IN THE SUPREME COUKT OF FLORIDA

CLARENCE HILL,

Appellant,

v.

CASE NO. 63,902

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF APPELLEE

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ATTOWEY FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant, Clarence Edward Hill, the capital criminal defendant below, will be referred to as "Appellant." Appellee, the prosecuting authority below, will be referred to as "the State."

References to the twelve-volume record on appeal will be designated "(R:)."

The State will take the liberty of refashioning appellant's various issues as appears in the section of this brief entitled "Issues on Appeal", infra.

All emphasis will be supplied by the State unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State reluctantly rejects appellant's statement of the case and statement of the facts, plus those factual passages contained in his discussions of his various issues, because these statements are incomplete and because, at times, they improperly fail to present the legal occurrences and the evidence adduced below in the light most favorable to the State as the prevailing party. See Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 457 U.S. 31 (1982). The State therefore substitutes its own statement of the case and facts necessary for purposes of resolving the narrow legal issues presented upon appeal, as follows:

On November 2, 1982, an indictment was filed in the Circuit Court of the First Judicial Circuit in and for Escambia County, Florida, charging Appellant with the first degree murder of Pensacola Police Officer Stephen Alan Taylor (Count I), the attempted first degree murder of Pensacola Police Officer Larry Douglas Bailly (Count II), the armed robberies of Melanie Morris, Tina Neese, and Patricia Devlin as custodians of funds belonging to the Freedom Savings and Loan Association of Pensacola (Counts III-V), and the possession of a firearm during the commission of these felonies (Count VI), all crimes said to have occurred on October 19. Cliff Anthony Jackson was charged as a co-defendant under the first five counts (R 1440-1441). Appellant thereafter filed

a number of pretrial motions, including a motion for individual and sequested voir dire allegedly made necessary by extensive but undocumented pretrial publicity (R *1452-1453).* Following a hearing on January *20, 1983,* this motion was denied by the Circuit Judge Edward T. Barfield, who ordered that the potential jurors would instead be interrogated in groups of thirty (R *1530-1534).* Also filed and denied were defense motions to preclude the prosecution from questioning potential jurors on their attitude towards the death penalty until a verdict of guilt was returned, at which time the prosecution could challenge for cause and replace those jurors opposed to capital punishment (R *1445-1449; 1526-1528).* Such motions were bottomed on the notion, which was not statistically supported, that jurors who favor the death penalty are more apt to find a defendant guilty than are jurors who oppose the death penalty. In the course of denying another defense motion during this hearing, Judge Barfield remarked:

> [A] juror can have reservations about the death penalty and not be subject to a challenge for cause by the State.

(R *1526).*

On April *14,* appellant moved for a change of venue, citing the aforementioned pretrial publicity as cause (R *1563-1657).* Attached to this motion were copies of numerous local newspaper articles and transcripts of local radio and television reports concerning the crimes charged. Of these items,

roughly sixty-eight were "factual" in the sense of reporting the occurrence and the aftermath of the crimes charged without direct comment, while exactly three were "emotional" in the sense of advocating a strong response to the crimes charged. Included in the "factual" category was the fact that the grand jury which had indicted appellant had issued a posthumous commendation to Office Taylor for his service (R *1573; 1649-1652).* Included in the "emotional" category were two editorials and a letter to the editor, all published within a week of the crimes charged, advocating the death penalty (R *1572; 1584; 1590).* However, in none of the latter items was appellant's personal guilt assumed or his personal punishment advocated (R *1572; 1584; 1590).* Judge Barfield indicated at an April *21* hearing that he would take the motion for a change of venue under advisement, and grant such motion if it proved impossible to empanel a fair jury locally (R *1723).*

Jury selection began on the morning of April *25,* and was concluded late the following afternoon (R *1-687).* The potential jurors, all of whom had apparently heard about the case, were interrogated in two groups of thirty each as Judge Barfield had ordered (R *6-24, 93-124, 190-191, 278-301).* Prospective jurors Linda Kay Bondurant and Lisa Bonner both related that they were troubled by the concept of capital punishment (R *254; 257).* Ms. Bondurant, who interestingly enough was a newspaper columnist,twice indicated her un-

equivocal opposition to the death penalty (R *236; 254;* 264),[1] but Ms. Bonner, evidently a deeply religious individual, was inarticulately equivocal at all times (R *257-259).* The State challenged both Ms. Bondurant and Ms. Bonner for cause over defense opposition (R *336-340).* Judge Barfield granted these challenges because in his opinion the two ladies were "unsure" as to whether they could recommend the death penalty under any circumstances (R *337; 340).* Appellant objected to the exclusion of these jurors, but did not specify as his basis for the objection that these exclusions were based on an incorrect interpretation of the law as expressed in Witherspoon v. Illinois, *391* U.S. *510* (1968), which of course stands for the proposition that the prosecution in a capital case cannot excuse a prospective juror for cause unless her opposition to the death penalty is unequivocal (R *340).*

Prospective juror George Ickes related that he had heard about the case and had formed a preliminary opinion that appellant was guilty of the crimes charged, while prospective juror Larry Johnson related that he had also heard about the case and had formed a preliminary opinion that if

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1 Ms. Bondurant stated: "I don't really think anybody should be put to death" at R *254,* and "I don't think I could say - I could ever say that I would be for capital punishment" at R *264.*

appellant was found guilty as charged the death penalty should be imposed (R *196; 297; 274; 288-290; 319-320; 521).* However, both jurors affirmed that they had set these opinions aside and would fairly follow the law (R *297-298; 327; 399-400; 498-502; 440-444; 519-526).*[2] The defense unsuccessfully challenged both Mr. Ickes and Mr. Johnson for cause over State opposition on the basis that they had formed firm conclusions as to ultimate issues in the case (R *329-330; 333-335; 540-543).* Mr. Ickes ultimately served on Appellant's jury, but the defense used a peremptory challenge to excluded Mr. Johnson (R *681; 544).*

Prospective juror Jernigan Harris related in response to defense questioning that he had served in the United States Navy for thirty years and that it was sometimes necessary to go to war (R *458-464).* Over unsuccessful defense objection and motion for a mistrial, the prosecutor pursued this theme by asking Mr. Harris if he had ever thought that the police and criminals were enemies at war (R *561-562).* The prosecutor then informed Mr. Harris, and later Amelia Nelson, that he had

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2 Mr. Ickes stated: "I would try to be fair" at R *297;* "yeah" when asked if he could presume appellant innocent at R *327;* "I would follow the law" at R *400;* and "I would have to...go by what the evidence presented" at R *498.* Mr Johnson stated: "No" when asked if he knew of any reason he could not be a fair and impartial juror at R *444,* "Yes" when asked if he could lay aside his preliminarily opinion that these crimes warranted the death penalty at R *523,* and "I'm going to follow the instructions of the court" at R *524.*

taken an oath to uphold the laws of Florida, and asked them if they could similarly abide by their oaths, and return a recommendation of death if convinced that such was legally warranted under the facts of the case (R 564; 566). After interrogation of Ms. Nelson had concluded, the defense alleged that these comments were improper, and unsucessfully objected and moved for a mistrial (R 567).

After appellant had exhausted his ten peremptory challenges to the venue, he moved for an additional ten such challenges or, in the alternative, renewed his motion for a change of venue (R 650). Judge Barfield denied these motions, but reminded appellant that he could still challenge the remaining potential jurors for cause (R 650-651). Appellant thereupon challenged all the remaining members of the panel, citing as cause the media publicity the case had received (R 651). This motion was also denied and then the prosecutor, who had exercised seven of his ten peremptory challenges, indicated that he would accept the panel (R 651-652). Twelve members, including Mr. Ickes and Mr. Harris, were then qualified as jurors in the case, and two were selected as alternates (R 681-687).

Meanwhile, the State had filed a notice to rely upon similar fact evidence that appellant had stolen a .22 caliber pistol from Shanavian Robinson, and a 1978 Buick Regal automobile from Janet Pearce, in Mobile Alabama earlier on the day the crimes charged had occurred (R 1658). When the State sought to introduce this testimony of these witnesses at trial

on April 27 as probative of appellant's premeditation to commit the crimes charged and his identity, and also to give a complete account of the events surrounding these crimes, appellant objected on the grounds that such evidence was only probative of his bad character and hence was inadmissible under Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847 (1959) (R 932-936; 1045-1047; 1053-1056). These objections were overruled, and the witnesses testified as described (R 936-946; 1056-1059). The State then proved that appellant and his co-defendant had driven Ms. Pearce's automobile to the Freedom Savings and Loan Association of Pensacola in the early afternoon of October 19, 1982, and that appellant had entered the bank carring Ms. Robinson's pistol (R 1048-1050; 1098; 1108-1109; 946; 951; 1077-1079).

Upon entering the bank appellant, accompanied by Jackson, approached tellers Tina Neese, Melanie Morris, and Patricia Devlin, demanded money, and threathened to "blow" the "head(s) off" of Ms. Morris and Ms. Devlin if they did not comply (R 714; 721; 749; 760-761; 775; 832). Appellant also threatened to "blow" assistant manager Pat Prince's "brains out" if she did not leave her office (R 798-802; 827-828). Deciding that discretion was the better part of valor, the bank employees did as they were told, and also hit the floor along with several customers when the robbers so demanded (R 756-762). Before leaving her office, however, Ms. Prince had tipped an alarm (R 797).

Jackson left the bank via the front door, where he was immediately apprehended by Officer Larry Bailly of the Pensacola Police Department. Appellant left the bank via the back door, undetected (R 717; 782-783; 806; 864-865; 1099). Appellant saw that Bailly and Officer Stephen Taylor of the Pensacola Police Department, who had just arrived on the scene, had Jackson on the ground and were in the process of handcuffing him (R 866-368; 784; 808; 835; 886; 898-900; 912). Appellant then casually snuck up behind the trio and began firing his pistol at the officers (R 785-786; 807-811; 827-828; 836-837; 851; 887-888; 894; 900-903; 913). Officer Taylor, who was struck in the back and chest, staggered a short distance, fell, and was soon dead (R 965-967; 975-976; 980; 787; 810; 839; 872; 914; 1077-1079). Officer Bailly, who was skinned in the neck, returned fire, striking appellant twice in the arms and three times in the stomach as he fled (R 869-870; 1104). Jackson then began grappling with Bailly and began to flee, only to be shot by Officer T. C. Miller of the Pensacola Police Department (R 871; 881-882; 1022). Jackson and appellant were apprehended by Officers Pat Adamson and Paul Muller of the Pensacola Police Department, respectively, after travelling short distances on foot (R 1020-1023; 918-928).

The events were witnessed in whole or in part by numerous nearby bank employees, bank customers, street bystanders, bus patrons, and law enforcement personnel, a fair number of whom were obviously endangered by the spectacle

(R 1669). Appellant, testifying in his own defense, essentially conceeded that most of the foregoing events had occurred, but denied that he had threatened the bank employees, and also denied that he had ever intended to hurt or kill anyone (R 1114-1115; 1105-1106). He also stated that he did not know Officer Taylor was shot. The defense had earlier unsuccessfully objected when the State had sought to prove Officer Taylor's identity and the fact and manner of his death by introducing several photographs taken of the victim, including one showing his face, which displayed tubes which had been placed in his body as part of emergency medical procedure (R 968-970; 960; 1093). The State noted that it had no autopsy pictures which did not display these tubes (R 970).

After both sides had rested and the defense had tendered the customary and unsuccessful motions for judgments of acquittal (R 1093-1095; 1136; 1142-1144), defense counsel addressed the jury as follows:

> [T]he only thing that we can do is to be honest with you...and that's what we have done from the start. And that's what I am going to do now...I expect you to find Clarence Hill guilty of first degree felony murder. I do not expect you to find him guilty of first degree premeditated murder or attempted murder with premeditation.

(R 1175-1177). After reminding the jury that his closing was sandwiched between defense counsel's two closings and he hoped that they would anticipate what he might hereinafter say, the prosecutor responded to defense counsel's attempt at personal intimacy with the jury by asking them to consider him "like the thirteenth juror" (R 1184-1185).

Defense counsel contemporaneously objected to this comment without success (R 1185). The prosecutor further remarked that while appellant had exercised his right to a jury trial, he had essentially conceeded the veracity of the charges with the exception of premeditation. When the prosecutor continued that "we could have progressed a lot quicker, and we wouldn't have had to -", defense counsel similarly objected without success, and the prosecutor concluded, 'but as I indicated, he gets the trial merely by entering that plea of not guilty" (R 1188). Counsel eventually moved for a mistrial on the basis of these two particular comments (R 1224-1225), but did not move for any corrective action when the prosecutor told the jury that he had done his job in bringing appellant to trial, and that they must do their by rejecting appellant's conduct as the conscience of the community (R 1187).

After deliberation, the jury found appellant guilty as charged on all counts (R 1266-1268; 1660-1661). Defense counsel then submitted a written request that the jury be instructed during the penalty phase of the trial regarding eight specific nonstatutory mitigating factors which they might find, among them appellant's low intelligence and injuries and his alleged acts of kindness to others (R 1287-1289; 1664). Judge Barfield refused to give this instruction, but did ultimately instruct the jury, pursuant to *Florida Standard Jury Instructions in Criminal Cases* (2nd Ed., 1981), p. 81, #8, that they could consider

in mitig tion any "aspect of the defendant's character or record, and any other circumstance of the offense" (R **1289; 1432).**

During the penalty phase, the prosecutor recalled that appellant had testified at trial that he had not intended to kill anyone, and sought to introduce the testimony of the treating physician Dr. Richard Slevenski that appellant had shown a lack of remorse for his crimes, in order to rebut the possibly mitigating influence of this statement (R **1300-1302).** Judge Barfield sustained a defense objection to the admissibility of this testimony, and defense counsel related that although he would be arguing appellant's injuries in mitigation, he would not necessarily argue his remorsefulness (R **1303).** Thereafter, the defense introduced the testimony of psychologist Dr. James Larson that appellant was "surprised" to have survived his wounds, several of which had medically necessitated the installation of a colostomy bag for waste removal which appellant subsequently displayed in open court (R **1319; 1378-1381).** That appellant displayed his wounds with some apparent degree of pride is evident from the fact that the prosecutor asked him on cross if he was proud of his wounds or had bragged of his toughness in surviving them when Officer Taylor had not survived his. Appellant denied that these were his reactions over appropriate but unsuccessful defense objections (R **1382-1383).** Dr. Slevenski then testified for the State in rebuttal that Appellant had indeed boasted of his fortitude as described,

and that unlike Jackson had no regret for his actions (R 1393; 1397-1398; 1402). A defense objection to the latter portion of this testimony was first denied and then sustained (R 1398). Appellant did not then move to strike this testimony, though he did unsuccessfully move for a mistrial (R 1398-1403). Overruled during the course of the penalty proceedings were defense objections to the testimony of Dr. Larson on cross that persons of appellant's low intelligence and lack of impulse control were no less dangerous than persons of high intelligence and were apt to seek immediate gratification without regards to the legal rights of others (R 1327-1331); plus the testimony of Dr. Slevenski on direct that persons such as appellant who displayed a "passive agressive" type of personality were difficult to work with (R 1396-1401).

The essence of the testimony of appellant's character witnesses was summarized by his mother's statement that "Clarence was nice" (R 1342). Appellant himself admitted that he had previously been convicted of an armed robbery in Mobile, but denied his guilt (R 1305; 1376-1378; 1383).

After both sides had rested and the defense had tendered the customary and unsuccessful motion for a directed verdict as to penalty (R 1403), the prosecutor, over an unsuccessful defense objection, beseeched the jury to "send a message to this defendant and others like him that you will... not tolerate" the practice of gunning down a policeman in the street (R 1409-1410). Prosecutionremarks that "[t]he

defendant is the enemy of the criminal justice system" and that the psychological testimony in the case should be considered in aggravation were also the subjects of unsuccessful defense objections (R *1418; 1416).*

After deliberation, the jury recommended by a vote of 10 to *2* that appellant be sentenced to death (R *1435-1437; 1665).* Judge Barfield set sentencing for May *24* (R *1438).* Appellant then filed a timely motion for a new trial, urging in highly conclusory language that Judge Barfield had erred in many of those legal rulings, heretofore noted, which he had made adversely to the defense over objection (R *1666-1667).* However, the Judge's refusal to order individual voir dire, his refusal to excuse Mr. Ickes and Mr. Johnson for cause, his refusal to give the defense more peremptory challenges, and his admission of Officer Taylor's autopsy photographs were not raised.

At a May *27* hearing Judge Barfield announced that he would follow the jury's recommendation, and following adjudication sentenced appellant to death for the murder of Officer Taylor (R *1680-1692; 1670-1679).* Sentencing on the other counts was also resolved. In committing his reasons for the death sentence to writing, the judge found that the following five aggravating circumstances had been established:

> The defendant has been previously convicted of a felony involving the threat of violence to some person. In committing the crime for which he is to be sentneced, the defendant knowingly created a great risk of death to many persons.

> The murder of Officer Taylor was committed while the defendent was in flight after committing the crime of robbery. The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape of Hill's codefendant from custody. The murder or Officer Taylor was committed by Hill in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R 1668-1669). The judge also found that:

> The age and background of Clarence Hill do little to mitigate the circumstances of the killing of Officer Taylor.

(R 1669). On June 20, Judge Barfield denied appellant's motion for new trial, and appellant thereafter perfected this timely appeal (R 1693-1694).

ISSUES PRESENTED UPON APPEAL

ISSUE I A

THE QUESTION OF WETHER THE TRIAL JUDGE ERRED IN EXCUSING PROSPECTIVE JURORS LINDA KAY BONDURANT AND LISA BONNER FOR CAUSE IS NOT PRESENTED FOR APPELLATE REVIEW AND IS UNCOMPELLING ON THE MERITS.

ISSUE I B

THE QUESTION OF WHETHER THE TRIAL PROPERLY DECLINED TO EMPANEL JURORS WHO OPPOSE THE DEATH PENALTY FOR THE GUILT PHASE OF THE TRIAL IS NOT PRESENTED FOR APPELLATE REVIEW AND IS UNCOMPELLING ON THE MERITS.

ISSUES II-V

THE TRIAL JUDGE PROPERLY EMPANELED AN IMPARTIAL JURY IN THIS CAUSE DESPITE ALLEGEDLY PREJUDICIAL PRETRIAL PUBLICITY.

ISSUES VI-IX

THE TRIAL JUDGE PROPERLY DENIED APPELLANT'S MOTIONS FOR A MISTRIAL DUE TO THE ALLEGED MISCONDUCT OF THE PROSECUTOR.

ISSUE X

APPELLANT IS NOT ENTITLED TO A NEW TRIAL "IN THE INTERESTS OF JUSTICE."

ISSUE XI

THE TRIAL JUDGE PROPERLY PERMITTED THE INTRODUCTION OF RELEVANT EVIDENCE THAT APPELLANT HAD STOLEN A PISTOL AND A CAR WICH HE USED TO FACILITATE COMMISSION OF THE CRIMES CHARGED SHORTLY THEREAFTER.

ISSUE XII

THE TRIAL JUDGE PROPERLY PERMITTED THE INTRODUCTION OF RELEVANT AUTOPSY PHOTOGRAPHS OF THE VICTIM.

ISSUE XIII

THE TRIAL JUDGE PROPERLY INSTRUCTED THE JURY AS TO THE NONSTATUTORY MITIGATING CIRCUMSTANCES IT COULD CONSIDER.

ISSUES XIV-XV

THE TRIAL JUDGE PROPERLY IMPOSED THE DEATH PENALTY IN THIS CASE.

ISSUE I A

THE QUESTION OF WHETHER THE TRIAL JUDGE ERRED IN EXCUSING PROSPECTIVE JURORS LINDA KAY BONDURANT AND LISA BONNER FOR CAUSE IS NOT PRESENTED FOR APPELLATE REVIEW AND IS UNCOMPELLING ON THE MERITS.

ARGUMENT

Appellant first alleges that the trial judge reversibly erred in excusing prospective jurors Linda Kay Bondurant and Lisa Bonner for cause upon motion of the State, and that he is entitled to a new sentencing proceeding as a result. This issue is not presented for appellate review and is uncompelling on the merits.

As noted, in the course of denying a defense motion during a January 20, 1983 pretrial hearing, Judge Edward T. Barfield, now a member of the First District Court of Appeal, remarked:

> [A] juror can have reservations about the death penalty and not be subject to a challenge for cause by the State.

This was, of course, a correct statement of the law. Witherspoon v. Illinois, 391 U.S. 510 (1968).

After jury selection had begun on April 25, prospective jurors Bondurant and Bonner both related that they were troubled by the concept of capital punishment. Ms. Bondurant twice indicated her unequivocal opposition to the death penalty, but Ms. Bonner, evidently a deeply religious individual, was inarticulately equivocal at all times. The State

challenged both Ms. Bondurant and Ms. Bonner for cause over defense opposition. Judge Barfield granted these challenges because in his opinion the two ladies were, as a matter of fact, Patton v. Yount, ___U.S.___ (1984), *35* Crim.L.Rptr. *3152,* "unsure" as to whether they could recommend the death penalty under any circumstances. This was, of course, an incorrect statement of the law. Witherspoon v. Illinois.

Appellant objected to the exclusion of these jurors, but did not specify as his basis for the objection that these exclusions were based upon an incorrect interpretation of the law as expressed in Witherspoon v. Illinois. Had he done so, it is very reasonable to assume, given that the highly qualified Judge Barfield did know the correct state of the law, that the record on appeal would now read as follows:[3]

> Defense Counsel: Your Honor, having noted my objections to the exclusions of Ms. Bondurant and Ms. Bonner, let me also specify as the basis for these objections that under Witherspoon v. Illinois the State cannot excuse a juror for cause unless her opposition to the death penalty is unequivocal.
>
> The Court: Counsel, you are right. That is exactly what Witherspoon says. What could I have been thinking of? Under the circumstances, I will revisit my ruling and deny the challenges for cause of Ms. Bondurant and Ms. Bonner.

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3 This exchange would have followed defense counsel's statement, "[n]ote our objection, please, as to both her and Mrs. Bonner" (R *340).*

Prosecuting Counsel: In that case, I will peremptorily challenge both women.

The Court: They will be excused.

(R 340). Thus, appellant's failure to specify the basis for his objection to the challenges for cause deprived Judge Barfield of the opportunity to correct a readily correctable error, which consequently deprived the State of opportunity to use two of its three ultimately unused peremptory challenges. Where a criminal defendant does not object to a putative error with specificity, including "authorities cited", the matter is ordinarily not preserved for appellate review. Lucas v. State, *376* So.2d *1149,* 1152 (Fla. *1979);* Jackson v. State, So.2d (Fla. 1st DCA 1984), *9* F.L.W. *1713.* The only exception to this rule occurs where the error complained of is "fundamental", which errors concerning the qualifications of jurors are not. See Rose v. State, *425* So.2d 521 (Fla. 1982), cert. denied, ___U.S. , 103 S.Ct. 1883 (1983).

Appellant can argue that, even if he had specified the basis of his objection to the exclusions of Ms. Bondurant and Ms. Bonner, the foregoing transaction might not have occurred. Perhaps not, but such is only conjecture, and "[r]eversible error cannot be predicated on conjecture." Jacobs v. Wainwright, ___So.2d (Fla. 1984), *9* F.L.W. *66,* citing to Sullivan v. State, *303* So.2d *632, 635* (Fla. 1974), cert. denied, *428* U.S. *911 (1976).*

Should the Court elect to reach this issue on the merits, the State would alternatively contend that the

exclusion of Ms. Bondurant and Ms. Bonner was harmless error because the prosecutor could have excused them by employing two of his unused peremptory challenges. Such was once clearly the law, Paramore v. State, *229* So.2d *855* (Fla. 1969), modified on other grounds, *408* U.S. *935* (1972), but in Chandler v. State, *442* So.2d *171* (Fla. 1983), this Court, without mentioning Paramore v. State, held that Davis v. Georgia, *429* U.S. 122 *(1976)* required that the harmless error rule not be applied in this context. The State would respectfully submit that this reliance upon Davis v. Georgia was misplaced for in that case it was "unclear whether the State was entitled to another peremptory challenge", *429* U.S. 122, *124* (Rehnquist, J. dissenting); hence, the question of whether the improper exclusion of jurors for cause could be harmless error where the prosecution did not exhaust its peremptory challenges was necessarily neither joined nor determined. It thus follows that the holding in Chavdler v. State must be overruled and that in Paramore v. State re-affirmed.

The State would close its discussion of this issue by suggesting that the United States Supreme Court, in its currently pending review of Witt v. Wainwright, *714* F.2d *1069* (11th Cir. 1983), may modify the holding in Witherspoon v. Illinois by permitting the exclusion of jurors whose ambivalence towards capital punishment may, in the mind of the trial judge, interfere with their ability to follow the law. See the synopsis of the United States Supreme Court oral

argument in Wainwright v. Witt contained at *36* Crim.L.Rptr. *4037;* compare Adams v. Texas, *448* U.S. *38 (1980).* The State would, of course, claim the benefit any such holding in the instant case. However, the State primarily contends here that this Court must enforce its own rule requiring that a party who contemporaneously objects to the ruling of a trial judge without the specifity necessary to guide the judge into appropriate corrective action commits an irredeemable procedural default. Lucas v. State. See also Wainwright v. Sykes, *433* U.S. 72 *(1977).*

ISSUE I B

THE QUESTION OF WHETHER THE TRIAL JUDGE PROPERLY DECLINED TO EMPANEL JURORS WHO OPPOSE THE DEATH PENALTY FOR THE GUILT PHASE OF THE TRIAL IS NOT PRESENTED FOR APPELLATE REVIEW AND IS UNCOMPELLING ON THE MERITS.

ARGUMENT

In his discussion of his Issue I, appellant alleges in passing that, under the notorious decision of Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), appeal pending, Case No. 83-2113 F.2d___ (8th Cir. 1984), the trial judge reversibly erred in refusing to empanel jurors who oppose the death penalty for the guilt phase of the trial, and that he is entitled to a new trial as a result. This issue is also not presented for appellate review, and is also uncompelling on the merits.

As noted, filed and denied before trial were defense motions to preclude the prosecution from questioning potential jurors on their attitude towards the death penalty until a verdict of guilt was returned, at which time the prosecution could challenge for cause and replace those jurors opposed to capital punishment. Such motions were bottomed on the motion, which was not statistically supported, that jurors who favor the death penalty are more apt to find a defendant guilty than are jurors who oppose the death penalty.

Appellant's failure to present evidence in support of his statistical assumption that the juruor who oppose the death penalty are less likely to vote to convict a

capital defendant than are jurors who favor the death penalty constitutes a waiver of the right to urge the exclusion of the former category of jurors as error upon appeal. Hulsey v. Sargent, 550 F.Supp. 179 (E.D. Ark. 1981). Again, "[r]eversible error cannot be predicated on conjecture." Jacobs v. State, 9 F.L.W. 66. See Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, *440* U.S. 776 (1979).

Moreover, even if appellant's Grigsby claim were properly before the Court, it would be meritless. Grigsby is inconsistent with this Court's earlier decisions of Riley v. State, 366 So.2d 19 (Fla. 1978), cert. denied, 459 U.S. 981 (1982), and Gafford v. State, 387 So.2d 333 (Fla. 1980), which hold that jurors who oppose the death penalty may be properly excluded from the guilt phase of a capital trial. See also Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Grigsby is also inconsistent with this Court's later decision of Lusk v. State, *446* So.2d 1038 (Fla. 1984), cert. denied, U.S.___ (1984), which affirms that the defense may dismiss for cause only those jurors who show actual prejudice towards the defendant, as opposed to those whose bias may be merely implied by their membership in a certain group.

Along parallel lines, Grigsby is inconsistent with our Supreme Court's earlier decision of Witherspoon v. Illinois, 391 U.S. 510, 518, in which the Court declined to judicially notice "that the exclusion of jurors opposed to

capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction", and Smith v. Phillips, *455* U.S. *209* (1982), in which the Court held that the defense must show the actual prejudice, rather than the implied bias, of a juror in order to receive a new trial. Grigsby is also inconsistent with the Court's subsequent decisions of Maggio v. Williams, ___U.S. , *78* L.Ed.2d 43, *47* (1983), affirming the foregoing interpretation of Witherspoon in vacating a stay of execution on what was essentially a Grigsby claim, and Sullivan v. Wainwright, ___U.S.___, 78 L.Ed *210, 212* (1983), denying a stay upon the petitioner's claim "that the jury that convicted him was biased in favor of the prosecution" and indicating that this claim had been properly found "meritless" by both the state and federal courts. See also Woodward v. Hutchins, ___U.S. (1984), *34* Crim.L.Rptr. *4156,* in which Justice Brennan dissented from the vacating of a stay of execution on the ground that the defendant had alleged a Grigsby claim. The Grigsby approach has, moreover, now been rejected by the Fourth Circuit, see Keeten v. Garrison, ___F.2d ___ (4th Cir. 1984), synopsized at *35* Crim.L.Rptr. *2420,* reversing Keeten v. Garrison, *578* F.Supp. *1164* (W.D.N.C. 1984), a case relied upon by appellant; and by the Supreme Court of Arkansas, see Rector v. State, *659* S.W. 2d *168* (Ark. *1983).*

Grigsby has thus in essence already been rejected by most of the courts which have considered it. This Court should note appellant's default, but may also wish to

reject Grigsby explicitly. It is respectfully submitted that the defense in Grigsby clearly began with the conclusion that the Arkansas capital law was unconstitutional in some way and worked backwards, selectively employing statistics to guile a receptive federal judge into validating the wholly illegitimate concept that individuals may be infallibly stereotyped on the basis of their membership in a certain group. Such an approach has no place in American jurisprudence. See Pulley v. Harris, ___U.S. (1984), *34* Crim.L. Rptr. *4026;* McCorquodale v. Balkcom, ___F.2d , Case No. 82-8011 (11th Cir. *1983);* Alvord v. Wainwright, Case No. *83-3345,* F.2d___ (11th Cir. *1984).* A criminal defendant has no constitutional right to a lawless jury. Strickland v. Mashington, ___U.S. (1984), *35* Crim.L.Rptr. *3066.* See also Huff, How to Lie With Statistics (1st ed. 1954), an excellent book with an unfortunate title, for an in-depth expose of the various methods of statistical manipulation.

ISSUES II-V

THE TRIAL JUDGE PROPERLY EMPANELED AN IMPARTIAL JURY IN THIS CAUSE DESPITE ALLEGEDLY PREJUDICIAL PRETRIAL PUBLICITY.

ARGUMENT

Appellant next alleges that the trial judge committed several reversible errors in empaneling the jury in this cause in the face of allegedly prejudicial pretrial publicity, and that he is entitled to a new trial as a result. Specifically, appellant alleges that the judge improperly denied his motions for individual and sequested voir dire (Appellant's Issue 111), to exclude prespective jurors George Ickes and Larry Johnson for cause (Appellant's Issue IV), for additional peremptory challenges (Appellant's Issue V), and for a change of venue (Appellant's Issue 11). The State believes that these allegations are all without merit, and will rebut each sequentially.

As noted, after appellant was charged with the crimes at issue here on November 2, *1982,* he filed a number of pretrial motions, including a motion for individual and sequestered voir dire allegedly made necessary by extensive but undocumented pretrial publicity. Following a hearing on January 20, *1983,* this motion was denied by the trial judge, who ordered that the potential jurors would instead be interrogated in groups of thirty, which they ultimately were.

In Davis v. State, ___So.2d (Fla. 1984), *9* F.L.W. *430,* this Court, citing to Stone v. State, 378 So.2d 765

(Fla. 1979), cert. denied, 449 U.S. 986 (1980) and Jones v. State, 343 So.2d 921 (Fla. 3rd DCA 1977), cert. denied, 352 So.2d 172 (Fla. 1977), affirmed that "[t]he granting of individual and sequestered voir dire is within the trial court's discretion." This Court found that the trial Judge in Davis v. State did not abuse his discretion in denying a defense motion for individual and sequestered voir dire in the face of that defendant's evidently documented claim of extensive pretrial publicity, and certainly should make the same finding here, particularly since appellant's claim of extensive and prejudicial pretrial publicity had not even been documented when the trial judge ruled.

Appellant moved for a change of venue on April 14, citing the aforementioned pretrial publicity as cause. Attached to this motion were copies of numerous local newspaper articles and transcripts of local radio and television reports concerning the crimes charged. Of these items roughly sixty-eight were "factual" in the sense of reporting the occurrence and the aftermath of the crimes charged without direct comment, while exactly three were "emotional" in the sense of advocating a strong response to the crimes charged. Included in the ''factual" category was the fact the the grand jury which had indicted appellant had issued a posthumous commendation to Officer Taylor for his service. Included in the "emotional" category were *two* editorials and a letter to the editor, all published within a week of the crimes charged, advocating the death penalty. However, in none of the latter

items was appellant's personal guilt assumed or his personal punishment advocated.[4] Judge Barfield indicated at an April 21 hearing that he would take the motion for a change of venue under advisement, and grant such motion if it proved impossible to empanel a fair jury locally, which action was procedurally proper. Murphy v. Florida, *421* U.S. *794 (1975).*

Jury selection began on the morning of April *25,* and was concluded late the following afternoon. The potential jurors had apparently all heard about the case but, with the exceptions of George Ickes and Larry Johnson, appellant has not specifically alleged as error upon appeal that any were *so* prejudiced as a result that they should have been excluded for cause upon motion of the defense. Prospective juror Ickes related that he had heard about the case and had formed a preliminary opinion that appellant was guilty of the crimes charged, while prospective juror Johnson related that he had also heard about the case and had formed a preliminary opinion that if appellant was found guilty as charged the death penalth should be imposed. However, both jurors affirmed

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The State's standards for expounding the "factual/emotional" dichotomy propounded but not explained in this Court's decision in Copeland v. State, ___So.2d___ (Fla. 1984), *9* F.L.W. *388, 389,* derives from our Supreme Court's implicit finding in Patton v. Yount, *35* Crim.L.Rptr. *3152, 3153,* that the fact that the articles in issue there "merely reported events without editorial comment" augured against granting that defendant's motion for a change of venue.

that they had set these opinions aside and would fairly follow the law.[5] The defense unsuccessfully challenged both Mr. Ickes and Mr. Johnson for cause over State opposition on the basis that they had formed firm conclusion as to ultimate issues in the case. Mr. Ickes ultimatelyserved on appellant's jury, but the defense used a peremptory challenge to exclude Mr. Johnson.

In its recent decisions of Davis v. State and Copeland v. State, ___So.2d___(Fla. 1984), 9 F.L.W. 388, this Court held that the competency of a challenged juror is a mixed question of law and fact which, while discretionary with the trial judge, is nonetheless open to extensive independent evaluation by a reviewing court. Although this was once a correct statement of the law, our Supreme Court's decision in Patton v. Yount, 35 Crim.L.Rptr. 3152, 3155 makes it clear that the question of juror partiality is now "plainly one of historical fact", the trial judge's resolution of which is entitled to great deference upon review. The Patton v.

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5 Mr. Ickes stated: "I would try to be fair"; "Yeah" when asked if he could presume appellant innocent; "I would follow the law"; and "I would have to---go by what the evidence presented." Mr. Johnson stated: "No" when asked if he knew of any reason he could not be a fair and impartial juror; "Yes" when asked if he could lay aside his preliminarily opinion that these crimes warranted the death penalty: and "I'm going to follow the instructions of the Court.

Yount court expressed the reasoning behind this deference as follows:

> It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed, and that were evident in this case. Prospective jurors represent a cross-section of the community, and their education and experience vary widely. Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially. The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading.

Id., 35 Crim.L.Rptr. 3152, 3156.[6] The State submits that, given the candor of Mr. Ickes and Mr. Johnson in admitting their preconceptions and their ultimate affirmances to follow the law, the decision of the trial judge that they were capable of serving impartially is final. See Davis v.

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[6] The State finds appellant's attempt to limit the import of Patton v. Yount to federal habeas corpus review of juror partiality strained. Review is review, and the same considerations which justify affording deference to a trial judge on petition for writ of habeas corpus exist upon direct alleal.

State, in which this Court held that a juror's assurances that she would render a verdict based on the evidence justified the denial of a defense challenge for cause.

After appellant had exhausted his ten peremptory challenges to the venue, he moved for an additional ten such challenges or, in the alternative, renewed his motion for a change of venue. Judge Barfield denied these motions, but reminded appellant that he could still challenge the remaining potential jurors for cause. Appellant thereupon challenged all the remaining members of the panel, citing as cause the media publicity the case had received. This motion was also denied and then the prosecutor, who had exercised seven of his ten peremptory challenges, indicated that he would accept the panel. Twelve members, including Mr. Ickes, were then qualified as jurors in the case, and two were selected as alternates.

In Parker v. State, ___So.2d (Fla. 1984), 9 F.L.W. 354, 356, this Court affirmed that "[i]t is well settled that the trial judge has discretion to grant or deny additional peremptory challenges" once a captial defendant has exhausted his requisite ten. This Court held that the trial judge in Parker v. State did not abuse his discretion in denying a defense motion for additional peremptory challenges in the face of that defendant's claim that such challenges were necessary, in part, because he was defending himself against serious multiple charges. In so holding, the Court stressed that all of the charges arose from a single criminal episode.

Appellant was also defending himself against serious multiple charges arising from a single criminal episode, and the decision of the trial judge that he did not require additional peremptory challenges should also be affirmed.

Judge Barfield's ultimate denial of appellant's continuing motion for a change of venue must be affirmed as well. "An application for a change of venue is addressed to a court's sound discretion, and a trial court's ruling will not be reversed absent a palpable abuse of discretion." Davis v. State, 9 F.L.W. 430. "Media coverage and publicity are only to be expected when murder is committed." Id. However, "[t]he relevant question" confronting a trial judge in considering a motion for change of venue due to the resulting publicity "is not whether the community remembered the case, but whether the jurors at [the defendant's] trial had such fixed opinions that they could not judge impartially the guilt of the defendant." Patton v. Yount, 35 Crim.L.Rptr. 3152, 3155. Accord, Copeland v. State; Davis v. State. Thus the character and pervasiveness of the publicity attendant the case have become largely irrelevant; the determinative consideration is whether this publicity has destroyed the impartiality of the individual potential jurors, and this determination is now the virtually exclusive prerogative of the trial judge as noted, Patton v. Yount. Accordingly, Justice Overton was correct when he opined in his Copeland v. State dissent that appellant's oft-cited decision of Manning v. State, 378 So.2d 274 (Fla. 1979), wherein this Court focused

upon the nature of the attendant publicity rather than its effect upon particular jurors to overturn the denial of that defendant's motion for a change of venue, is no longer good law. Given that the pretrial publicity in the instant case was largely factual rather than emotional in nature, and that appellant has specifically and incorrectly alleged as error upon appeal that it so prejudiced only two jurors to the extent that they should have been excused for cause upon motion of the defense, the State submits that the judge below did not abuse his considerable discretion in denying a change of venue even though all of the prospective jurors had apparently heard of the case. Compare Copeland v. State. A criminal defendant is entitled to an impartial jury, not an ignorant jury, Murphy v. Florida, 421 U.S. 794, 800-801, and appellant received that to which he was entitled.

ISSUES VI-IX

THE TRIAL JUDGE PROPERLY DENIED APPELLANT'S MOTIONS FOR A MISTRIAL DUE TO THE ALLEGED MISCONDUCT OF THE PROSECUTOR.

ARGUMENT

Appellant further alleges that the trial judge reversibly erred in denying defense motions for a mistrial due to the alleged misconduct of the prosecutor during voir dire (Appellant's Issue VI), during closing argument on guilt (Appellant's Issue VII), during the penalty phase (Appellant's Issue VIII), and during closing argument on penalty (Appellant's Issue IX), and that he is entitled to a new trial and /or a new sentencing proceeding as a result. The State believes that these allegations are all uncompelling, and will rebut each sequentially.

Preliminarily, however, the State would note that in the recent seminal case of State v. Murray, *443* So.2d *955, 956* (Fla. 1984), which appellant neither discusses nor cites, this Court held that even a prosecutor's highly improper closing argument at trial....

> ....does not warrant automatic reversal of a conviction unless the errors involved are *so* basic to a fair trial thay they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial.'' Cobb v. State, *376* So.2d *230, 232* [Fla. *19791.* The appropriate test for whether the error is prejudicial is the "harmless error'' rule set forth in

> Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and its progeny. We agree with the recent analysis of the Court in United States v. Hastings, ___ U.S. ___, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). The supervisory power of the appellate court reverse a conviction is inappropriate as a remedy when the error is harmless... [i]t is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.

These same principles should apply regardless of when during a proceeding the alleged misconduct occurs. See Davis v. State. Moreover, "[i]n the absence of fundamental error... [which goes] to the foundation of the conviction or sentence... the failure to [contemporaneously and specifically] object [to the alleged misconduct] precludes consideration of this point on appeal." Id., 9 F.L.W. 430, 431.

By framing the issue of prosecutorial conduct primarily in terms of prejudice and preservation, the State is not conceeding that the prosecutor in this case behaved improperly at all, but is only seeking to cut to the bottom line: did the disputed conduct amount to reversible error?[7]

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[7] This "bottom line" approach is fortified by analogy to our Supreme Court's decision in Strickland v. Washington, ___U.S.___, 35 Crim.L.Rptr. 3066, 3074, that a court evaluating an ineffectiveness of counsel claim may find the claim uncompelling simply because the defendant could not have suffered any prejudice, regardless of whether counsel's performance was severely substandard.

In a case where the sufficiency of the evidence to convict is sensibly not even contested (see "Initial Brief of Appellant", p. 2) due to its overwhelming nature, and the sufficiency of the evidence to impose the death penalty is contested only in passing, it is obvious that for prosecution conduct to amount to reversible error, this conduct will have to have been highly egregious indeed.

With these basics in mind, we will return to the specifics of the instant case. As noted, prospective juror Jernigan Harris, who later served on appellant's jury, related in response to defense questioning during voir dire that he had served in the United States Navy for thirty years and that it was sometimes necessary to go to war. Over unsuccessful defense objection and motion for a mistrial, the prosecutor pursued this theme by asking Mr. Harris if he had ever thought that the police and criminal were enemies at war. The prosecutor then informed Mr. Harris, and later Amelia Nelson, that he had taken an oath to uphold the laws of Florida, and asked them if they could similarly abide by their oaths and return a recomnendation of death if convinced that such was legally warranted under the facts of the case. After interrogation of Ms. Nelson had concluded, the defense alleged that these comments were improper, and unsuccessfully objected and moved for a mistrial.

Although the propriety of these prosecution comments is preserved for appellate review, it is clear that they were not "so prejudicial as to vitiate the entire trial",

State v. Murray, 443 So.2d 955, 956, quoting Cobb v. State, 376 So.2d 230, 232 (Fla. 1979), particalarly considering when they occurred. The defense, moreover, broached the subject of prospective juror Harris' views upon war and hence is hardly in a position to complain of the prosecution's pursuit of the subject. Cf Ellison v. State, 349 So.2d 731 (Fla. 3rd DCA 1977), cert. denied, 357 So.2d 185 (Fla. 1978); United States v. Tasto, 586 F.2d 1068 (5th Cir. 1978), cert. denied, 440 U.S. 928 (1979). As for the prosecutor's effort to impress upon the jurors the seriousness of their oaths, the State challenges the defense to produce one viable case where such was held reversible error.

After the jury had been selected and the evidence presented, and both sides had rested, defense counsel addressed the jury as follows:

> [T]he only thing that we can do is to be honest with you. And that's what we have done from the start. And that's what I am going to to now...I expect you to find Clarence Hill guilty of first degree felony murder. I do not expect you to find him guilty of first degree premeditated murder or attempted murder with premeditation.

After reminding the jury that his closing was sandwiched between defense counsel's two closings and he hoped that they would anticipate what he might hereinafter say, the prosecutor responded to defense counsel's attempt at personal intimacy with the jury by asking them to consider him "like the thirteenth juror.'' Defense counsel contemporaneously objected to this

comment without success. The prosecutor further remarked that while appellant had exercised his right to a jury trial, he had essentially conceeded the veracity of the charges with the exception of premeditation. When the prosecutor continued that "we could have progressed a lot quicker, and we wouldn't have had to--", defense counsel similarly objected without success, and the prosecutor concluded, "but as I indicated, he gets the trial merely by entering that plea of not guilty." Counsel eventually moved for a mistrial on the basis of these two particular comments, but did not move for any corrective action when the prosecutor told the jury that he had done his job in bringing appellant to trial, and that they must do theirs by rejecting appellant's conduct as the conscince of the community.

The propriety of only the first two of these comments by the prosecutor is preserved for appellate review. The prosecutor's comment that he would like to be regarded as a sort of "thirteenth juror" was clearly invited by defense counsel's earlier effort to tell the jurors how he personally felt they should vote. Cf United States v. Tasto. The prosecutor's ambiguous and passing reference to the utterly obvious fact that appellant had gone to trial despite essentially conceeding the veracity of the majority of the allegations against him was clearly not reversible error if for no other reason than that the prosecutor did not urge the jurors to draw any particular conclusion from this fact. Cf Bassett v. State, *449* So.2d *803* (Fla. 1984), in which a majority of

this Court held that even a prosecutor's open disparagement of that defendant's exercise of his right to a jury trial at sentencing did not require a reversal of the sentence imposed.

After the jury had returned its verdicts of guilty upon all charges, the prosecutor recalled during the penalty phase that appellant had testified at trial that he had not intended to kill anyone, and sought to introduce the testimony of the treating physician Dr. Richard Slevenski that appellant had shown a lack of remorse for his crimes, in order to rebut the possibly mitigating influence of this statement. Judge Barfield sustained a defense objection to the admissibility of this testimony, and defense counsel related that although he would be arguing appellant's injuries mitigation, he would not necessarily argue his remorsefulness. Thereafter, the defense introduced the testimony of psychologist Dr. James Larson that appellant was "surprised" to have survived his wounds, several of which had medically necessitated the installation of a colostomy bag for waste removal which appellee subsequently displayed in open court. That appellant displayed his wounds with some apparent degree of pride is evident from the fact that the prosecutor asked him on cross if he was proud of his wounds or had bragged of his toughness in surviving them when Officer Taylor had not survived his. Appellant denied that these were his reactions over appropriate but unsuccessful defense objections. Dr. Slevenski then testified for the State in rebuttal that appellant had indeed boasted of his fortitude as described, and that unlike Jackson he

had no regret for his actions. A defense objection to the latter portion of this testimony was first denied and then sustained. Appellant did not then moved to strike this testimony, though he did unsuccessfully move for a mistrial. Overruled during the course of the penalty proceedings were defense objections to the testimony of Dr. Larson on cross that persons of appellant's low intelligence and lack of impulse control were no less dangerous than persons of high intelligence and were apt to seek immediate gratification without regards to the legal rights of others; plus the testimony of Dr. Slevenski on direct that persons such as appellant who displayed a ''passive agressive" type of personality were difficult to work with.

The propriety of the prosecutor's elicitation of evidence that appellant, unlike his co-defendant, felt no remorse for his actions, is not preserved for appellate review due to appellant's failure to follow his ultimately successful objection to such testimony with a motion to strike. See Williams v. State, *435* So.2d *863* (Fla. 1st DCA *1983);* Leonard v. State, *423* So.2d *594* (Fla. 3rd DCA *1982).* Even if the matter of appellant's lack of remorse had been preserved, the State is confident that the admission of evidence thereupon could not be found to have constituted reversible error. Compare Pope v. State, *441* So.2d *1073* (Fla. 1983), in which this Court held that even a trial judge's inappropriate finding in aggravation that the defendant felt no remorse did not vitiate the death sentence imposed; see also Jackson v. Wainwright, *421* So.2d *1385* (Fla. 1982), cert. denied, ___U.S. ,

103 S.Ct. 3572 (1983). A query: won't a person who injures or kills someone unintentionally be more apt to experience remorse than one who acted deliberately? The propriety of the prosecutor's questions as to whether appellant was proud of his wounds and had consequently bragged of his toughness in surviving them, while technically preserved for appellate review, is uncompelling simply because this Court is in no position to conjecture that such questions were not induced by appellant's in-court demeanor in displaying his wounds, which may well have been proud, petulant, and/or defiant. Cf Patton v. Yount. The propriety of the prosecutor's elicitation of evidence concerning appellant's hair-trigger psychological profile was clearly relevant to rebut the continuing impact of his potentially mitigating trial testimony that he had not intended to kill anyone. Cf Cape v. Francis, F.2d (11th Cir. 1984), Case No. *83-8341,* holding that even admission of a psychiatrist's testimonial opinion that the defendant was criminally responsible at the time of the offense did not constitute reversible error.

After both sides had rested as to penalty, the prosecutor, over an unsuccessful defense objection, beseeched the jury to "send a message to this defendant and others like him that you will...not tolerate'' the practice of gunning down a policeman in the street. Presecution remarks that "[t]he defendant is the enemy to the criminal justice system" and that the psychological testimony in the case should be considered in aggravation were also the subjects of unsuccessful defense objections.

Although the propriety of these prosecution comments is preserved for appellate review, it is clear that they too were not "so prejudicial as to vitiate" the entire sentencing proceeding, State v. Murray, 443 So.2d 955, 956, quoting Cobb v. State, 376 So.2d 230, 232; cf Davis v. State; cf Boatwright v. State, ___So.2d___(Fla. 4th DCA 1984), 9 F.L.W. 1603, interpreting State v. Murray to hold that the overwhelming evidence of the defendant's guilt upon a certain charge rendered a prosecutor's thrice-repeated appeal to the jury to send the criminal community a message with their verdict harmless error.

"[T]he prosecutor's comments", appellant remarks, referring specifically only to his comments during voir dire but inferentially encompassing the whole lot, "were roughly equivalent to tossing a lighted match into a gas tank" ("Initial Brief of Appellant", p. 79). The State would close its discussion of the prosecutorial comment issues by responding with this metaphor: you can't start a fire without a spark.

ISSUE X

APPELLANT IS NOT ENTITLED TO A NEW TRIAL "IN THE INTERESTS OF JUSTICE".

ARGUMENT

Appellant next essentially theorizes that the accumulation of errors allegedly committed by the trial judge in empaneling a jury (Appellant's Issues I-V) and in permitting the prosecutor latitude (Appellant's Issues VI-IX), if not reversible in and of themselves, still entitle him to a new trial "in the interests of justice." Fla.R.App.P. 9.140(f); see Tibbs v. State. The State thoroughly disagrees, believing that which is proper in each of its elements cannot be improper in its entirety. Compare Douglass v. State, 184 So. 756 (Fla. 1938), in which this Court granted a new trial in the interests of justice based on highly questionable evidence of guilt coupled with prosecutorial misconduct which included an insinuation that defense counsel had committed incest.

ISSUE XI

THE TRIAL JUDGE PROPERLY PERMITTED THE INTRODUCTION OF RELEVANT EVIDENCE THAT APPELLANT HAD STOLEN A PISTOL AND A CAR WHICH HE USED TO FACILITATE COMMISSION OF THE CRIMES CHARGED SHORTLY THEREAFTER.

ARGUMENT

Appellant further alleges that the trial judge erred in admitting evidence that he had stolen a pistol and a car which he used to facilitate commission of the crimes charged shortly thereafter, and that he is entitled to a new trial as a result. The State disagrees.

As noted, the State filed a pretrial notice to rely upon similar fact evidence that appellant had stolen a .22 caliber pistol from Shanavian Robinson, and a 1978 Buick Regal automobile from Janet Pearce, in Mobile Alabama earlier on the day the crimes charged had occurred. When the State sought to introduce this testimony of these witnesses at trial as probative of appellant's premeditation to commit the crimes charged and his identity, and also to give a complete account of the events surrounding these crimes, appellant objected on the grounds that such evidence was only probative of his bad character and hence was inadmissible under Williams v. State. These objections were overruled, and the witnesses testified as described. The State then proved that appellant and his co-defendant had driven Ms. Pearce's automobile to the Freedom Savings and Loan Association of Pensacola in the early afternoon of October 19, 1982, and that appellant

had entered the bank carrying Ms. Robinson's pistol, with which he was soon to murder Officer Taylor.

Appellant repeats here his claim that this evidence was inadmissible under the rule of Williams v. State that "evidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion", 110 So.2d 654, 663. The "Williams Rule" has been codified as §90.404(2)(a), Fla.Stat. as follows:

> "90.404 Character evidence; when admissible.--
> (2) OTHER CRIMES, WRONGS OR ACTS.--
> (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity."

"[T]he test for admissibility of such evidence is relevancy, not necessity", Ruffin v. State, 397 So.2d 277, 279 (Fla. 1981), cert. denied, 454 U.S. 882 (1981), for reasons which were very well expressed by the Fourth District in the earlier case of Gordan v. State, 288 So.2d 295, 296-297, (Fla. 4th DCA 1974), cert. denied, 293 So.2d 362 (Fla. 1974):

> Part of the problem with collateral crime evidence is that criminal cases are tried on the general denial of a not guilty plea and, as the controverted or genuine issues are unknown until the defense rests and the weight of the evidence unknown until the

> verdict is in, the State must try every issue; that is, every element of the offense charged and of every lesser included offense and the identity of the accused as the perpetrator.

Moreover:

> The rule with reference to the admissibility of indirect, collateral, or circumstantial evidence is that 'great latitude is to be allowed in the reception of indirect or circumstantial evidence. It includes all evidence of an indirect nature, whether the inferences afforded by it be drawn from prior experience, or be a deduction of reason from the circumstances of the particular case, or of reason aided by experience. The competency of a collateral fact to be used as the basis of legitimate argument is not to be determinded by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth.'

Astrachan v. State, 28 So.2d 874, 875 (Fla. 1947), quoting Mobley v. State, 26 So. 732, 733 (Fla. 1899).

In the instant case, the disputed evidence was primarily admissible to prove the contraverted issue of appellant's premeditation to murder Officer Taylor, insofar as it is logically inferrable that one who arms himself with a stolen weapon and drives a stolen car to the scene of a bank he plans to rob may well contemplate killing someone in the process. Cf Gordan v. State, holding that evidence that an aggravated assault defendant had committed an aggravated battery upon a different victim at the same location three hours earlier was relevant to prove the defendant's depraved state of mind.

Such evidence was also admissible, however, to prove appellant's "intent, preparation, plan, knowledge, (and) identity" in committing all of the crimes charged, including the three counts of armed robbery, although some of these issues were not ultimately contraverted. See generally Heiney v. State, 447 So.2d 210 (Fla. 1984).

A second problem with appellant's argument here is that the contested evidence was technically not of crimes collateral to the crimes charged; it was, rather, of crimes episodically connected to the crimes charged. "[W]here it is impossible to give a complete or intelligent account of the crime charged without referring to the other crime", evidence of the related crime is admissible, Nickles v. State, 106 So. 479, 489 (Fla. 1925), and such admission does not present a "Williams Rule" type of problem. See United States v. Kloock, 652 F.2d 492, 494 (5th Cir. 1981), holding that "evidence of an uncharged offense arising out of the same transaction or series of transactions as the charged offense is not an 'extrinsic' offense [i.e. is not a collateral offense] within the meaning of (Fed.R.Evid.) 4.04(b)", the federal equivalent of $90.404, Fla.Stat. See generally Gorham v. State, ___So.2d ___ (Fla. 1984), 9 F.L.W. 310,

The State would finally and alternatively claim that any error in the admission of collateral crime evidence in this case was harmless under Clark v. State, 378 So.2d 1315 (Fla. 3rd DCA 1980) and Holland v. State, ___So.2d ___ (Fla. 1st DCA 1983), 8 F.L.W. 905, cert. pending, ___So.2d ___ (Fla.

1984), Case No. 63,830, in view of the fact that appellant, by not alleging an insufficiency of the evidence against him upon appeal, has essentially conceeded the truth that the evidence against hin was overwhelming.

ISSUE XII

THE TRIAL JUDGE PROPERLY PERMITTED THE INTRODUCTION OF RELEVANT AUTOPSY PHOTOGRAPHS OF THE VICTIM.

ARGUMENT

Appellant next alleges that the trial judge erred in admitting autopsy photographs of the victim in view of their puportedly "gruesome, inflammatory, and irrelevant'' nature, and that he is entitled to a new trial as a result. The State once more disagrees.

As noted, the defense unsuccessfully objected when the State sought to prove Officer Taylor's identity and the fact and manner of his death by introducing several photographs taken of the victim, including one showing his face, which displayed several tubes which had been placed in his body as part of emergency medical procedure. The State noted that it had no autopsy pictures which did not display these tubes.

These photographs were admissible regardless. As is the case with collateral crime evidence, Ruffin v. State, the test for admissibility of grotesque photographic evidence is relevancy, not necessity. Straight v. State, **397** So.2d **903** (Fla. **1981),** cert. denied, *454* U.S. 882 **(1981).** In Straight v. State, this Court affirmed the admission of several autopsy photographs which depicted the appearance of the murder victim's body after it had spent twenty days in a river, despite the gruesome nature of these photographs and despite the defendant's

offer to stipulate to the only fact the photographs were relevant to prove, which was the manner of death. If photographs of a victim's body which has been altered by water are admissible to prove the manner of death when such are not the only photographs available, then certainly photographs of a victim's body which has been altered by emergency medical procedures are similarly admissible to prove identity and the fact and manner of death when such are the only photographs available.

ISSUE XIII

THE TRIAL JUDGE PROPERLY INSTRUCTED THE JURY AS TO THE NONSTATUTORY MITIGATING CIRCUMSTANCES IT COULD CONSIDER.

ARGUMENT

Appellant further alleges that the trial judge erred in instructing the jury on the nonstatutory mitigating circumstances it could consider, and that he is entitled to a new sentencing proceeding as a result. Again, the State disagrees.

As noted, the jury after deliberation found appellant guilty as charged on all counts. Defense counsel then submitted a written request that the jury be instructed during the penalty phase of the trial regarding eight specific non-statutory mitigating factors while they might find, among them appellant's low intelligence and injuries and his alleged acts of kindness to others. Judge Barfield refused to give this instruction, but did ultimately instruct the jury pursuant to *Florida Standard Jury Instructions in Criminal Cases* (2nd Ed., 1981), p. 81, #8, that they could consider in mitigation any "aspect of the defendant's character or record, and any other circumstance of the offense." The essence of the testimony of appellant's character witnesses was summarized by his mother's statement that "Clarence was nice."

This Court has held that the aforecited portion of the Florida Standard Jury Instructions does not limit the jury's consideration of nonstatutory mitigating factors, see e.g.

Ellege v. State, *408* So.2d 1021 (Fla. 1981), cert. denied, *459* U.S. *981* (1982), Armstrong v. State, *429* So.2d *287* (Fla. 1983), cert. denied, ___U.S.___, *104* S.Ct. *203* (1984), and the cases cited therein. The clear implication is that the instruction accurately expresses Florida law vis-a-vis non-statutory mitigating factors in every respect. It would be ironic indeed for this Court to hold that the judge below erred in instructing the jury in a currently correct fashion, as he was legally obliged to. Moreover, even if this Court is impressed with the Supreme Court of North Carolina's problematic pronouncement in dicta that it might constitute reversible error to deny a proffered written jury instruction upon specific nonstatutory mitigating factors presented in a given capital case, State v. Johnson, 257 S.E.2d *597* (N.C. 1979), this case is the wrong place to change Florida law given the uncompelling nature and proof of the non-statutory mitigating factors alleged. Cf Goode v. Wainwright, *704* F.2d *593,* 602 (11th Cir. 1983), reversed on other grounds, U.S. , *104* S.Ct. *378* (1983), in which it was held that even the giving of a jury instruction which may have improperly limited the jury's consideration of nonstatutory mitigating factors did not warrant federal habeas corpus relief where the evidence of same was not "persuasive."

ISSUES XIV-XI

THE TRIAL JUDGE PROPERLY IMPOSED THE DEATH PENALTY IN THIS CASE.

ARGUMENT

Appellant finally alleges that the trial judge improperly imposed the death penalty in this case both because the evidence was insufficient to support a finding that he committed the murder in a cold, calculated and premeditated manner (Appellant's Issue XV), and because the record is unclear as to the extent the judge either considered or found his background as nonstatutory mitigation (Appellant's Issue XIV), and that he is entitled to a remand for resentencing by the judge as a result. The State believes that both allegations are uncompelling, and following a review of the relevant facts, will rebut both sequentially.

As noted, the State introduced evidence at trial that appellant, accompained by Jackson, armed himself and then approached tellers Tina Neese, Melanie Morris, and Patricia Devlin, demanded money, and threatened to "blow" the "head(s) off" of Ms. Morris and Ms. Devlin if they did not comply. Appellant also threatened to "blow" assistant manager Pat Prince's "brains out" if she did not leave her office. Deciding that discretion was the better part of valor, the bank employees did as they were told, and also hit the floor along with several customers when the robbers so demanded. Before leaving her office, however, Ms. Prince had tripped an alarm.

Jackson left the bank via the front door, where he was immediately apprehended by Officer Larry Bailly of the Pensacola Police Department. Appellant left the bank via the back door, undetected (R *717; 782-783, 806; 864-865, 1099).* Appellant saw that Bailly and Officer Taylor of the Pensacola Police Department, who had just arrived on the scene, had Jackson on the ground and were in the process of handcuffing him. Appellant then casually snuck up behind the trio and began firing his pistol at the officers. Officer Taylor, who was struck in the back and chest, staggered a short distance, fell, and was soon dead.

Given these circumstances, appellant's claim that the trial judge erred in finding that the murder was committed in a cold, calculated and premeditated fashion, and consequently in imposing the death sentence as the jury had recommended, is highly uncompelling. What could be more cold, calculated and premeditated than the act of an armed bank robber who, eschewing an opportunity for a clean getaway, sneaks up behind the officers who have apprehended his partner and murders one of them? Compare Combs v. State, *403* So.2d *418* (Fla. 1981), cert. denied, *456* U.S. *984* (1982); O'Callaghan v. State, *429* ***So.*** 2d *691* (Fla. *1983).*

Appellant's claim that the judge's finding in support of the death penalty that his "age and background...do little to mitigate the circumstances of the killing of Officer Taylor", amounts to a lack of record clarity as to the extent that the judge either considered or found his unremarkable past and

personage as nonstatutory mitigation sufficient to warrant a remand, is similarly uncompelling. In Mann v. State, *420* So.2d 578, 581 (Fla. 1982), this Court held that a "trial judge's findings in regard to the death sentence should be of unmistakable clarity *so* that we can properly review them and not speculate as to what he found." See also Hall v. State, **381** So.2d **683** (Fla. 1980). Can there be any doubt that the judge below considered the evidence presented regarding appellant's unremarkable past and personage and found that this established a nonstatutory factor of exceedingly modest and nondispositive weight given that it was dwarfed in magnitude by the five statutory aggravating factors he also found? There is no need for a remand to clarify the obvious.

CONCLUSION

WHEREFORE, the State submits that the judgments and sentences appealed from must be AFFIRMED in every respect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee has been forwarded to Mr. Steven L. Bolotin, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, on this 31st day of October, 1984.

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