**IN THE TENNESSEE COURT OF CRIMINAL APPEALS**

**AT NASHVILLE**

**JANUARY 1996 SESSION**



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| **STATE OF TENNESSEE,** | ) | C.C.A. NO. 01C01-9307-CC-00218 |
| | ) | |
| Appellee, | ) | CHEATHAM COUNTY |
| | ) | |
| VS. | ) | Hon. Allen W. Wallace |
| | ) | |
| **JAMES BLANTON,** | ) | (First-Degree Murder, Grand Larceny, |
| | ) | and First-Degree Burglary) |
| Appellant. | ) | |

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**FIRST-DEGREE MURDER CONVICTIONS AND DEATH SENTENCES AFFIRMED; FIRST-DEGREE BURGLARY CONVICTIONS AFFIRMED; GRAND LARCENY CONVICTIONS AFFIRMED AS MODIFIED**

**PAUL G. SUMMERS,**
Judge

## O P I N I O N

In this capital case, the appellant, James Blanton, was convicted by a jury of two counts of first-degree premeditated murder, four counts of grand larceny, and three counts of first-degree burglary. In the sentencing hearing, the jury found three aggravating factors as to the murder of Buford Vester: (1) the appellant was previously convicted of one or more violent felonies; (2) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the appellant; and (3) the murder was committed while the appellant was engaged in committing or was an accomplice in the commission of, or was attempting to commit, or fleeing after committing or attempting to commit any first-degree murder, arson, rape, robbery, burglary, larceny, kidnaping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb. See T.C.A. § 39-2-203(I)(2), (6), (7)(1982).[1] As to the murder of Myrtle Vester, the jury found the above three aggravating factors and found that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind. See T.C.A. § 39-2-203(I)(2), (5), (6), (7). The jury found that there were no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances and sentenced the appellant to two sentences of death by electrocution.[2]

In this appeal, the appellant raises numerous issues that challenge the sufficiency of the evidence and alleged errors occurring during the guilt phase and during the sentencing phase of the trial. Having carefully considered the appellant's contentions as to the sufficiency of the evidence and as to errors occurring during the guilt phase, and having decided that none has merit, we affirm the appellant's convictions with one modification. We find that the convictions for grand larceny in Count 1 of No. 10560 and in Count 2 of No. 10563 should be merged into one conviction. Accordingly, the judgment of the trial court is modified to reflect only three counts of grand larceny. As to alleged error occurring during the sentencing phase, we have again carefully considered the

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[1]In 1991, T.C.A. § 39-2-203 was superseded by T.C.A. § 39-13-204.

[2]At a separate hearing, the trial court sentenced the appellant to an aggregate sentence of 93 years on the other convictions.

appellant's contentions and have decided that none has merit. Thus, we affirm the appellant's sentences of death.

## BACKGROUND

The state's proof introduced at the guilt phase of the trial demonstrated that early on the morning of June 16, 1988, eight men successfully escaped from the Kentucky State Penitentiary at Eddyville, Kentucky. The eight escapees included the appellant, Derrick Quintero, William Hall, Joseph Montgomery, Ronnie Hudson, Bobby Sherman, Leo Sperling, and Floyd Cook. Sherman was apprehended by Kentucky authorities the next day, and Sperling and Cook were caught on June 18, 1988. Approximately six days after the escape, Montgomery and Hudson were captured in Taylor County, Kentucky. Hall was returned in July 1988, and the appellant and Quintero were returned to the Kentucky State Penitentiary in November 1989.

On the day of the escape, a 1966 Chevrolet truck was stolen from Curtis and Nina Rogers of Eddyville, Kentucky. In October 1989, the truck was finally located in a wooded area of Stewart County, Tennessee. Two round paper weights with the inscription “Cumberland Electric Membership Corporation” were found in the bed of the truck. Mr. Rogers testified that he had never seen the paperweights before and that they did not belong to him.

Shortly after the escape occurred in Eddyville, there was a rash of burglaries in the Leatherwood Resort Area in Stewart County, Tennessee, which is on Kentucky Lake. Most of the homes in the area are summer cabins, and the full-time residents are mostly elderly and retired people.

On Saturday, June 18, 1988, Jim McMinn of Clarksville, Tennessee, drove out to his cabin in the Leatherwood area to go fishing. He arrived at the cabin around noon and went fishing in his boat around 1 p.m. When he returned around 3 p.m., he noticed

two boxes of 20 gauge shotgun shells lying on the floor. He then went to his bedroom where he kept a loaded .22 caliber revolver, and it was missing. The telephone in his cabin had been removed from the wall, and the phone line had been cut on the outside. When Mr. McMinn went to his truck, the ignition had been completely destroyed. An axe was lying inside the truck, and Mr. McMinn's telephone was in the bed of the truck. Mr. McMinn walked to a neighbor's house and called the sheriff's department.

After receiving several reports of suspicious persons and recognizing that the escapees might be in the area, the Stewart County Sheriff's Department conducted a search of the Leatherwood community. The search lasted from approximately 11 p.m. on Saturday, June 18, until 3 a.m. on Sunday, June 19; however, none of the escapees were found.

On Sunday, June 19th, at approximately 1:30 p.m., Essie Settles, a 74-year-old widow and resident of Dover, Tennessee, discovered that her white 1982 Ford Fairmont and some tools were missing from her garage. The car was located one week later at a riverbank in Marion County, Kentucky, with some of the tools inside it, including a hammer, a hacksaw, two crowbars, steel cutters, and a chisel. Ms. Settles' chain saw was not recovered.

On Wednesday, June 22nd, the Kentucky State Police were able to apprehend Hudson and Montgomery near the area where Mrs. Settles' car was located. During the capture, Hudson fired four shots at the pursuing officers. After Montgomery and Hudson were apprehended, Mr. McMinn's .22 caliber pistol and Neal Foster's .22 caliber pistol were found in their possession. Two live rounds were recovered from Mr. Foster's pistol and four spent shells were recovered in the area.

Hudson's brother, Michael Hudson, testified that Hudson and Montgomery were waiting for him at his apartment in Lebanon, Kentucky, on Sunday, June 19, 1988. He testified that the two were in a white car with Tennessee plates. Michael Hudson and

a friend, Robert Payne, followed the two escapees down to the riverbank, where Hudson and Montgomery hid the car amongst the weeds. Michael Hudson and Robert Payne stayed with the escapees for several hours and then left. Hudson's sister, Judy Hudson, also came down to the river to see them. The next morning, Ms. Hudson returned to the river, and the two escapees followed her back to her home in Campbellsville, Kentucky. They stayed with Ms. Hudson until that evening when she escorted the two men to Martha Grover's apartment, where they stayed until early Tuesday evening. None of the witnesses saw the appellant with Hudson and Montgomery.

On June 19, 1988, the Stewart County Sheriff's Department received two more reports of burglaries in the Leatherwood community. Alfred Cherry, of Springfield, Tennessee, testified that he and his wife owned a trailer in the Leatherwood community, approximately three-tenths of a mile from the Vesters' residence. In 1988, the Cherrys normally would go to their trailer every week. On Sunday, June 19, 1988, Mr. Cherry, his wife, and two grandchildren went to the trailer around 3:00 or 3:30 p.m. They discovered the back door torn off and the trailer in disarray. The bed was unmade, wet towels were in the shower, and the refrigerator light switch had been taped down so as to prevent the light from coming on. Mr. Cherry went next door to the trailer of Thomas Harris, his brother-in-law, and discovered that it had been burglarized as well.

The items missing from the Cherry's cabin included two bedspreads, a green thermal blanket, a sleeping bag, a portable radio/tape player, fifteen cassette tapes, a rechargeable flashlight, a small handsaw, five or six knives, coffee mugs, various canned goods, some alcohol, a toothbrush, underwear, and paper weights with the Cumberland Electric logo. Mr. Cherry positively identified the paper weights found in the Rogers' truck. Mr. Cherry also positively identified two knives by their markings. He identified another knife as being identical to the one taken from his trailer. Two of the knives were later recovered at the Foster residence: a filet knife was recovered outside the Foster residence; and the other was found in Mr. Foster's living room. Mr. Cherry also testified that a paring knife was returned to him by the sheriff. Of the two knives never recovered, one was a

Raplan filet knife, and the other was a knife made from a cross-cut saw with a deer horn handle on it. The blades on these knives were six or six and a half inches. The estimated value of the property stolen from his trailer was between $600 - $700.

Mr. Cherry's brother-in-law, Thomas Harris, confirmed that he owned the trailer next door to Mr. Cherry. Mr. Thomas also found that his back door had been pried off and that his trailer was a mess. All of the canned food was gone, the refrigerator light had been taken out, the sink was full of dirty dishes, and there was food still in a skillet on the stove. Mr. Harris testified that wet towels and sheets were strewn about and cigarette burns were all over the floors. Items missing from Mr. Harris' trailer included quilts, blankets, silverware, butcher knives, and a fishing tackle box. Mr. Harris estimated that the total value of the items taken from his trailer was between $400 -$500.

Mr. Harris' telephone bill reflected that three unauthorized calls had been placed to a telephone number in Springtown, Texas, on Sunday, June 19, at 3:51 a.m., 8:55 a.m., and 9:19 a.m. Two unauthorized calls had been placed to a telephone number in Hopewell, Pennsylvania, at 4 a.m. and 9:19 a.m. The telephone number in Springtown, Texas, was determined to belong to Bryan Quintero at that time. The telephone number in Hopewell, Pennsylvania, was determined to belong to Barbara Vasser, who testified that she was William Hall's girlfriend at the time.

On the evening of Monday, June 20, 1988, John Corlew and Arthur Jenkins, of Clarksville, Tennessee, arrived at the Leatherwood boat dock to do some night fishing. They launched the boat and fished in the Leatherwood Bay. Sometime between 11:30 p.m. and 1 a.m., while the men were fishing along the north bank, they heard shots from the direction of the Vesters' residence. Mr. Corlew testified that he first heard two shots, which were fairly clear, followed by a pause, then he heard two more shots followed by a little pause, and then one more shot. Mr. Corlew testified that the first two shots sounded like they were from a pistol or a high-powered rifle. Mr. Jenkins only remembered hearing four shots.

Because the fish were not biting, the men decided to stop at midnight and wait until morning to go back out in the boat. At approximately 12:00 or 12:15 a.m., Mr. Jenkins saw a red GMC or Chevrolet pick-up truck come down to the boat dock. A man exited the truck and reached for the gas pump which appeared to be locked. The man then walked across in front of the restaurant, went around the corner, and stayed there approximately five or six seconds. The man then returned to his truck and left. Sometime later, Mr. Jenkins saw a '77 or '78 Pontiac drive down to the dock, circle around and drive back. Upon learning about the Vester murders, Mr. Corlew contacted the Stewart County Sheriff's Department.

On Tuesday, June 21, 1988, Neal Foster, a full-time resident in the Leatherwood community, discovered that his house had been burglarized. Mr. Foster left his home on the afternoon of June 16, and did not return until around 8:30 a.m. on Tuesday, June 21. When Mr. Foster opened his garage door, he could see that the door into the house was open. He immediately left and went to a neighbor's house to call the sheriff's department.

Inside, the house had been ransacked. In the kitchen, food was on the counter, two deer steaks were in the microwave, and his binoculars were sitting on the counter. On the floor in the living room was a green ammunition box, a plastic bag full of old coins, a flashlight, and the holster for his .22 caliber RG pistol that was recovered when Hudson and Montgomery were captured. On the floor in the hallway was a Diet Pepsi can inside two other tin cans, a tin can of old coins, a notebook that once had old coins in it, some socks, and a shoe box, all of which belonged to Mr. Foster. Also in the hallway was a pair of white tennis shoes that did not belong to Mr. Foster. Towels were strewn around the house. In the bathroom, the shower curtain was torn, and Mr. Foster's pocket knife, towels, socks, a .22 caliber cartridge box, and a 20 gauge shotgun shell were all out on the counter. The beds were messed up and had things spread on top of them. The dresser drawers were left open, and stuff was scattered around the bedroom, including two walkie-talkies, a belt buckle, a hacksaw, a 12 gauge shotgun barrel and the pad that Mr. Foster

had on his 20 gauge shotgun.

Mr. Foster had several guns at his house that he kept in a walk-in closet. Besides his .22 caliber pistol, he owned a Glenfield Model 60 .22 caliber rifle, a Marlin .30-30 caliber lever action rifle, a 20 gauge shotgun, a single shot shotgun, and a Remington 100 12 gauge shotgun. His 12 gauge shotgun, which was rendered inoperable by being sawed off too closely, was found lying on his bed. The stock and barrel had both been sawed off, and the spring from the stock was lying near the gun. The 20 gauge shotgun was missing from his house, however, he identified the 20 gauge shotgun found in the Vesters' car as his. Specifically, he testified that the serial number matched and also showed how his full name was carved under the forearm of the gun. The barrel had also been sawed off and left in the bedroom. The .30-30 lever action rifle and .30-30 accelerator rifle bullets were also missing from Mr. Foster's house, but the rifle was never recovered. Besides the accelerator rifle bullets, Mr. Foster had .30-30 caliber rifle shells; Sears, Winchester, Federal, and Montgomery Ward brand 20 gauge shotgun shells, which were 4 through 7 ½ shot; and 12 gauge shotgun shells. Some ammunition of each of these types in his house were missing after the burglary. Coins were also missing from Mr. Foster's house; and he identified six silver dollars, recovered in Memphis, as being identical to the ones taken from his home.

Several latent prints were found on evidence taken from the Foster residence. A latent left thumb print found on a full box of Federal 12 gauge shotgun shells was identified as belonging to Quintero; a latent right ring fingerprint found on a Federal 12 gauge shotgun shell box was identified as belonging to Quintero; a right middle finger and a right index fingerprint found on a Federal field load 12 gauge shotgun shell box were identified as belonging to the appellant; a right palm print from one of the gun stocks was identified as belonging to Quintero; and a latent right ring fingerprint on a Diet Pepsi can was identified as belonging to Hall.

Wayne Vester, the Vesters' son, tried to reach his parents by telephone on

Monday, June 20, 1988, and twice on Tuesday, June 21. When he was unable to reach his parents, Wayne called Howard Allor, who lived approximately a quarter mile from the Vesters. Mr. Allor had last seen the Vesters on the morning of June 17, when he ate breakfast with them. Mr. Allor told Wayne that their car was gone and that he thought they were in Nashville. When Wayne could not locate his parents in Nashville, he called Mr. Allor back on Wednesday, June 22, and asked him to go check on his parents. Mr. Allor drove over to the Vesters' house, and from the kitchen area, Mr. Allor could see the bodies of Mr. and Mrs. Vester. He tried to call the sheriff from there, but the phone was dead. Upon leaving, Mr. Allor stopped by the home of another neighbor to see if he was all right and relayed what had happened. He then returned home and called the sheriff's department.

Wayne Vester and his 12-year-old son had visited his parents the weekend prior to the murders. They had arrived on the evening of Friday, June 17, and had left on Sunday evening, June 19, at approximately 5 or 6 p.m. They had brought groceries for his parents, including Pepsi Colas, lunch meat, bread, and milk.

David Hicks, the Sheriff of Stewart County, was notified of the Vester murders at approximately 1:00 or 1:30 p.m. on Wednesday, June 22. The Tennessee Bureau of Investigation ("T.B.I.") conducted the primary investigation of the crime scene at the Vester residence.

The only entrance into the Vester residence was through the front screen door, which did not appear to be damaged. Alongside the front walkway to the house was an unopened Pepsi can, and the packages of Pepsi Cola that Wayne Vester brought to his parents were no longer on the porch as he had left them on Sunday. The screen in the front bedroom window was missing, and the window was open. Underneath the window was a concrete block, which appeared to have been taken from in front of a shed at the back of the house. A cloth glove, matching a glove found at the Crawford residence, was on the ground below the block. The Vesters' maroon 1985 Pontiac Bonneville was

missing.

There were three windows on the back of the Vester house. The missing window screen was lying on the ground near Mr. Vester's bedroom window which was one of the back windows. The wires to the telephone connection box outside the Vester residence had been damaged and the line was dead. A live 20 gauge Federal shotgun shell with #6 bird shot was found lying near the electrical box. Another live 20 gauge Federal shotgun shell with #6 bird shot was found lying between the Vester house and a shed in the back. A spent 20 gauge Federal shotgun shell casing with #4 bird shot was found near the shed approximately 18 feet from the back bedroom window.

The window in Mr. Vester's bedroom was visibly bent, a portion of the glass louvers was broken, shards of glass were found on the bed, and the screen had a hole in it, indicating that Mr. Vester was shot at least once from outside the house. Mr. Vester's body was found on the floor next to his bed. The covers were drawn back and there was blood on the pillow and bed. Five shot pellets were retrieved from the room, all of which were #5 bird shot. Two shot shell filler wads were found beside Mr. Vester's body, and a 20 gauge plastic shot wad was recovered from beside his head. This type wad is consistently loaded in 20 gauge shot shells and fired from 20 gauge shotguns. A plastic shot sleeve, one shot shell, a plastic shot wad, and several shot pellets, all #4 and #5 bird shot, were recovered from Mr. Vester's body.

Mrs. Vester's body was found in her bedroom next to the bathroom. Mrs. Vester was shot once with a 20 gauge shotgun, twice with a high-powered rifle, and stabbed thirteen times. A copper jacketed bullet was recovered from her body. The window drape in Mrs. Vester's bedroom had a hole in it, and there was a hole in the screen. The glass louvers, which were open, were not broken, indicating that the high-powered rifle or shotgun was held at close range to the window. At least one shot came through the window which was consistent with hitting Mrs. Vester's arm and ricochetting off of the heating unit cover and then out the living room window where the shot wad

created a star-shaped hole. Shot was sprayed all over the house, especially the kitchen. All of the shot pellets found in the house were #4 and #5 bird shot.

Blood was found on Mrs. Vester's bed, and there was a considerable amount of blood on the bathroom floor, as well as blood splattering on the bathtub and commode. Mrs. Vester's feet were also covered in blood.

In the living room, the Metro and State Section of The Tennessean, dated Monday, June 20, 1988, and a pocket book were on the sofa. The mail carrier in that area testified that the Vesters did not receive the paper through the mail. In the front bedroom, where the window screen was missing, a live 20 gauge shotgun shell was found lying next to a ransacked jewelry box on the floor.

The medical examiner, Dr. Charles Harlan, testified that the Vesters died one and a half to two hours after they ate dinner. He determined that three different weapons were used in the murders. Mrs. Vester's body had three gunshot wounds. Gunshot wound A was located at the right portion of the chest below the collarbone. A copper jacket entered the body at this wound and was recovered in the left arm. The wound was approximately a quarter inch in diameter and was basically round in shape. Gunshot wound B was at the upper arm. The defect measured 3.4 inches by 1.8 inches. It was jagged with an irregular edge, and there were multiple tangential abrasions associated with the wound. Gunshot wound C was at the right forearm. The two bones were severed, and the hand and wrist were attached to the body by a peninsula of soft tissue. Dr. Harlan testified that the gunshot wounds to the right arm would have been from a high-velocity rifle or a shotgun. He could not determine the order in which the wounds were inflicted.

Dr. Harlan further testified that Mrs. Vester's body had twelve stab wounds to the head, neck, and shoulders, and one stab wound to the middle of the back. Most of the wounds were on the left side of the head and neck, and were inflicted by a squared object with a sharp edge, such as a kitchen or hunting knife. He testified that the stab

wounds to the right common carotid artery, which was 90% severed, and the left common carotid artery, which was 10% severed, would have been fatal. He also testified that the gunshot wound to the right forearm would have been fatal unless Mrs. Vester was at a hospital. Based on his autopsy, Dr. Harlan determined that Mrs. Vester could have survived up to 15 minutes.

Mr. Vester's body had two gunshot wounds. The central defect from gunshot wound A was at the head and neck juncture and the total dispersal pattern of pellets was 13 inches, causing significant injury to the left lung, aorta, and pulmonary artery. Gunshot wound B was to the right chest at the level of the right breast. The total dispersal pattern of pellets was 6 to 8 inches, causing injury to the right lung and to the liver. Dr. Harlan recovered shotgun pellets and a shot column from the chest and abdomen of Mr. Vester's body.

Dr. Harlan determined that the chest wound to Mr. Vester's body was sustained by a shotgun discharge that was probably 6 to 10 feet away. The neck wound was sustained by a shotgun discharge from approximately 10 to 12 feet away. Dr. Harlan testified that Mr. Vester could have survived up to five minutes.

After the Vesters' bodies were discovered, the Stewart County Sheriff's Department started checking on the cabins in the surrounding area. On Thursday, the officers discovered that the Crawford residence, less than a quarter of a mile from the Vesters' residence, had been burglarized. John and Virginia Crawford, from Davidson County, had been at their trailer from the evening of Friday, June 17, 1988, until Sunday, June 19, around 2:00 or 2:30 p.m. When they left on Sunday, everything had been clean and orderly at the trailer. The following Thursday, when the Crawfords were notified that their trailer had been burglarized, they drove to the trailer after work to find that the back door had been pried open with a pick and that a mess had been made in the kitchen. It appeared that canned foods, crackers, and candy bars from the cabinet and refrigerator had been eaten. Prints were lifted from several items in the trailer. A latent left thumb

print, identified as belonging to Hall, was developed from the bottom of a can of ham, and a latent right index fingerprint, identified as belonging to the appellant, was taken from a Butterfingers candy wrapper found in the refrigerator. The Crawfords identified two gloves found at the trailer - one white jersey and one brown jersey - as belonging to Mrs. Crawford. A patch on one of the gloves had been sewn on by Mrs. Crawford. Mr. Crawford testified that a flashlight had also been taken from the trailer. One of the gloves found at the Crawfords' matched the one found outside the Vesters' front bedroom window. Although the gloves were a common type, analysis of the fibers of both gloves indicated that it was possible they were mates and originally sold together as a pair.

On June 21, 1988, around 8 a.m., employees of the Memphis Funeral Home observed three men in a maroon Pontiac, later identified as the Vesters' car, enter the parking lot of the funeral home and park approximately 250 feet from the building. Two employees of the funeral home testified that one man got out of the front seat, took his tank top off, and put on three different shirts. The other two men also got out of the car. Although neither witness could make a positive identification, they testified that all three men were white; they were about the same height; two of the men were probably 180 pounds and had darker hair; and the third man had lighter hair and was lighter. The three men were in the parking lot for approximately 5 to 7 minutes. Then, after one of them took a satchel out of the trunk, the three men proceeded to walk off towards the hospital across the street. One of the men turned around, walked back, and put something in the car. He then joined the other two men, and they walked off. It was assumed that the men were construction workers at the hospital. However, when the car was not picked up by Thursday, the employees noticed that the car and the license plate matched the description of a missing car in the newspaper. They immediately called the Memphis Police Department.

On the morning of Thursday, June 23, the Memphis Police Crime Scene Squad responded to the call from the funeral home. They found a 1985 maroon Pontiac Bonneville matching the description of the Vesters' vehicle. The keys were in the ignition

of the car, and under the floor mat behind the driver's seat, the officers recovered a sawed off 20 gauge shotgun, identified as belonging to Mr. Foster. They also located a .30-30 caliber cartridge under the floor mat, matching the ammunition taken from Mr. Foster's residence. Under one of the seats was a crumpled Budweiser beer can. Initially, the can was mismarked as a 12 oz. can, however, the officer who recovered the can indicated that it had been a 16 oz. can. Three latent prints identified as belonging to the appellant were found on the Budweiser can. No other prints were found in the car. The officer noted that the temperatures in Memphis at that time had been extremely hot which made it difficult to lift prints. Other items retrieved from the vehicle included a Ray-O-Vac flashlight, electrical tape, thirteen 20 gauge shotgun shells, three 12 oz. Pepsi Colas, one 12-pack of Pepsi, a portable electric air compressor, a Black & Decker car vacuum, and a brown umbrella.

Curtis Jones, who was a security guard at the Memphis Greyhound bus station, testified that he worked Tuesdays and Wednesdays at the bus station back in June of 1988. The bus station is located in downtown Memphis approximately one mile from the Memphis Funeral Home. His job at the bus station was to ensure that persons who did not have any business at the station were kept out. Mr. Jones sat in a booth at the station and watched the doors to see who came in and to determine whether they bought tickets. Periodically, he would walk around and ask people if they had bus tickets or if they were waiting for someone to arrive.

Mr. Jones testified that on either Tuesday, June 21, or Wednesday, June 22, between 11 a.m. and 1 p.m., three men came into the bus station. Two of the men sat down and began watching television, one of whom talked to a black man seated nearby. The third man, who had darker skin and appeared Hispanic, went to use the telephone. When the men failed to purchase tickets, Mr. Jones approached the two men seated and asked if they had tickets. The man, whom he identified as the appellant, told him that they would leave as soon as their friend finished using the telephone. Altogether, the three men were in the station five to ten minutes. Later that same day, the Memphis police came by

the bus station with a photographic line-up of the eight escapees. Mr. Jones responded that the appellant, Quintero, and Hall had already been there and left. Later in the week, Mr. Jones spoke with Agent Stout of the T.B.I., and again, Mr. Jones identified the appellant, Quintero, and Hall from the line-up. In the courtroom, Mr. Jones identified the appellant as the person he spoke with at the bus station. He stated that the appellant had changed his appearance somewhat in that his hair had been cut, he no longer had a mustache, and he seemed to have put on some weight.

Agent Stout also talked with two employees at Blue Movies West, an adult bookstore and entertainment center located across the street from the bus station. Shirley Denise Morrow testified that she worked as a cashier in the bookstore in June of 1988. On Tuesday, June 21, 1988, the day before her birthday, three men, all white except one that appeared Mexican, came into the bookstore around 9 or 10 a.m. The men wanted to trade silver dollars and half dollars for tokens. Ms. Morrow traded some of the silver dollars and half dollars and bought some for herself.

The men then went to the back of the building to watch movies. Approximately ten minutes later, the men returned to the front of the store and wanted to sell Ms. Morrow what appeared to be a class ring and a wedding band. She suggested that they go to a pawn shop, but one of the men indicated that they could not because they did not have any identification. They then offered Ms. Morrow $50 to let them stay in the movie house until their ride came to pick them up around 9 p.m. Ms. Morrow did not agree to this. About that time, one of the dancers came out from the back and said something to the men. The three men left at that point, and Ms. Morrow contacted the police.

Agent Stout talked with Ms. Morrow on Thursday, June 23, and showed her the photographic array of the eight escapees. Ms. Morrow identified the appellant, Quintero, and Hall as the three men who came into the bookstore. Agent Stout took the six silver dollars that the men sold to Ms. Morrow, and they were later identified by Mr. Foster as identical to the coins stolen from his residence. Ms. Morrow also made an in-

court identification of the appellant.

Hall was eventually captured in El Paso, Texas, and the appellant and Quintero were captured in Mexico near El Paso. Barbara Vasser, Hall's girlfriend at the time, testified that after Hall called her for a third time after the escape, her mother called the Pennsylvania State Police. Ms. Vasser testified that she was afraid for Hall's safety, so she agreed that if Hall called again, she would set up a place and time where she could wire him money. Hall called Ms. Vasser on July 6, 1988, and she agreed to wire him money at the Western Union on North Stanton Street in El Paso, Texas. The Federal Bureau of Investigation ("F.B.I.") was notified, and a surveillance was established at the appointed Western Union. At approximately 2:20 p.m., Hall came into the Western Union in El Paso and was arrested.

Subsequently, the F.B.I. received leads that Quintero and the appellant were staying at the Santa Fe Hotel in Juarez, Mexico, just across the border from El Paso. On July 10, 1988, Quintero and the appellant were apprehended at the hotel by Mexican officials and transported across the international bridge. F.B.I. agents were waiting at the border check point and took custody of the men. An old wallet with an imprint of Mr. Foster's driver's license was taken from Quintero.

The defense attempted to present the testimony of Quintero and Hall, however, both invoked their privilege against self-incrimination and refused to testify. The trial court informed the jury that both witnesses had invoked their right not to testify and instructed both men to hold up their hands for the jury to observe. The appellant was not allowed to introduce into evidence the affidavits prepared by Quintero and Hall.

Based on this evidence, the jury found the appellant guilty of two counts of first-degree premeditated murder, four counts of grand larceny, and three counts of first-degree burglary.

At the sentencing phase of the trial, the state introduced proof that in 1981, the appellant had been convicted of murder in Perry County, Kentucky. The state also showed that in 1985, the appellant had pled guilty to wanton endangerment in the first degree in Lyon County, Kentucky. An officer at the Kentucky State Penitentiary at Eddyville, Kentucky, identified the appellant as one of the eight inmates that escaped from the facility on June 16, 1988.

Finally, the state introduced additional photographs and testimony concerning Mrs. Vester's body. Mrs. Vester was found lying in her bedroom just outside the bathroom. The state introduced photographs depicting the amount of blood on the bathroom floor and depicting the blood on Mrs. Vester's feet. The state also introduced a photograph of Mrs. Vester's body rolled over so that the jury could see the severity of the injuries.

In mitigation, the appellant presented testimony that he was born on November 8, 1958, in Perry County, Kentucky, and spent some of his early childhood in Hazard County, Kentucky, all of which is considered part of Appalachia. Julie Maddox, a psychological examiner and expert in the field of psychological testing, testified as to the results of various tests that she administered on the appellant. The first test was the Bender Gestalt Test, which is designed to determine whether a person has any severe brain damage. Ms. Maddox found no signs of traumatic brain damage in the appellant, although he appeared to be intellectually impaired.

The second test administered was the Wide Range Achievement Test, revised ("WRAT"). In arithmetic, the appellant achieved a score of 20 out of 66, placing him in the .1 percentile and at a fourth grade level. In spelling, the appellant achieved a score of 8 out of 51, placing him in the .2 percentile and at a fourth grade level. In reading, the appellant scored 29 out of 89, again placing him in the .2 percentile and at a level lower than the third grade.

Next, Ms. Maddox administered the Wexler Adult Intelligence Scale Revised

Test ("Wexler") which measures I.Q. The appellant received a verbal I.Q. level of 74, a performance I.Q. level of 77, and a full-scale I.Q. level of 74. This placed the appellant in the 3 percentile, meaning 97% of the people in the United States scored above the appellant. The error range on this test is plus or minus five points. Ms. Maddox testified that a score of 90 to 109 is considered average and a score of 70 or below indicates mild mental retardation.

Ms. Maddox testified that she had also administered a Minnesota Multi-Phase Personality Inventory ("MMPI"), but that she had not brought that test with her. She testified that there were no indications from the test that the appellant was malingering.

Next, the defense presented the testimony of Susan Cannon, executive director of PEACE, Inc. (Project to End Abuse Through Counseling and Education) located in Nashville, Tennessee. She introduced into evidence the appellant's school records from first through eighth grade. She also testified that male children typically learn violent behavior at home and repeat it in their own home as an adult.

The appellant's maternal aunt, Lucy Coots, testified that she has lived her entire life in Perry County, Kentucky. She testified that the appellant's father, George Blanton, was a violent man who would come home drunk and beat his wife and kids. She further testified that the appellant grew up under difficult family and economic conditions. The defense presented two CBS documentaries on living conditions in Perry and Knott Counties, Kentucky, during the time when the appellant was growing up. Ms. Coots testified that they accurately depicted the living conditions of the appellant's family. After the appellant's father went to prison, the appellant's mother married another man who was a good father to the children. He died of cancer about two years after they married, and the appellant's mother died about three years after that. Ms. Coots testified that the appellant often called her on the telephone and wrote her letters.

The appellant's brother and sister also testified. They confirmed Ms. Coots' testimony concerning the living conditions of the family. The appellant had six siblings, one of whom died from Muscular Dystrophy. Neither witness had seen or heard from the appellant in 10 or 11 years. One of the appellant's brothers is incarcerated in the Kentucky State Penitentiary at Eddyville, Kentucky.

In rebuttal, the state presented Dr. Samuel Craddock, who testified that he was part of an investigation team that interviewed the appellant on April 17, 1991. From his examination, Dr. Craddock determined that the appellant "was functioning in the low/average or dull/normal range of intelligence depending on which of the Wexler Intelligence Scale was used."

Finally, the state presented testimony that while the appellant was in the Tennessee Department of Correction ("TDOC"), he had sent several coded letters to Joseph Montgomery in the Kentucky State Penitentiary. Although the letters contained numerous capitalization and spelling errors, they were introduced to rebut testimony that the appellant was of low intelligence.

Based on this proof, the jury sentenced the appellant to death for the murders of Buford and Myrtle Vester.

## SUFFICIENCY OF THE EVIDENCE

The appellant contends that the evidence did not support any of the multiple convictions. He argues that had he been tried on each charge individually, he would have been acquitted of all charges. The appellant further concludes that because the state was permitted to present evidence concerning co-defendants Quintero and Hall, along with evidence of the various burglaries, the jury was sufficiently confused and angered to convict the appellant of all of the crimes and sentence him to two death sentences. The state submits that while the evidence presented in this case was entirely circumstantial,

given the remote location of the victimized community and the manner in which the appellant acted, it proved beyond a reasonable doubt the commission of each crime.

In Tennessee, great weight is given to the result reached by the jury in a criminal trial. A jury verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state's theory. State v. Williams, 657 S.W.2d 405 (Tenn. 1983). On appeal, the state is entitled to the strongest legitimate view of the evidence and to all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832 (Tenn. 1978). Moreover, a guilty verdict removes the presumption of innocence which the appellant enjoyed at trial and raises a presumption of guilt on appeal. State v. Grace, 493 S.W.2d 474 (Tenn. 1973). The appellant has the burden of overcoming this presumption of guilt. Id.

In reviewing the sufficiency of the evidence, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Duncan, 698 S.W.2d 63 (Tenn. 1985); T.R.A.P. 13(e).

A crime may be established by direct evidence, circumstantial evidence, or a combination of the two. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987). Here, the parties agree that the proof of premeditation and deliberation was circumstantial in nature. Before an accused may be convicted of a criminal offense based upon circumstantial evidence, the facts and the circumstances "must be so strong and cogent as to exclude every other reasonable hypotheses save the guilt of the defendant, and that beyond a reasonable doubt." State v. Crawford, 225 Tenn. 478, 482, 470 S.W.2d 610, 612 (1971). "A web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Id. at 484, 470 S.W.2d at 613.

While the appellant was charged as a principal on all counts, the jury was properly charged on aiding and abetting. See State v. Hensley, 656 S.W.2d 410, 413 (Tenn. Crim. App. 1983). Under the pre-1989 Code, one could be considered an aider and abettor if one advised, counseled, procured, or engaged another to commit a crime. Flippen v. State, 211 Tenn. 507, 365 S.W.2d 895 (1963). A particular act or even physical participation in the commission of the crime is not necessary. The appellant need only to have been "constructively" present. State v. Lequire, 634 S.W.2d 608, 613 (Tenn. Crim. App. 1981). Even if the evidence was circumstantial, there must be proof that the aider and abettor associated himself with the venture, acted with the knowledge that an offense was to be committed, and shared the principal's criminal intent. Hembree v. State, 546 S.W.2d 235, 239 (Tenn. Crim. App. 1976)(citing Flippen v. State). Intent may be inferred from the circumstances surrounding the crime. Presley v. State, 161 Tenn. 310, 30 S.W.2d 231 (1930). While mere presence is not sufficient to conclude that a defendant aided and abetted in a crime, presence, companionship, and conduct before and after the criminal event are all proper considerations. State v. McBee, 644 S.W.2d 425, 428-29 (Tenn. Crim. App. 1982).

In short, the theory presented by the state at trial was that all of the crimes were inextricably intertwined. The evidence showed that two knives taken from the Cherry residence were found at the Foster residence. Moreover, the appellant's fingerprints were found on a Federal 12 gauge shotgun shell box found at the Foster residence. At the Vester residence, ammunition similar to that taken from the Foster residence was found, including 3 live Federal 22 gauge shotgun shells and one casing. Pellets removed from the Vester residence and the victims' bodies were also consistent with the ammunition stolen from the Foster residence. The proof also connected the appellant to the Vesters' 1985 maroon Pontiac Bonneville which was later recovered in Memphis. In the car, the police found a sawed-off 20 gauge shotgun, which was positively identified by Mr. Foster, and a crumpled beer can with the appellant's fingerprints on it. Finally, at least two eye witnesses placed the appellant as being with Quintero and Hall in Memphis at the time the Vesters' vehicle was abandoned.

Based on the evidence in the record before this Court, we find that a rational jury could have found the evidence sufficient to support the appellant's multiple convictions with one exception. However, we also find that the evidence does not support dual convictions dealing with larcenies of personal property belonging to the Vesters. The record does not indicate that the larcenies occurred at separate times, thus, the two counts must be merged. See Greer v. State, 539 S.W.2d 855, 858 (Tenn. Crim. App. 1976).[3]

**PREMEDITATION AND DELIBERATION**

The appellant argues that, even if the state had proven that he participated in the murders, there is no proof of premeditation or deliberation. Basically, he argues that there is no competent proof as to how the victims were murdered. In response, the state argues that the evidence, albeit circumstantial, was sufficient to demonstrate premeditation and deliberation. As stated earlier in this opinion, a crime may be established by direct evidence, circumstantial evidence, or a combination of the two. State v. Tharpe, 726 S.W.2d 896, 899-900. Here, the parties agree that the proof of premeditation and deliberation was circumstantial in nature. In State v. Brown, 836 S.W.2d 530 (Tenn. 1992), our Supreme Court held that the element of deliberation contemplates a lapse of time between the decision to kill and the actual killing. The Court stated that "the deliberation and premeditation must be akin to the deliberation and premeditation manifested where the murder is by poison or lying in wait -- the cool purpose must be formed and the deliberate intention conceived in the mind, in the absence of passion, to take the life of the person slain." Id. at 539 (quoting Rader v. State, 73 Tenn. 610, 619-20 (1880)). Thus, in order to convict a defendant for first-degree murder, a jury must find that the defendant killed with coolness or deliberation and after reflective thought or premeditation. State v. West, 844 S.W.2d 144, 147 (Tenn. 1992); see also State v. Brooks, 880 S.W.2d 390, 392-93 (Tenn. Crim. App. 1993).

[3]This reduces the appellant's total effective sentence from 93 years to 81 years on the non-death penalty convictions.

There is no specific time required to form the requisite deliberation. State v. Gentry, 881 S.W.2d 1, 3-4 (Tenn. Crim. App. 1993). Deliberation is present when the circumstances suggest that the defendant contemplated the manner and the consequences of his act. State v. West, 844 S.W.2d at 147. While deliberation and premeditation are similar, they are defined as separate and distinct elements of first-degree murder. See T.C.A. § 39-13-201(b)(deliberate act is "one performed with a cool purpose" and premeditated act is "one done after the exercise of reflection and judgment."); see also State v. Brooks, 880 S.W.2d at 392-93. Deliberation and premeditation may be inferred from the circumstances where those circumstances affirmatively establish that the defendant premeditated his assault and then deliberately performed the act. State v. Nelson, No. 02C01-9211-CR-00251 (Tenn. Crim. App. Oct. 14, 1993). This Court has held that Brown requires "proof that the offense was committed upon reflection, 'without passion or provocation,' and otherwise free from the influence of excitement" before a second-degree, intentional murder can be elevated to murder in the first degree. State v. Hassell, No. 02C01-9202-CR-00038, Slip Op. at 3 (Tenn. Crim. App. Dec. 30, 1992).

With regard to premeditation and deliberation, the Court in State v. Brown recognized the following relevant circumstances: (1) the fact that a deadly weapon was used upon an unarmed victim, (2) the homicidal act was part of a conspiracy to kill persons of a particular class, (3) the killing was particularly cruel, (4) the defendant made declarations of his intent to kill the victim, or (5) preparations were made before the homicide for concealment of the crime, as by the digging of a grave. 836 S.W.2d at 541-42. The elements of deliberation and premeditation are questions for the jury and may be inferred from the manner and circumstances of the killing. State v. Gentry, 881 S.W.2d 1, 3.

As proof of premeditation, the appellant and his co-defendants burglarized the Cherry residence, where they obtained knives. Then, they burglarized the Foster residence, where they sawed off shotguns and armed themselves with guns and ammunition. Once at the Vester residence, they cut the telephone wires so that no one

could call for help. As proof of deliberation, the appellant and his co-defendants shot both unarmed victims, who were already in bed, from outside their bedroom windows. Moreover, the jury could have found from the proof that Mr. Vester was shot the second time from inside the house to ensure that he was actually dead. This second shot was at such close range that the shotgun wad was lodged inside Mr. Vester's body. Mrs. Vester was shot twice in the arm with a high-power rifle, once in the chest with a shotgun, and stabbed thirteen times with a knife before she collapsed outside the bathroom door. The bathroom floor was covered in blood and there were splatterings of blood indicating that Mrs. Vester unsuccessfully attempted to escape further injury. The Vesters' home was then rummaged through, and their car was taken. In this case, the proof of premeditation and deliberation is overwhelming.[4]

**JUDGMENT OF ACQUITTAL**

The appellant contends that under State v. Thompson, 549 S.W.2d 943, 946 (Tenn. 1977), the trial court erred by failing to grant his motion for a partial judgment of acquittal regarding the Cherry indictment and the Vester indictments which was made at +the close of the state's case and again at the end of the trial. Specifically, the appellant contends that the trial court abused its discretion by allowing these charges to go to the jury when there was no evidence that the appellant was at either residence. The state responds that the trial court reviewed the evidence, albeit circumstantial, in the light most favorable to the state, and properly found the evidence sufficient for the jury to consider.

The standard for determining whether a trial court should have granted a motion for judgment of acquittal is whether, after considering the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime or crimes beyond a reasonable doubt. State v. Culp, 891 S.W.2d 232, 235

[4]The appellant further argues that the trial court erred by instructing the jury that "intent or design to kill may be conceived and deliberately formed in an instant." Because the evidence of premeditation and deliberation is overwhelming, any arguable error in the trial court's jury instruction was indeed harmless. See State v. Brown, 836 S.W.2d 530, 543; State v. Howell, 868 S.W.2d 238, 254 (Tenn. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994).

(Tenn. Crim. App. 1994). Having found that the evidence was sufficient to support the verdicts of guilty, it is apparent that the trial court did not err in overruling the appellant's motion for judgment of acquittal. See State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992)(citing Farmer v. State, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978)), cert. denied, ___ U.S. ___, 114 S.Ct. 740, 126 L.Ed.2d 702 (1994).

**MOTION TO SEVER**

The appellant contends that the trial court erred in denying his pre-trial motion to sever the offenses. Specifically, the appellant asserts that the evidence does not support a finding of a common scheme or plan and furthermore, that the evidence of all of the cases on trial would not have been admissible upon the trial of all the others.

Under Tenn. R. Crim. P. 14(b)(1), a defendant has a right to have the offenses severed "unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others." Both portions of the rule must be satisfied to avoid severance: there must be a common scheme or plan and the evidence of one offense must be admissible at trial of the others.

In determining whether or not to grant a severance, the trial court must look at "the facts and circumstances involved in the various crimes that are charged." State v. Morris, 788 S.W.2d 820, 822 (Tenn. Crim. App. 1990). The decision to grant a severance is left to the sound discretion of the trial court, State v. Furlough, 797 S.W.2d 631, 642 (Tenn. Crim. App. 1990), and will not be disturbed unless the defendant is unfairly or unduly prejudiced. See Woodruff v. State, 164 Tenn. 530, 538-39, 51 S.W.2d 843, 845 (1932); State v. Wiseman, 643 S.W.2d 354, 362 (Tenn. Crim. App. 1982). It is the responsibility of the appellant to show that he was clearly prejudiced by the trial court's refusal to sever the offenses. See State v. Hodgkinson, 778 S.W.2d 54, 61 (Tenn. Crim. App. 1989).

Common scheme or plan encompasses groups or sequences of crimes committed in order to achieve a common ultimate goal or purpose as well as crimes which occur within a single criminal action. State v. Hallock, 875 S.W.2d 285, 290 (Tenn. Crim. App. 1993). In the present case, the various crimes and the sequence of their occurrence were part of a greater plan to leave the country and avoid capture by the Kentucky authorities. Moreover, all of the crimes for which the appellant was charged occurred in the Leatherwood community of Stewart County within less than a week. Key pieces of evidence found at the murder scene and in the Vesters' stolen car linked the appellant to the burglaries and thefts from the Cherry, Foster, and Vester residences; and evidence of the burglaries and thefts from the Foster, Cherry, and Vester residences aided in establishing the appellant's opportunity, motive, and intent to kill the Vesters. Further, evidence of the uncharged crimes at the McMinn, Settles, Harris, and Crawford residences helped to establish the appellant's common scheme to escape from the Kentucky authorities. See State v. Wooden, 658 S.W.2d 553, 558 (Tenn. Crim. App. 1983).

In determining whether the second prong has been met, the Court must look to the Tennessee Rules of Evidence, specifically, Rule 404(b). See State v. Hallock, 875 S.W.2d at 290-92. The "admission of evidence of other crimes which tends to show a common scheme or plan is proper to show identity, guilty knowledge, intent, motive, to rebut a defense of mistake or accident, or to establish some other relevant issue." Id. at 92. There is no doubt that in this case, the proof of each offense was inextricably connected with the evidence in the other offenses. In such cases, the Supreme Court has held that the denial of a motion to sever the offenses is not error. See State v. Shepherd, 902 S.W.2d 895, 903-904 (Tenn. 1995). This issue is without merit.

## JURY INSTRUCTIONS[5]

The appellant asserts that the trial court erred by (a) including "moral certainty" in its definition of reasonable doubt, (b) charging the jury to sequentially consider

[5]It should be noted that the record does not include the transcript of the jury instructions as actually given. Instead, the typewritten instructions are included in the technical record.

the degrees of homicide, (c) shifting the burden of proof on the issue of malice, and (d) charging the jury with a general instruction concerning flight.

### A. Reasonable Doubt Instruction

Specifically, the appellant contends that the jury instruction on reasonable doubt did not lend content to the moral certainty phraseology used by the trial court. Thus, there was a reasonable likelihood that the jury understood it to allow conviction based on insufficient proof in violation of the standard set forth in Cage v. Louisiana, 498 U.S. 39, 41, 111 S.Ct. 328, 329-30, 112 L.Ed.2d 339 (1990) and Victor v. Nebraska, ___ U.S. ___, 114 S.Ct. 1239, 1247-48, 127 L.Ed.2d 583 (1994). This, the appellant argues, compounded the lack of evidence of premeditation and deliberation.

The state submits that the trial court charged the jury with the Tennessee Pattern Jury Instruction (T.P.I.--Crim. § 2.03), which has been found not to violate due process numerous times by our Courts. See e.g. State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995).[6]

In this case, the trial court instructed the jury as follows:

> Reasonable doubt is that doubt engendered by an investigation of all proof in the case and an inability after such investigation to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible or imaginary doubt. Absolute certainty of guilt is not demanded by law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.
>
> The state must prove beyond a reasonable doubt all of the elements of the crimes charged, that the crimes, if in fact committed, were committed by the defendant in Stewart County, Tennessee, and that they were committed before the finding and returning of the presentments in this case.

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[6]The state points out that this issue has been waived by the appellant's failure to raise it in his motion for new trial. See State v. Baker, 785 S.W.2d 132, 135 (Tenn. Crim. App. 1989). We note that because of the qualitative difference between death and other sentences, our Supreme Court has normally looked at the merits of an issue even though it was not raised at trial. See State v. Bigbee, 885 S.W.2d 797, 805 (Tenn. 1994), State v. Duncan, 698 S.W.2d 63, 67-68 (Tenn. 1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 348 (1986); State v. Strouth, 620 S.W.2d 467, 471 (Tenn. 1981), cert. denied, 455 U.S. 983, 102 S.Ct. 1491, 71 L.Ed.2d 692 (1982). We have chosen to consider the issue on the merits.

In Victor v. Nebraska, the United States Supreme Court ruled that the phrase "moral certainty" may have lost its historical meaning and that modern juries, unaware of the historical meaning, might understand "moral certainty," in the abstract, to mean something less than the high level of determination constitutionally required in criminal cases. While the Court expressed criticism of the continued use of the "moral certainty" phrase, the Court did not actually hold that it was constitutionally invalid. Instead, the Court looked to the full jury charge to determine if the phrase was placed in such a context that a jury would understand that it meant certainty with respect to human affairs. Id. at ___, 114 S.Ct. at 1247-48. In particular, the Supreme Court was concerned with the terms "grave uncertainty" and "actual substantial doubt." Cage v. Louisiana, 498 U.S. 39, 41, 111 S.Ct. 328, 329-30.

In this case, the terms of particular concern to the United States Supreme Court were not included in the charge. In several cases, this Court has upheld similar instructions as consistent with constitutional principles. See Pettyjohn v. State, 885 S.W.2d 364, 365-66 (Tenn. Crim. App. 1994); State v. Hallock, 875 S.W.2d 285, 294. Moreover, our Supreme Court has held that "[t]he use of the phrase 'moral certainty' by itself is insufficient to invalidate an instruction on the meaning of reasonable doubt." State v. Nichols, 877 S.W.2d 722, 734.

Thus, the full charge given by the trial court, although containing the phrase "moral certainty," did not violate the appellant's rights under the United States or Tennessee Constitutions.

**B. Sequential Jury Instructions**

Next, the appellant argues that charging the jury to first inquire if he was guilty of the greater offense, and only if they acquit, to then proceed to consider each of the lesser included offenses violates due process of law by creating an impermissible risk that the jury will convict a defendant of first-degree murder without considering whether he was

entitled to a conviction for second-degree murder or voluntary manslaughter.

This Court has repeatedly upheld the giving of sequential jury instructions. See State v. Raines, 882 S.W.2d 376, 381-82 (Tenn. Crim. App. 1994); State v. McPherson, 882 S.W.2d 365, 375-76 (Tenn. Crim. App. 1994); State v. Rutherford, 876 S.W.2d 118, 119-20 (Tenn. Crim. App. 1993).

**C. Malice Instruction**

The appellant contends that the trial court's instruction on malice shifted the burden of proof on an essential element of the offense in violation of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

In response, the state argues that the instruction given by the trial court has been held not to unconstitutionally shift the burden of proof from the state to the defendant.

The trial court gave the following charge:

> Malice is an essential ingredient of this offense, and it may be either express or implied. A case of homicide cannot be murder unless at and before the killing the wicked intent, constituting malice aforethought, exists in the mind of the slayer. Malice is an intent to do injury to another, a design formed in the mind of doing mischief to another.
>
> Express malice is actual malice against the party slain and exists where a person actually contemplates the injury or wrong he inflicts. Implied malice is malice not against the party slain, but malice in general, or that condition of mind which indicates a wicked, depraved and malignant spirit and heart regardless of social duty and fatally bent on mischief. Implied malice may be found to exist where the wrongdoer did not intend to slay the person killed but death resulted from a consciously unlawful act done intentionally and with knowledge on the wrongdoer's part that the act was directly perilous to human life. In this event, there is implied such a high degree of conscious and willful recklessness as to amount to that malignity of heart constituting malice.
>
> If a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then you may infer malice sufficient to support a conviction of murder in the first degree, but again, this inference may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the defendants [sic] or exists in the evidence of the state. A "deadly weapon" is any weapon or

> instrument which, from the manner in which it is used or attempted to be used, is likely to produce death or cause great bodily injury.
>
> Malice cannot be inferred from deadly intent only, because the deadly intent may be justifiable under the law, as where one willfully kills another to save his own life or to save himself from bodily harm and the danger is imminent and immediate, or when the intent to kill is produced by anger, for if it were sudden and upon reasonable provocation, the killing might or might not be manslaughter, but it would not be murder.
>
> You are reminded that the state always has the burden of proving every element of the crime charged beyond a reasonable doubt. A permissible inference may or may not be drawn from an elemental fact from proof by the state of a basic fact. However, all inferences permitted to be drawn may be rebutted. An inference does not place any burden of proof of any kind upon the defendant.

In Sandstrom, the United States Supreme Court held that an instruction creating a presumption of malice that has the effect of shifting the burden of proof to the defendant violates due process of law. 442 U.S. at 523-24, 99 S.Ct. at 2459. See State v. Coker, 746 S.W.2d 167, 170 (Tenn. 1987), cert. denied, 488 U.S. 871, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988). In State v. Bolin, 678 S.W.2d 40 (Tenn. 1984), our Supreme Court stated that "juries may be instructed that a permissible inference may or may not be drawn of an elemental fact from proof by the State of a basic fact, but that such inference may be rebutted and the inference places no burden of proof of any kind upon [a] defendant." Id. at 44-45. In the present case, the trial court did not instruct the jury that malice could be presumed from any fact, instead, the trial court instructed the jury that permissible inferences could be made from certain facts if taken as true. Nothing in the jury instructions indicates a due process violation as provided by Sandstrom.

### D. Flight Instruction

In his final challenge to the jury instructions, the appellant argues that the charge concerning flight as consciousness of guilt violated his rights to a correct and complete charge of the law concerning the issues tried. Specifically, he contends that it was error for the trial court to give a general instruction concerning flight because the jury was misled to believe that they could consider the appellant's flight to avoid recapture by Kentucky authorities as evidence of guilt for the crimes charged.

The state points out that the appellant failed to object at trial or raise this issue in his motion for new trial. T.R.A.P. 36(a). Moreover, the state contends that while the appellant's flight from prison and subsequent actions in Stewart County were performed with the intent to avoid recapture by the Kentucky authorities, the appellant also fled to Memphis directly after the murders.

The trial court gave the following instruction on flight during the guilt phase:

> The flight of a person accused of a crime is a circumstance which, when considered together with all of the facts of the case, may justify an inference of guilt. Flight is the voluntary withdrawal of oneself for the purpose of evading arrest or prosecution for the crimes charged. Whether the evidence presented proved beyond a reasonable doubt that the defendant fled is a question for your determination.
>
> The law makes no nice or refined distinction as to the manner or method of a flight; it may be open, or it may be a hurried or concealed departure, or it may be a concealment within the jurisdiction. However, it takes both a leaving the scene of the difficulty and a subsequent hiding out, evasion, or concealment in the community, or a leaving of the community for parts unknown, to constitute flight.
>
> If flight is proved, the fact of flight alone does not allow you to find that the defendant is guilty of the crime alleged. However, since flight by a defendant may be caused by a consciousness of guilt, you may consider the fact of flight, if flight is so proven, together with all of the other evidence when you decide the guilt or innocence of the defendant. On the other hand, an entirely innocent person may take flight and such flight may be explained by proof offered, or by the facts and circumstances of the case.
>
> Whether there was flight by the defendant, the reasons for it, and the weight to be given to it, are questions for you to determine.

The trial court's instruction was language taken directly from T.P.I. - Crim. § 37.16 (2d ed. 1988), and has been previously approved as a correct statement of the law in Tennessee. See State v. Harris, 839 S.W.2d 54, 74 (Tenn. 1992), cert. denied, 507 U.S. 954, 113 S.Ct. 1368, 122 L.Ed.2d 746 (1993). In the present case, there was sufficient evidence that the appellant left the scene of the murders and subsequently left the community. See State v. Stafford, 670 S.W.2d 243, 246 (Tenn. Crim. App. 1984).

Moreover, the trial court instructed the jury that whether the appellant fled, what the reasons for it were, and the weight it was to be given were questions solely for its

decision, that it need not infer flight, and that flight alone was insufficient to prove guilt. This coupled with the overwhelming proof of the appellant's guilt, renders any error as to the flight instruction harmless. See State v. Smith, 893 S.W.2d 908, 918 (Tenn. 1994), cert. denied, ___ U.S. ___, 116 S.Ct. 99, 133 L.Ed.2d 53 (1995).

**ARREST AND EXTRADITION FROM MEXICO**

The appellant argues that imposition of the death penalty violates his due process rights under the United States and Tennessee Constitutions because he was unlawfully seized in Juarez, Mexico and transported to El Paso, Texas by Mexican officials acting in concert with F.B.I. agents in Texas. Although his habeas corpus petitions filed in Texas and in Kentucky were denied, he claims that the findings of these courts support his claim that his seizure in Mexico and transport to the United States violated his rights under the Mexican Constitution and under Mexico's obligation under the American Convention on Human Rights. Moreover, the appellant argues that the means by which the appellant's presence was acquired so that he could be sentenced to death "shocks the conscience" in violation of due process.

The state responds that two other courts have determined that the appellant's seizure did not sufficiently shock the conscience as to violate due process. The state further submits that the facts support the findings of the Texas and Kentucky courts in that there is nothing particularly shocking about the method in which the appellant was seized and brought into the United States. Finally, the state argues that no remedy is available to the appellant at this time since he has already been tried and convicted fairly.

The appellant bases much of his argument on the Mexican Constitution and Mexico's obligation under the American Convention of Human Rights; however, analysis of this issue comes under Sneed v. State, 872 S.W.2d 930 (Tenn. Crim. App. 1993). In Sneed, this Court noted a two-prong test to determine whether due process requires that an extradited defendant must be returned: (1) was the extradition procedure challenged

in advance of trial, and (2) did an evidentiary hearing establish that the conduct of governmental authorities was so illegal and outrageous as to shock the conscience of the court. Id. at 937.

Here, the appellant preserved the issue before trial. Specifically, he filed a Motion to Bar the State From Seeking the Death Penalty, alleging that his illegal seizure by government agents prevented the Mexican government from receiving assurances that he would not be subjected to the death penalty, and that kidnapping him from Mexico violated his state and federal constitutional rights, including those guaranteed by Article I, § 8 of the Tennessee Constitution. The motion was summarily denied by the trial court.

Previously, while incarcerated in Texas awaiting extradition to Kentucky, Quintero and the appellant filed petitions for writ of habeas corpus with the Criminal Law Magistrate's Court of El Paso, Texas. In denying the petition, the magistrate made the following findings of fact:[7]

> 1. That each Relator fled from the State of Kentucky to Juarez, Chihuahua, Mexico.
>
> 2. That on July 10, 1988, each Relator was seized and arrested at the Santa Fe Hotel, Juarez, Chihuahua, Mexico, by FBI agents and agents of the Mexican Federal Judicial Police, acting in joint concert.
>
> 3. No arrest warrant was issued for the arrest of Relators by the governments of Mexico or Chihuahua.
>
> 4. There was no formal request made by the United States to apprehend and arrest the fugitives and have the fugitives extradited from Mexico to the United States for trial.
>
> 5. Relators were brought from Juarez, Mexico, to El Paso, Texas, by FBI agents, acting in joint concert with Mexican Federal Judicial Police, without benefit of having any judicial process in Mexico used to aid in their apprehension.
>
> 6. Neither Relator was brought before any judge in Mexico for purposes of having any hearing regarding said Realtors [sic] arrest.

[7]The magistrate did not hold a full evidentiary hearing after determining that one was unnecessary.

7. Relators were not formally deported from Mexico, nor afforded any deportation hearing in Mexico.

The magistrate went on to state:

> The Court was not shocked by any of this. Notwithstanding the foregoing, this Court further finds that the Applications for Writs of Habeas Corpus filed by Relators herein should be denied. The Court hereby overrules Relators' applications for writs of habeas corpus.

The illegality of the action taken by Mexican and F.B.I. agents was noted by the Texas Court of Appeals in affirming the denial of a contemporaneous habeas corpus petition:

> The case law proffered by the State and relied upon by this Court in previously upholding these denials of habeas corpus relief stand only for the proposition that isolated, spontaneous illegal seizures of the person, absent abusive treatment shocking to the conscience, will not support a challenge to the Court's personal jurisdiction over the fugitive, Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952); Ker v. Illinois, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886); United States v. Toscanino, 500 F.2d 267 (2nd Cir. 1974). We do not construe these cases and others cited in Day and Quintero as affirmative, prospective sanctions for the F.B.I. or any other state or federal law enforcement agency, either directly or through surrogates, to establish a regular policy and practice of engaging in such activity of illegally seizing United States citizens in a foreign country.
>
> We uphold the denial of relief in this case because the four seizures which we have been presented, in fact, reflect but two transactions. A third occurrence will in all probability necessitate consideration of whether we are not, in fact, seeing the results of an organized, coordinated program of international kidnaping which has become a policy of at least this regional branch of the F.B.I. That agency and any other law enforcement agency acting in concert in such activity would be well-advised not to rely upon this Court's resolution of the Day-Day and Quintero-Blanton cases. This caveat applies to any such seizure occurring after the date of this opinion. Otherwise, Appellant's four points of error are overruled.

Day v. State, 763 S.W.2d 535, 536 (Tex. App.--El Paso 1988).[8]

Once extradited to Kentucky, the appellant filed a petition for writ of habeas

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[8]The appellant's case, Blanton v. State, (Tex. App.--El Paso, No. 08-88-00277-CR, Nov. 2, 1988, PDRR), is unpublished. See also Quintero v. State, 761 S.W.2d 438 (Tex. App.--El Paso 1988), cert. denied, 493 U.S. 826, 110 S.Ct. 90, 107 L.Ed.2d 55 (1989).

corpus in the Lyons County, Kentucky Circuit Court which was denied and affirmed on appeal. The trial court's factual findings were, in part, as follows:[9]

1. Petitioners, James Blanton, William Hall, and Derrick Quintero escaped from the Kentucky State Penitentiary on June 16, 1988.

2. Petitioner Hall was apprehended in the United States and returned to Kentucky State Penitentiary on July 9, 1988.

3. On July 10, 1988, Eric Benson and other FBI agents went to Juarez, Chihuahua, Mexico, and arrested James Blanton and Derrick Quintero in a room at the Santa Fe Hotel.

4. There were no arrest warrants issued in Mexico authorizing the arrest of Petitioners Blanton and Quintero.

5. There was no formal extradition request made by authorities of the United States to apprehend and arrest the Petitioners and have the Petitioners extradited from Mexico to the Untied States for trial.

6. Petitioners Blanton and Quintero were brought from Juarez, Mexico, to El Paso, Texas, by FBI agents acting in joint concert with Mexican Federal Judicial Police, without benefit of having any judicial process in Mexico used to aid in their apprehension.

7. Petitioners Blanton and Quintero were not brought before any Judge in Mexico for purposes of having any hearing regarding their arrest.

8. Petitioners Blanton and Quintero were neither formally deported from Mexico nor afforded any deportation hearing in Mexico.

9. On January, 25, 1980, Mexico and the United States entered into a Treaty regarding extradition.

10. Officials of the United States did not go through diplomatic channels to extradite Petitioners Blanton and Quintero.

11. Officials of the United States did not send the following documents to Mexico: a description of the offense; a statement of facts; text of legal provisions describing essential elements of the offense; text of legal provisions describing the punishment for the offenses; time limitation on prosecution or execution of sentence; identification information; certified copies of arrest warrants; and evidence justifying apprehension.

12. Mexico does not have a death penalty.

13. All three of the Petitioners were arrested pursuant to fugitive

[9]The Kentucky circuit court's findings are included in the appendix to the appellant's brief, however, the document does not appear to be included in the technical record.

> warrants issued by the U.S. District Court, Western District of Kentucky.

While the order of the Kentucky court is not contained in the record, it is implicit that it did not find these facts to be sufficiently "shocking" so as to grant the defendant's writ of habeas corpus.

In Sneed v. State, this Court stated:

> In our view, Swaw [v. State, 3 Tenn. Crim. App. 92, 457 S.W.2d 875 (1970)] stands for the proposition that after a fair trial and conviction, there is simply no remedy available irrespective of the nature of the governmental action bringing the defendant into this jurisdiction. The Ker-Frisbie doctrine would prevail. The failure to assert any due process violation before trial would serve as a waiver of personal jurisdiction. If, however, the procedure is challenged in advance of trial and an evidentiary hearing establishes that the conduct of governmental authorities, as opposed to that of any private individual, is so illegal and outrageous as to shock the conscience of the court, the law of the land clause provides a measure of relief. See Tenn. Const. art. I, § 8. The accused must be returned to the asylum state pending the initiation of the extradition procedure.

872 S.W.2d at 937.

In the present case, two different courts have reviewed the appellant's claims that his extradition violates due process. Both agreed that the actions of the F.B.I. were illegal, yet neither court found that such action shocked the conscience. The appellant argues that this Court should find that "extradition to execute" shocks the conscience. However, in this state, our Supreme Court has determined that the death penalty is not cruel and unusual punishment. See State v. Black, 815 S.W.2d 166 (Tenn. 1991). Thus, the fact that the appellant received death sentences does not suggest that the Texas and Kentucky courts, the finders of fact, incorrectly held that the illegal actions of the F.B.I. were not so outrageous as to demand relief to this appellant.

**ADMISSION OF PREVIOUS MURDER CONVICTION**

The appellant argues that the trial court committed plain error by admitting into evidence a copy of the June 20, 1988, Metro and State Section of The Tennessean, which contained an article on the inside page about the escapees and which mentioned the appellant's previous murder conviction in Kentucky. Specifically, the appellant contends that the admission of the newspaper, although not for the purpose of showing the appellant's prior conviction, amounted to an admission of evidence that he had been previously convicted of murder. Since the state offered the newspaper as evidence, the appellant argues that it was the state's responsibility to review the exhibit and redact any prejudicial aspect.

In response, the state argues that this issue has been waived pursuant to T.R.A.P. 36(a) by the appellant's failure to object to the introduction of this evidence. If not waived, the state argues that there is no proof that the jury read the article, thus, any prejudice is pure speculation.

At trial, the state sought to introduce the June 20, 1988, Metro and State Section of The Tennessean, which was found lying on the sofa in the Vesters' living room. After the trial court confirmed that the defense had been given an opportunity to see the newspaper, it allowed the state to admit the newspaper section into evidence. The trial court also verified that the purpose of admitting the newspaper section was to show the date.

It is well established that in a criminal trial, evidence that a defendant has committed some other crime wholly independent of that for which he is charged, even though it is a crime of the same character, is usually not admissible because it is irrelevant. State v. Howell, 868 S.W.2d 238, 254. "[B]ecause of the obvious prejudice of such evidence to the defendant, its admission often constitutes prejudicial error, requiring the reversal of a conviction." Id. (citing Bunch v. State, 605 S.W.2d 227, 229 (Tenn. 1980)).

In the present case, the appellant has failed to show that admission of the

newspaper was prejudicial error. The article concerning the escapees was located on page 2B. Since defense counsel, the prosecutors, and the trial judge all failed to notice the article when the section was introduced into evidence, it is not certain that the jurors noticed it either. Moreover, the newspaper was not passed to the jury, instead, the jury was given a period of time at the end of the proof, in which to individually view all of the more than 200 exhibits. Finally, when the newspaper was introduced into evidence, the trial court verified, in front of the jury, that it was introduced for the purpose of showing the date, June 20, 1988. Without some type of proof that even one of the jurors read the article, this Court cannot speculate as to prejudice resulting from the newspaper being admitted into evidence.

**ADMISSION OF IDENTIFICATION TESTIMONY**

The appellant argues that the photo array was impermissibly suggestive and caused a substantial likelihood that he would be mistakenly identified by the witnesses based on their viewing of the photo array rather than on their independent recollection. The appellant further argues that the likelihood of misidentification caused by the photo array used in this case violated his due process rights and the identification testimony should have been excluded.

The state responds that the identification procedures were not unduly suggestive under the test set forth in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), and that the trial court properly allowed the identification witnesses to testify at trial.

The photographic array shown to identification witnesses Curtis Jones and Shirley Denise Morrow included pictures of the eight escapees from Eddyville, Kentucky. The appellant's photograph appeared as the first picture in the first row of four photographs, with a row of four photographs directly underneath. Quintero's photograph was number five, and Hall's photograph was number six, both on the bottom row. The

appellant's photograph appears to be somewhat lighter than the others. There was no attempt to choose photographs of men with similar physical characteristics.

The photographs contained in a photographic array do not have to mirror the accused. Instead, the law simply requires that the police refrain from "suggestive identification procedures." Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401. Thus, a photographic identification is admissible unless, based upon the totality of the circumstances, "the confrontation conducted...was so unnecessarily suggestive and conducive to irreparable mistaken identification that...[the accused] was denied due process of law." Stovall v. Denno, 388 U.S. 293, 301-302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199, 1206 (1967). In Biggers, the Court set forth a five-factor analysis for determining whether an identification tainted by suggestion may nonetheless be admitted into evidence:

1. the opportunity of the witness to view the criminal at the time of the crime.
2. the witness's degree of attention at the time of the crime.
3. the accuracy of the witness's prior description of the criminal.
4. the level of certainty demonstrated by the witness at the confrontation.
5. the length of time between the crime and the confrontation.

Id. at 199, 93 S.Ct. at 382; State v. Philpott, 882 S.W.2d 394, 400 (Tenn. Crim. App. 1994).

A jury-out hearing was held on the admissibility of testimony from Mr. Jones and Ms. Morrow. At the conclusion of the hearing, the trial court held that the testimony was admissible. At the hearing, Mr. Jones testified that in June of 1988 he was a security guard at the Memphis Greyhound bus station. As part of his job, he observed people that came into the bus station to ensure that they either had a bus ticket or were waiting for someone to arrive. On June 21, 1988, between 11 a.m. and 1 p.m., Mr. Jones saw three white men come into the bus station. All of the men had long hair, one looked slightly Hispanic, and the other two men had mustaches. He testified that one of the paler men

had blonder hair than the other. Mr. Jones testified that two of the men sat down and began watching television while the Hispanic-looking man used the telephone. One of the men watching television was talking to a black man who was waiting for someone to arrive. When the men did not buy tickets, Mr. Jones approached the two men seated and asked if they had tickets. The appellant told Mr. Jones that they would leave as soon as their friend finished using the phone, which they did. Mr. Jones testified that the three men were in the bus station approximately five to ten minutes. That same day, officers from the Memphis Police Department came to the bus station and showed Mr. Jones the photo-line up. He selected photographs of the appellant, Quintero, and Hall. Mr. Jones testified that the police never indicated to him which ones were the suspects or what they had done. On June 23, 1988, two days later, T.B.I. Special Agent Richard Stout testified that he interviewed Mr. Jones and showed him the same photographic array. Again, Mr. Jones selected the same three photographs. In identifying the appellant in the courtroom, Mr. Jones noted that the appellant had longer hair and a mustache, was slimmer, and was not quite as pale when he saw him at the bus station.

In applying the relevant factors to determine whether the photographic array was impermissibly suggestive, the trial court found:

> [L]et's go back to Mr. Curtis Jones' testimony. He had a good opportunity to view the defendants and the defendant in this case. They walked directly toward him, he was there for the purpose of watching, he had a high degree of attention to him; he was watching them. He wanted to see whether they went to a counter and bought a ticket. If they didn't, then he had to check them, so his degree of attention to them was great.
>
> He is -- I've watched his meanor [sic] and demeanor on the witness stand; he makes an excellent witness. His accuracy of the description, the accuracy of a prior description is good....The level of certainty demonstrated his--he's just certain. You know, I've looked at him, watched him, watched him testify. The time span between the time he saw them and the time of the lineup was very short; I believe it was the next day or something like that, within a day or two anyway.
>
> Everything that Mr. Curtis Jones says certainly suggests that this identification was not made from a photo lineup, but was made from his very keen observation. And I will say in watching him testify and his testimony, has a very keen observation. He's interested in things like this. He wants to be -- working at being a private eye and things like that, so his observation is very keen and I'm impressed with the witness. I've listened to the other two officers. There's nothing suggestive by this lineup. He may testify as to identification of the defendant; he may identify him in court.

Ms. Morrow testified that in June of 1988 she worked as cashier at the Blue Movies West near the bus station. At approximately 9 or 10 a.m. on Tuesday, June 21, 1988, three men came into the bookstore and traded silver dollars and half dollars in order to purchase tokens to watch the peep shows. Ms. Morrow also purchased some silver dollars from the three men. The witness recalled the date because it was the day before her birthday. Shortly after the men went to view the movies, they came back and asked Ms. Morrow if they could pay her $50 to let them stay in the movie house all day. Ms. Morrow refused. Then they tried to sell her a couple of rings. One of the dancers came out to the front of the store and asked "[d]id you all hear about those prisoners that broke out up in Tennessee? You all look just like them."[10] The dancer picked up the phone, and the three men left. The police were then called. Two days later, Agent Stout interviewed Ms. Morrow and showed her the same photographic array. Ms. Morrow picked out the appellant, Quintero, and Hall.

The trial court ruled:

> This lady can testify and identify the defendant. I think that she fits all the criteria that I stated previously in the case with Curtis Jones.
>
> She had the opportunity to see them; her degree of attention was to them. She gave a good description, she's --her level of certainty is great. The time span is short from the time that she did that until the police talked to her, so she'll be allowed to testify.

Although the photographs are not similar, under the test set forth in Neil v. Biggers, the array was not impermissibly suggestive to taint the identification, and the trial court properly allowed these witnesses to testify. Our Court has held on several occasions that a pre-trial identification was admissible notwithstanding the fact that the photograph of the accused contained peculiar characteristics not contained in the remaining photographs. See, e.g., Young v. State, 566 S.W.2d 895, 898 (Tenn. Crim. App. 1978) (accused was only person depicted with "short hairs growing from his chin"); Shye v. State,

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[10]At trial, this testimony was excluded as hearsay.

506 S.W.2d 169, 173 (Tenn. Crim. App. 1973)(accused had lighter skin and was heavier than others depicted in the remaining photographs displayed).

The findings of a trial court on a motion to suppress have the weight of a jury verdict and should not be set aside unless the evidence contained in the record preponderates against its findings. Here, the testimony at the jury-out hearing supports the trial court's findings of fact; and this Court affirms the denial of the motion to suppress the testimony.

**OPPORTUNITY TO REVIEW POLICE OFFICER'S WRITTEN REPORT**

The appellant argues that the trial court erred in refusing to allow him to see a copy of Sergeant Robert Montgomery's written report which Sergeant Montgomery reviewed prior to testifying. While Sergeant Montgomery did not review his report while on the witness stand, he did review it prior to testifying in order to refresh his recollection. Because it was used to refresh his testimony, the appellant submits that the report should have been turned over to defense counsel under Tenn. R. Evid. 612.

The state argues that because the witness did not use the report while on the stand, defense counsel was not entitled to see a copy of the report under Rule 612. The state further argues that even if defense counsel should have been allowed to view the report as Jencks material, review on this issue is impossible because the report was not preserved in the record for appellate review. The state goes on to contend that any error would be harmless because defense counsel was given an opportunity to fully cross-examine the witness on any discrepancies in his testimony.

On direct examination, Sergeant Montgomery, of the Memphis Police Department Crime Scene Squad, testified that, among other things, he removed a 16-oz. Budweiser beer can from the Vesters' car which was found at the Memphis Funeral Home parking lot in Memphis, Tennessee. Sergeant Montgomery further testified that his report

erroneously indicated that the beer can was a 12-oz. can rather than a 16-oz. can. He explained the discrepancy as a mismarking of evidence. Three latent prints found on the beer can were later identified as belonging to the appellant. Sergeant Montgomery testified that there had been a heat wave in Memphis in June of 1988. Specifically, he testified that the temperature was 86 degrees on the morning the police found the car and that hot weather increases the difficulty in lifting prints.

On cross-examination, Sergeant Montgomery stated that he had referred to his report prior to testifying, although he did not carry it with him to the witness stand or refer to the report during his direct examination. The trial court refused to allow defense counsel to review the report, but it did allow counsel to cross-examine the witness extensively concerning the discrepancy as to the size of the beer can and concerning the emperature in Memphis at the time the Vesters' car was found.

Tenn. R. Evid. 612 provides in part:

> If a witness uses a writing while testifying to refresh memory for the purpose of testifying, an adverse party is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

(emphasis added). As pointed out in the Advisory Commission Comments, "[o]nly writings used 'while testifying' are subject to opposing counsel's inspection." Clearly, the trial court properly denied the appellant's request to review Sergeant Montgomery's report under Tenn. R. Evid. 612.

Next, while not argued by the appellant, the state points out that Sergeant Montgomery's report could have been requested as Jencks material. Under State v. Robinson, 618 S.W.2d 754 (Tenn. Crim. App. 1981), an officer's own investigation report may constitute a prior "statement" by that officer. Id. at 760. Once it is decided that the

trial court erred in failing to order production, the Court must decide if it was reversible error. Id. Without the requested document, the trial court's ruling cannot be reviewed on appeal. Id. at 761.

Regardless, it appears that any error would be harmless, in that defense counsel extensively explored any concerns over the witness' credibility as to the latent prints removed from the beer can.

## ADMISSION OF COLOR VIDEOTAPE AND PHOTOGRAPHS

The appellant argues that the color video and photographs of the victims' bodies should have been excluded from evidence because they had no probative value with respect to proving that the appellant was present and committed or participated in the murders. The appellant argues that the display of dead bodies to the jury was highly prejudicial and inflammatory. Moreover, the appellant argues that the video tape and photographs were needlessly cumulative in nature compared to the physical evidence and the testimony of the crime scene investigators. The appellant further argues that the admission of the video tape and the photographs in the guilt phase inflamed the jury and prejudiced him in the penalty phase. He does not contest the introduction of various photographs at the sentencing hearing which were introduced to show that the murder of Mrs. Vester was heinous, atrocious, and cruel. The state argues that the trial court did not abuse its discretion in admitting the video tape and the photographs in that their probative value far outweighed any prejudicial effect.

### A. Color Video Tape

The color video tape, which was taken when officers from the Stewart County Sheriff's Department first arrived on the scene, shows the exterior and the interior of the Vesters' home, including the victims' bodies as they were found.

The admissibility of video tapes of a crime scene is within the sound discretion of the trial court, and its ruling on the admissibility of such evidence will not be overturned without a clear showing of abuse of discretion. State v. Bigbee, 885 S.W.2d 797, 807; State v. Van Tran, 864 S.W.2d 465, 477 (Tenn. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1577, 128 L.Ed.2d 220 (1994).

After finding that the video tape was probative on the issue of whether the murders were premeditated or felony-murder, the trial court stated:

> So, as far as this film is concerned, I do not think it is shocking. I do not think it's inflammatory. The fact is, from what I've been told previously in opening statement, I'm kind of surprised at no more than the film shows. So, I'm going to overrule your objection as to the film. It's going to be admitted.

As in Bigbee, "the tape is unpleasant because it shows postmortem lividity and some rigor mortis," but the trial court did not abuse its discretion in allowing the video tape to be played for the jury. 885 S.W.2d at 807.[11]

**B. Photographs**

As with the video tape, "the admissibility of photographs is a matter to be determined by the trial court in the exercise of its sound discretion." Cagle v. State, 507 S.W.2d 121, 132 (Tenn. Crim. App. 1973). Absent a clear showing of abuse of discretion, the trial court's ruling will not be overturned. State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978).

Rule 401, Tenn. R. Evid., defines relevant evidence as that having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 403, Tenn. R. Evid., provides that relevant evidence may be excluded if its probative value is

[11]The state submits that "the lighting was so poor in the video tape that it is hard to make out the victims at all." While the video tape is not shocking, the victims are easily identifiable.

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

At the guilt phase, the trial court allowed the state to introduce five photographs about which the appellant objects.

The first photograph shows blood on Mr. Vester's bed and pillow. The trial court allowed it in because it showed that Mr. Vester was apparently first shot through the window because the blood on the bed was in line with the bullet hole in the window. The trial court stated that the photograph "does have probative value, and the prejudicial effect is -- I mean the inflammatory nature of it is close. It's a discretion I think the trial court has got to make. I think it's probative enough that it outweighs the prejudicial effect, and I'm going to admit it."

The second photograph shows the bathroom where Mrs. Vester was found just outside the bathroom door. There is a substantial amount of blood on the floor and some splatterings of blood on the bathtub and commode. In finding that the prejudicial effect did not outweigh the probative value, the trial court stated "I do not see that that is in any way shocking. It does show the location and so forth. It gives some indication of again of a struggle, throughout the house, of Mrs. Vester."

The third photograph shows the spray of blood in the bathroom. The trial court stated "I'm going to allow you to admit [Exhibit B-114] even though it is probably inflammatory, but it's [sic] probative value to show the premeditation of the violence in this crime. Just that you could draw from that she was trying to get away and many, many other things which would show the premeditation and coolness and purpose necessary for first degree murder. I'm going to admit that one."

The fourth photograph shows Mrs. Vester's bed with a small amount of blood.

The trial court found that there was "very little about [the photograph] that's inflammatory." The trial court further found that the photograph was probative because "it does give indication that she was shot and later on the other wounds were inflicted upon her."

The fifth photograph is of the ceiling and shows some blood splatterings. The trial court did not find anything inflammatory about the photograph and found that it was probative to show a struggle throughout the house indicating premeditation, coolness of purpose, and malice.

None of these photographs were inflammatory, especially considering the facts of the case. Moreover, the photographs were relevant to show premeditation and deliberation. The appellant argues that the photographs had no probative value with respect to proving that he was present and committed or participated in the murders. However, assuming the jury found that the appellant did participate in the murders, then the state would have to prove whether the murders were committed in the commission of a felony or whether they were premeditated and deliberate. These photographs are probative on this issue. The trial court did not abuse its discretion in allowing the state to introduce these photographs at the guilt phase. See State v. Stephenson, 878 S.W.2d 530, 542 (Tenn. 1994); State v. Van Tran, 864 S.W.2d 465, 477.

Although the appellant does not raise the admissibility of photographs at the sentencing phase, the state introduced five additional photographs to show that the murder of Mrs. Vester was heinous, atrocious, or cruel. Two of the photographs showed the blood found in the bathroom, two showed the wounds on the front of Mrs. Vester's body, and one photograph showed blood on the bottom of Mrs. Vester's feet.

The introduction of photographs of the victim's body at the sentencing phase in order to prove that a murder was heinous, atrocious, or cruel has been repeatedly upheld. See State v. McNish, 727 S.W.2d 490, 494-95 (Tenn. 1987), cert. denied, 484 U.S. 873, 103 S.Ct. 210, 98 L.Ed.2d 161; State v. Smith, 868 S.W.2d 561, 579 (Tenn.

1993), cert. denied, ___ U.S. ___, 115 S.Ct. 417, 130 L.Ed.2d 333 (1994); State v. Cazes, 875 S.W.2d 253, 263 (Tenn. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 743, 130 L.Ed.2d 644 (1995). In comparison, the photographs introduced in the present case were not shockingly gruesome. Thus, under a standard of abuse of discretion, the photographs were properly admitted into evidence to show that the murder of Mrs. Vester was heinous, atrocious, or cruel.

**RIGHT TO JURY REPRESENTING FAIR CROSS-SECTION OF THE COMMUNITY**

The appellant argues that allowing members of certain professions and occupations to claim an exemption from jury service denied him his constitutional right to be tried by a jury composed of a fair cross-section of the community. He contends that because capital cases are more complex than most cases, the exclusion of those prospective jurors who are better educated deprived him of the right to have jurors who were best prepared to address the issues.

The state argues that the statutory exemptions in existence at the time of the appellant's trial presented no possibility that there was a substantial threat that the remaining pool of jurors was not representative of the community.

A state has an inherent power to exempt citizens from jury service. Rawlins v. Georgia, 201 U.S. 638, 26 S.Ct. 560, 50 L.Ed. 899 (1906); Honeycutt v. State, 544 S.W.2d 912, 916 (Tenn. Crim. App. 1976). In Tennessee, the General Assembly granted exemptions to the following groups, among others: all persons holding office under the laws of the United States or this state; all practicing attorneys; all certified public accountants; all public accountants; all physicians; all clergymen; all acting professors or teachers of any college, school, or institution of learning; all members of fire companies; all pharmacists; members of the National Guard; dentists; optometrists and podiatrists. T.C.A. §22-1-103 (1980)(superseded); T.C.A. § 63-5-123 (1982)(superseded); T.C.A. § 63-8-117 (1982)(superseded); T.C.A. § 63-3-118 (1982)(superseded).

In 1993, the General Assembly added the following section amending T.C.A. § 22-1-103:

> Any exemption from liability to act as a juror under this code shall only exist to exempt such person from the initial summons to serve. Upon receipt of such summons any person exempt under this section shall notify the clerk of the court issuing the summons, informing the clerk of a seven (7) day period such person will be available to serve as a juror within the next twelve (12) month period from the date of summons. Such exempt person shall only be required to serve on the jury during the seven (7) day period.

An exemption for jury service is personal to the individual who is exempted by law, and this individual may either claim or waive the exemption. In other words, an exemption is a personal privilege rather than a disqualification. East v. State, 197 Tenn. 644, 646, 277 S.W.2d 361, 362 (1955); Smith v. State, 566 S.W.2d 553, 557-58 (Tenn. Crim. App. 1978). If the individual desires to serve, he or she is free to waive the exemption and become a member of the jury panel.

In order to establish a violation of the fair cross-section requirement of the Sixth Amendment, the group alleged to have been excluded must be a "distinctive" group in the community. Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979). Whether a particular group or class of individuals constitutes a "cognizable group or a "distinctive group" is a question of fact. Hernandez v. Texas, 347 U.S. 475, 478, 74 S.Ct. 667, 670, 98 L.Ed.2d 866 (1954). The following factors are to be considered in determining whether a cognizable group exists: (1) the presence of some quality or attribute which defines and limits the group, (2) a cohesiveness of attitudes or ideas or experience which distinguishes the group from the general social milieu, and (3) a community of interests which may not be represented by other segments of society. Id.; State v. Nelson, 603 S.W.2d 158, 163 (Tenn. Crim. App. 1980).

While the groups that were exempted share the same profession or occupation, there is no evidence that individuals falling within one of these classifications share unique attitudes, ideas, or experiences. Consequently, members of a particular

profession or occupation do not constitute a cognizable group based solely on the occupation or profession. State v. Boyd, 867 S.W.2d 330, 336 (Tenn. Crim. App. 1992); see also State v. Van Tran, 864 S.W.2d 465, 474.

After reviewing the same issue in State v. Bell, 745 S.W.2d 858 (Tenn. 1988), the Supreme Court stated:

> There is no possibility that the exemptions granted under Tennessee's jury selection system posed any substantial threat that the remaining pool of jurors would not be representative of the community. This issue is without merit.

Id. at 861. See also State v. Hodges, 01C01-9212-CR-00382 (Tenn. Crim. App. filed May 18, 1995) (automatically on review in the Supreme Court). This issue is without merit.

**ADMISSION OF CO-DEFENDANTS' AFFIDAVITS**

The appellant argues that the trial court erred by not admitting the affidavits of co-defendants Quintero and Hall as "statements against interest when the declarant is unavailable" after each invoked his privilege against self-incrimination. Specifically, the appellant points out that this evidence, if admitted, would have supported his argument that he was not at the scene of the murders or of the burglaries as charged. In response, the state cites Smith v. State, 587 S.W.2d 659 (Tenn. 1979), cert. denied, 446 U.S. 920, 100 S.Ct. 1855, 64 L.Ed.2d 274 (1980), and argues that the trial court properly excluded the statements as being untrustworthy.

At trial, the appellant called Quintero and Hall to testify. At a jury-out hearing, both co-defendants invoked their Fifth Amendment right against self-incrimination and refused to testify or answer any questions. Thereafter, the appellant moved to introduce affidavits signed by the co-defendants under Tenn. R. Evid. 804(b)(3) as statements against the penal interests of the declarant. The affidavit signed by Derrick Quintero read

as follows:

> 1. If called to testify for James Blanton at a trial, wherein I was not a defendant, I would testify to the following facts:
>
> 2. I personally observed James Blanton and knew his whereabouts on Friday, June 17, 1988 and Saturday, June 18, 1988.
>
> 3. I lost personal contact with Mr. Blanton at approximately 11:00 p.m. on Saturday, June 18, 1988, at a location in Stewart County, Tennessee.
>
> 4. I did not observe James Blanton again in Stewart County, Tennessee.
>
> 5. If called to testify at a trial wherein Mr. Blanton and I were co-defendants I would assert my privilege and refuse to testify to the above facts.[12]

Hall's affidavit was substantially identical except at number 4, his affidavit states "I did not observe James Blanton again until days later in the following week. And would so testify."

The trial court denied the appellant's motion on the basis that the affidavits were unreliable. In denying the motion, the trial court stated in part:

> I'm not going to admit them. I'm not going to allow them in evidence. I think that they are absolutely a -- it irritates the Court and I don't get irritated very often. But I'm irritated at everybody involved in this case that had anything in the world to do with preparing those affidavits because they are false, they are blatantly false, and I thought they were false at the time and I was right. So, they are not going to be able to use those affidavits. I apologize if I get a little upset about it, but I get upset that we could have tried all three of these people.

The Tennessee Rules of Evidence were adopted effective January 1, 1990, and were in full force and effect at the time this case was heard. Once it is determined that a witness is unavailable to testify under Tenn. R. Evid. 804(a), a previous statement by the witness may be admitted as an exception to the hearsay rule. Tenn. R. Evid. 804(b)(3)

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[12]It appears that the affidavits were originally introduced with the appellant's motion to sever his case from that of the co-defendants so that the co-defendants would testify at his trial.

provides:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

In the present case, it is obvious that the co-defendants were unavailable to testify in that they both chose to invoke their right against self-incrimination. Rule 804 eliminated the condition espoused by Smith v. State that declarations against penal interest offered by the accused in a criminal prosecution must be corroborated. See Advisory Commission Comments to Tenn. R. Evid. 804(b)(3). Thus, the Court must look at the statements to determine whether the co-defendants would not have made them unless believing them to be true. While the comments to the Rule indicate that corroboration is no longer a necessary requirement, the trial court must make a determination as to the believability of the statements. Whether the statements were believable would be left to the sound discretion of the trial court. Here, the trial court adamantly found that the co-defendants' statements were false.

Moreover, it does not appear that the statements made are so far contrary to the declarants' pecuniary or proprietary interest. While in the co-defendants' sworn statements they indicate that they were not with the appellant during the time frame within which the victims were murdered, the co-defendants did not intimate that they in fact committed the murders. The statements are open to interpretation, and the trial court acted within its discretion in refusing to allow the appellant to introduce the affidavits of Quintero and Hall.

**CLOSING ARGUMENTS AT PENALTY PHASE**

The appellant contends that the prosecution made several improper remarks during closing arguments. The standard of review in determining whether counsel was

allowed too much latitude during closing argument is abuse of discretion. State v. Sutton, 562 S.W.2d 820, 823 (Tenn. 1978). Closing argument must be temperate, must be predicated on evidence introduced during the trial of a case, and must be pertinent to the issues being tried. Id. The prosecutor may state an ultimate conclusion which would necessarily follow if the testimony of the prosecution witnesses were believed by the jury. State v. Brown, 836 S.W.2d 530, 552.

**A. Jury's Responsibility to Impose Sentence**

The appellant complains that the prosecutor diminished the jury's sense of responsibility in determining the sentence by his comments during closing argument. Specifically, the appellant argues that the prosecution's remarks violated the principles of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Initially, the state points out that these statements were not objected to at trial.[13] The state further submits that if the remarks are taken in context, the jury understood its duty.

In Caldwell, the Supreme Court stated that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id. at 328-29, 105 S.Ct. at 2639. In reviewing an alleged violation under Caldwell, the Court must first determine whether the prosecutor's comments to the jury were such that they would minimize the jury's role and sense of responsibility for determining the appropriateness of death as a sentence and, if so, whether the trial judge sufficiently corrected the impression left by the prosecutor. State v. Cazes, 875 S.W.2d 253, 263; State v. West, 767 S.W.2d 387, 399 (Tenn. 1989), cert. denied, 497 U.S. 1010, 110 S.Ct. 3254, 111 L.Ed.2d 764 (1990).

During both the opening statement and closing argument at the sentencing hearing, the prosecution made several statements concerning the jury's responsibility in

[13]This issue was first raised in the appellant's First Amendment to Motion for New Trial.

sentencing the appellant. During the opening statement, the prosecution made the following statements:

> And I want you to take one thing to the jury room with you when you deliberate this case. You didn't send this defendant to the electric chair, he sent himself. It's not you. And you lay it on my shoulders or General Alsobrooks' shoulders. We're asking you to do this. We're asking you to follow the law and bearing in mind that we will be responsible. And you didn't send him where he's going, he sent himself.

Subsequently, during closing arguments, the prosecution made the following comments:

> Ladies and gentlemen, I told you before that you are not the one that's sending him to the penitentiary - to the electric chair; he did it himself. It's not you...And it falls on you in this case to be the people who make a decision, but you make a decision based on the law and facts.

At the end of his argument, the prosecutor reiterated to the jury to "keep in mind, you didn't send anyone to the electric chair; he did it himself."

While the comments made by the prosecutor could be construed to have violated the dictates of Caldwell, they can just as easily be interpreted as an expression of the appellant's burden of responsibility for his own actions. Regardless, the issue is whether the trial court cleared up a Caldwell-type impression if one takes the appellant's view as to the true meaning.

At the end of the sentencing hearing, the trial court gave the following instruction:

> It is now your duty to determine, within the limits prescribed by law, the penalty which shall be imposed as punishment for each offense....In arriving at this determination, you are authorized to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances which may have been raised by the evidence throughout the entire course of this trial, including the guilt-finding phase or the sentencing phase or both. The jury are the sole judges of the facts, and the law as it applies to the facts in the case.

Furthermore, defense counsel made the following statement during his closing argument:

> I think it's important for you to understand and I think you understand at this point, this is your verdict. Each and every one of you bear individual responsibility for this verdict and General Atkins nor anybody else can be with you. When you come back into the courtroom and return a verdict, it is yours and we expect it to be yours, each of yours. And we expect that each of you will participate in the verdict. It's a very, very -- it's the most serious decision that you could ever make as a juror.

Under Cazes and West, any error in the prosecution's argument was rendered harmless. The trial court did not endorse the state's argument, which the appellant did not object to, and it correctly instructed the jury before deliberation.

**B. Community Safety and Specific Deterrence**

The appellant contends that the prosecutor improperly urged the jury to impose the death penalty because the appellant represented a future danger. During closing arguments, the prosecution made the following remarks:

> Society, this State, Kentucky, wherever, will not be safe from this individual until he is removed from it, that's just basically all we can say. We talk about aggravating circumstances and that's the reason that aggravating circumstance is there. Do you have a right as a citizen to be safe in your home? You won't be unless we impose the law that's provided.
>
> * * * *
>
> I wouldn't even impose that type of punishment on the people he'll be exposed to in the penitentiary. The people that he would see daily in there, they'd be in danger. And you might not have a concern for them like you would innocent people out here in a community, but you don't need to put this individual anywhere that he's going to harm and murder and slaughter people again.
>
> * * * *
>
> Can we afford the chance that this man will escape again? It's risky.
>
> * * * *
>
> All you're doing is applying the law and the facts, so don't become

> overburdened with your situation and expose the people of this State and whatever State this individual might wind up in, to being slaughtered.
>
> * * * *
>
> [I]f we don't do what the law requires today then somebody else will have to die before another jury had the opportunity to do what --
>
> [The defendant's objection was sustained at this time and the trial court instructed the jury to "disregard what happens in the future; you're trying this case."]
>
> Ladies and gentlemen, the law provides a way for you to protect yourself and society from people who will go out and murder and kill such as this defendant and the other cohorts did in this case.
>
> * * * *
>
> Will you do what is necessary to protect our society from people like James Blanton?
>
> * * * *
>
> It would not be fair, as General Atkins said to you, to even think about putting this guy back in the penitentiary for life and exposing other people to this rogue.

A capital sentencing jury is not precluded from consideration of the future dangerousness of a particular defendant where such is a relevant factor under a state's capital sentencing law. See Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 3453, 77 L.Ed.2d 1171 (1983); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

However, our Courts have held that generally, the issue of specific or general deterrence should be avoided by the prosecution in closing argument at a capital sentencing hearing. See State v. Bates, 804 S.W.2d 868, 881 (Tenn. 1991), cert. denied, 502 U.S. 841, 112 S.Ct. 131, 116 L.Ed.2d 98; State v. Irick, 762 S.W.2d 121, 131 (Tenn. 1988), cert. denied, 489 U.S. 1072, 109 S.Ct. 1357, 103 L.Ed.2d 825 (1989). Specifically, the deterrence argument is usually irrelevant to the aggravating circumstances listed in Tennessee's statute. State v. Bates, 804 S.W.2d at 882. Thus, unless "relevant to some theory raised by the State[']s proof, or the defense, it interjects an element into the jury's

considerations not provided for by the law." Id.; see also State v. Hines, 758 S.W.2d 515, 520 (Tenn. 1988). In Bates, the defendant's mitigating theory was that the defendant was mentally disturbed to such a degree that it lessened his culpability, that he would be confined for the rest of his natural life, and that he would be amenable to treatment and rehabilitation. The Supreme Court held that the state's argument concerning specific deterrence was in direct response to the defendant's theory and was not improper under the circumstances. Id. at 882.

Here, while the defendant did present proof concerning his childhood and mental ability, it was used to argue that the jury should be merciful and did not open the door to the prosecutor's argument. However, as pointed out in State v. Irick, in reviewing the propriety of argument in a capital sentencing proceeding, the reviewing court must determine whether the prosecutor's comments affected the sentencing decision. 762 S.W.2d at 131. "If the Court cannot say the comments had no effect on the sentencing, then the jury's decision does not meet the standard of reliability required by the Eighth Amendment." Id. (citing Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633). Based on the proof presented at the sentencing hearing, this Court is confident that these comments did not affect the sentencing decision.

**C. Appeal to Vengeance**

Next, the appellant submits that it was improper for the state in its closing argument to state "[c]ounsel wants to talk about mercy. Did James Blanton show those two people in that house any mercy that night?" The state later argued "I'm not asking you to send this man to the electric chair out of some sort of hatred. Counsel wants to talk about hatred; I'm not asking you to do that."

In State v. Bigbee, 885 S.W.2d 797, 812, the Supreme Court held that it was reversible error where the prosecutor reminded the jury that there had been no one there to ask for mercy for the victims and encouraged the jury to give the defendant the same

consideration that he had given his victims. In finding the prosecutor's argument to be improper, the Court stated that the argument "encouraged the jury to make a retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence." Id.

The state submits that the facts of this case are distinguished from those in Bigbee in that here, defense counsel specifically begged the jury for mercy at the end of his argument. Moreover, the state points to the prosecutor's later comments that he was not asking the jurors to act out of hatred. We agree.

**D. Mitigating Factors**

Finally, the appellant contends that the prosecution misled the jury regarding the nature of mitigating evidence and its role in the sentencing determination, and confused the issues of criminal responsibility and moral culpability. In response, the state contends that the prosecution had the right to rebut the arguments presented by the defense.

During closing arguments, the prosecution made the following comments:

> The definition [of mitigation] always says to alleviate, to become milder. That's what mitigation is. Judge Wallace will tell you what the law is and what the definitions are. But what has been shown in the mitigation? A poor background?...Can we blame this thing, this horrible thing that occurred over there in Stewart County on Appalachia? No.
>
> * * * *
>
> Can we say that everybody that's low normal can go out and kill elderly couples and not be punished for it?
>
> * * * *
>
> [B]ut don't consider that 11 year old boy, little James, consider James Blanton, the adult.
>
> * * * *
>
> It's insulting, to suggest that a man should be excused for his conduct because he came up hard. It is insulting, I'll say it again, and it has no

business in a courtroom of law.

The Supreme Court has held that it is proper for the state to argue to the jury that it should not return a life sentence based on the mitigating circumstances presented by the defendant. See State v. Howell, 868 S.W.2d 238, 258. In State v. Brimmer, 876 S.W.2d 75 (Tenn. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 585, 130 L.Ed.2d 499, the Court found that "the State's argument 'that there were no mitigating circumstances in this case and that Dr. Engum's testimony concerning the defendant should be entitled little weight' limited the jury's consideration of mitigating factors. This argument did no more than set out the State's interpretation of the proof." Id. at 85. Although the prosecution's comment that the mitigating evidence presented by the appellant "has no business in a courtroom of law," there is nothing here that would suggest reversible error. The state is entitled to argue to the jury that it should not give much weight to the mitigating evidence presented.

**FELONY-MURDER AGGRAVATOR**

Based on the argument that the premeditated murder convictions are erroneous, the appellant submits that should this Court substitute or otherwise impose felony-murder convictions, then the felony-murder aggravator, T.C.A. § 39-2-204(i)(7), would be void as to both sentences under State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), cert. dismissed, ___ U.S. ___, 114 S.Ct. 651, 126 L.Ed.2d 555 (1993).

Having found that the evidence supports the appellant's two convictions of premeditated first-degree murder, the application by the jury of the felony-murder aggravator in the case of each victim was appropriate. Moreover, this Court does not have the authority to substitute felony-murder convictions after the jury acquitted the appellant on these charges. This issue is without merit.

**RELIANCE ON AGGRAVATING CIRCUMSTANCES (6) & (7)**

The appellant argues that the jury's finding that the murders were committed to avoid arrest or prosecution and committed while engaged in committing a felony constituted double weighing or double enhancement for the same conduct.[14]

Specifically, the appellant submits that the jury was misled by the trial court's failure to narrow the aggravating circumstances considered by the jury. In fact, the trial court instructed the jury on all twelve aggravating circumstances over the appellant's objection. The appellant contends that the jury was further misled by the state's closing argument at the sentencing hearing:

> When you look at the aggravating circumstance number six, you'll see that, that these murders were committed for the purpose of avoiding or preventing a lawful arrest and prosecution. You know they murdered Mr. and Mrs. Vester just as sure as I'm standing here to prevent them reporting that they had taken their car and took off.
>
> * * * *
>
> So when you think about aggravating circumstance number six, think about it, that's what it means. They murdered them to get rid of them as witnesses and to keep them from reporting their location. There's no doubt about why they did that. There can be no question when you look at the aggravating circumstance concerning the murders were committed while the defendants were engaged in committing or were attempting to commit or being an accomplice of in the commission of such a crime here. And here we're talking about burglary and theft. They were burglarizing the house and they stole the car. There's no question, nothing, that indicates otherwise that these people were murdered while the defendant and his cohorts were burglarizing and robbing the Vesters and taking their car. No one can question that. There's no doubt about that.

In response, the state points out that this argument has previously been rejected. Specifically, our Supreme Court rejected this argument in State v. Brimmer, 876 S.W.2d 75, 86. However, such is not dispositive since neither of these aggravating circumstances were instructed or found in Brimmer. Id. At the same time, the Supreme Court has not chosen to embrace the cases which follow Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), as

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[14]The jury did not apply T.C.A. § 39-2-203(i)(8), that the murders were committed during escape from lawful confinement.

cited by the appellant.

In analyzing this issue, we first note that it was error for the trial court to instruct the jury on all twelve aggravating circumstances. See State v. Laney, 654 S.W.2d 383, 388 (Tenn. 1983), cert. denied, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699. A trial judge should only charge on the aggravating circumstances raised by the proof at the hearing. State v. Buck, 670 S.W.2d 600, 608 (Tenn. 1984). However, if the evidence supports the jury's findings, then the appellant was not prejudiced by the trial court's error. See State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981).

Accordingly, even if our Supreme Court were to find that use of these two aggravating factors constitutes double weighing in some circumstances, here, the proof easily supports the jury's findings. Specifically, the proof supports a finding that the appellant killed the victims in order to avoid recapture following his escape from the Kentucky State Prison and a separate finding that the appellant killed the victims in the perpetration of a felony, specifically, grand larceny and burglary. As pointed out by the state, had the appellant not been avoiding recapture by the Kentucky authorities, a stronger argument could be made that (i)(6) was inappropriate. And conversely, had the appellant simply murdered the victims and not burglarized their house and stolen their car, a stronger argument could be made that (i)(7) was inappropriate. As further pointed out by the state, the fact that the jury failed to find aggravator (i)(8), that the murder was committed by the appellant during his escape from lawful custody, strengthens the jury's application of aggravators (i)(6) and (i)(7). We agree that under the facts of this case, the jury's application of aggravators (i)(6) and (i)(7) did not constitute double weighing.

Regardless, even if one of these two aggravating factors was invalid, under State v. Howell, 868 S.W.2d 238, such error would be harmless. The factors to consider in conducting a harmless error review include, "but are not limited to, the number and strength of remaining valid aggravating circumstances, the prosecutor's argument at

sentencing, the evidence admitted to establish the invalid aggravator, and the nature, quality and strength of mitigating evidence." Id. at 261. In Howell, the remaining valid aggravating factor was (i)(2), previous convictions of felonies involving the use of violence to the person. The Court stated that the effect of this aggravating circumstance on the sentence "may increase where there is proof of more than one prior violent felony conviction." Id. Here, the appellant had two prior convictions of felonies involving the use of violence. Therefore, we find that any error was harmless.

**HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE**

The appellant argues that this aggravating circumstance was not an appropriate basis for a death sentence in this case for numerous reasons. First, the appellant contends that the trial court erred by instructing the jury under the pre-1989 statute with regard to the aggravating circumstance that the "murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind." T.C.A. § 39-2-203(i) (1982). The appellant claims that the pre-1989 statutory language is unconstitutionally vague. Second, the appellant argues that the evidence does not support a finding that the murder of Mrs. Vester involved "depravity of mind."

The 1989 amended version of the statute provides that "the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." T.C.A. § 39-13-204(i)(5). In State v. Cazes, 875 S.W.2d 253, the Supreme Court held that it was not error to instruct the jury pursuant to the statute in effect at the time the offense occurred. Id. at 267. See also State v. Smith, 893 S.W.2d 908, 920.

Moreover, our Supreme Court has repeatedly held that this aggravating circumstance is not unconstitutionally vague or overbroad. See State v. Williams, 690

S.W.2d 517, 526-30 (Tenn. 1985). See also State v. Black, 815 S.W.2d 166, 181; State v. Barber, 753 S.W.2d 659, 670 (Tenn. 1988), cert. denied, 488 U.S. 900, 109 S.Ct. 248, 102 L.Ed.2d 236.

Finally, as in State v. Smith, the evidence easily supports a finding of either depravity of mind or physical abuse beyond that necessary to produce death. 893 S.W.2d at 920. The present case can be distinguished from the facts in State v. Van Tran, 864 S.W.2d 465, 479, where the Court held that there was insufficient evidence as to the circumstances of the victim's death or of the defendant's state of mind. In Van Tran, the proof showed that the victim was shot seven or eight times at close range and that the defendant inflicted two of the shots, the second of which was discharged into the victim's face while he was moving around on the floor.

Here, the proof showed that Mrs. Vester was in bed when she was initially shot from her bedroom window. She was then shot two more times. One of the wounds was from a high-power rifle which nearly severed her arm. As she struggled to save herself, stepping in her own blood, she was stabbed 13 times, resulting in the two fatal wounds. The medical testimony indicated that Mrs. Vester could have lived up to fifteen minutes after receiving these wounds. Based on these facts, the proof of depravity of mind or substantial physical injury beyond that necessary to produce death is overwhelming. Cf. State v. Smith, 868 S.W.2d 561, 579-80; State v. McNish, 727 S.W.2d 490, 494 (victim beaten several times and remained alive and at least partially conscious throughout her ordeal).

**JURY INSTRUCTIONS AT PENALTY PHASE**

The appellant submits that the trial court erred by instructing the jury on all twelve aggravating circumstances. He further argues that the trial court's instruction regarding the heinous atrocious, or cruel aggravating circumstance was vague and overbroad.

### A. Instruction on Aggravating Circumstances

The appellant argues that the jury was confused by the trial court's instruction on all twelve aggravating circumstances, resulting in reversible error. Specifically, he points out that the jury found as to both victims that the murders were "committed while the defendant was engaged in committing or was an accomplice in the commission of, or was attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnaping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb." The appellant argues that since the jury verdict did not indicate that the jury found the murders were committed in the commission of burglary or larceny, the jury was obviously confused by the trial court's charge.

As the state concedes, and as pointed out earlier in this opinion, it was error for the trial court to instruct the jury on all twelve aggravating circumstances. See State v. Laney, 654 S.W.2d 383, 388. A trial judge should only charge on the aggravating circumstances raised by the proof at the hearing. State v. Buck, 670 S.W.2d 600, 608. However, if the evidence supports the jury's findings, then the appellant was not prejudiced by the trial court's error. State v. Pritchett, 621 S.W.2d 127.

While the jury did not specify which felon(ies) it was relying on in applying aggravating circumstance (i)(7), it is clear from the proof that the jury would have considered burglary and larceny. There is no prejudice here.

Finally, although not raised by the appellant, the state points out that the trial court failed to instruct the jury on the elements of the underlying felonies. However, since the trial court gave the definitions of these crimes during the guilt portion of the trial, any error was harmless. See State v. Brimmer, 876 S.W.2d 75, 83.

### B. Instruction on Aggravating Circumstance (i)(5)

The appellant again argues that the instruction regarding the heinous, atrocious, or cruel aggravating circumstance was vague and overbroad. Specifically, he contends that the instruction failed to require that the jury find an intent to inflict severe mental or physical pain upon the victim.

As stated earlier in this opinion, our Supreme Court has repeatedly held that this aggravating circumstance is not unconstitutionally vague or overbroad. See State v. Williams, 690 S.W.2d 517, 526-30. see also State v. Black, 815 S.W.2d 166, 181; State v. Barber, 753 S.W.2d 659, 670. This issue is without merit.

**CONSTITUTIONALITY OF DEATH PENALTY STATUTE**

Acknowledging that the following arguments concerning the constitutionality of the death penalty statute have previously been rejected by our Supreme Court, the appellant raises these issues in order to preserve them for later review.

The appellant submits that several of the aggravating circumstances set forth in T.C.A. § 39-2-203(i) have been so broadly interpreted that they fail to provide a meaningful basis for narrowing the population of those convicted of first-degree murder to those eligible for the death penalty.

First, the appellant contends that T.C.A. § 39-2-203(i)(6) has been construed and applied in such a manner as to be duplicative of T.C.A. § 39-2-203(i)(7). Specifically, the appellant argues that the circumstance that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution has been construed and applied in such a manner as to duplicate the circumstance that the murder was committed while the defendant was engaged in committing a felony. This argument was addressed earlier in this opinion and is without merit.

Second, the appellant contends that T.C.A. § 39-2-203(i)(5), the aggravating

circumstance that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind is vague and overbroad. The Supreme Court has repeatedly held that this circumstance is not unconstitutionally vague or overbroad. See State v. Williams, 690 S.W.2d 517, 526-30. See also State v. Black, 815 S.W.2d 166, 181; State v. Barber, 753 S.W.2d 659, 670.

Third, the appellant contends that T.C.A. § 39-2-203(i)(2), (5), (6), and (7) are too inclusive of violent offenders and fail to meaningfully narrow the class of those who may be subject to the death penalty. Specifically, the appellant contends that it is the exception rather than the rule that a homicide does not involve a combination of (2) and (5) or a combination of (6) and (7). The appellant offers nothing in support of his assertions. This argument was rejected in State v. Keen, No. 02S01-9112-CR-00064, Slip Op. at 35 (Tenn. May 25, 1994), reh'g granted (May 16, 1995). See also State v. Cauthern, 778 S.W.2d 39, 47 (Tenn. 1989) (rejecting argument that statute does not meaningfully limit the class of death-eligible defendants).

In another challenge to the death penalty statute, the appellant contends that the provisions of the Tennessee death penalty statute and other provisions of the state's criminal law have resulted in the arbitrary and capricious infliction of the death penalty.

First, the appellant complains that the prosecutors in this state have unlimited discretion as to whether or not to seek the death penalty in a given case. Citing to statistics on the death penalty in Tennessee, the appellant claims that for the prosecution to have the absolute discretion in this regard violates the state and federal guarantees of equal protection and results in the same wanton and freakish imposition of the death penalty that was condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The appellant also argues that the prosecutor's unfettered discretion to subject any defendant charged with first-degree murder to a capital sentencing hearing constitutes an improper delegation of judicial power and of legislative power in violation of Article II, § 2 of the Tennessee Constitution.

The United States Supreme Court rejected this argument in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 2937, 49 L.Ed. 2d 859 (1976). Applying Gregg, our Supreme Court in State v. Brimmer, 876 S.W.2d 75, held that opportunities for discretionary action which inhere in the processing of a murder case, including the authority of the prosecutor to select those persons whom he or she wishes to prosecute for a capital offense, does not render the death penalty unconstitutional on the theory that the opportunities for discretionary action render imposition of the death penalty arbitrary or freakish. Id. at 86.

Second, the appellant argues that the death penalty statute has been imposed discriminatorily on the basis of economics, race, gender, and geographic region in the state. This argument has been repeatedly rejected by the Supreme Court. See State v. Brimmer, 876 S.W.2d 75, 87 n. 5; State v. Cazes, 875 S.W.2d 253, 268; State v. Smith, 857 S.W.2d 1, 23 (Tenn. 1993); State v. Evans, 838 S.W.2d 185, 196 (Tenn. 1992).

Third, the appellant argues that the jury selection process excludes jurors who have scruples against the death penalty and in the process, excludes a sizable representative portion of the community.

In State v. Caughron, 855 S.W.2d 526, 542 (Tenn. 1993), the Supreme Court rejected the argument that questioning jurors about their beliefs on the death penalty biases the jury toward a finding of guilt and an acceptance of the death penalty in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and of Article I, §§ 8 and 9, of the Tennessee Constitution. This argument was also rejected by the United States Supreme Court in Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986).

Fourth, the appellant contends that capital defendants should be allowed to address jurors' popular misconceptions concerning parole eligibility, the cost of incarceration versus the cost of execution, general deterrence, and the method of

execution in order to avoid arbitrary decision making. This argument has been repeatedly rejected by the Supreme Court. See State v. Black, 815 S.W.2d 166, 179 (Tenn. 1991); See also State v. Brimmer, 876 S.W.2d 75, 86-87; State v. Cazes, 875 S.W.2d 253, 268.

Fifth, the appellant contends that it is constitutional error to instruct juries that they must agree unanimously in order to impose a life sentence and to prohibit juries from being told the effect of a non-unanimous verdict. This argument has been repeatedly rejected by the Supreme Court. See State v. Brimmer, 876 S.W.2d 75, 87; State v. Cazes, 875 S.W.2d 253, 268; State v. Smith, 857 S.W.2d 1, 22-23; State v. Barber, 753 S.W.2d 659, 670-71.

Sixth, the appellant submits that requiring the jury to agree unanimously to a life verdict violates the holding in McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), and in Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

The Supreme Court has repeatedly rejected this argument. See State v. Brimmer, 876 S.W.2d 75, 87; State v. Thompson, 768 S.W.2d 239 (Tenn. 1989); State v. King, 718 S.W.2d 241, 249 (Tenn. 1986). Specifically, in Brimmer, the Court noted that McKoy and Mills stand for the principle that any requirement that the jury must unanimously find a mitigating circumstance before it can be considered violates the Eighth Amendment. The Court went on to state that the requirement of a unanimous verdict does not violate these principles. Brimmer, 876 S.W.2d at 87. See also State v. Bigbee, 885 S.W.2d 797, 814.

Seventh, the appellant argues that the Tennessee Pattern Jury Instructions create a reasonable likelihood that jurors are led to believe they must unanimously agree on the existence of any mitigating circumstances.

While the appellant admits that this argument was rejected in State v.

Thompson, 768 S.W.2d 239, 251-52 (Tenn. 1989), he argues that the Supreme Court relied upon an additional jury instruction given by the trial court. This argument was also rejected in State v. Bates, 804 S.W.2d 868, where the Court stated "we are satisfied that nothing in the Tennessee statutes, in the instructions given to the jury, or in the verdict form submitted to the jury, was likely to lead any juror to believe that he or she was precluded from considering mitigating circumstances unless all jurors agreed that circumstance existed." Id. at 883.

Eighth, the appellant argues that the statute fails to require that the jury make the ultimate determination of whether death is the appropriate penalty in a specific case. This argument has been rejected by our Supreme Court. See State v. Brimmer, 876 S.W.2d 75, 87; State v. Smith, 857 S.W.2d 1, 22.

Finally, the appellant submits that once an aggravating circumstance is proven, the burden of proof shifts to the defendant to present mitigating evidence. Therefore, the appellant argues, it is constitutional error to deny the defense the right to give the final closing argument in the penalty phase. This issue has been rejected by the Supreme Court on numerous occasions. See State v. Brimmer, 876 S.W.2d 75, 87 n. 5; State v. Cazes, 875 S.W.2d 253, 269; State v. Smith, 857 S.W.2d 1, 24; State v. Caughron, 855 S.W.2d 526, 542.

In another challenge to the death penalty statute, the appellant argues that electrocution is cruel and unusual punishment, therefore, violating the Eighth Amendment of the United States Constitution and Article I, § 16 of the Tennessee Constitution. The Supreme Court rejected this argument in State v. Black, 815 S.W.2d 166, 179 (Tenn. 1991). The Court has repeatedly reaffirmed its holding. See State v. Nichols, 877 S.W.2d 722, 737; State v. Cazes, 875 S.W.2d 253, 268; State v. Howell, 868 S.W.2d 238, 258; State v. Smith, 857 S.W.2d 1, 23; State v. Bane, 853 S.W.2d 483, 489 (Tenn. 1993).

In his final constitutional challenge to the death penalty statute, the appellant

argues that the appellate review process in death penalty cases is constitutionally inadequate in its application. Specifically, the appellant contends that the appellate review process is not constitutionally meaningful because the appellate courts cannot reweigh proof due to the absence of written findings concerning mitigating circumstances, because the information relied upon by the appellate courts for comparative review is inadequate and incomplete, and because the appellate courts' methodology of review is flawed.

This issue was recently raised in State v. Keen, No. 02S01-9112-CR-00064 (Tenn. May 25, 1994), reh'g granted (May 16, 1995). The Supreme Court noted that the appellant's "attack on the appellate review process is so generalized that a response is well nigh an impossibility. Moreover, he does not relate this complaint to the specifics of his case, therefore a case oriented response is not required." Slip Op. at 39. The Court went on to reject the appellant's argument. Slip Op. at 39-40. See also State v. Barber, 753 S.W.2d 659, 664. The same is true here.

Moreover, the appellant contends that the statutorily mandated proportionality review is conducted in violation of due process and the law of the land. As proof, the appellant argues that since the promulgation of the current statute in 1977, the Supreme court has found no death sentence to be imposed in a disproportionate manner.

As previously noted, the appellate review provided for in the statute has been held to afford a meaningful proportionality review. See State v. Brimmer, 876 S.W.2d 75, 87-88; State v. Cazes, 875 S.W.2d 253, 270-71. Moreover, in State v. Branam, 855 S.W.2d 563 (Tenn. 1993), the Supreme Court found the death penalty to be disproportionate and reduced the defendant's sentence to life. Id. at 570-71.

**PROPORTIONALITY REVIEW**

The death sentences have been reviewed by this Court in the manner mandated by T.C.A. § 39-13-206(c)(1). The sentences were not imposed in an arbitrary manner. Additionally, the evidence adduced at the sentencing hearing regarding the

aggravating circumstances found by the jury is overwhelming. Moreover, the evidence presented in support of the aggravating circumstances clearly outweighed the evidence introduced to establish any mitigating circumstances beyond a reasonable doubt. Finally, a comparative proportionality review, which considers both the nature of the crimes and of the appellant, reveals that the death sentence for the murder of Buford Vester was neither excessive nor disproportionate to death sentences imposed in similar cases. See State v. Bates, 804 S.W.2d 868; State v. Howell, 868 S.W.2d 238. A comparative proportionality review also reveals that the death sentence for the murder of Myrtle Vester was neither excessive nor disproportionate. See State v. Smith, 868 S.W.2d 561; State v. Harris, 839 S.W.2d 54. In comparing these cases to the present, we recognize that "no two cases are alike, and no two defendants are alike." State v. Barber, 753 S.W.2d 659, 665 (Tenn. 1988).

## CONCLUSION

We have carefully considered the appellant's contentions as to alleged errors occurring during the guilt phase and sentencing phase of the trial and conclude that none has merit. The convictions and death sentences are affirmed. The two grand larceny convictions from the Vester residence are hereby merged into one conviction, and the aggregate sentence of 93 years is therefore reduced to 81 years. Costs of this appeal are taxed to the appellant.[15]

[15]No execution date is set in this opinion. T.C.A. § 39-13-206(a)(1) (Supp. 1995) provides for automatic review by the Tennessee Supreme Court upon affirmance of the death penalty. If the death sentence is upheld by the higher court on review, the Supreme Court will set the execution date.

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PAUL G. SUMMERS, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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JOSEPH M. TIPTON, JUDGE