IN THE SUPREME COURT OF FLORIDA

ALPHONSO CAVE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO: 63,172

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, ALPHONSO CAVE, was the defendant, and Appellee, the STATE OF FLORIDA, the prosecution, in the proceedings held before the Circuit Court in and for Pinellas County, Florida. In this Answer Brief, the parties will be referred to, as they appear before this Court.

"R" means the Record-on-Appeal in the above-styled cause; "e.a." means "emphasis added"; "SR" means the Supplemental Record being filed with Appellee's Motion to Supplement, containing a transcript of Appellant's taped confession on May 5, 1982, that accompanies this Brief.

STATEMENT OF THE CASE

Appellant, along with codefendants John Earl Bush, J.B. Parker and Terry Wayne Johnson, was charged, by indictment, with the first degree murder, robbery and kidnapping of Frances Julia Slater, on April 27, 1982, in Martin County, Florida. (R, 1). Appellant's trial was severed from that of the other defendants, and he was tried in Pinellas County (St. Petersburg), Florida. (R, 158, 228).

A hearing was held on December 2, 1982 and February 1, 1983, on Appellant's motion to suppress statements made by Appellant on May 5, 1982, to law enforcement officials in Martin County, Florida. (R, 1966-2146). At the conclusion of the hearing, the trial court denied said motion. (R, 2145-2146). Other pretrial motions challenging, inter alia, the Florida death penalty statute, seeking funds for expert assistance, and seeking to preclude imposition of the death penalty, were denied as well, by the trial court. (R, 168-187).

Trial was held from December 6, 1982 to December 8, 1982. (R, 315-318). The jury returned a verdict of guilty, on all three counts, as charged, against Appellant. (R, 2892-2893; 307-309). After the penalty phase hearing, the jury rendered an advisory sentence of the death penalty. (R, 321; 2957). The trial court imposed the death penalty upon Appellant, on December 10, 1982, and life sentences on the sepa-

rate convictions for robbery and kidnapping. (R, 325-328); 2981-2984). Pursuant to subsequent mandate by the Florida Supreme Court, the trial court entered its written findings, in support of the imposition of the death penalty, on April 2, 1984. (R, 2986-2988).

Appellant's Motion for New Trial, was denied by the trial court, after a hearing on December 1, 1983. (R, 347; 1247-1252).

STATEMENT OF FACTS

Because Appellant's Statement is self-serving, incomplete, and does not contain sufficient Record references for his "facts", Appellee submits its own Statement of the Facts, as follows:

At the suppression hearing, Officer Jones testified he took a statement from John Bush, concerning the Slater murder, in which Bush admitted his part in the crime, and implicated Appellant, Parker and Johnson as the others involved. (R, 1972-1973). Various law enforcement officers, including an assistant state attorney, and Martin County deputy sheriff, proceeded to solicit the cooperation of Bush's co-accomplices, including Appellant. (R, 1980). Said officers, including Sergeant Irving Hamrick, were told that, if Appellant was seen, he was not to be placed under arrest, but was to be informed that his cooperation was being sought voluntarily. (R, 1980, 1991).

Upon arriving at Appellant's residence, Hamrick knocked, identified himself as a police officer, and stated he was there to "solicit cooperation". (R, 1993). Appellant responded by stating, "I'll get a shirt". (R, 1993). There was no conversation in the car, when Appellant voluntarily accompanied Hamrick to the Martin County State Attorney's office. (R, 1995-1996).

Once at said office, Appellant was advised of his

Miranda rights by Officer Lloyd Jones, of the Martin County Sheriff's Department. (R, 2004, 2023). Appellant indicated he understood each of these rights, in the presence of Jones and Officer Robert Crowder. (R, 2006, 2024). When asked to sign the rights form, Appellant declined, but indicated he was willing to talk, and would talk to the officers. (R, 2007, 2024). This was noted on the rights form. (R, 2007).

At the outset, Officer Jones advised Appellant that Bush had made a statement, implicating Appellant. (R, 2025). Appellant asked to hear the tape of Bush's statement. (R, 2025). After the tape was played, (R, 2016, 2025), Appellant acknowledged his participation, (R, 2025-2026), by admitting, verbally, that he was present with Bush, Parker and Johnson at the L'il General Store, in Stuart, Florida; that he had held a gun on Frances Slater, while in the store; that he had led her out of the store, into the car, at gunpoint; that he had gotten into the back seat of the car with Slater; and that Slater had pleaded for her life, while in the car. (R, 2026-2027). Jones asked Appellant if he would give a formal statement. (R, 2027). Appellant asked to speak to his mother, and was allowed to do so. (R, 2027). After speaking to her, Appellant directed Jones to take his statement, and said statement was taped. (R, 2028). At the outset of the tape, Appellant was re-advised of his Miranda rights, and indicated his understanding of each one. (SR, 1).

Appellant did not request an attorney, or ask that the questioning be stopped, at any time, from the time he was found at his residence, through the giving of his taped statement. (R, 2029, 2032, 2052, 2103, 2106, 2108, 2109, 2110, 2111). Appellant did not ask to leave at any time, and was not threatened, coerced, or unduly influenced in any manner. (R, 2018, 2032, 2090). Appellant gave a taped confession, according to Officer Jones, due to his recognition of Bush's voice on Bush's taped confession, and his realization that the tape was real. (R, 2089-2090).

The trial court denied Appellant's suppression motion, specifically finding, inter alia, that Appellant freely and voluntarily gave his statements; that he had freely waived his rights, as advised, both verbally and on tape; and that the officers were not initially required to advise him of his rights, when he first came voluntarily to the State Attorney's Office. (R, 2145-2146).

On the evening of April 26, 1982, Frances Slater relieved Nancy Anderson, at 11 P.M., at the L'il General Store, at US 1 and Route 707, in Stuart, Florida, as a replacement for another employee who was hurt. (R, 2485). Anderson left the money from the store, in Slater's custody. (R, 2485-2486). Slater was seen alive, at all times, prior to 2:46 A.M. the following morning, by her sister, Kathy Slater (R, 2474-2475); Nancy Anderson (R, 2484-2486);

Johnny Johnson (R, 2489), and Karen Agati (R, 2548-2549).

At approximately 3:00 A.M., April 27, 1982, Danielle Symons drove past the store, and observed three black males inside. (R, 2491-2495). Symons subsequently identified the car, and Bush, in photo lineups. (R, 2500, 2508). After Symons left the vicinity, Mark Hall went into the store to get cigarettes, and noticed the cash register was open, and had been tampered with, and the store was empty. (R, 2530-2532). Upon arriving at 3:08 A.M., Officer Peggy Schwarz confirmed these facts, and further noted that all of the bills were gone from the cash register. (R, 2538-2539, 2542). Karen Agati, the manager of the store, confirmed that $134 had been taken from the store, without her permission. (R, 2551, 2552).

At approximately 4:50 P.M., April 27, 1982, the body of Frances Slater was discovered, approximately thirteen (13) miles from the L'il General Store, off of State Road 76, in a ditch 17 feet away. (R, 2567-2568, 2572, 2578, 2579). Dr. Ronald Wright performed the autopsy of the body, identified from photos (R, 2568, 2574-2576), on April 28, 1982, at approximately 10:30 A.M. (R, 2608). Dr. Wright concluded, based upon reasonable medical certainty, inter alia, that Slater had suffered a stab wound in the abdomen, consistent with having been in a defensive posture, and having jumped back, when so wounded (R, 2611,

2619); that Slater was additionally cut on the ring finger of her left hand (R, 2611); and that Slater had been shot in the back of the head (R, 2616). Dr. Wright identified the gunshot wound to the head, as the cause of death, and further stated that the victim's bladder had emptied, consistent with being in fear at the time. (R, 2618, 2619).

Officer Tim Bargo stopped a white and blue Buick in southwest St. Lucie County, at approximately 3:45 A.M., April 27, 1982, because the car had a defective taillight. (R, 2637, 2638). Inside of the car were four black males. (R, 2638). Bargo, along with Officer Willie Williams, stopped the vehicle shortly thereafter a second time, when a computer check showed a conflict between the tag, and the owner of the registration. (R, 2646, 2653). Bush, and Appellant were outside the car, trying to get the car started. (R, 2654, 2655). Williams positively identified Appellant, from prior knowledge. (R, 2655-2656). Said vehicle was later identified as belonging to Bush (R, 2663, 2670), and was later examined by Dr. Nippes, a criminologist. (R, 2760). Based on his examination, Nippes concluded that fibers found in the back of the car, matched those taken as samples from the carpet of the TV room in the Slater home. (R, 2783). Nippes also found that head hairs found in the car, matched samples from the victim, and that the hairs found in the car showed that they were forcibly

removed from the victim's head. (R, 2784-2785).

Before the jury, at trial, Officer Jones testified that, after hearing the Bush tape, Appellant admitted, inter alia, that he was with Bush on the night of the murder, and participated in it (R, 2716-2717); that Appellant went into the store, and held the gun on Ms. Slater (R, 2717); that Appellant brought Slater to the car, put her in the car, at gunpoint, and got into the back seat with her (R, 2717, 2758); and that, while in the car, Slater pleaded for her life, and offered to do anything if she was let go by Appellant and his codefendants. (R, 2717).

Appellant's taped confession was admitted into evidence, and played for the jury. (R, 2753, 2756). The jury was given a transcript of the confession, which had been identified and certified as an accurate reproduction of the tape (R, 2724-2726), with a cautionary instruction that the transcript was not to be considered as evidence, but strictly to aid in identifying the speakers on the tape. (R, 2755).

In his confession, after being advised of his rights, and indicating his understanding of them, (SR,1-2), Appellant admitted he was with Bush, Parker and Johnson, on the morning of April 27, 1982 (SR, 2); that upon arriving at the store in Stuart, Appellant "had the gun, entered the store, and [I] went into the store. We all

went in the store, and I demanded the money", with his gun drawn (SR, 3, 4), that the victim got money from the safe (SR, 5), and that the four of them later split the money. (SR, 6). Appellant further stated that the victim was told to get in the car, and put there, by all four men (SR, 9, 11); that he observed Bush stab the victim, and Parker shoot her (SR, 3, 6, 11), and that it was Bush's idea to kill the victim. (SR, 7).

At the advisory sentence hearing, the State requested instructions on the aggravating circumstances of: commission of the murder, while engaged in flight from the perpetration of the felonies of robbery and kidnapping (R, 2902); the commission of the murder to avoid lawful arrest (R, 2902-2903); that the killing was "heinous, atrocious and cruel" (R, 2904); and that the murder was committed in a cold, calculated and premeditated manner. (R, 2905). The trial court granted the State's request, except for the "cold, calculated and premeditated" aggravating circumstance. (R, 2902-2906).

Defense counsel requested instructions on the mitigating circumstances of: no significant prior criminal history, which was granted (R, 2906); that the defendant's participation was relatively minor, which was denied, on the basis that the evidence did not support such an inference (R, 2899-2901; 2912-2913); that the Appel-

lant's ability to conform his conduct was substantially impaired, due to drinking, which was denied, based on the absence of any evidence to support this point, and on Appellant's own statement that he knew what he was doing (R, 2913-2914; SR, 4); any other aspect of Appellant's character or record, which was granted (R, 2914-2915); "anything in mitigation", which was denied, since encompassed within the prior instruction (R, 2915), and Appellant's age (23) at the time of the crime, which was denied, on the basis that such an age was not considered to be a mitigating factor, and that 18 was considered the age of majority, based on a prior Florida Supreme Court decision. (R, 2916-2918). The State relied on the evidence presented at the guilt phase, and presented no further evidence at the penalty phase. (R, 2922). Appellant presented no evidence or testimony. (R, 2922).

After receiving instructions on said aggravating and mitigating circumstances, and on the vote requirements, as to the imposition of the appropriate penalty, (R, 2948-2952), the jury began deliberations on an advisory sentence. Subsequently, the jury advised the court that the jurors were at a "split decision", wanted this fact "stated and published", and wished to be advised by the trial court. (R, 2955). The trial court proposed a response that under its previous instructions, "if by six or more votes the jury determines that the defendant should not be put to death",

the sentence should be life, with the mandatory minimum term. (R, 2951, 2955-2956). Defense counsel expressly agreed that the proposed response contained a correct statement of the law (R, 2956), and said response was given to the jury. The jury rendered an advisory sentence of the death penalty, by a vote of 7 to 5. (R, 321, 2957). In response to defense counsel's motion for mistrial, as to the advisory sentence, the trial court, in denying same, confirmed defense counsel's express agreement to the trial court's response to the jury's inquiry. (R, 2966-2968).

The trial court imposed the death penalty, following the jury's majority recommendation. (R, 2981-2984). These findings were subsequently placed in writing, pursuant to this Court's mandate, on April 4, 1984. (R, 2986-2988). The trial court found that the murder was committed while Appellant was engaged, or was an accomplice, in the commission of the offenses of kidnapping and robbery (R, 2986); that the murder was "especially heinous, atrocious and cruel" (R, 2986-2987); and that the murder was committed to avoid lawful arrest or escape from custody. (R, 2987). The trial court further specified that Appellant had not presented any mitigating circumstances, as to his character or record. (R, 2987). The court further concluded, among its factual findings, that Appellant "played a major role in the victim's death" (R, 2987); that Appel-

lant had the only gun, committed the robbery with it, forced Ms. Slater into the car, assisted in "proceeding" to the murder scene, and was in the back seat when the victim was "forcefully removed" and murdered. (R, 2987).

POINTS ON APPEAL

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POINT II — WHETHER THE RECORD HAS BEEN SUPPLEMENTED WITH CERTIFIED COPY OF TRANSCRIPT OF APPELLANT'S CONFESSION, USED AS AID AT TRIAL, APPELLANT'S ARGUMENT HAS NO MERIT; AND WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING TRANSCRIPT, FOR LIMITED USE AS NON-EVIDENTIARY AID IN IDENTIFYING SPEAKERS ON TAPE?

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ARGUMENT

POINT I

TRIAL COURT APPROPRIATELY EXCLUDED PROSPECTIVE JURORS BENNETT AND BLACK, FOR CAUSE, BASED ON CRITERIA OF WITHERSPOON v. ILLINOIS, 391 U.S. 510, (1968) [RESTATED]
(APPELLANT'S POINTS I, XV, XXII)

Appellant has initially challenged the excusal of jurors William Bennett and Thomas Black by the trial court, for cause, maintaining that the trial court failed to make the appropriate inquiry, and did not receive sufficient responses, according to the decision in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct 1770, 20 L.Ed.2d 776 (1968). However, the Record demonstrates that each of the aforementioned veniremen gave responses, to appropriate inquiry by the Court, the State and defense, so as to justify excusal under the Witherspoon criteria.

Contrary to Appellant's assertion, the trial court's initial questioning of the venire panel indicated a full and complete understanding of the Witherspoon test. In addressing the capital punishment aspects of the case, the trial court posed this basic question:

> Does any juror have such a belief as to capital punishment, either for or against, that you could not or you would be reluctant to or you would even hesitate to find the Defendant guilty of the offense in the first trial --

> that is, guilty of first-degree murder -- if it so proven to the exclusion of every reasonable doubt by the State of Florida that the Defendant is guilty of first-degree murder? Does any juror have such an opinion?

(R, 2179)(e.a.). This inquiry clearly tracks and addresses one of the two relevant considerations addressed by Witherspoon, namely, whether a prospective juror's "attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt". Witherspoon, 391 U.S., at 523, 20 L.Ed.2d, at 785, n. 21; McCorquodale v. Balkcom, 721 F.2d 1493 (11th Cir. 1983); Spinkellink v. Wainwright, 578 F. 2d 582 (5th Cir 1978)(en banc); Maggard v. State, 399 So.2d 973 (Fla. 1981), cert. denied, 454 U.S. 1059, 102 S.Ct 610, 70 L.Ed.598 (1981); Foster v. State, 369 So.2d 928 (Fla. 1979); Williams v. State, 228 So.2d 377 (Fla. 1969). Defense counsel made no objection to this inquiry, at this stage, or any of those stages referred to by Appellant. (R, 2179, 2261, 2262, 2288). The court additionally instructed the venire panel, at various stages of the proceedings, that a defendant could be guilty of first degree murder, on the basis of felony-murder and "aider and abettor" culpability. (R, 2177-78; 2261-62; 2386-2387).

As to jurors Bennett and Black, Appellant challenges the sufficiency of their responses to the aforementioned Witherspoon inquiries. The Witherspoon decision, and the

legion of courts subsequently interpreting Witherspoon, have mandated that a juror should be excused for cause if his responses unequivocally and unmistakably make it clear that he would automatically vote against imposition of the death penalty, or that the possibility of the death penalty would prevent the juror's neutrality as to determination of guilt. Witherspoon, supra; McCorquodale, supra; Williams, supra; Adams v. Texas, 448 U.S.38, 100 S.Ct 2521, 65 L.Ed.2d 581 (1980); Boulden v. Holman, 394 U.S.478, 89 S.Ct 1138, 22 L. Ed.2d 433 (1969); Burns v. Estelle, 626 F.2d 396 (5th Cir. 1980); Williams, supra. In the case of both jurors herein, the Record could not be more clear that each was properly excused for cause.

Mr. Bennett expressly stated he could not follow the law, as re-read to him by the trial court, as to accomplice culpability and felony murder. (R, 2261-62). Additionally, in response to further questioning by defense counsel,[1] juror Bennett made his inability to neutrally consider the evidence as to Appellant's guilt, even more strong and unequivocal:

> MRS. STEGER [defense counsel]:
> Mr. Bennett, you've stated that you feel that you could not vote

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[1]To the degree Appellant's argument is based upon the statement of juror Bennett, as elicited by defense counsel's questioning, Appellant is procedurally barred from review of this point, by the "invited error" doctrine. McCrae v. State, 395 S.2d 1145 (Fla. 1980), cert.denied sub nom, McCray v. Florida, 454 U.S. 1941, 102 S.Ct 583, 70 L.Ed.2d 486 (1981).

> to impose the death penalty in this particular case, or recommend the death penalty. Would your convictions with regard to that have any bearing on your ability to render a guilty or not guilty verdict as to the issue of first-degree murder?
>
> MR. BENNETT: Knowing that a first-degree murder conviction carries with it a possible death sentence, yes, it would.
>
> MRS. STEGER: So you would not be able to render a guilty verdict as to first-degree murder?
>
> MR. BENNETT: Correct.
>
> MRS. STEGER: Now, Mr. Bennett, you obviously understand, being an attorney, that being a juror is your civic duty. And also, if the Judge instructs you on the law, that you are to follow the law. You still feel you would not be able to render a verdict, a recommendation of death, if in fact it was warranted?
>
> MR. BENNETT: My job is to uphold the law as well, but I'm sorry, my morals would not permit me to do it in this instance.

(R, 2263-2264)(e.a.) Bennett twice repeated his unwillingness to vote for conviction or the death sentence, if presented with such circumstances. (R, 2264, 2265, 2266). Therefore, excusal of Bennett was entirely proper, according to the Witherspoon criteria. Witherspoon, supra, at n. 21; Spinkellink, supra; Burns, supra; Brown v. State, 381 So.2d 690 (Fla. 1980); Downs v. State, 386 So.2d 788 (Fla. 1980), cert.denied, 449 U.S. 976, 101 S.Ct 387, 66 L.

Ed.2d 238 (1980).

Similarly, juror Black expressed very similar adamant unwillingness to follow state law on first-degree felony murder, expressly stating that he could not do so. (R, 2386-2387). Black further unequivocally stated he could not impose the death penalty under such circumstances. (R, 2383). Further attempts by defense counsel to further explore this juror's attitudes, again resulted in a reaffirmance by the juror of his intransigence as to the guilt phase, and the prospect of the death penalty:

> MRS. STEGER: Mr. Black, if -- knowing that this is a first-degree murder case with the potential verdict of or recommendation of death, if it got that far, would the fact that death is a possibility in this case affect rendering a guilty or not guilty verdict?
>
> MR. BLACK: Yes, it would.
>
> MRS STEGER: In the first phase?
>
> MR. BLACK: Yes, it would.
>
> MRS. STEGER: Mr. Black, would you agree that there are certain circumstances under which death is the proper penalty? For example, Adolf Hitler, a mass murderer?
>
> MR. BLACK: That is a cliche, which I can't buy. I can't buy cliches about death. Death is death, when it comes to an individual, and that poor girl is dead because somebody didn't think about that. I just can't go along morally with taking a life, no matter whose life it is.

(R, 2388). Appellant's counsel indicated no further desire to question juror Black. (R, 2387-88). This juror's responses were sufficiently unequivocal to meet both aspects of the Witherspoon standard. Witherspoon; Spinkellink, Downs, supra; compare Witt v. Wainwright, 714 F.2d 1069 (11th Cir 1983), at 1076-80, 1082.

Appellant appears to have tangentially challenged the Constitutionality of the voir dire process, in accordance with the dictates of Witherspoon, on the basis that said process violates the "cross-section of the community" aspect of the "fair and impartial jury" rights afforded under the Sixth Amendment. Appellant's failure to make this challenge, at the time of the excusal of jurors Bennett and Black, prevents consideration of this point herein. Maggard v. State, supra, 399 So.2d, at 976. On the merits, both this Court and the 5th Circuit has rejected this contention, as well as the charge that a "death-qualified"jury, under Witherspoon, is "prosecution-prone". Maggard, supra; Riley v. State, 366 So.2d 19 (Fla. 1975); Spinkellink, supra, at 593-594, 595-596. Appellant's reliance on the decision in Grigsby v. Mabry, 569 F.Supp. 1273 (E D Ark 1983), is misplaced, since said decision has been questioned and rejected in the Federal appellate circuit in which it arose, see Hutchins v. Woodard, 730 F.2d 953 (4th Cir. 1984), application for vacation of stay granted, ___U.S.___, ___S.Ct___,

78 L.Ed.2d 977 (1984); Barfield v. Harris, 719 F.2d 58 (4th Cir. 1983), and has been previously decided by the Fifth Circuit and Florida in a contrary manner, in Spinkellink and Riley, respectively.

Since Appellant's Constitutional rights were not violated by the excusal of the aforementioned jurors from the panel, the death sentence should be affirmed.

POINT II

SINCE RECORD HAS BEEN SUPPLEMENTED WITH CERTIFIED COPY OF TRANSCRIPT OF APPELLANT'S CONFESSION, USED AS AID AT TRIAL, APPELLANT'S ARGUMENT HAS NO MERIT; FURTHERMORE, TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING TRANSCRIPT, FOR LIMITED USE AS NON-EVIDENTIARY AID IN IDENTIFYING SPEAKERS ON TAPE. [Restated]

Appellant has initially urged that, since a copy of the transcript of the confession is "missing from the Record", said absence mandates reversal and a new trial for him. This argument ignores Appellant's responsibilities, as the appealing party, in providing, by supplementation or otherwise, an adequate record. Brice v. State, 419 So.2d 749 (Fla. 2nd DCA 1982); Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979). Appellee has subsequently moved to supplement the record, to include a certified copy of the transcript of the confession, since the Record reveals said confession was transcribed, and admitted as evidence. (R, 2707-2708; 2753-2757).

Appellant further alleges, in general and conclusory terms, that it was "fundamental error" to allow the jury to be

given copies of the transcription of the confession, when the transcript was not in evidence. Appellant's Brief, at 12. However, both Florida and Federal courts have approved of the use of transcripts of recorded statements, in tandem with the recorded statements themselves, as an "aid to understanding" and identifying the speakers on the tape. Golden v. State, 429 So.2d 45 (Fla. 1st DCA 1983), at 50, 51-52; United States v. Collazo, 732 F.2d 1200 (4th Cir 1984); United States v. Larson, 722 F.2d 139 (5th Cir 1983); United States v. Costa, 691 F.2d 1358 (11th Cir 1982); United States v. Onori, 535 F.2d 938 (5th Cir 1976). The use of said transcripts does not constitute reversible error, merely by virtue of their lack of status as "evidence". Golden, supra, at 50; Costa, supra, at 1362, 1363.

Appellant's trial counsel objected to the use of such transcripts, solely on the basis that the tape itself was the "best evidence". (R, 2707, 2754). However, as in Golden, supra, such an objection again ignores the underlying legitimate, limited purpose, for which the trial court permitted the jury's use herein. Golden, supra, at 50-52.

In allowing use of the transcripts, in tandem with the tape, for the limited purposes, as aforementioned, by special cautionary instruction (R, 2755), the trial court did not abuse its discretion, or commit reversible error. Golden, supra; Larson, supra, at 144-145; Onori, supra, at 947; United States v. Slade, 627 F.2d 293 (DCC Cir 1980); United States v. Dorn, 561 F.2d 1252 (7th Cir 1977); Fountain v. United States, 384 F.2d. 624 (5th Cir 1967), cert.denied, 390 U.S. 1005, 88 S.Ct 1246, 20

L.Ed.2d 105 (1968).

POINT III

TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING PHOTOGRAPHS, SINCE SAME WERE RELEVANT TO PROVE IDENTITY OF VICTIM, TO DEPICT CRIME SCENE, AND TO PROVE CAUSE OF DEATH. [Restated]

Appellant asserts that State Exhibits 7, 8, 13 and 14 were erroneously and prejudicially admitted, because each such photograph was allegedly irrelevant and inflammatory. It is axiomatic that it is within the trial court's discretion to rule on the admissible nature of photographs offered into evidence, and that such discretion will not be disturbed, absent a showing that same was abused. Engle v. State, 438 So.2d 803 (Fla. 1983); Wilson v. State, 436 So.2d 908 (Fla. 1983); Edwards v. State, 414 So.2d 1174 (Fla. 5th DCA 1982).

The State offered Exhibit 7 as relevant to prove identity of the victim (a required element of proof of corpus delecti)(R, 2560, 2561); Exhibit 8, to show a depiction of the crime scene (R, 2573); and Exhibits 13 and 14, as relevant to the issue of the cause of the victim's death, in conjunction with Dr. Wright's expert medical testimony. (R, 2613, 2614). Additionally, the trial court gave a limiting instruction to the jury, upon admission of each such item, expressly cautioning the jury of the limited relevance of each photo, and that said photos were not to be considered to arouse sympathy for the victim, by virtue of its gruesome depictions. (R, 2563; 2577; 2615).

Since each photograph was offered by the State to prove a relevant issue of required proof, each such photo was properly admitted. Wilson, supra; Mazzara v. State, 437 So.2d 716 (Fla. 1st DCA 1983); Edwards, supra; Rodriguez v. State, 413 So.2d 1303 (Fla. 3rd DCA 1982); Adams v. State, 412 So.2d 850 (Fla. 1982). The offer by defense counsel to stipulate to the issue of cause of death, was irrelevant to the propriety of the admission of the subject photographs. Edwards. In light of the relevance of the photos, and the cautionary instructions given, Appellant's contention on this point is completely lacking in merit.

POINT IV

PROSECUTORIAL COMMENTS, REFERRED TO BY APPELLANT, DID NOT AMOUNT TO MISCONDUCT CONSTITUTING REVERSIBLE ERROR, AND WERE PERMISSIBLE AS COMMENTS ON EVIDENCE.
[Restated]

Appellant's first two references to prosecutorial comments, made during closing argument of the guilt phase, Appellant's Brief, at 17, cannot be challenged herein, since the failure by defense counsel to object or in any way challenge such comments (R, 3010, 3011), waives consideration of same herein. State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Clark v. State, 363 So.2d 331 (Fla. 1978).

On the merits, the prosecutor's comments, as to defense counsel's attempt to deny Appellant's involvement in any crime other than the robbery (R, 3010), was fair comment upon the evidence, was made in response to defense summation, and

was therefore not reversible or erroneous. Lynn v. State, 395 So.2d 621 (Fla. 1st DCA 1981), cert.denied, 402 So.2d 611 (Fla. 1981); Jones v. State, 355 So.2d 198 (Fla. 3rd DCA 1978); White v. State, 377 So.2d 1149 (Fla. 1979), cert.denied, 449 U.S. 845, 101 S.Ct 129, 66 L.Ed.2d 54 (1980); Whitney v. State, 132 So. 2d 599 (Fla. 1961). Similarly, the prosecutor's references to the victim's last activities at home, while alive, on the night of the murder, was a comment upon evidence that had been stipulated to by defense counsel, in lieu of the testimony of the victim's twin sister, Kathy Slater. (R, 2474-2475); White, supra.

Appellant further maintains that other comments were improper as attempts to appeal to the sympathy of the jury, and warranted a mistrial. This Court has previously held that the "device" of mistrial is to be used only in cases of "absolute necessity", where further expense of time and effort would be futile. Ferguson v. State, 417 So.2d 639 (Fla. 1982); Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert.denied, 444 U.S. 885, 100 S.Ct 177, 62 L.Ed.2d 115 (1979). Additionally, because Appellant did not specify his grounds for mistrial (R, 2818), and further failed to ask for a curative instruction, prior to his mistrial motion (R, 2818), Appellant's challenge to the State's comment that "we would not have had to introduce this into evidence" (R, 2818), cannot be considered herein. Ferguson, supra; Clark, supra. Furthermore, on the merits, said comment was permissible as a comment on the evidence. White, supra.

Similarly, the prosecutor's reference to the fact that the only witness to the robbery (R, 2832) was the dead victim, again was proper comment on the evidence, White, and further, did not inform the jury of any fact not within their common knowledge, based on the evidence presented. Singer v. State, 109 So.2d 7 (Fla. 1958), at 28; (R, 2832).

Defense counsel's failure to request a curative instruction, or move for mistrial, after the prosecutor's comment on the murder weapon, waived his challenge to such comment herein. Ferguson; Mancebo v. State, 350 So.2d 1098 (Fla. 1978), cert.denied, 359 So.2d 1217 (Fla. 1978); Clark, supra. Furthermore, the transcript of Appellant's confession, the tape of which was played for the jury and admitted into evidence (R,2753-2756), rendered such comment permissible, since the fact within the statement were established by Appellant's own confession. (SR, 3, 6). White.

The final prosecutorial comment at the guilt phase challenged by Appellant, also lacks procedural and substantive merit. Appellant did not preserve same for appellate review, since defense counsel wholly failed to object to same in any way. Clark. Further, the prosecutor's reference to Appellant's initial alibi, referred to statements made by Appellant to Officer Lloyd Jones, as reflected in Jones' testimony (R, 2714), and Appellant's ultimate confession (SR, 1-13), and is therefore unobjectionable. White.

With the sole exception of the comment referring to Appellant's character, (R, 2933), all other sentencing phase

comments referred to in Appellant's brief were made without objection, motion for mistrial, request for curative instruction, or any type of protest or challenge by defense counsel. (R, 2929, 2930, 2937, 2938). Therefore, Appellant's challenges of such comments have been waived herein. Clark, supra; Maggard, supra; Bassett v. State, 449 So.2d 803 (Fla. 1984); Ferguson, supra; Morris v. State, (Case # 83-198)[9 FLW 1239][3rd DCA, June 5, 1984].

As to the comment arguably objected to, the failure by said counsel to request a curative instruction or move for mistrial, procedurally bars review herein. Ferguson; Mancebo, supra. Assuming arguendo that the propriety of said comment was properly preserved, it is evident from the Record that said comment occurred during the State's rebuttal of the mitigating circumstance of the character and record of the Appellant, as urged by defense counsel.[2] (R, 2914-2915; 2933, 2934, 2948-2953); Section 921.141(1), Florida Statutes (1977). The State's reference to Appellant's character was entirely proper, as comment on the nature of the evidence, and lack of same as to mitigation. White, supra; Smiley v. State, 395 So.2d 235 (Fla. 1st DCA 1981); Snowden v. State, 449 So.2d 332 (Fla. 5th DCA 1984); also, see Meeks v. State, 339 So.2d 186 (Fla. 1976).

As to all other alleged misconduct at sentencing, none of the comments rise to such a level, so as to have fundamental-

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[2]Since requested by defense counsel, Appellant is barred herein from challenging a ruling which defense counsel instigated. Pope v. State, 441 So.2d 1073 (Fla. 1983); McCrae, supra.

ly tainted and/or destroyed the fairness of the proceedings to a point where a request for retraction or curative instruction would not have cured the errors. Blackburn v. State, (Case No. 83-98)[9 FLW 663][5th DCA, March 22, 1984]; Maggard, supra; Ferguson, supra; Cobb v. State, 376 So.2d 230 (Fla. 1979), Abbott v. State, 334 So.2d 642 (Fla. 3rd DCA 1976).

Additionally, in light of the overwhelming evidence of guilt, as related in the Statement of Facts, supra, and in Point X, infra, the comments referred to by Appellant, if erroneous, should be deemed harmless. State v. Murray, 443 So.2d 955 (Fla. 1984); United States v. Hasting, ___U.S.___, 103 S.Ct 1974, 76 L.Ed.2d 96 (1983); Chapman v. California, 386 U.S. 18, 87 S.Ct 824, 17 L.Ed.2d 705 (1967).

POINT V

SINCE IDENTIFICATION OF LINEUP PHOTOGRAPH BY WITNESS SYMONS WAS RELEVANT TO PROVE APPELLANT'S CULPABILITY, TRIAL COURT PROPERLY ADMITTED SAID EVIDENCE.

Appellant's challenge to the admission of a lineup photograph of John Bush (R, 2512), was primarily based upon grounds that said photograph was irrelevant to consideration of Appellant's guilt or innocence. (R, 2511). The trial court's admission of said item was a matter placed within its discretion, and must be affirmed, absent a showing of abuse of such discretion. Edwards v. State, 414 So.2d 1174 (Fla.5th DCA 1982); Jent v. State, 408 So.2d 1024 (Fla. 1981), cert.denied, 457 U.S. 1111, 102 S.Ct 2916, 73 L.Ed.2d 1322 (1982); Welty v. State, 402 So.2d 1159 (Fla. 1981).

The trial court's rejection of Appellant's objection was based on the "materiality" and relevancy of said lineup photograph, to Appellant's culpability as an accomplice to the murder charges. (R, 2512). The identification of Bush from said photo lineup, by the State's witness, Danielle Symons, (R, 2496-97, 2508) as testified to by Officer Heckendorn (R, 2508), was certainly relevant to tend to prove or disprove Appellant's involvement, as an "aider and abettor" to the murder. Section 90.401, Florida Statutes (1976); State v. Joseph, 419 So.2d 391 (Fla.3rd DCA 1982). Said evidence was relevant and material in supplying evidence of perpetration of the robbery by Appellant's co-felon, thereby tending to establish Appellant's "accomplice" culpability. Enmund v. Florida, 458 U.S. 782, 102 S.Ct 3318, 73 L.Ed.2d 1140 (1982); Hawkins v. State, 436 So.2d 46 (Fla. 1983); Bryant v. State, 412 So.2d 347 (Fla. 1982). Said evidence was further relevant to demonstrate Appellant's criminal connection to his co-felon Bush, and to the crime itself. Hall v. State, 403 So.2d 1321 (Fla. 1981); Coxwell v. State, 397 So.2d 335 (Fla. 1st DCA 1981); Shapiro v. State, 345 So.2d 362 (Fla. 3rd DCA 1971).

Furthermore, in view of the overwhelming evidence of guilt against Appellant, see Statement of Facts, supra, Point X, infra, the admission of such testimony was harmless error, if any. Palmes v. State, 397 So.2d 648 (Fla. 1981), cert.denied, 454 U.S. 882, 102 S.Ct 369, 70 L.Ed.2d 195 (1981); also, see Anderson v. State, 439 So.2d 961 (Fla. 4th DCA 1983); Tejeda-Bermudez v. State, 427 So.2d 1096 (Fla. 3rd DCA 1983).

POINT VI

TRIAL COURT APPROPRIATELY REQUIRED DEFENSE PROFFER OF PART OF CLOSING ARGUMENT, AND APPROPRIATELY DENIED SAME, UNDER THE CIRCUMSTANCES. [Restated]

The trial court's decision to compel a proffer by defense counsel of a portion of her closing argument, was neither inappropriate or improper. Said ruling resulted from the consistent attempts by defense counsel to urge erroneous constructions, about the nature and legal consequences of felony-murder. (R, 2835-37); 2838-2842). The nature of said misstatements, including those in the proffer, were properly regarded by the trial court as inappropriate comments on the applicable law, and deletion of some parts of the felony-murder jury instruction which resulted in incorrect statements of law. (R, 2835-2846).

Defense counsel did not properly have the prerogative to instruct the jury, during her closing argument; further, it was improper to give and argue non-applicable, confusing and misleading instructions to the jury. Seckington v. State, 424 So.2d 194 (Fla.5th DCA 1983); Taylor v. State, 330 So.2d 91 (Fla.1st DCA 1976). In view of the circumstances, the trial court properly required and denied defense proffer, on objection by the State. Blitch v. State, 427 So.2d 785 (Fla.2nd DCA 1983); State v. Jones, 377 So.2d 1163 (Fla. 1979); Garmise v. State, 311 So.2d 747 (Fla.3rd DCA 1975); also, see United States v. Trujillo, 714 F.2d 102 (11th Cir 1983).

Additionally, Appellant's failure to object to the required proffer of argument, (R, 2841-2844, 2845), procedurally

waived consideration of the issue herein. Castor, supra.

POINT VII

TRIAL COURT APPROPRIATELY DENIED MOTION FOR MISTRIAL, IN VIEW OF SUSTAINING OF OBJECTION, AND GIVING CURATIVE INSTRUCTION AT APPELLANT'S REQUEST. [Restated]

Appellant maintains that a state witness "testified as to the substance of an accomplice's statement that Appellant owned the knife which was used to stab the victim". Appellant's Initial Brief, at 24. It is important to note that the prosecutor's inquiry, as to Bush's statements regarding ownership of the knife used, was not answered or testified to by the witness, Officer Charles Jones. (R, 2718). The question itself was not so fundamentally prejudicial as to require a mistrial, as an absolute necessity, or vitiate the entire trial. Ferguson, supra; Mancebo, supra; Cobb, supra. In response to defense counsel's request for a curative instruction, the trial court agreed to give same (R, 2721), and subsequently instructed the jury that the offending question was "completely immaterial and irrelevant", and that the jury was "not to consider in any way in consideration of your verdict, that question, or speculate on what answer may have been given to that question in any way". (R, 2722). Denial of mistrial was thus appropriate. Ferguson; Cobb.

Because defense counsel's sole trial objection, as to the substance of Bush's statement, conceded admissibility, as to its relation to Appellant (R, 2715-2716), Appellant's attempt

to assert a Bruton rule violation[3], for the first time herein, cannot therefore be considered. Sapp v. State, 411 So.2d 363 (Fla. 4th DCA 1982).

POINT VIII

TRIAL COURT APPROPRIATELY DENIED APPELLANT'S SUPPRESSION MOTION, SINCE STATE ESTABLISHED THAT CONFESSION WAS FREELY AND VOLUNTARILY GIVEN. [Restated]

Appellant has challenged the finding of voluntariness of his confession, as concluded by the trial court, on several factual grounds. However, Appellant's argument involves nothing more than re-allegation of Appellant's trial testimony, which conflicted with the consistent testimony of various police officers involved in the taking of Appellant's statement. In affording the trial court's denial of suppression ruling a presumption of correctness, and in resolving all inferences in favor of affirming said ruling, it is evident that, based on its review of the circumstances, the trial court correctly found Appellant's confession to be freely and voluntarily given. Williams v. State, 441 So.2d 653 (Fla.3rd DCA 1983); DeConingh v. State, 433 So.2d 501 (Fla. 1983).

The Record herein shows that, inter alia, prior to attempting to locate Appellant at his residence, the officers of the Fort Pierce police department were under clear instructions, to merely "solicit Appellant's cooperation", not arrest him or place him under formal custody (R, 1980, 1985, 1988, 1991); that

[3]Bruton v. United States, 391 U.S. 123, 88 S.Ct 620, 20 Ed.2d 476 (1960).

when Appellant's cooperation was sought, Appellant voluntarily accompanied the officers to the State Attorney's office, without coercive actions by the officers (R, 1993, 2000, 2001); that Appellant was afforded his Miranda rights, upon arrival at said office [(although not then in custody, so that the giving of rights at said time was not even required, see Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct 711, 50 L.Ed.2d 714 (1977); State v. Clark, 384 So.2d 687 (Fla.4th DCA 1980), cert.denied, 392 So.2d 1372 (Fla. 1980), (R, 2004, 2006, 2023, 2024)], and that Appellant acknowledged he understood these rights. (R, 2004, 2006, 2023, 2024). The Record further reveals that Appellant then verbally agreed to be questioned, concerning the Slater murder (R, 2007); that Appellant did not request counsel at said time (R, 2012, 2029, 2032, 2052, 2103, 2105, 2106, 2108-2111), and that Appellant did not express a desire to leave, although up until his verbal confession, he would have been permitted to do so. (R, 2017-18, 2023, 2055, 2060). As to the tape of Bush's statement, Appellant was told of its existence prior to any questioning, including the fact that the statement implicated Appellant in the crime. (R, 2025, 2037). Appellant initiated the request to hear the taped statement (R, 2025, 2044); confessed verbally after the tape was played (R, 2025-2027), and agreed to give a formal statement, after asking to and speaking with his mother (R, 2027, 2028). Appellant made no request for an attorney at this stage, and did not make any request that he wanted the questioning to end. (R, 2029, 2032). The Supplemental Record indicates Appellant was further re-advised of his Constitutional

rights, (SR, 1), and thereafter made a statement admitting his participation in the crimes. (SR, 1-12; R, 2724). Significantly, Appellant himself, during cross-examination by the State at the suppression hearing, conceded that he spoke with the police voluntarily, and that he decided "to tell the truth" when he realized the Bush tape was real, and recognized Bush's voice on the tape. (R, 2089, 2090, 2097).

Thus, there is no lack of substantial competent evidence to support the trial court's findings. (R, 2145-2146). DeConingh; Sanders, supra. Appellant's agreement to, and subsequent answering of questions by the subject officers, as well as the giving of inculpatory statements, after being appropriately advised of his rights, demonstrates a waiver of his rights to remain silent. North Carolina v. Butler, 441 U.S. 369, 99 S.Ct 1755, 60 L.Ed.2d 286 (1979); Warren v. State, 384 So.2d 1313 (Fla.3rd DCA 1980). The lack of any coercion or undue influence imposed upon Appellant to obtain a confession, substantiates the trial court's conclusions as well. DeConingh, supra; Brewer, supra; State v. Caballero, 396 So.2d 1210 (Fla.3rd DCA 1981).

Appellate courts have rejected the "inherently coercive" argument of Appellant, instead relying upon the existence or lack of specific proscribed conduct such as threats, promises, or unduly influential inducements, designed to elicit incriminating responses. Barnason v. State, 371 So.2d 680 (Fla.3rd DCA 1979). While Appellant was entitled to the protection of his Constitutional rights, it is axiomatic that an officer may try to obtain as much information as possible, concerning a crime,

from a suspect or other individuals, short of committing violations of such rights. Stevens v. State, 419 So.2d 1058 (Fla. 1982); Barnason, supra.

Appellant's initial denial of involvement in the Slater murder robbery and kidnapping, was not tantamount or equivalent to a request for the cessation of questioning, or the invoking by Appellant of his right to remain silent. Warren, supra. As aforementioned, the clear testimony at the suppression hearing belies any claim by Appellant that he answered questions and gave statements on any basis but a voluntary one, or that he was forced to cooperate, in any fashion, with the officers present with him at said time. (R, 2007, 2017-18, 2023, 2029, 2032, 2033, 2055, 2060, 2089, 2090, 2099, 2100).

Advising Appellant, that Bush had given a statement implicating Appellant, was not coercive or unduly influential. An officer's comment to a suspect does not render a statement involuntary, if it does not constitute a misrepresentation, and the suspect has been advised of his rights. Caballero, supra; Harley v. State, 407 So.2d 382 (Fla.1st DCA 1981); State v. Pressley, 389 So.2d 216 (Fla.5th DCA 1982); Paramore v. State, 229 So.2d 855 (Fla. 1969). Appellant's verbal and taped confessions herein were not the product of comments by Officer Jones that in any way constituted a mental or physical threat or coercion against Appellant. Caballero; Barnason; Warren; also, see Bassett v. State, 449 So.2d 803 (Fla. 1984). The Record shows that the confessions were produced, in Appellant's own words, by his apprehensions, based on the situation with which he was con-

fronted. This circumstance does not invalidate the voluntary nature of Appellant's inculpatory statements. Williams, 441 So.2d, at 657; Caballero, at 1213; State v. Williams, 386 S.2d 27 (Fla. 2nd DCA 1980); Ebert v. State, 140 So.2d 63 (Fla.2nd DCA 1962).

Since the evidence demonstrated that Appellant was given said rights upon his arrival at the station, acknowledged his understanding of them, and had the ability to read, with an eleventh-grade education, (R, 2004, 2006, 2007, 2023-2026, 2086-2087), no re-advising of rights was mandated. Williams, 386 So. So.2d, at 29; Biddy v. Diamond, 516 F.2d 118 (5th Cir 1975), at 122 (and cases cited therein), cert.denied, 425 U.S. 950, 965 S. Ct 1924, 48 L.Ed.2d 194 (1976).

POINT IX

TRIAL COURT APPROPRIATELY ADMITTED APPELLANT'S CONFESSION, SINCE STATE ESTABLISHED CORPUS DELECTI BY INDEPENDENT EVIDENCE, PRIOR TO INTRODUCTION, AND ADMISSION OF TAPED CONFESSION. [Restated]

Appellant maintains that the State failed to meet its burden of proving corpus delecti, prior to the introduction of Appellant's confession. (R, 2753). Because the Record demonstrates that there was ample and sufficient evidence demonstrating that a death occurred, that the victim was identified (as Frances Slater), by medical and lay testimony (R, 2557, 2568, 2573-2576, 2589-2590; 2608-2610), and that the death of Frances Slater was the result of a gunshot wound to the head (R, 2616, 2619), there was sufficient independent proof of corpus delecti, to admit Appellant's confession. Bassett v. State, 449 So.2d,

at 807; Stone v. State, 378 So.2d 765 (Fla. 1979), at 771, cert. denied, 449 U.S. 986, 101 S.Ct 407, 66 L.Ed.2d 250 (1980); Frazier v. State, 107 So.2d 16 (Fla. 1958).

POINT X

EVIDENCE WAS SUFFICIENT TO WARRANT INSTRUCTION TO JURY, DURING SENTENCING PHASE, ON SPECIFIC AGGRAVATING CIRCUMSTANCES, AND TO SUPPORT TRIAL COURT'S FINDINGS OF SAME; FURTHER, TRIAL COURT APPROPRIATELY CONSIDERED MITIGATION EVIDENCE. (APPELLANT'S POINTS X, XIV, XIX, XX, XXII, XXVII). [Restated]

The trial court's granting of the State's request for penalty phase jury instructions, on various aggravating circumstances, and the findings of the trial court, on such aggravating circumstances (SR, 1-3), are challenged by Appellant on the basis of insufficient evidence. The Record contains more than sufficient evidence to support each such instruction and finding, in accordance with Section 921.141 of the Florida Statutes.

Appellant has characterized the trial court's finding, on the factor of "avoiding arrest", as speculative, and lacking in evidentiary support as applied to Appellant. Officer Jones testified that Appellant, in his verbal confession, stated he had held the gun on the victim while robbing the store, and thereafter forced her into the car. (R, 2727). Further, during the entire ride to her death, she pleaded for her life, and promised to do anything if Appellant and the others would let her go. (R, 2717). Appellant further related that he was in the back seat with Frances Slater, for the entire ride. (R, 2758).

Additionally, Appellant's taped confession indicates that he committed the robbery, at gunpoint, and forcibly placed her in the car, to go with Appellant and his accomplices. (SR, 3, 8, 9; R, 2753-2756). There was clearly substantial evidence, inter alia, that Slater was driven to a remote area, approximately thirteen miles from the robbery scene, forcibly pulled from the car by her hair, and killed by a shotgun wound in the back of her head. (R, 2557, 2579, 2616, 2619, 2717, 2784-2785; SR 1-12).

Therefore, based on the evidence, both the instruction and the court's finding of fact, as to this aggravating circumstance, were clearly appropriate. Herring v. State, 446 So.2d 1049 (Fla. 1984); Oats v. State, 446 So.2d 90 (Fla. 1984); Jones v. State, 411 So.2d 165 (Fla. 1982); Elledge v. State, 408 So.2d 1021 (Fla. 1982), cert.denied, ___U.S.___, 103 S.Ct 316, 74 L.Ed. 2d 293 (1982). The facts presented by the State's case-in-chief supported the trial court's finding that Slater, as the sole employee present at an all-night convenience store, and the only witness to the robbery, was "summarily executed" to prevent subsequent identification (R, 2987); Herring, supra; Oats, supra; Elledge, supra.

Appellant has additionally maintained that the murder was not "heinous, atrocious and cruel", in that there were no additional acts, setting Frances Slater's murder apart from the capital felony "norm". State v. Dixon, 283 So.2d 1 (Fla. 1973). Appellant has selectively ignored evidence presented which demonstrated, inter alia, the aforementioned circumstances of the armed robbery, kidnapping and murder. (R, 2579, 2717). Addi-

tionally, there was expert medical testimony that Ms. Slater emptied her bladder, an act consistent with being in fear (R, 2618); and that, at the death scene, she was pulled from the car by her hair (R, 2784-2788), stabbed while in a defense posture, consistent with having jumped back (R, 2619), and subsequently killed by a bullet wound in the back of her head. (R, 2616, 2619). Such evidence demonstrates the victim's awareness of her imminent death, her tremendous fear prior to being mercilessly executed, and her physical and mental torment at the scene of the murder. These facts thus supported the instruction and finding that the murder, as committed, was heinous, atrocious and cruel. Lemon v. State, ___S.2d___(Case No. 63,410)[9 FLW 308][Fla.Supreme Court, July 19, 1984]; Routly v. State, 440 So.2d 1257 (Fla. 1983), at 1265; Smith v. State, 424 So.2d 726 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla. 1982), cert.denied, ___U.S.___, 103 S.Ct 182, 74 L.Ed.2d 148 (1982); Smith v. State, 407 So.2d 894 (Fla. 1981), cert.denied, 456 U.S.984, 102 S.Ct 2260, 72 L.Ed.2d 864 (1982); Knight v. State, 338 So.2d 201 (Fla. 1976).

Appellant's challenge to the finding that the murder was committed while Appellant was engaged in the commission of, or flight from, commission of the crimes of robbery and kidnapping, is procedurally precluded by defense counsel's admission, during the sentencing phase, that the facts on the Record supported such a finding. (R, 2902); Castor, supra; Pope, supra. Assuming arguendo this Court reaches the merits, it is clear that the evidence of a robbery and kidnapping, as separate offenses committed by Appellant, was supported by the evidence,

including Appellant's confession. (R, 2485, 2531, 2538-2539, 2542, 2551-2552, 2618, 2717, 2753, 2784-2785; SR, 1-12). The trial court's finding that money was taken from the store, while the victim was held at gunpoint, and that the victim was forced by gunpoint into the car's back seat while taken to the murder scene, was supported by the evidence. Said finding was not in any way related to the same aspect of Appellant's crimes, so as to constitute improper doubling or otherwise invalidate said finding. Delap v. State, 440 So.2d 1242 (Fla. 1983); 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).

Appellant further maintains that the trial court's denial of requested instructions, as to certain mitigating circumstances was inappropriate. Specifically, Appellant initially argues that the jury should have been allowed to consider that Appellant's participation in the offense was "relatively minor", and that Appellant did not actually commit the crime. (R, 2912). The trial court appropriately based its denial of this instruction, on the reasons and conclusions given for denying Appellant's prior motion to preclude consideration of the death penalty, based on the decision in Enmund v. Florida, 458 U.S. 782, 102 S. Ct 3368, 73 L.Ed.2d 1140 (1982). The Record evidence herein showed that Appellant committed the armed robbery, and held the gun on the victim to effectuate the kidnapping, which facilitated and precipitated the murder. Such facts do not in any way place Appellant in the "minor accomplice" role, such as that of the defendant in Enmund, supra. As the state argued, and the

trial court concluded, (R, 2899-2901, 2913), the facts herein did not merely justify an inference that Appellant was a minor participant. Enmund, 73 L.Ed.2d, at 1152; Dale v. Francis, 727 F.2d 990 (11th Cir 1984); Adams v. Wainwright, 709 F.2d 1443 (11th Cir 1983). Based on these circumstances, the trial court did not abuse its discretion in denying an instruction not supported by the evidence. Squires v. State, ___S.2d___, (Case No. 61,431)[9 FLW 98][Fla. Supreme Court, March 15, 1984]; Enmund, supra; White v. State, 403 So.2d 331 (Fla. 1981), cert.denied, ___U.S.___, 103 S.Ct 3571, 77 L.Ed.2d 1412 (1981).

Similarly, there was no evidence to support the giving of instructions on the mitigating circumstance of "substantial impairment of the defendant's ability to conform his conduct", by virtue of having been drinking. In Appellant's own confession, he admitted that he knew what he was doing, when committing the subject crimes. (SR, 4). No other evidence on this point was produced, admitted or testified to at trial. The trial court's denial of this instruction was entirely proper. (R, 2914).

The trial court did not abuse its discretion in refusing to consider the age of Appellant (twenty-three at the time) as a mitigating circumstance. Said age of Appellant has not prevented the imposition of the death penalty in other similar cases. Herring, supra, at 1057 (defendant was 19 at time of offense); Hargrave v. State, 366 So.2d 1 (Fla. 1978), (19) cert. denied, 444 U.S. 919, 100 S.Ct 239, 62 L.Ed.2d 176 (1979); Meeks v. State, 339 So.2d 186 (Fla. 1976); (21), cert.denied, 439 U.S. 991, 99 S.Ct 592, 58 L.Ed.2d 666 (1978). As relied upon by the

trial court, in rejecting this circumstance, a panel of this Court has previously determined that, since one is considered an adult at 18, a 23-year old defendant does not warrant mitigation due to his age. Songer v. State, 322 So.2d 481 (Fla. 1975), at 484.

Assuming arguendo that the trial court should have instructed the jury that Appellant's age could be considered as a mitigating circumstance, such error, if any, was harmless, in view of the overwhelming weight of the aggravating circumstances presented by the Record. Barclay v. Florida, ___U.S.___, 103 S. Ct 3418, 77 L.Ed.2d 1134 (1983); Zant v. Stephens, ___U.S.___ 103 S.Ct___, 77 L.Ed.2d 235 (1983); Vaught v. State, 410 So.2d 147 (Fla. 1982); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert.denied, 444 U.S. 919, 100 S.Ct 239, 62 L.Ed.2d 176 (Fla. 1979).

The trial court's rejection of Appellant's request that "anything in mitigation" be considered as a separate mitigating circumstance was proper, since the trial court granted Appellant's request to give an instruction that "any other aspect of the defendant's character or record, or any other circumstance of the offense" could be considered in mitigation, according to the standard jury instructions and appropriate statutory language. Florida Criminal Jury Instructions, Capital Cases, (Fla.1981) at 81; Section 921.141(1) Florida Statutes (1979). Since Appellant's request was encompassed by an instruction the court agreed to grant, Appellant cannot have suffered prejudice of any kind.

Since Appellant was afforded the opportunity to request any factors (statutory or otherwise) in mitigation, and chose not to make certain requests, or present any evidence in mitigation at the sentencing phase, he cannot now be heard to complain of the court's failure to consider those circumstances not requested. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct 2954, 57 L.Ed.2d 973 (1978); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir 1978), cert.denied, 440 U.S. 976, 99 S.Ct 1548, 59 L.Ed.2d 796 (1979); Hall v. Wainwright, 565 F.Supp. 1222 (M D Fla. 1983), at 1239; Armstrong v. State, 429 So.2d 287 (Fla. 1983), cert.denied, ___U.S.___, 104 S.Ct 203, 78 L.Ed.2d 177 (1983); Peek v. State, 395 So.2d 492 (Fla. 1981), cert.denied, 451 U.S. 964, 101 S.Ct 2036, 68 L.Ed.2d 342 (1981). It was entirely within the trial court's discretion to accord no weight to any mitigating circumstances, and impose the death penalty as a result of its weighing process. Eddings, supra; Hall, supra; Armstrong, supra; Daugherty v. State, 419 So.2d 1067 (Fla. 1982), cert.denied, ___ U.S.___, 103 S.Ct 1236, 75 L.Ed.2d 469 (1983).

POINT XI

JURY INSTRUCTIONS GIVEN AT ADVISORY SENTENCING PHASE, ON VOTE REQUIREMENT, AND ON CONSIDERATION OF AGGRAVATING AND MITIGATING CIRCUMSTANCES, WERE PROPER AND APPROPRIATE. [Restated]

Appellant's challenge to the jury instructions given by the trial court, at the close of the advisory sentencing phase, as being confusing and erroneous, completely lacks proce-

dural and substantive merit.

Initially, it is apparent from the Record that defense counsel did not object to the instructions given, or request any of his own. (R, 2948-2952). Thus, Appellant is barred from raising this issue herein, having waived same. Aldridge v. Wainwright, 433 So.2d 988 (Fla. 1983), at 990; Castor, supra.

Furthermore, as to each of the three referenced portions of the instruction as to the vote requirement, the trial court's instructions tracked the language of the standard criminal jury instructions. (R, 2950, 2951, 2952); Penalty Proceedings - Capital Cases, F.S. 921.141, Florida Standard Criminal Jury Instructions (Fla. 1981), at 81-82. Appellant's challenge to the validity of such instructions has been similarly rejected by this Court. Aldridge, supra; Hitchcock v. State, 432 So.2d 42 (Fla. 1983), at 44, n. 3. Moreover, Appellant's reliance on the decision in Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, ___ U.S. ___, 103 S.Ct 883, 75 L.Ed.2d 928 (1983), as invalidating the instruction given, was specifically and directly rejected by this Court in Hitchcock, supra, at 44, n. 3, and Aldridge, supra, at 990.[4]

As aforementioned, those instructions referred to by Appellant (in an inaccurate manner, see, R, 2949), track the

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[4]Appellee is not unmindful of this Court's decision in Harich v. State, 437 So.2d 1082 (Fla. 1983), as to the difference between paragraphs within the standard jury instruction, on the vote requirements. However, Appellant was not prejudiced herein, for the same reasons contained in Harich, supra: lack of objection and absence of request for special instructions as well as lack of objection to the proposed response to the juror's inquiry, infra. Harich, at 1086.

standard jury instruction. Florida Standard Criminal Jury Instructions, supra, at 81. The entire instructions in this regard properly indicated to the jury that the aggravating and mitigating circumstances were to be applied by a"totality of circumstances" approach, rather than "mere tabulation". Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982), at 1389, cert.denied, ___ U.S.___, 103 S.Ct 3572, 77 L.Ed.2d 1412 (1983). In view of such circumstances, and the lack of any objection to said instructions when given, Aldridge, supra; Castor, supra, the trial court's advisory sentence instructions were entirely proper.

POINT XII

TRIAL COURT APPROPRIATELY RESPONDED TO JURY INQUIRY, DURING ADVISORY SENTENCING PHASE DELIBERATIONS.

The trial court's response to the jury's inquiry as to its "split decision", (R, 2955), was a verbatim reiteration of the standard jury instructions on this point, re-advising the jury that "if by six or more votes the jury determines that the defendant should not be put to death" (R, 2955-56), the advisory sentence would be life imprisonment, with the mandatory minimum term. (R, 2955-2956). Florida Standard Criminal Jury Instructions, at 82; (R, 2951). As evidenced by the decisions in Hitchcock and Aldridge, supra, there is nothing wrong or inappropriate with this standard instruction (notwithstanding this Court's decision in Harich, supra). Furthermore, said response is not even close to being in the nature of an Allen charge. Allen v. United States, 164 U.S. 492, 17 S.Ct 154, 41 L.Ed.2d

525 (1896); Florida Standard Criminal Jury Instructions, supra, Number 2.21. The trial court's response was that mandated as the proper response in such a situation. Rose, supra, at 525.

Additionally, defense counsel expressly agreed to the trial court's response as the appropriate one, and the correct statement of the law, and no objections were made to said response when proposed.[5] (R, 2955, 2956; 2966-2968). As such, Appellant waived any challenge to the propriety of the trial court's response, before this Court. Aldridge, supra; Castor, supra; Harich, supra.

POINT XIII

TRIAL COURT APPROPRIATELY DENIED APPELLANT'S MOTION TO CONDUCT INDIVIDUALIZED DISCUSSIONS WITH JURORS, CONCERNING VERDICT. [Restated]

Appellant argues that the trial court should have polled each individual juror, based on statements allegedly made to the press after rendition of verdict, showing the jury's confusion by the Court's answer to their inquiry, and by the vote requirement at the penalty phase. Defense counsel did not proffer any statements or proof of any kind, to substantiate such allegations, and it is thus clear that said motion was based on nothing more than speculative conjecture. (R, 2972, 2973).

Furthermore, the alleged areas of confusion among the jurors, were questions which are integrally inherent in the verdict, and the deliberative process, thus entitled to sanctity

[5]Therefore, Harich, supra, would not support Appellant's position on this point.

and preservation. Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir 1982), cert.denied; ___ U.S.___, 104 S.Ct 348, 78 L.Ed.2d 698 (1983); State v. Blasi, 411 So.2d 1320 (Fla. 2nd DCA 1981); State v. Thomas, 405 So.2d 220 (Fla. 3rd DCA 1981); Parker v. State, 336 So.2d 426 (Fla. 1st DCA 1976); State v. Ramirez, 73 So.2d 218 (Fla. 1954). Since said areas were not the proper subject of post-verdict inquiries, the trial court's ruling in this regard was entirely proper. Thomas, supra; Ramirez, supra.

POINT XIV

TRIAL COURT AND PROSECUTION INQUIRIES, AND PROCEEDING, ON ALTERNATIVE THEORIES OF FIRST-DEGREE MURDER, WAS ENTIRELY PROPER, AND DID NOT VIOLATE DICTATES OF ENMUND v. FLORIDA. [Restated]
(APPELLANT'S POINTS XIV, XVII, XIX, XX, XXII)

Appellant's primary complaint, on this point, was the alleged "indoctrination" of the jury, with the allegedly erroneous impression that felony-murder was a "legally acceptable theory" upon which to find Appellant guilty of first-degree murder. This perspective patently ignores the statutory definitions of first-degree murder, as well as case law precedent which validated the State's option to proceed under alternate theories of first-degree murder.

Appellant did not object to any of the voir dire references, specifically cited in his brief, that the court and prosecution made to the felony-murder law. (R, 2207-2211, 2358). Such references and inquiries by the trial court and prosecutor were not only proper, but required, in view of the rights of the pro-

secution and defense to jurors who would fulfill their oath, in a capital case, to follow the law as instructed, Witherspoon, supra; see Appellee's Point I, supra. It is equally obvious that the defense placed heavy reliance on the felony-murder theory, by expressly agreeing to the propriety of a felony-murder instruction, in its motion for judgment of acquittal, and by specifically requesting an instruction on second-degree felony-murder. (R, 2786, 2787, 2789). Therefore, Appellant is barred from review on this point. Sapp v. State, 411 So.2d 363 (Fla. 1982); Castor, supra. It is well-accepted that the State may proceed under alternate theories of first-degree murder, even if premeditation is the only theory charged in the indictment. O'Callaghan v. State, 429 So.2d 691 (Fla. 1983); State v. Pinder, 375 So.2d 836 (Fla. 1979); Knight v. State, 338 So.2d 201 (Fla. 1976), Appellant's challenge to the "legality" of the felony-murder theory is completely untenable.

Finally, Appellant has erroneously interpreted Enmund, supra, to both preclude imposition of the death penalty, and to have altered Florida law as to felony-murder. The Enmund decision did not eliminate felony-murder as a crime, or make it a "legal fiction", as Appellant contends. Appellant's Brief, at 49. Instead, the Supreme Court, in focusing upon the relative culpability and involvement of the parties therein, established that the death penalty could not be imposed upon an individual who did not kill, attempt to kill, intend to kill, or aid or facilitate the killing. Enmund, 73 L.Ed.2d, at 1152. As already argued in Point X of this brief, supra, the factual circumstances

herein do not approach those of Enmund.

POINT XV

TRIAL COURT, IN PROPERLY EXCLUDING JURORS FOR CAUSE UNDER WITHERSPOON STANDARDS, DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS.

Appellee maintains that the arguments presented by Appellant, in this point, were addressed in this brief, in Point I.

The additional claim, in support of a "two jury" requirement, that jurors who have been "death qualified" are more likely per se to convict a defendant, has been specifically addressed in Spinkellink, supra, and by this Court in Riley and Maggard.

POINT XVI

TRIAL COURT APPROPRIATELY DENIED APPELLANT'S CHALLENGES TO CONSTITUTIONALITY OF STATUTE, AS CHARGED IN INDICTMENT. [Restated] (APPELLANT'S POINTS XVI, XVII)

The trial court's denial of motions challenging the indictment's sufficiency, and the Constitutionality of the murder statute, (Section 782.04, Florida Statutes (1977) and death penalty statute (Section 921.141, Florida Statutes (1979)), is challenged by Appellant in conclusory and summary terms, with little if any case law, statutory support or substantiation.

Appellant apparently challenges the use of the word "presents" in the indictment, rather than "charges". Appellant's Brief, at 55; Rule 3.140(c), Florida Rules of Criminal Procedure (1975). Such an alleged difference does not constitute a defect

in the indictment. Wilson v. State, 78 Fla. 41, 82 So. 600 (1919). Moreover, even if defective arguendo, such "variance", if any, did not render the indictment vague, to the point of prejudice. Rule 3.140(o), Fla.R.Crim.P.; State v. Gray, 435 So.2d 816 (Fla. 1983). Further, Appellant was not entitled to have the indictment include the list of statutory aggravating circumstances, as contained in Section 921.141, which the State intended to rely upon at the sentencing phase. Appellant had such notice of the possible aggravating circumstances, by reference to the statute. Spinkellink v. Wainwright, supra, at 609-610; Clark v. State, 379 So.2d 97 (Fla. 1979), cert.denied, 450 U.S. 936, 101 S.Ct 1402, 67 L.Ed.2d 371 (1981); Menendez, supra, at 1282, n. 21.

Appellant's challenges to the Constitutional nature of the murder and death penalty statutes have also been posed and rejected in prior cases. Both sections have withstood challenges, on the grounds of vagueness, in that the classifications of murder, according to degree, have been held to be sufficiently specific in delineation. Haber v. State, 396 So.2d 707 (Fla. 1981); State v. Jefferson, 347 So.2d 427 (Fla. 1977); Alford v. State, 307 So.2d 433 (Fla. 1975), cert.denied, 428 U.S. 923, 96 S.Ct 3234, 49 L.Ed.2d 1226 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert.denied, sub nom Hunter v. Florida, 416 U.S. 943, 94 S.Ct 1950, 40 L.Ed.2d 295 (1974).

Appellant's contentions, based on alleged due process grounds, have also been rejected on the merits, on the basis that the death penalty statutory circumstances are adequate

limits on the sentencing court's discretion. Ford v. Strickland, 696 F.2d 804 (11th Cir 1983), at 817-818; Spinkellink, supra, at 609, 610, 616; Proffit v. Wainwright, 428 U.S. 242, 96 S.Ct 2960, 49 L.Ed.2d 913, 925-927 (1976); Alvord v. State, 322 So.2d 533 (Fla. 1975), at 540; Alford; supra, at 444; Menendez v. State, 419 So.2d 312 (Fla. 1982); Tafero v. State, 403 So.2d 355 (Fla. 1981); Songer v. State, 365 So.2d 696 (Fla. 1978), at 700, cert. denied, 441 U.S. 956, 60 S.Ct 1060, 49 L.Ed.2d 2185 (1974). It is further clear that Appellant was not limited to the statutory mitigating circumstances, Lockett v. Ohio, 438 U.S. 586, 98 S. Ct 2954, 57 L.Ed.2d 973 (1978); Lewis v. State, 398 So.2d 432 (Fla. 1981), at 438-439; Menendez, supra; Ford, supra; Songer, supra; and that the enactment of said aggravating and mitigating circumstances was not an attempt by the Florida legislature to improperly usurp the procedural rule-making function of the Florida Supreme Court. Morgan v. State, 415 So.2d 6 (Fla. 1982), cert.denied, ___U.S.___, 103 S.Ct 473, 74 L.Ed.2d 621 (1982); Dobbert v. State, 375 So.2d 1069 (Fla. 1979). Moreover, the Florida Supreme Court does in fact conduct a proportionality review of all death penalty cases, in the interest of uniformity. Williams v. State, 437 So.2d 133 (Fla. 1983); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert.denied, 454 U.S. 1000, 102 S.Ct 542, 70 L.Ed. 407 (1981); Witt v. State, 387 So.2d 922 (Fla. 1980).

Appellant's Constitutional challenges, on the basis of Enmund, has been addressed in Point X and XV of this Brief. The argument that the State should elect its theory under first-

degree murder, was rejected in Pinder, supra, as addressed in Point XIV, supra.

Finally, Appellant's challenge, on Eighth Amendment grounds, must fail herein, since such a basis for challenge has also been similarly rejected. Proffitt, supra; Spinkellink, supra, at 595-606, 616; Menendez, supra.

POINT XVII

TRIAL COURT'S DENIAL OF APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL, FOR NEW TRIAL, AND TO PRECLUDE IMPOSITION OF DEATH PENALTY, WAS PROPER AND APPROPRIATE IN ALL RESPECTS. [Restated] (APPELLANT'S POINTS XVIII, XIX, and XXVIII).

Under the appropriate standard of review, Appellant, by moving for acquittal, admitted all facts and inferences therefrom, as presented by the State's case-in-chief, as well as conceding all inferences and presumptions by this Court to be resolved in favor of the trial court's ruling. Muwwakil v. State, 435 So.2d 304 (Fla. 3rd DCA 1983); Green v. State, 408 So.2d 1086 (Fla. 4th DCA 1982). In examining the State's evidence, it is apparent from the Record that denial of Appellant's motion was warranted.

Appellant's stated grounds, at trial, was the State's alleged failure to prove first-degree murder (on a premeditation theory), armed robbery, or kidnapping. (R, 2786-2788). A review of the Statement of the Facts, supra, and the Record, demonstrates that there was sufficient testimony and evidence presented as to all three criminal offenses, to present questions for the jury, including premeditated murder. Green, supra;

Point X, supra; Statement of Facts, supra.

Appellant further alleged, in his motion for new trial (as to the guilt/innocence stage), the standard arguments challenging the weight of the evidence, and further reargued the grounds raised in his motion for a directed verdict of acquittal. (R, 337; 2150-2151). Since the trial court's prior denial of Appellant's motion for judgment of acquittal was not a proper basis for a motion for new trial, the trial court's rejection was warranted. McArthur v. Nourse, 369 So.2d 578 (Fla. 1979). Appellant has not raised any argument or support, in his brief, to demonstrate an abuse of discretion by the trial court, in denying Appellant's other "mistrial" grounds. State v. Prieto, 439 So.2d 288 (Fla. 3rd DCA 1983); Baker v. State, 336 So.2d 364 (Fla. 1976).

Appellant's attempt at a conclusory "shotgun" approach, which in reality was an attack upon the sufficiency of the evidence, mandates affirmance of the denial of new trial. Perry v. State, 362 So.2d 460 (Fla. 1st DCA 1978); Coles v. State, 91 So. 2d 200 (Fla. 1957); Baker, supra.

Appellant's challenge to the trial court's refusal to preclude the death penalty in Points XIX and XX, has been adequately addressed by Appellee in Points X and XIV, supra.

POINT XVIII

TRIAL COURT APPROPRIATELY DENIED APPELLANT'S REQUESTED INSTRUCTION OF SECOND-DEGREE FELONY-MURDER, SINCE THERE WAS NO EVIDENCE TO SUPPORT SAME. [Restated] (APPELLANT'S POINT XXI).

It is axiomatic that if there is no evidence presented to support a particular defense theory or view of the evidence, so as to merit a particular instruction, a defendant is not then entitled to have such an instruction given. Holley v. State, 423 So.2d 562 (Fla. 1st DCA 1982); Palmes v. State, 397 So.2d 648 (Fla. 1980), cert.denied, 454 U.S. 882, 102 S.Ct 369, 70 L. Ed.2d 195 (1981). The Record demonstrates that such was the proper reason for the trial court's refusal to instruct on second-degree felony-murder.

The particular element of second-degree felony-murder, which was not supported by the evidence on the Record, is that the defendant committing the killing did not commit, and was not involved in, the underlying felony. Section 782.04(3)(i), Florida Statutes (1982); also, see Florida Standard Criminal Jury Instructions, Felony-Murder - Second Degree (1981), at 66; State v. Lowery, 419 So.2d 621 (Fla. 1982). Because the evidence demonstrated that Appellant did participate, and was involved and present at the robbery and murder scenes, said evidence did not support a legal theory requiring evidence of non-presence and lack of involvement in the underlying felony. Lowery, supra; Palmes, supra.

The overwhelming evidence of Appellant's guilt rendered any such erroneous (if so) rejection of said requested in-

struction, as harmless. Allen v. State, 424 So.2d 101 (Fla. 1st DCA 1982); Harden v. State, 422 So.2d 1106 (Fla. 5th DCA 1982); Palmes, supra.

POINT XIX

TRIAL COURT DID NOT IMPROPERLY PREVENT DEFENSE COUNSEL FROM OFFERING EVIDENCE AS TO WEIGHT OF APPELLANT'S CONFESSION, SINCE APPELLANT MADE NO PROFFER, AND SUSTAINING OF DEFENSE COUNSEL'S QUESTION CONCERNING VOLUNTARINESS OF CONFESSION WAS PROPER. [Restated] (APPELLANT'S POINT XXIV)

Appellant has stated that defense counsel was improperly deprived of presenting evidence, as to the weight of Appellant's confession, to the jury. This claim has been procedurally barred, since the Record contains no proffer by defense counsel of evidence that, but for a ruling by the trial court, would have been presented on this question. (R, 2733-2740). Defense counsel specifically stated she would not cross-examine Officer Jones on this subject. (R, 2740). This Court must therefore affirm on this point. Ketrow v. State, 414 So.2d 298 (Fla. 2nd DCA 1982); Bennett v. State, 405 So.2d 265 (Fla. 4th DCA 1981); Whitted v. State, 362 So.2d 668 (Fla. 1978), at 672.

On the merits, Appellant's counsel attempted to elicit, from Officer Jones, his opinion on the necessity of re-advising Appellant of his rights, after his verbal confession. (R, 2733). As the State and trial court correctly noted, the necessity for re-advising Appellant of his Miranda rights, presented a legal question, concerning the voluntariness of Appellant's statement, concerning his willingness to talk, and his knowledge and oppor-

tunity to exercise his rights while under questioning. Williams, supra, 386 So.2d, at 29. Such questions have consistently been viewed as preliminary inquiries, involving the admissibility of statements as evidence which are within the province of the trial court to determine. DeConingh, supra; Palmes, supra, at 653; Brewer, supra.

The trial court, far from restricting Appellant from eliciting testimony, on the weight of the confession, advised counsel she was free to ask a wide range of possible questions on the subject. (R, 2739, 2740). Defense counsel's lone inquiry was properly restricted, as an attempt by counsel to improperly re-visit the question of voluntariness before the jury. Palmes, at 653.

POINT XX

CONVICTIONS AND SENTENCES, FOR CRIMES OF ROBBERY AND KIDNAPPING, DID NOT VIOLATE APPELLANT'S RIGHTS AGAINST DOUBLE JEOPARDY. [Restated] (APPELLANT'S POINT XXIII)

Appellant's argument initially ignores the fact that the Record contains no attempt by Appellant to raise the double jeopardy issue by pre-trial motion, or a specific challenge on these grounds to the indictment, therefore waiving consideration herein of this issue. Drakes v. State, 400 So.2d 487 (Fla. 5th DCA 1981); Bell v. State, 262 So.2d 244 (Fla. 4th DCA 1972), cert.denied, 265 So.2d 50 (Fla. 1972).

Assuming arguendo appropriate preservation of the issue, a determination as to whether robbery and kidnapping were "lesser included offenses" of murder for double jeopardy pur-

poses, depends upon an examination of the statutory elements, to see if one offense "..requires an element of proof that the other does not..." State v. Baker, (Case No: 63,269)[9 FLW 282][Fla. Supreme Court, July 12, 1984]; Bell v. State, 437 So.2d 1057 (Fla. 1982); State v. Carpenter, 417 So.2d 986 (Fla. 1982); Blockburger v. United States, 284 U.S. 299, 52 S.Ct 180, 76 L.Ed. 306 (1932).

In examining the statutory offenses of first degree murder, kidnapping and robbery, it is evident, under this test, that each statute fits this test. Baker, supra. It has been held that "Because the robbery statute requires the taking of property, which the murder statute does not, and the first degree murder statute requires an unlawful killing, which the robbery statute does not...", Ennis v. State, 364 So.2d 497 (Fla. 2nd DCA 1978), at 499, the offenses of robbery and murder are not deemed the "same offense", for double jeopardy purposes. Id. Furthermore, the kidnapping statute requires forcible confinement or abduction of an individual against his consent, with intent to commit any one of four alternative acts; the murder and robbery statutes do not involve these considerations. Section 787.01, Florida Statutes (1979); Section 782.04, Florida Statutes, (1977); Section 812.13, Florida Statutes (1980); Blockburger, supra. Therefore, there was no double jeopardy violation created by Appellant's multiple convictions on different, dissimilar criminal offenses, even though arising out of the same facts.

According to this Court's latest treatment of the issue in Baker, supra, neither robbery or kidnapping could be con-

sidered as "necessarily lesser included offenses". Baker, at 282. As defined by this Court, a "necessarily" lesser included offense is one in which the lesser offense is always an essential aspect of the major offense, as with robbery and larceny, since "... every robbery necessarily includes larceny". Brown v. State, 206 So.2d 377 (Fla. 1968), at 381-382 (e.a.). Robbery and kidnapping are not in all circumstances necessarily included in proof of murder, unless, depending on the evidence, the theory of murder is felony-murder. Thus, the foregoing analysis and test apply herein, because robbery and kidnapping must be considered, at most, as "Category 4" offenses under Brown, supra, and do not involve the same elements as that of murder, by statute. Baker, at 283; Bell, supra; State v. Gibson, (Case No. 61,325)[9 FLW 234, 235, and 235, n.2][Fla.Sup.Court, June 14, 1984].

Thus, under the appropriate Constitutional analysis, the separate convictions and sentences for robbery and kidnapping, herein, does not violate double jeopardy considerations. Baker; Gibson, supra; Bell. The Florida legislature enactment of a separate and cumulative statutory scheme for each of the three crimes, further mandates this conclusion. Bell; Missouri v. Hunter, ___ U.S. ___, 103 S.Ct 673, 74 L.Ed.2d 535 (1983); Gibson.

POINT XXI

OFFICER'S TESTIMONY, AS TO FACT THAT CO-ACCOMPLICE HAD IMPLICATED APPELLANT, DID NOT CONSTITUTE BRUTON VIOLATION; FURTHER, ERROR, IF ANY, WAS HARMLESS.
[Restated] (APPELLANT'S POINT XXV)

Appellant's assertions on this point have been procedurally barred, by virtue of Appellant's concession at trial that said statement, as connected to evidence demonstrating Appellant's acquiescence in the trial court's limitation of such evidence, (R, 2716), further precludes appellate review on this point. Pope, supra; McCrae, supra.

On the merits, the Record demonstrates that no Bruton rule violation occurred. The statement given by John Bush, was never introduced at trial, and Bush and Appellant were not jointly tried. It was apparent from the State's proffer that Officer Jones merely indicated he had taken a statement from Bush, and that said statement had been made. (R, 2680, 2681). This testimony does not constitute the introduction of a co-accomplice's statements, against Appellant. Bruton, supra. When there was any testimony as to the nature of Bush's statement, inculpatory of Appellant, it was in compliance with the trial court's instruction, pursuant to defense objection that references to Bush's statement were limited to the relation of said statement to Appellant. (R, 2716).

The underlying premise of a Bruton violation is the introduction of incriminating statements against a defendant, and the denial of the right to cross-examine and confront the person making the inculpatory statement. Hall v. State, 381 So.

2d 683 (Fla. 1978); Bruton, supra. However, the only testimony on the nature of Bush's statement came from Officer Lloyd Jones, who was available for cross-examination and was present during the transcription of Bush's statement. Pena v. State, 432 So.2d 715 (Fla. 3rd DCA 1983). Thus, the underlying basis of a Bruton problem, did not exist herein.

Assuming there was a Bruton error (R, 2716-2717), Appellant confessed to the crimes, inculpating himself and his accomplices, as admitted at trial. (R, 2753). This fact, and the overwhelming proof of Appellant's guilt, made the officer's testimony on this point (if erroneous) either clearly harmless, or did not constitute a Bruton violation. Parker v. Randolph, 442 U.S. 62, 99 S.Ct 2132, 60 L.Ed.2d 713 (1979); Harrington v. California, 295 U.S. 250, 89 S.Ct 1726, 23 L.Ed.2d 284 (1969); Hall v. Wainwright, 559 F.2d 964 (5th Cir 1977), cert.denied, 434 U.S. 1076, 98 S.Ct 1266, 55 L.Ed.2d 782 (1978); Adams v. State, 445 So.2d 1132 (Fla. 2nd DCA 1984); Gafford v. State, 427 So.2d 1088 (Fla. 1st DCA 1983); Damon v. State, 397 So.2d 1224 (Fla. 3rd DCA 1981).

POINT XXII

TRIAL COURT APPROPRIATELY DENIED APPELLANT'S MOTIONS FOR FUNDS FOR EXPERTS.
[Restated] (APPELLANT'S POINTXXVI)

Appellant's subject motions, seeking funds for expert assistance, were no more than general, conclusory and speculative requests, resembling a "fishing expedition". (R, 148-149; 150-151). Appellant did not present any specific grounds, or de-

fenses, or allege the manner in which any such ground or defense would be aided or shown by such expertise.

Appellant cites no authority for his proposition that he was Constitutionally entitled to such assistance. It has been held in Florida that the right of any witness to compensation by a governmental entity is purely and entirely dependent upon the creation of such entitlement in Florida, by statute. Palm Beach County v. Rose, 347 So.2d 127 (Fla. 4th DCA 1977), quashed on other grounds, 361 So.2d 135 (Fla. 1978). Appellant has not based his right to authorization of payment, by the State, for such experts, upon any statutory authority in Florida.

Federal courts have authorized state payment of expert assistance funds only when the nature of the assistance sought is psychiatric, and there is a serious issue as to the sanity of a criminal defendant. Hoback v. Alabama, 607 F.2d 680 (5th Cir 1979), at 682, n. 1; Pedrero v. Wainwright, 590 F.2d 1383 (5th Cir 1979), at 1390-1391, and cases cited therein. Appellant sought no such specific assistance from the trial court.

Thus, the trial court properly denied such motions for expert assistance funds.

POINT XXIII

TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO PRECLUDE EXCLUSION OF MOTHERS WITH CHILDREN UNDER FIFTEEN, FROM JURY SERVICE; FURTHER, ERROR, IF ANY, WAS HARMLESS.
[Restated] (APPELLANT'S POINT ~~XXIX~~)

Appellant's claim in this regard infers that since Section 40.013(4) of the Florida Statutes was held Unconstitu-

tional, see Anthony v. Alachua County Court Executive, 403 So.2d 1085 (Fla. 1st DCA 1981), affirmed, 418 So.2d 264 (Fla. 1982), the trial court should have precluded exclusion of mothers of fifteen year old children, per se.[6] (R, 143-144). Appellant made no showing that any such potential jurors were excluded on such a basis by the trial court, or that any such individual potential jurors could not have been subject to exclusion from service from any other reason. Section 40.013 et seq, Florida Statutes (1983).

Furthermore, Appellant has not demonstrated any prejudice, as a result of the trial court's denial of relief, since there was no automatic exclusion of any potential juror, by virtue of being a mother, employed full-time with children under 15 years old. (R, 2176-2465).

Thus, Appellant's point herein lacks merit.

POINT XXIV

SINCE APPELLANT'S INDIVIDUAL APPELLATE POINTS LACK MERIT, AND DO NOT CUMULATIVELY DEMONSTRATE ERROR, APPELLANT'S CLAIM OF FUNDAMENTAL ERROR IS WITHOUT MERIT. [Restated] (APPELLANT'S POINT XXX)

Since Appellee has demonstrated the lack of merit in each and all of Appellant's issues, Appellant's claim of "cumulative fundamental error" is insufficient on its face.

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[6]Effective June 23, 1983, Section 40.013(4) was rewritten, to provide for excusal of expectant mothers or parents not employed full-time, and in custody of children under 6 years old.

POINT XXV

SECTION 925.036, FLORIDA STATUTES (1981) DOES NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS.
[Restated] (APPELLANT'S POINT XXXI)

Appellant's challenge to this statute must be summarily rejected, from a procedural standpoint, since it was not raised before the trial court, Trushin v. State, 425 So.2d 1126 (Fla. 1982), and does not constitute fundamental error. Hargrave v. State, 427 So.2d 713 (Fla. 1983).

Furthermore, Appellant's attack upon the statutory limit, for fees to appointed defense or appellate counsel, has been resolved by prior decisions of this Court, upholding the Constitutionality of said statute. Chandler v. State, 442 So.2d 171 (Fla. 1983), at 172, n.1; Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981); MacKenzie v. Hillsborough County, 288 So.2d 200 (Fla. 1973). Appellant's general and conclusory arguments on this point, are merely complaints about inadequate pay for services rendered, which does not constitute a sufficient basis for challenging the Constitutionality of Section 925.036. Blair v. State, 406 So.2d 1103 (Fla. 1981), at 1108.

CONCLUSION

WHEREFORE, Appellee respectfully requests that this Court AFFIRM the Judgment of Convictions of murder, robbery and kidnapping, and the sentences imposed for each crime, in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been mailed to WAYNE R. McDONOUGH, ESQUIRE, Attorney for Appellant, Saliba and McDonough, P.A., 2121-14th Avenue, Box 1690, Vero Beach, Florida 32960, this 4th day of September, 1984.

Richard G. Bartmon

Of Counsel