based on what appeared in the prior transcript, the state did not engage in any improper cross-examination.

D(1)(b). Cross-examination of Dr. Toomer regarding Valle's insanity

Dr. Toomer expressed the opinion that Valle was acting under extreme emotional duress and was unable to conform his conduct to the requirements of the law. (R. 5327) He based this opinion on the "stressors" that Valle had been exposed to during his life: dysfunctional family life, abuse by father, self-blame for death of aunt, etc. (R. 5319-26) In 1981, when he first evaluated Valle, he came to the same conclusion, that these stressors influenced Valle's behavior. (R. 5318-19) He believed that Valle would be nonviolent in the future. (R. 5347-48) On cross-examination, the prosecution brought out that Toomer's 1981 report concluded that Valle was insane at the time of the offense. (R. 5352-53) The prosecution then asked a series of questions, based on the facts of the offense, Valle's confession, and Valle's actions, designed to show that Valle understood the distinction between right and wrong during the offense, and that Toomer's 1981 insanity opinion was without basis. The state was therefore seeking to demonstrate that Toomer's current opinion regarding stressors and emotional distress, was lacking in credibility because his 1981 opinion was without basis and lacking in credibility. (R. 5332-33) Thus, the state was testing the basis of Toomer's current opinion of Valle by questioning the validity of his prior opinion of Valle. Contrary to the Appellant's arguments, the state was not urging rejection of mental-status mitigation because Valle was legally sane. The trial court specifically instructed the jury that the question of insanity has never been and was not currently an issue in this case. (R. 5353)

Cross-examination of an expert witness, to determine the credibility of his opinions, is subject to greater latitude than cross-examination of lay witnesses. For example, Parker, supra, permits experts to be cross-examined as to matters which would not otherwise be admissible. See also, LeMere v. Goren, 233 Cal. App. 799, 43 Cal. Rptr. 898, 902 (1965) ("Once an expert offers his opinion ... he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of a factual witness ...."). Defense counsel had already queried Toomer about his 1981 evaluation and opinion of Valle. (R. 5318-19) Thus, the state's cross-examination regarding the 1981 evaluation, wherein Toomer opined that Valle was insane, was also within the scope of direct examination. As Toomer's dubious opinion of Valle's insanity in 1981 raises the issue of the credibility of his current opinion of Valle in 1988, it was a proper subject for cross-examination and impeachment.

The Appellant further complains that in closing argument, the prosecutor commented that Valle's attorneys did not even believe Toomer's 1981 insanity opinion as it was never presented as evidence by the defense. (R. 5904) The defense failed to preserve this issue for appellate review as there was never a timely objection to the comment. Immediately prior to closing arguments, the parties agreed that they would refrain from objections during closing arguments unless the comment was believed to be so damaging that it must be stopped, and that objections would be heard at the conclusion of the arguments. (R. 5865-66, 5933) At the conclusion of oral arguments, the court recessed, and upon resuming, defense counsel commenced his objections to the state's closing argument, without referring to the foregoing comment. (R. 5962-64) The judge suggested waiting for Valle to return before proceeding further with the objections (R. 5964-66), and he indicated that as to final arguments, he was open to talking about whether any corrective

instructions were warranted. (R. 5965) A charge conference then ensued and Valle apparently returned to the courtroom, as the court's jury instructions commenced. (R. 5992) As of that time, defense counsel had not requested that the court revisit objections to closing arguments since Valle had returned. Defense counsel did not bring this up until after the jury's verdict, at which time defense counsel then articulated the basis for his objection to the state's closing argument. (R. 6027, 6037-39)

As the court expressed a willingness to hear any objections once Valle returned, defense counsel's failure to raise the objection until after the verdict resulted in an untimely objection and an unpreserved issue. The trial court had consented to hearing objections after the arguments, not after the verdict. By deferring until after the verdicts, defense counsel made a conscious decision to put the court in a position where it could not even give any curative instructions which might be sufficient to cure any improper comments. See, e.g., Jones v. State, 466 So.2d 293 (Fla. 3d DCA 1985), pet. for review denied, 478 So.2d 53 (Fla. 1985) (motion for mistrial after jury instructions and after jury retired for deliberations was too late to preserve objection to comments in closing argument); State v. Cumbie, 380 So.2d 1031, 1033-34 (Fla. 1980) (same).

To the extent that the comment may have improperly referred to defense counsel's beliefs about Toomer's 1981 opinion, that comment would not constitute reversible error. "In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty phase trial." Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985). Multiple improper comments were not deemed sufficiently outrageous to taint the validity of the jury's recommendation in Bertolotti. The same is true in the instant case. See also, Garron v. State, 528 So.2d 353,

358-60 (Fla. 1988) (cumulation of six improper prosecutorial comments was deemed sufficiently egregious to warrant new penalty phase proceeding). The single comment in question does not warrant a new sentencing proceeding.

D(2). Limitation on Mitigation Defenses

The Appellant claims that a wide variety of prosecutorial comments throughout the trial improperly limited the jury's right to consider mitigating evidence. These claims will be addressed individually.

a) The Appellant complains that comments in voir dire that "mere sympathy should not play a part in your verdict" (R. 3416), and closing arguments that "[y]ou have to put that type of sympathy out of your mind" (R. 5875, 5886), improperly limited the jury's ability to consider mercy. (Brief of Appellant at 73-74). In California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), the court held that a trial court's instruction, during the sentencing phase of a death penalty case, that the jury not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice or public opinion, did not violate the eighth and 14th amendments. More recently, in Saffle v. Parks, ____ U.S. ____, 108 L.Ed.2d 415 (1990), the Supreme Court refused to announce a new rule of law requiring the jury to be allowed to consider and give effect to emotions. The Court specifically rejected the contention "that the antisympathy instruction runs afoul of Lockett [v. Ohio] and Eddings [v. Oklahoma] ...." 108 L.Ed.2d at ___; 46 Cr.L.Rptr. at 2195. The trial judge in Saffle had instructed the jury to "avoid any influence of sympathy, sentiment, passion, prejudice, ..." 108 L.Ed.2d at ____; 46 Cr.L.Rptr. at 2193. The federal court of appeals, in habeas corpus proceedings, had found this instruction improper, but the Supreme Court reversed that decision. The Supreme Court, in Saffle, notes the many jurisdictions finding that antisympathy instructions are proper. 108 L.Ed.2d at ____. The court also gave an instruction that "[t]his case must not be

decided for or against anyone solely because you feel sorry for anyone or are angry at anyone or because of feelings or prejudice or bias. (R. 6003) In view of the foregoing, the prosecutor's comments were not improper. See also, Correll v. Dugger, 558 So.2d 422, 425 (Fla. 1990) (no error in refusing to instruct that jury could consider mercy in its deliberations). Lastly, the defense never objected to the foregoing portions of the closing argument and these matters are not preserved. Cumbie, supra.

b) The Appellant asserts that during voir dire, the prosecutor erroneously defined the concept of mitigating circumstances. A review of the prosecutor's comments shows that he was only giving examples of such circumstances. He was not saying that those were the only mitigating factors or that the jury could not consider others. (R. 2670-73) Furthermore, the defense accepted the court's offer of a curative instruction and the judge advised the jury that it be appropriately instructed later on that mitigating factors include not just the list that the jury would get later on, but "anything else that you think is mitigating as you hear all the evidence" and that mitigating factors do not "just go for an excuse of the crime." (R. 2675-76) Not only did this fully and accurately instruct the panel, but the jury similarly received appropriate instructions on mitigating factors at the conclusion of the case. (R. 5997)[20] The implication of the Appellant's argument, especially at footnote 109, is that every time the prosecutor gives an example of a mitigating factor, such example is inherently misleading unless the prosecutor perennially repeats the litany of all mitigating factors, including the catchall for anything else that the jury wishes to con-

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[20] The State would also note that this Court has used similar language in Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), where it found that a defendant's intelligence was not a mitigating factor as that quality "does not extenuate or reduce moral culpability."

sider. Since the court appropriately instructs the jury on mitigating factors, the prosecutor can properly single out individual factors for comment without any such problem. As to the prosecutor's comment during opening argument, "that there are no valid mitigating circumstances, circumstances that excuse this type of murder, (R. 3734), again, the jury was fully instructed on mitigating factors at the end of the case (R. 5997), and this comment in no way tells the jury not to consider anything.

c) During cross-examination, McClendon said that he understood that a purpose of the system was "that those that we are putting to death are those that we in corrections cannot handle." (R. 4525) The prosecutor questioned him about this opinion:

> If you opinion about whether or not somebody deserves the death penalty is based upon some concept that there is or is not a good alternate facility and that that's not part of the law in Florida, would I be fair to say that your opinion --

(R. 4526) Not only did the court give a cautionary instruction that the jurors receive instructions on law from the judge, not the lawyers (R. 4530), but the prosecutor's comment was correct. There is nothing in Florida law providing that the determination of who gets the death penalty is based on the existence of alternative facilities. While a defendant cannot be prevented from presenting mitigating testimony under Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d (1986), that he has behaved well in jail and may do so in the future, it is the defendant's behavior, rather than the existence of alternative facilities, that is being considered. As with all else herein, the jury was instructed that it could consider anything it deemed mitigating. (R. 5997) If the comment is deemed misleading, it was adequately cured. Duest v. State, 462 So.2d 446, 448 (Fla. 1985).

d) The Appellant complains that the prosecutor commented that mitigating evidence presented by the defense should not be considered, because it had no causal relationship to the offense. (R. 5878-79, 5881-82, 5886, 5911) The Appellant appears to operate under the misconception that if the Appellant presents some evidence which the Appellant believes to be mitigating, the State most accept that the Appellant has established it, and the prosecution must tell the jury to accept it. Such is not the law. The Appellant has taken isolated comments out of context. The thrust of the state's closing argument was that the defense failed to present sufficient evidence to establish any mitigating factors. Thus, after referring to a cause and effect relation between mitigating evidence and the crime, the prosecutor asked the jury how the fact that Valle was made to wear a dress when he was four years old constituted mitigating evidence. So too, the prosecutor asked the jury why the fact that Valle's parents spanked him as a child should be accepted as a mitigating factor. The prosecutor continued to question the contention that the father was a terrible parent:

> Look at these terrible things that were brought to our attention. The defendant wanted to play baseball and his father wanted him to go to college. He thought he should go to college because he was bright enough. He knew he was good enough to get the grades. What a terrible father.
>
> He missed his son's graduation. I don't know why. We haven't heard why.

(R. 5879-80). The entire closing argument continues with the same thrust - that the defense did not establish mitigating factors. Thus while an abusive childhood can constitute a mitigating factor, Campbell v. State, 15 F.L.W. 342, 344 at n. 6 (Fla. June 14, 1990), the prosecutor should certainly be able to question how an occasional parental spanking constitutes an abusive childhood, or how parental insistence on a college education constitutes an abusive childhood. The clear essence of the prosecutor's argument is that

the jury should not accept such mitigating factors as being established. The prosecutor couldn't prohibit the jury from considering anything it wanted to, as the judge made clear in his final instructions, telling the jury that there was no limitation on the mitigating factors it could consider. (R. 5997) As previously noted the judge told the jury that the judge, not the lawyers, instructs on the law. Additionally, as no objections came until after the verdict (R. 6040), such objections were untimely and this issue is not preserved for appeal. Cumbie, supra.

The Appellant also complains about the prosecutor's comment that defense counsel would get up and cry. (R. 5932) An objection to this comment was immediately sustained. (R. 5932) There was no request for a curative instruction, or a motion for mistrial, at that time, even though the objection was sustained. This issue is not preserved for appeal. Clark v. State, 363 So.2d 331, 335 (Fla. 1978); Duest, supra.

e) The Appellant complains that the prosecutor commented that it should not matter that Valle was going to be good in jail. (R. 5884) Once again, the comment is taken out of context, as the prosecutor's argument was that a mitigating factor based on model prisoner evidence was never established. The prosecutor challenged the defense expert's claim that Valle was not the worst prisoner; that he was a six or seven on a scale of ten. (R. 5884) The prosecutor emphasized the numerous disciplinary reports and Valle's inability to follow rules, and the escape attempt. (R. 5893-94) Very simply, the prosecutor was establishing that Valle was hardly a model prisoner. The comments were proper, especially in view of the court's final instructions which enabled the jury to consider anything. Carter v. State, 560 So.2d 1166 (Fla. 1989); Jackson v. State, 545 So.2d 846, 850 (Fla. 1989) (court's standard instruction on mitigating factors sufficiently apprised jury it could consider any significant aspect of defendant's life and

character). Lastly, the earliest objection which can remotely be construed as referring to this comment occurs after the verdict (R. 6040-45) and was untimely. The issue is not preserved for appellate review. Cumbie, supra. Alternatively, any error should be deemed harmless, as the evidence overwhelmingly demonstrated that Valle was not a model prisoner.

E. Application of Aggravating Circumstances

1. Section 921.141(5)(j) and the ex post facto clause of the Constitution.

Section 921.141(5)(j), Florida Statutes, which became effective October 1, 1987, lists as an aggravating circumstance that "[t]he victim of the capital felony was a law enforcement officer engaged in the performance of his official duties." The lower court found that under the facts of this case, "since [Valle] is in the identical circumstances he would have been in 1978," there was no ex post facto violation in applying § 921.141(5)(j). (R. 3684) The trial court emphasized the similarity of the previously existing aggravating factors, §§ 921.141(5)(e) and (g). (R. 3679)

In Combs v. State, 403 So.2d 418, 421 (Fla. 1981), this Court concluded that § 921.141(5)(i), Florida Statutes, defining the aggravating circumstance that the murder was "cold, calculated and premeditated ...," could be applied retroactively to offenses committed before its effective date, since it did not add anything new to the offense of first degree murder. Premeditation was an inherent element of the crime and the defendant would know, by virtue of previously existing statutes, that a premeditated homicide could result in the death penalty.

So too, in the instant case, § 921.141(5)(j), pertaining to the killing of a police officer engaged in the performance of official duties, is essentially subsumed within the previously existing aggravating factors of § 921.141(5)(e) and (g) - that the killing was committed "for the

purpose of avoiding or preventing a lawful arrest or effecting an escape from custody" and that the killing was "committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." Thus, Valle would have known in 1978, that killing a police officer could result in an aggravating factor, as the killing was to avoid arrest by that officer, who was engaged in his official duties, and as the killing was to disrupt the enforcement of laws by that officer. In the instant case, there is no way to separate the officer's status as an officer, under 5(j), from the officer's instrumental and essential role under factors 5(e) and 5(g). Without the officer, in his role as an officer, neither 5(e) nor 5(g) would exist in this case. Thus, the three are intricately interwoven, and 5(j) is subsumed within 5(e) and (g), and clearly existed in 1978.

Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), does not change the foregoing conclusions. One element of the ex post facto claim is that the new law must disadvantage the offender affected by it. 482 U.S. at 430; Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). Valle is clearly not disadvantaged by 5(j) since the police officer's status, while engaged in official duties, would similarly have resulted in aggravation under 5(e) and (g) in 1978. He is further not disadvantaged by the new law since the judge, in his sentencing order, merged all three factors - 5(e), (g) and (j) - together and treated them as a single aggravating factor. (R. 900-903) Similarly, Weaver emphasizes that the purpose of the ex post facto clause was to "give fair warning of [legislative enactments'] effect ..." 450 U.S. at 28-29. Sections 921.141(5)(e) and (g) clearly gave Valle fair warning that killing a police officer could result in an aggravating factor. See also, Stone v. Dugger, 524 So.2d 1018, 1919 (Fla. 1988) (held that Combs is not affected by Miller).

Accordingly, there is no ex post facto violation in applying 921.141(5)(j) retroactively. If there is any such violation, it should alternatively be deemed harmless because the judge merged that factor with 5(e) and (g) and did not give it any added significance.[21]

2. Tripling of Aggravating Circumstances

The Appellant contends that the trial court erred in failing to give the jury an instruction specifically permitting it to weigh factors which involve the same aspect of the offense as a single circumstance. The Appellant is referring to factors 5(e), (g) and (j), which the trial court, in its sentencing order, merged into a single factor. (R. 900-903)[22]

The failure to give an instruction such as the one requested by the defense does not constitute error. In Suarez v. State, 481 So.2d 1201, 1209 (Fla. 1985), the defense complained that the trial court erroneously instructed the jury on two factors which must be treated as one factor. This Court held:

> ... However, Provence and White regarded improper doubling in the trial judge's sentencing order, and did not relate to the instructions to the penalty phase jury. The jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in making

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[21] The Appellant also claims that § 921.141(5)(i) (cold, calculated, premeditated) was erroneously aplied retroactively. This claim has been rejected both before and after Miller. Combs, supra; Stone, supra.

[22] This issue was also raised and rejected in the prior appeal in this case. In case no. 61,176, Valle argued that the court erred in failing to instruct the jury that the state may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. (Brief of Appellant, case no. 61,176, pp. 85-90). This Court rejected that argument, finding the jury instructions to be proper and adequate. "This Court has consistently held that the standard jury instructions on aggravating and mitigating circumstances, which were given in this case, are sufficient and do not require further refinements." 474 So.2d at 805. This prior holding establishes the law of the case, barring reconsideration on this appeal. Harvard v. State, 414 So.2d 1032, 1037 (Fla. 1982).

> their assessment as to whether death was the proper sentence in light of any mitigating factors presented in the case. The judge, on the other hand, must set out the factors he finds both in aggravation and in mitigation, and it this sentencing order which is subject to review vis-a-vis doubling.

481 So.2d at 1209. Suarez established that it is not necessary to give the jury an instruction on doubling, since the instructions as given were deemed appropriate.

Moreover, the instructions as given were fully adequate. Not only was the jury given the list of factors, but consistently with State v. Dixon, 283 So.2d 1, 10 (Fla. 1973) and Provence v. State, 337 So.2d 783, 786 (Fla. 1976), the judge instructed the jury that the "advisory sentence is not to be reached by merely counting up the aggravating and mitigating circumstances. You are required to use your reasoned judgment in determining whether the facts of this case under the aggravating and mitigating circumstances upon which I have instructed you can be satisfied by life imprisonment or require the imposition of a death sentence in light of the totality of the circumstances presented." (R. 6004) Thus, the jury was told not merely to add up the number of factors, but to give them appropriate weight and view them in totality. See also, Jackson v. State, 498 So.2d 406, 411 (Fla. 1986) (trial court's improper consideration of both 5(e) and (g) did not render sentence invalid since "sentencing statute requires a weighing rather than a mere tabulation of factors in aggravation and mitigation."); Jacobs v. State, 396 So.2d 1113, 1117-19 (Fla. 1981).

As the requested instruction herein is not necessary, the given instructions were fully adequate, and the judge's sentencing order properly treats the three factors as a single factor, the Appellant has not demonstrated any error. See also, Valle II, 474 So.2d at 805 (adequacy of standard instructions).

F. "Mandatory Death" Arguments

The Appellant contends that the prosecutor improperly made the following argument to the jury:

> If you find that there are four aggravating, three aggravating or five aggravating, two aggravating or one aggravating and they outweigh any mitigating you may find--but it's our position there is no mitigating in this case--the law requires that you recommend the death penalty.

(R. 5922) Initially, it should be noted that this issue is not properly preserved for appellate review, as the only objection to it was after the jury's verdict. (R. 6043-48) Cumbie, supra.

Second, as to the merits, the prosecutor's comment is an accurate statement of Florida law and does not result in any violation of state or federal constitutional principles. The Appellant argues that the jury cannot be prohibited from opting for mercy in any case, regardless of the aggravating or mitigating circumstances. Not only does the prosecutor's comment say nothing whatsoever about mercy, but the Appellant's proposition is incorrect. Under Florida law, a jury's advisory sentence must be based upon a "reasoned judgment", which in turn must be based upon the weighing of the aggravating and mitigating circumstances. Alvord v. State, 322 So.2d 533, 540 (Fla. 1975). Any discretion must be "reasonable and controlled", not arbitrary and without regard to the aggravating and mitigating factors. Id. Indeed, the absolute discretion of a jury for mercy, as argued by the Appellant, would run contrary to the "guided discretion" that is required for the application of the death penalty. Proffit v. Florida, 428 U.S. 242, 254-58, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Thus, when sufficient aggravating circumstances[23] exist and outweigh the mitigating circumstances, a jury, under Florida's death penalty scheme, is required to recommend a sentence of death, and the prosecutor's comment was proper. This conclusion is further inherent in opinions such as State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), which held that "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances...." Although the Eleventh Circuit Court of Appeals, in Jackson v. Dugger, 837 F.2nd 1469, 173-74 (11th Cir. 1988), has disapproved of such instructions on presumptions due to the burden-shifting nature of the instruction, neither the prosecutor's comment, nor the judge's jury instructions in the instant case, utilized any such burden-shifting presumption. Furthermore, even without reference to any burden shifting presumption, Dixon and Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982), would still stand for the proposition that the jury must recommend death if sufficient aggravating circumstances outweigh the mitigating circumstances. Consistent with this analysis, this Court, in Merdyk v. State, 545 So.2d 846, 849-50, at n.3 (1989), has held that there was no requirement that a jury be instructed that the appropriate penalty is solely within its discretion and that each juror may decide to grant mercy with or without a reason.

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[23] With respect to the sufficiency of the aggravating circumstances, it should be noted that the prosecutorial comment in question was immediately preceded by the prosecutor's reference to aggravating "factors which warrant the imposition of the death penalty." (R. 5922) Thus, the prosecutor's comments were fully consistent with the requirement that the aggravating circumstances be sufficient to warrant death.

The foregoing is further consistent with <u>California v. Brown</u>, <u>supra</u>, and <u>Saffle v. Parks</u>, <u>supra</u>, which have upheld anti-sympathy instructions in death penalty proceedings. Similarly, in <u>Boyde v. California</u>, 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 361 (1990), concluded that it was constitutionally proper to instruct the jury that if it concluded that the aggravating factors outweighed the mitigating factors, "it shall impose a sentence of death." Such instructions were found proper based on <u>Blystone v. Pennsylvania</u>, 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 255 (1990), which held that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." 108 L.Ed.2d at 264.

With respect to the Appellant's reliance on <u>Drake v. Kemp</u>, 762 F.2d 1449 (11th Cir. 1985), it should be noted that the statements therein about the jury's ability to opt for mercy are expressly based on Georgia's death sentencing scheme, which expressly permits such arbitrary discretion on the on the part of the jury. 782 F.2d at 1459. As Georgia's sentencing scheme is not at issue here, <u>Drake</u> is completely irrelevant.

The state would note that the court's instructions to the jury properly advised the jury of how it was to determine its advisory sentence and what matters it could consider. (R. 5993-6005) The jury was told to determine whether sufficient aggravating circumstances existed to justify the death penalty and whether those circumstances outweighed any mitigating circumstances. (R. 5993) The jury was permitted to consider any mitigating factors it chose to consider. (R. 5997) The jury was told, consistent with <u>Alvord</u>, that it was free to exercise its "reasoned judgment" in finding the death sentence inappropriate. (R. 6004-5) Even if the prosecutor's comment was in any way inaccurate, the court's instructions were clearly proper.

As to the prosecutor's comment, during voir dire, of which the Appellant also complains, the foregoing arguments are equally applicable.

Thus, the jury lacks the absolute, unguided discretion that the Appellant claims it has. The prosecutor's description of the jury's role was accurate, and the court fully and fairly advised the jury of its role.

IV

EVIDENCE PRESENTED AT TRIAL AND PROSECUTORIAL COMMENTS DURING THE SENTENCING PHASE, DID NOT RESULT IN A VIOLATION OF BOOTH V. MARYLAND, 482 U.S. 496 (1987).

Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), held that evidence of personal characteristics of the victims and the emotional impact of the crimes on the family, in a capital case, violates the eighth amendment to the United States Constitution. South Carolina v. Gathers, 490 U.S. ____, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), applied this principle to prosecutorial comments during closing arguments. The Appellant contends that the principles of Booth and Gathers were violated in this case.

The Appellant first complains about Officer Spell's testimony that Pena was his friend and that Spell loved Pena's dog. (R. 3797) This is not the type of testimony that Booth is referring to. Spell's friendship with Pena was a relevant circumstance in this case, as it explained why Spell had approached Pena and Valle (i.e., to say hello to Pena [R. 3796-98]) It is therefore further corroborative of Spell's ability to see what occurred and hear what was said. Thus, the Court in Booth noted that:

> Our disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context. Similar types of information may well be admissible because they relate directly to the circumstances of the crime.

482 U.S. at 507, n. 10 (emphasis added). Moreover, neither Spell's friendship with Pena, nor Spell's love of the dog, in any way describe personal characteristics of the deceased or the emotional impact of the crime on the deceased's family.

The Appellant next refers to Detective Wolfe's testimony that during the investigation he went to the chapel where the funeral services were being held. (R. 4070) Again, this does not implicate Booth as it does not relate to personal characteristics of the deceased or the emotional impact of the crime on the victim's family. Moreover, any jury would undoubtedly be inherently aware that the deceased would have had a funeral.

The Appellant next turns to the prosecutor's closing argument and begins by selectively taking statements out of context. Thus, the prosecutor commenced the comments of which the Appellant complains by telling the jury to disregard mere sympathy, even though "[t]here are sympathies there on both sides." (R. 5875) It was in this context that the prosecutor argued that the jury should not base its decision on sympathies for Valle's family members - for the sister and father who cried in court:

> There would not be people with those types of pain if it weren't for the crime that he committed. If you want to place the fault somewhere, the fault lies there [with Valle's actions]; that his sister cries, that widows cry, that children cry or that parents cry. He did that and he should be punished for what he did.

While the foregoing has a passing reference to the crying widow, that should not be deemed violative of Booth for several reasons. First, the entire argument was designed to tell the jurors to avoid all sympathies, and such arguments are proper. California v. Brown, Saffle v. Parks, supra. Second, Booth did not involve a mere passing reference to a crying widow. Any juror of minimal intelligence would inherently know, on his own, that surviving relatives would have cried. Rather, Booth involved detailed statements,

based on interviews with survivors, that they suffered from lack of sleep, became withdrawn and distrustful, could no longer watch violent movies, had to endure a sorrowful wedding ceremony just days after the parents' murders. 482 U.S. at 500. The victim impact statement continued with this theme and further details in great depth. The state submits that Booth was not intended to refer to what is obvious to anyone - that a family member cried.

The Appellant next complains about the prosecutorial comment that "nobody was here to beg for mercy for the officer. ..." (R. 5903) Once again, this does not violate Booth as it relates neither to the characteristics of the victim nor the emotional impact on the victim's family.

The Appellant next refers to comments that Pena, a "cop," was doing his normal job, protecting people, earning a living and supporting his family. References to Pena's work obviously relate to aggravating factors of the crime - his status as an officer; obstruction of law enforcement; etc. While the reference to "supporting his family" (R. 5919), might arguably violate the holding of Booth, such a comment should be deemed harmless. First, as noted above, it clearly lacks the depth and details of the references in Booth. Second, any jury is already inherently aware that any working person is supporting his family. This Court has already noted that harmless error analysis applies to Booth claims. See, LeCroy v. State, 533 So.2d 750, 754-55 (Fla. 1988).

Lastly, the Appellant complains about comments that Officer Pena was an innocent man, who was not represented by lawyers, and for whom no experts testified as to whether he would be a good father. (R. 5932-33) The thrust of this comment is not the characteristics of the victim, but the victim's lack of legal representation. Those are matters to which Booth does not apply.

The Appellant has alternatively argued that the comments violated Bertolotti v. State, 476 So.2d 130 (Fla. 1985); and Jackson v. State, 522 So.2d 802 (Fla. 1988). In Bertolotti, multiple comments, including references inviting the jury to imagine the victim's final pain; and references to the lack of lawyers to beg for the victim's life, were not sufficiently outrageous to taint the validity of the jury's sentencing recommendation. Similarly, an improper comment in Jackson, that the victims could no longer read books, visit their families, or see the sun rise, was not deemed serious enough to warrant resentencing. So too, in the instant case, any improprieties in the above comments would not be serious enough to warrant a resentencing hearing, and must be deemed harmless. See, Bertolotti, 476 So.2d at 133 ("we do not find the misconduct here to be so outrageous as to taint the validity of the jury's recommendation in light of the evidence of aggravation presented.")[24]

V.

THE IMPOSITION OF A DEATH SENTENCE DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. Applicability of § 921.141(5)(i), Florida Statutes.

The lower court found that the homicide was committed in a cold, calculated, and premeditated manner, without any pretense of moral or

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[24] The state would also note that a current majority of the Supreme Court, in dissenting opinions in Booth or Gathers, has expressed explicit disapproval of Booth. (Justice's Rehnquist, White, O'Connor, Scalia and Kennedy). Furthermore, Booth is based solely on the Eighth Amendment, and there would be no independent basis for Booth under the Florida Constitution, due to Art. I, sec. 16(b), providing victims with the right to be heard, when relevant, at all crucial stages of criminal proceedings.

legal justification. (R. 902) In support of that conclusion, the sentencing order set forth the following facts:

> Approximately eight minutes elapsed between the initial stop and the murder of Officer Pena. After the defendant heard the information about the car come on the radio, he returned to his car and told Mr. Ruiz that he would have to waste the officer. He got the gun and concealed it along the side of his leg and slowly walked back to the car. He fired at Officer Pena from a distance of 1 1/2 to 3 feet from the officer, hitting him in the neck. He purposely said "Officer" in order to get a better shot. He then stepped back and shot at Officer Spell. Although he aimed at his head, Officer Spell was able to quickly turn, causing the bullet to strike him in the back. Approximately 2 to 5 minutes elapsed from the time the defendant left Officer Pena's car to get the gun and slowly walk back to shoot and kill Officer Pena.
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> The Court finds that these actions establish not only a careful plan to kill Officer Pena to avoid arrest, but demonstrate the heightened premeditation needed to prove this aggravating circumstance. This was, without any doubt, an execution-type murder. It was committed without any pretense of moral or legal justification. Officer Pena did nothing to provoke or cause the defendant's actions.

(R. 902) The court's findings are supported by Valle's statements, the dispatch tape recording, the dispatcher's testimony, the autopsy, and Officer Spell's observations. (R. 3780-95, 3796-3815, 3865-66, 4028-55, 4101-4104)

The aggravating factor that the homicide was cold, calculated and premeditated, requires that there be "heightened premeditation" beyond the simple premeditation required for first-degree murder. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987); Porter v. State, 15 F.L.W. S353, 354 (Fla. June 14, 1990). The factor requires "that the defendant planned or prearranged to commit murder before the crime began." Thompson v. State, 15 F.L.W. S347, 349-50 (Fla. June 14, 1990).

Such heightened premeditation and planning clearly exist in the instant case. Most significantly, Valle, after hearing information over the dispatch radio, which led him to believe he would be arrested for proba-

tion violation, walked back to Ruiz and specifically told Ruiz that he would have to "waste" or "kill" Officer Pena. Such verbal announcements of an intent to kill, prior to the killing, have routinely been found to support the heightened premeditation required for this factor. For example, in Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988), during the course of an armed robbery, the defendant and his companion "openly discussed whether to kill" the victims. Id. There was no indication that they had planned any killings before commencing the robbery. This Court upheld the finding that the murders were committed in a cold, calculated and premeditated manner, as they "were undertaken only after the reflection and calculation which is contemplated by this statutory aggravating circumstance." Id. The same holds true in the instant case. Campbell v. State, 15 F.L.W. S342 (Fla. June 14, 1990), in rejecting this factor, noted that there was "no respite for reflection." The reflection in the instant case not only exists, but was verbally expressed, prior to the killing, to another person.

In Johnson v. State, 438 So.2d 774, 779 (Fla. 1983), the defendant, prior to killing a deputy sheriff had said that he would not mind shooting people to obtain money. This expressed intent to kill was of importance in upholding this aggravating factor. Likewise, in Dufour v. State, 495 So.2d 154, 156, 164 (Fla. 1986), the announced intention to find and kill a homosexual resulted in this factor being upheld. See also, Provenzano v. State, 497 So.2d 1177, 1180, 1183 (Fla. 1986).

The instant case is unlike the spontaneous killing, without reflection, of victims during store robberies, as in Rogers, supra, and Hamblen v. State, 527 So.2d 800 (Fla. 1988). Nor is the instant case comparable to those involving spontaneous fits of rage. See, e.g., Mitchell v. State, 527 So.2d 179 (Fla. 1988). The instant killing was preceded by an express plan to kill, which plan was articulated to Ruiz and carried out in the manner likely to ensure its success.

Not only was the plan to kill expressly articulated prior to the murder, but the shooting from point-blank range is indicative of an execution style killing. Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984). "Heightened premeditation can be demonstrated by the manner of the killing ..." when the evidence also shows the prior plan to commit the murder. Thompson, supra.

The Appellant argues, on the basis of Preston v. State, 444 So.2d 939 (Fla. 1984); Wilson v. State, 493 So.2d 1019 (Fla. 1986); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Richardson v. State, 437 So.2d 1091 (Fla. 1983); and Washington v. State, 432 So.2d 44 (Fla. 1983), that this factor is inapplicable where the time period for reflection is short, or where the killing is committed extemporaneously to avoid arrest. None of these cases involve defendants who, prior to committing a murder, expressly told a third party that they intended to commit the murder. Sufficient reflection can exist, even in a short period of time, when there is a clear communication of the plan. Harvey, supra. Thus, the lower court properly found this aggravating circumstance to exist.

B. Consideration of Mitigating Factors

The Appellant claims that the trial court failed to give proper consideration to mitigating factors. He asserts first that during voir dire, a comment by the judge somehow minimized nonstatutory mitigation. The defense objected to the prosecutor's definition of aggravating and mitigating factors during voir dire, and the judge advised the jury that there is a "list of aggravating and mitigating [circumstances], but then mitigating factors are also anything else that they believe would be mitigating in this case." (R. 2673-76). Not only is there nothing improper about the court's comment, but during a bench conference, defense counsel fully accepted the language that the judge decided to use, stating that "[t]hat would be fine,

judge, thank you." (R. 2675) On several occasions the judge advised the jury that he would fully instruct the jury on the law at the end of the case.

The Appellant claims that during defense examination of witness Milledge, the judge commented, at a bench conference, "Do you think you can like get to more relevant things pretty soon?" (R. 5046) The judge clarified this, saying that he was not saying that her testimony was unimportant; that the court has "a right to limit what the court believes is repetitive or redundant or potentially relevant. ..." (R. 5046) (emphasis added). Not only was the judge's comment not made in the presence of the jury, but a review of Mr. Milledge's testimony reflects that it was extensive and often repetitive. She was in no way prevented from testifying as to anything.

The Appellant next attacks language in the sentencing order. The judge rejected the mitigating factor that the defendant's capacity to conform his conduct to the requirements of the law was substantially impaired. (R. 905-6) The court found that despite the testimony of Toomer and Milledge, the court did not believe that this circumstance reasonably exists. (R. 905) The Appellant does not contest the rejection of this statutory factor.[25] Rather, he argues that the court should have proceeded to address the evidence in the context of a nonstatutory mitigating factor - i.e., even if Valle's ability to conform his conduct to the law was not substantially impaired, that ability to conform may have been slightly

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25 See Rogers, supra. The evidence in this case from the defendant's own experts and confession, reflects that Valle has an IQ of 127, is intelligent and clearly evaluated his actions and options before shooting the officer. His conscious decision to "waste" the officer to prevent his own arrest, indicates that he fully appreciated the criminality of his conduct. In Rogers, intelligence and articulateness were deemed sufficient to establish that Rogers was capable of understanding the criminality of his conduct. 511 So.2d at 534-35.

impaired. There are several problems with the Appellant's argument. Most importantly, the judge, in going through the relevant evidence found that Valle "fully appreciated the criminality of his conduct" and had the "capacity to conform his conduct to the law. ..." (R. 906) (emphasis added). Such language on the part of the judge was clearly indicating that not only was there no "substantial" impairment, but there was no lesser degree of impairment either, since Valle could "fully" appreciate the criminality of his conduct. As such, the court implicitly and inherently rejected any nonstatutory mitigating argument that a lesser degree of impairment existed.

The trial judge's conclusion is abundantly supported by the record evidence presented herein, that Valle was intelligent, articulate, planned, knew consequences, and had no alcohol or drug addiction. Furthermore, the defense never argued to either the judge or jury that a level of impairment which was less than substantial should be considered as a nonstatutory mitigating factor. The issue arose only in an extremely targential manner-in an argument over whether to delete the word "substantial" from the phrase "substantial impairment" in the instructions to the jury. (R. 5772-73) See, Rogers, 511 So.2d at 535, noting that several alleged nonstatutory mitigating circumstances were not raised in the trial court. The Appellant's reliance on Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987), is misplaced, as that case involved a Hitchcock issue, in which jury instructions expressly limited the jury's ability to consider non-statutory mitigating evidence, a situation which does not exist in the instant case.

Next, the Appellant suggests that the lower court erroneously failed to consider evidence submitted as mitigation. That is a misreading of the judge's order. The judge prefaced the section on mitigating factors by stating that "[t]he court has nonetheless considered each and every statutory

mitigating factor, as well as other conceivable mitigating evidence, which has been presented or argued by the defense." (R. 905) (emphasis added). The judge, after proceeding through possible statutory mitigating factors, then addressed "any other aspect of the defendant's character or record and other circumstances of the offense to warrant mitigation." (R. 906) The court addressed the defense expert testimony regarding model/nonviolent prisoner/rehabilitation, and stated that "[t]he court has considered their opinions, weighed the evidence concerning these witness' opinions, as well as the State's evidence in rebuttal. The court does not find that this mitigating circumstance reasonably exists." (R. 906)[26]

The order then addressed the remainder of the defense evidence:

> The Court heard testimony from his family, including his sister Georgina, his father and his niece Ann. These witnesses testified concerning his life prior to the murder. This included his lack of love and attention by his parents, the methods his father used to discipline him and life during his teenage years. The Court also heard from witnesses who knew the defendant in high school. The Court additionally heard from the defendant outside the presence of the jury concerning his current remorse over the killing, wherein he accepts full responsibility for his actions.
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> Considering all the evidence which the defense has presented concerning these circumstances, the Court does not find that these circumstances to be relevant mitigating circumstances. Even if they were established, the Court finds that they are outweighed by the aggravating factors.

(R. 906-907)

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[26] As noted in the statement of the facts, the testimony below reflects that the defendant tried to escape three times during his incarceeration (the cut cell bar incident; the possession of a jail key; and the Dade County Jail incident); had a lengthy prison disciplinary record; and even his own expert, Dr. Fisher, refused to label him as a "model prisoner."

The Appellant asserts that the next to last sentence erroneously rejects the evidence as irrelevant A fair reading of the order, in its totality, is that the judge is not finding that the categories of nonstatutory mitigating evidence - i.e., parental discipline, lack of love, etc. - are irrelevant categories. Rather, the order is concluding that the defense did not reasonably establish such nonstatutory mitigating factors. This is implicit from the last sentence, which commences, "Even if they were established . . . ." (R. 907) By starting the sentence in this manner, the judge was obviously indicating, in reference to the prior sentence, that these factors were not established by the evidence. As such, the court was not excluding the factors from his consideration; the court was only finding that the evidence did not establish the existence of the factors. The language may be somewhat inartful, but that is the only fair reading of those sentences when placed in the context of the entire order. Thus, the order had also stated that the judge considered all "conceivable mitigating evidence, which has been presented or argued by the defense". (R. 905)

A "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." Campbell v. State, 15 F.L.W. S342, 344 (Fla. June 14, 1990). Mitigating factors must be found to exist only if the factors have been "reasonably established by the evidence" and are "mitigating in nature." Id. The evidence in the instant case did not reasonably establish the existence of any mitigating factors.

While an abused or deprived childhood may be mitigating in nature, Campbell, 15 F.L.W. at 344, n. 6, the evidence in this case did not establish such an abused childhood. Rather, it only established methods of parental discipline of which defense counsel apparently disapproves. With

respect to parental "beatings," the father said that he occasionally beat Valle with a belt as a form of punishment at the age of five or six. (R. 5471) He said that this was not too often, and that he disciplined his children out of love. (R. 5471, 5483-87) Ms. Milledge, while claiming that there was a history of physical abuse over the years, admitted she had no idea how frequent the beatings were. (R. 5030, 5037) She was unaware of any incidents in which blood was drawn (R. 5100) Dr. Toomer stated that there were never any physical injuries from these methods of parental discipline. (R. 5363) Corporal punishment has been deemed a permissible disciplinary method in schools, when it is not with excessive force. Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977); Wise v. Pea Ridge School Dist., 855 F.2d 560 (8th Cir. 1988); Cunninghan v. Beavers, 858 F.2d 269 (5th Cir. 1988). Certainly that which we allow our schools to do should not be converted into "child abuse" when done by a parent. Indeed, schools are deemed to be acting in loco parentis when applying corporal punishment.

As to evidence of psychological stress, the court, as noted above, evaluated it and rejected it. The principal testimony of this nature came from Dr. Toomer, who basically said that Valle acted as he did because of all the "stressors" that came together to influence his behavior. (R. 5318-19) He emphasized the lack of quality and dysfunction within Valle's family, referring to interpersonal relations and communications, the "physical abuse," the death of an aunt, and the gambling. (R. 5319-26) He also admitted that there was no evidence of brain damage, a high IQ, and no evidence of a major mental disorder or hallucinations. (R. 5369-73) The court was also aware that several days after the murder, when Valle would supposedly have been under even more stress, he was perfectly calm and did not react in any violent manner when confronted by the Deerfield Beach police, thereby casting even further doubt on the claim of some level of

psychological/emotional disturbance or stress. The court could properly find that the defense did not reasonably establish the existence of such psychological stress which was related in any manner to the commission of the instant offense and could thus constitute a nonstatutory mitigating factor. Few among us have not suffered deaths of close relatives. Few among us have not had arguments with parents. If such matters must be accepted as rising to a sufficient evidentiary level to establish a significant degree of psychological or emotional impairments, then the concept of requiring that a mitigating factor be established by reasonable evidence is utterly meaningless.

Dr. Toomer's testimony of psychological stress was not binding on the trial court and could be rejected in light of Toomer's articulated reasons. Toomer based his opinion in part on the alleged "child abuse", which has already been demonstrated to be nonexistent. Toomer further based his opinion on an alleged "lack of quality" within the Valle family. Toomer apparently blames the elder Valle for fleeing a despotic Cuban regime, and struggling and working around the clock to keep his family sheltered, fed, educated and together. Would that all of the children in this state were so unfortunate as to have such a father. Indeed, a fair reading of Valle's background evidence suggests that his childhood was one which was more fortunate than most. Toomer also based his opinion on the effect of the death of Aunt Izelle on the defendant. Mitigating evidence must, in some capacity, extenuate or reduce the degree of moral culpability for the offense. Rogers, 511 So.2d at 534. How the death of an aunt, ten years before this offense, can in any way extenuate or reduce the degree of moral culpability for the offense, is utterly beyond rational comprehension. See, Rogers, 511 So.2d at 535.

The instant case must be compared to several other cases. In Nibert v. State, 15 F.L.W. S415 (Fla. July 26, 1990), the defense did present significant evidence of physical and/or psychological child abuse, insofar as the defendant's mother forced the defendant, as a child, to start drinking alcohol. As there was also evidence of Nibert's alcoholic state at the time of the offense, the earlier child abuse had a clear connection to the homicide. Thus, child abuse was not only established in Nibert, but it was relevant to the homicide. In Cochran v. State, 547 So.2d 928, 932 (Fla. 1989), mitigating factors were deemed established based on evidence of a low IQ, a history of crippling emotional problems and a severe learning disability. Likewise, in Brown v. State, 526 So.2d 903, 908 (Fla. 1988), the defendant had a low IQ, just above the level for mild mental retardation, and had the emotional maturity of a preschool child. By contrast, in the instant case, neither an abusive childhood, nor psychological stress are established by any reasonable quantum of evidence. See, Nibert, supra., 15 F.L.W. at 5416.

Furthermore, even if the trial court's order is read as rejecting the foregoing evidence as not being "relevant" mitigating circumstances, as opposed to not being sufficiently established by the evidence, such a conclusion would be correct. While Campbell, 15 F.L.W. at 5344, n.6, lists an abusive childhood as a valid nonstatutory mitigating circumstance, Rogers, supra, makes it clear that a nonstatutory factor has mitigating weight only "if relevant to the defendant's character, record or the circumstances of the offense." 511 So.2d at 535. Rogers' alleged childhood trauma did not meet that standard of relevance and did not produce "any effect upon him relevant to his character, record or the circumstances of the offense so as to afford some basis for reducing a sentence of death." Id. Such relevancy is established in cases such as Nibert and Cochran; it is not established in the instant case.

Lastly, even if the trial court's language did erroneously find that these circumstances were not relevant circumstances, the court, in the alternative, did find that "[e]ven if they [mitigating factors] were established, the Court finds that they are outweighed by the aggravating factors." (R. 907) Such alternative conclusion would cure and render harmless any possible error in the prior language in the court's order.

CONCLUSION

Based on the foregoing, the imposition of the death sentence should be affirmed.

Respectfully submitted,

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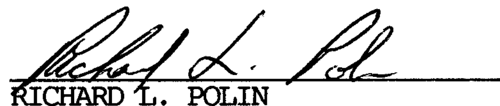
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to LOUIS M. JEPEWAY, JR. ESQ., Suite 407, Biscayne Building, 19 West Flagler Street, Miami, Florida 33130; and MICHAEL A. MELLO, ESQ., Vermont Law School, Witcomb House, P.O. Box 96, Chelsea Street, South Royalton, Vermont 05068 on this 20th day of August, 1990.



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