IN THE SUPREME COURT OF FLORIDA

RAYMOND THOMPSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

APPEAL NO. 69,352
(Case No. 85-899CFA)

ANSWER BRIEF OF APPELLEE

On Appeal from the Circuit Court,
Seventeenth Judicial Circuit, Broward
County, Florida [Criminal Division]

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PRELIMINARY STATEMENT

Appellant was the defendant in the Circuit Court, Seventeenth Judicial Circuit, In and For Broward County, Florida. Appellee was the prosecution below. This Court has jurisdiction pursuant to Article V, Section 3(b)(1), Florida Constitution.

STATMENT OF THE CASE AND FACTS

Appellee accepts the Statement of the Case and Facts as presented on page two (2) through ten (10) of the Appellant's Initial Brief to the extent the statement is accurate with the following additions and/or modifications.

1. The exact amount of money in the safe was never established beyond an amount "over $400,000."

2. The statement that witness Bobby Davis and his wife were supported by the federal governemnt is a myopic interpretation of participation in the witness protection program.

SUMMARY OF THE ARGUMENT

POINT I

The Appellant failed to preserve the Brady issue in that his Motions for Discovery were not inclusive as to an affidavit in another case. Any error is harmless as the affidavit did not contain evidence which affected the guilt

determining process. The contents of the affidavit was more prejudicial to Appellant than not.

POINT II

Appellant's multiple assertions of prejudice resulting from alleged references to his bad character or propensity to commit crime are illusory and/or not preserved for appellate review. Allegations as to evidence of "threats" made to the victims family are, on the whole, unsupportable, as are the allegations of impropriety in the admission of testimony of "witness protection programs" and "hugh sums of money." The allegations as to drug and alcohol use are without merit. The witnesses testified to their own use, defense counsel opened the door to this line of questioning and the issue was not preserved as to each allegation. Evidence as to the witnesses testimony in other cases did not prejudice Appellant. The alleged cumulative impact is nugatory as other allegations of error, supra, are without substance.

POINT III

There was no violation of double jeopardy standards. The Appellant motioned for mistrial at the first trial, not the Appellee. The Appellee did not provoke the mistrial.

POINT IV

State and Federal jurisdiction over the high seas is concurrent sub judice as essential elements of the crime were committed in Florida. The essential element of premeditation

occurred in Florida, as did the kidnapping. There was no question raised at trial as to jurisdiction and the jury instruction was to venue; there was no objection to the instruction.

POINT V

The trial court's override of the recommended life sentence was proper as the mitigating circumstances were found to be without substance. The aggravating factors, sub judice, provided the trial court with the mandate to override. There was no overlap in aggravating circumstances as to one set of facts, the prior conviction is not too remote in time, the crime was committed while Appellant was engaged in the commission of a kidnapping in a heinous, atrocious or cruel manner, and it was done in a cold calculated and premeditated manner for pecuniary gain.

POINT VI

The Constitutionality of Florida's capital sentencing statute, §921.141, Fla. Stat., has been upheld by this Court. As applied, sub judice, the capital sentence is Constitutional. Allegations of acquittal of the instant murder in federal court are without merit.

POINT I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR MISTRIAL, AS THERE WAS NO BRADY VIOLATION.

Appellant alleges that his cause was prejudiced by the prosecution's failure to supply an affidavit, sworn to by one of the state's main witnesses sub judice. The crux of Appellant's allegations of prejudice is that the credibility of the affiant could have been further impeached had his affidavit been supplied to defense counsel in timely fashion.[1] The affidavit was a document obtained in the case of State v. Errico. (R. 3324). The issue is whether the "prosecution ... withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty ... ." Brady v. Maryland, 373 U.S. 87, 88 (1963). Appellee has determined, and will demonstrate forthwith, why Appellant's argument fails. Affirmation of Appellant's guilt is mandated.

On August 21, 1986 Appellant's counsel filed an "Index of Exhibits Filed with Motion for New Trial" (R. 3322), the Motion for New Trial was filed on August 20, 1986. (R. 3295-3310). Exhibit C of said Index (R. 3324) is the Affidavit that was allegedly withheld from defense counsel. Appellant's defense counsel obtained the affidvait on August 6, 1986.

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[1] Upon receipt of the transcript of the hearing regarding the alleged Brady violation from the State Attorney's office, Appellee will motion this Court to Supplement the Record and Brief. The Prosecutor indicates the circumstances under which the affidavit was prepared further bolsters Appellee's argument.

Any alleged prejudice is solely illusory as the only information not elicited at trial was that Davis in his October **23, 1985** affidavit swore that Appellant told him that the cash amount stolen by the victim was "approximately **$500,000**". (R. **3324).** The testimony of Davis at trial and/or deposition was that the dollar amount was either $600,000 or over **$400,000.** The value of an impeachment based on an affidavit where the approximate amount given is between the two figures testified to, is nugatory.

The validity of the alleged Brady violation must be determined with deference to the numerous cases that have interpreted the mandate of the Supreme Court. In United States v. Agurs, **427** U.S. **97 (1976)** the Court explicated the three basic situations where Brady applies. Agurs at **103.** The second situation encompasses "a pretrial request for specific evidence." Id. at **104.** Appellee first notes that Appellant made four requests for discovery information.

> 1. The complete criminal history records of any State witness who has or will give testimony against the Defendant in the case at bar.

(R. 2984, 3008).

> 2. Defendant **...** moves this Court to issue an order requiring the State of Florida to reveal any agreement entered into between the State of Florida, the United States Attorney, or any other law enforcement agency and any prosecution witness **...** .

(R. 3000, 3008)

> 3. [P]ursuant to Rule of Criminal Procefure 3.220(a)(1)(i)(ii), moves this Court to enter an order compelling the State Attorney to disclose to defense counsel the following: All investigative Reports made by any federal or local agencies including but not limited to the F.B.I., DEA and IRS.

(R. 3010). The basis of number three was to secure information that "a law enforcement officer's credibility may be impeached through use of his reports to show prior statements inconsistent with his trial tesitmony." (R. 3010, 3011).

> 4. All documents and tangible objects, including but not limited to memorandum, medical reports, transcripts, notes and audio and video tapes, containing or reflecting information regarding psychiatric and/or drug abuse treatment that any state civilian witness, specifically icnluding Bobby Davis has been or is presently receiving.

(R. 3025).

The above recitation of Requests for Discovery do not cover affidavits given in other prosecutions. Appellee maintains that defense counsel, by an act of omission, has not preserved a basis for a Brady claim.

Notwithstanding, Appellee, in the alternative posits, assuming arguendo there was a Brady violation, that Appellant was not prejudiced; and any claims to the contrary are without substance.[2]

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[2] Appellant references R. 3295 wherein it is alleged that Defendant filed a Demand for Discovery pursuant to Rule 3.220. Appellee maintains that the alleged February 12, 1985 Demand is not in the record. (R. Vol. 20 p. 2 Index).

The Appellant's Motion for New Trial (R. 3295), which is the sum and substance of Appellant's Brady allegations, indicates the innocuous nature of the affidavit allegedly withheld. The contents of the affidavit (R. 3324-26) do not "have a definite impact on the credibility of [the] important prosecution witness." United States v. Pitt, 717 F.2d 1334, 1339 (11th Cir. 1983) quoting Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975). Preliminarily and contrary to Appellant's allegations, there was no Richardson violation.[3] The state filed with defense counsel a list of state witnesses. (R. 3045, wherein defense motions to strike). Further, Richardson and its progeny address allegations of discovery violations at trial where corrective action, if required, may be taken.

> [W]hen it is brought to the attention of the trial court during the course of the proceedings that the state has failed to comply with the Rule the Court has a discretion to determine if such failure has prejudiced the defendant on trial.

Richardson at 776 (emphasis added). Richardson is inapposite sub judice.

On the merits of Appellant's front line attack of an alleged Brady violation, Appellee, based on due process constituional precepts states:

> Unless the omission deprived the defendant of a fair trial, there was no consittutional violation requiring that the verdict be set aside; and absent a constitutional violation,

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[3] Richardson v. State, 246 So.2d 771 (Fla. 1971).

> there was no breach of the prosecutor's constitutional duty to disclose.

United States v. Agurs, **427** U.S. **97, 108 (1976).** The standard by which constitutional error is determined is materiality, and must be viewed "in the context of the entire record." Agurs at **112.**

> [I]f evidence actually has no probative significance at all, no purpose would be served by requriing a new trial **... .**

Aqurs at 110. Even if, as alleged by Petitioner, this one affidavit was dispositive of the affiant's credibility as to create extreme doubt as to his motives, a new trial is not mandated as the testimony of the affiant, Bobby Davis, was not "determinative of guilt or innocence." Giglio v. United States, **405** U.S. **150, 154 (1972).** State witnesses, especially Bobby Stephens (R. **2031)** present substantial and competent evidence, albeit circumstantial, of Appellant's guilt. Robert Tippie testified that Appellant offered $100,000 to a man if he could find Savoy. (R. **1693, 1694).** Bobby Stephens testified that he worked for Appellant (R. **2050);** and that Appellant was one of the men on the boat from which Savoy was thrown after he was shot (R. **2051);** Appellant instructed Bobby Davis and Pat Menillo to bring Savoy up from below deck, Appellant was giving the orders. (R. **2052).** The Appellant was standing behind Savoy when he was shot. (R. **2053-55).**

The preceding standards, used to determine the effect to the alleged lack of disclosure of impeachment material was refined in United States v. Baqley, **473** U.S. **667 (1985).** It is

this final refinement that Appellee relies upon to discredit Appellant's allegations of error, assuming a request was made for materials sworn to in another prosecution of another defendant. The Agurs triparte standard of materiality was restated in Bagley.

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Bagley at **682.** The Bagley Court also formulated a standard by which this Court may review the totality of circumstances.

> [T]he reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation, or presentation of the defendant's case.

Bagley at **683.** Sub judice, any document withheld, and Appellee strongly denies a Brady violation, would not have altered the effect of the extensive impeachment of witness/affiant Bobby Davis. Defense counsel had deposed Bobby Davis and had opportunity to elicit any and all prior statements.

Appellant's first substantive allegation as to the trial value of the alleged impeachment evidence in the affidavit regards the affiant's trial testimony about the kidnapping of the victim, James Savoy. At trial Bobby Davis testified on direct examination that Bobby Stephens called him with information that Savoy was at the Cricket Club. (R. **926-928).** Pat Menillo and

Scott Errico went into the Cricket Club for a few hours and they, along with the affiant, planned a car accident in order to effectuate Savoy's kidnapping pursuant to Appellant's orders. (R. **929-931).** They subsequently brought Savoy to Stephen's house. (R. **932).** The Appellant was informed that Savoy was being held, and the following day Appellant directed that Savoy be brought to his Hallandale home and be kept on his boat. (R. **950-954).** Bobby Davis testified, and this factor ties Appellant in further, that after Appellant's unsuccessful search for Savoy, Appellant put out a contract on Savoy's life. (R. **926, 1080-81).** It is coincidential that Appellant's <u>own</u> "men" brought Savoy in, thereby connecting him explicitly with the kidnapping. Davis' affidavit does tie in Appellant and is not an inconsistent statement. The affidavit, as a whole (R. **3324-3326),** implicates Appellant--his money was stolen, he and the affiant went to Boston (R. **1074, 3324)** to find Savoy and <u>his</u> "employee's'' (R. **887, 888, 1199, 1689, 1698, 2041, 2043)** called the day subsequent to the kidnapping--the kidnapping was accomplished and they needed further instructions. Defense counsel, as to this subissue - the kidnapping - extensively impeached Bobby Davis as to contradictions in the dates of the kidnapping (R. **1074-75),** not that it did not occur. Davis testified that once in Boston he and Scott Errico thought they had found Savoy, Sr. They actually found Savoy, Jr.

> Q: [Prosecutor] If it would have been James Savoy, Sr. what were you planning to do?

A: [Davis] We would have grabbed him.

Q: what would you have done with him?

A: Well the plans, if it was Jimmie Savoy, was to grab him and hold him to call Ray [Appellant] and find out what to do next.

Q: Why would you have called Ray?

A: He's the one we worked for.

(R. **916, 917).** Other witnesses tied Appellant in with the kidnapping. Robert Tippie testified that Appellant offered him $100,000.00 to find Savoy. (R. **1693).** Robert Stephens testified that he tried calling Appellant when he first spotted Savoy, but couldn't get through, and therefore called Bobby Davis. (R. **2040).**

The affidavit alleged to be wrongfully withheld further ties Appellant in with the kidnapping. Bobby Davis was impeached as to his testimony regarding the date, place and time of the kidnapping. The affidavit does not say Appellant participated or did not participate <u>actively</u> in the initial kidnapping of Savoy. But implicitly Petitioner is implicated.

I was associated with a group of people, including SCOTT ERRICO, who were involved in a large drug smuggling ring directed by Raymond Michael Thompson.

(R. **3324).** Explicitly, the Appellant is implicated in the subsequent and continued kidnapping of Savoy. Paragraph **12** of the affidavit:

After Thompson questioned Savoy we were instructed to take him to Thompson's house at

460 Sunset Isle, Hallandale, Broward County, Florida.

(R. 3325). Trial testimony of Bobby Davis (R. **903, 917,** 951), and Bobby Stephens (R. **2040, 2048-50)** further implicate Appellant in the kidnapping. It was pursuant to his instructions that Savoy was transported from Stephens' home to Appellant's home/boat where he was further restrained. (R. **953).**

Petitioner's next allegation of resulting prejudice concerns the amount of money Bobby Davis stated Appellant said was stolen. In the affidavit Bobby Davis said the amount allegedly stolen was "approximately **$500,000."** (R. **3324).** (See f.n. 1). On direct examination, Davis testified that he was told by Appellant that "over **$400,000"** was stolen. **(R. 949, 957).** On cross examination, defense counsel impeached this testimony. Davis testified that he never was told **$600,000.** was taken. **(R. 1054, 1063, 1069, 1187-89).**

> Q: [Defense Counsel] All right, sir. Do you recall telling Special Agent Parrish that it was $600,000?
>
> A: [Bobby Davis] No, sir, I always thought it was $400,000.
>
> Q: So you never told him $600,000?
>
> A: I'm not sure if I did or not but I always thought it was over **400,000.**
>
> Q: You never remember using the term $600,000?
>
> A: No, I don't.

Q: And you have no recollection of telling Special Agent Parrish that it was allegedly $600,000?

A: Like I said, I always thought it was over 400,000.

(R. 1076). "Over $400,000" can be any amount - approximately $500,000 or $600,000. Without the drama of cross examination and the sanctity of the jury room during deliberations, further impeachment by reference to "approximately 500,000" would not further discredit Bobby Davis and surely is not testimony of such value as to vitiate the entire trial or deprive Appellant of a fair trial. The amount of money Savoy stole was not the reason for the prosecution sub judice -- (See Appellant's brief at 22 "C"). The kidnapping and murder for the money Savoy stole, were the reasons.

Petitioner's bold assertion that witness Bobby Davis committed perjury in his October 23, 1985 affidavit is not an accurate representation. Point for point dissection of the affidavit supports Davis' trial testimony, or at least is not a contradiction thereof. Appellant was convicted because the facts presented to the jury established his involvement beyond a reasonable doubt, and not because an evidentiary luke warm document was not requested by, or alternatively, made available to defense counsel. The points of alleged inconsistency, (Appellant's Brief at 19 note 2) are miniscule compared to the thoroughly impeaching cross examination defense counsel subjected this witness to.

Petitioner might not have used the affidavit regardless of whether he requested it or not. The affidavit (R. 3324) states the approximate amount of money stolen was "smuggling profits." All things being equal, the minimal impact of further impeachment as to the amount of money stolen, a tangent at best, is outweighed by the prejudice to Appellant of the tail end of that sentence.

Appellant finds an impeachable contradiction in what affiant Bobby Davis said regarding Savoy's attempted escape (R. 3325 1/11), compared with witness Bobby Stephens' version of the attempted escape.[4] There is no impeachment potential in that allegation. Appellant also contends that the affiant's statement "Savoy attempted to escape again while on the boat but was caught"[5] contradicts evidence of distance and location from the shore nwhere they disposed of Savoy. Assuming Appellant meant paragraph 18 (R. 3325), the affiant's statement about taking the "boat out approximately one mile into the Atlantic Ocean ... [that] the water was rough and we could go out no further" confirms his trial testimony. "We went east southeast. It was pretty rough so I'm not very sure about the distance." (R. 956). He also said they went out maybe a thousand yards. (R. 1088). But he also testified that they "were approximately a mile out." (R. 958).

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4 Appellant's brief at 19, note 2.
5 R. 3325 paragraph 16.

Respondent maintains that there was no Brady violation as defense counsel did not request the affidavit; the record reflects requests for other items, but no general or specific request for the affidavit used in State v. Errico, Case No. 85-899. Assuming the request was made, however, the State complied with witness lists and this information was otherwise available to the defense. Further, the allegations of a thwarted impeachment of Bobby Davis are bogus. The affiant's statements referenced in Appellant's initial brief are, at most, approximations of facts that happened years ago and are confusing as this witness was involved in trial testimony in other cases involving Appellant. There are no absolute contradictions and the alleged prejudice to Petitioner is illusory. The effect of the claimed materiality of the affidavit would have done nothing to "undermine the outcome." Bagley at 682.

Respondent respectfully requests this Court to affirm Appellant's conviction and sentence as the alleged Brady wiolation was not prejudical as the affidavit's impeachment value was nonexistent and further, defense counsel has not shown a request for said document.

POINT II

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE.

Appellant maintains that his conviction was a result of improper references to his bad character and/or his propensity to

commit crime. Appellee asserts that said allegations are without merit.

A. Testimony of Threats to Savoy and His Family

Appellant references nine alleged incidents where reference is made to threats to Savoy and/or his family by Appellant or his employees. (Appellant's brief at 21).

1. (R. 914-915). A review of the testimony indicates not one "threat" reference was made. Bobby Davis testified that he and Scott Errico were in Boston looking for Savoy, Sr. They found Savoy, Jr. (R. 915). Under false pretenses these men gained entrance to Savoy, Jr.'s room and they "just engaged him in small talk." (R. 916). They are no objections, no threats, and consequently no appealable issue.

2. (R. 925). Bobby Davis testified that Appellant told him that he had some "traces of the phone calls when Scott and Pat were calling and threatening." (R. 924-25). The threats were 'over the money stolen by Savoy and were made to his parents. (R. 925). Defense counsel did not object and therefore the lack of preservation negates this allegation of error and prejudice. Clark v. State, 363 So.2d 331 (Fla. 1978)

3. (R. 1230-32). There is one reference here as to threats made. David Shomers, from the Florida Department of Law Enforcement, testified that he went to Massachusetts to collect evidence. He interviewed the son and daughter-in-law of Savoy. (R. 1230). He collected a letter they had from Savoy's

girlfriend and "some original notes that Ricky Savoy had made concerning phone calls ... . [A]nd [he] collected several family snapshots." (R. **1230-31).** The next day he met with the local police and learned they had reports of threatening phone calls which they reported to the FBI. (R. 1232). No objection was made and there was no reference to Appellant. There was no error or prejudice to Appellant by this testimony. Clark.

4. (R. **1473).** The only reference to phone calls was "Did there ever come a time when you had occasion to talk to your brother about certain phone calls that were made?" (R. **1473)** James Savoy, Jr. answered "Yes." There was no objection, no perservation of the nonexistent prejudice claim and no error. Clark.

5. (R. **1476).** No reference to threats were made. Savoy, Jr. testified that he was "suspicious of everything that was happening." (R. **1476).** Defense objected (R. **1477)** to the prosecutor's question as to why he was suspicious, and there is no testimony regarding threats at page **1476.**

6. (R. **1488).** Savoy's son Richard testified that he received one phone call, that he spoke to both his wife and mother-in-law regarding phone calls--no mention here as to the nature of the calls. Defense made no objections. There was no error, nor contest to, the admission of this testimony.

7. (R. **1402-1494).** Richard Savoy testified that he went to the police and told them of the events that were taking place, he

contacted the phone company and requested his phone be tapped. (R. **1492).** He did not get a tap put on his phone. He then spoke with the FBI. (R. **1494).** At R. **1495** there is reference to a conversation about phones with the FBI. Defense objected on hearsay grounds. The objection was sustained. **(R. 1495).** A proffer and argument was made (R. **1495-1504)** and as a result there was an agreement (R. **1504)** between defense and prosecution. The following questions were asked of Richard Savoy.

> Q: Now, Mr. Savoy, you received telephone calls; correct?
>
> A: Yes.
>
> Q: And you were threatened and your family were threatened; correct?
>
> A: Yes.

(R. 1513). There was no prejudice, if the objection was sustained. Clark.

8. (R. **1513-1514).** Defense counsel and the prosecution agreed, supra (R. **1504)** that leading questions would be permissible in reference to threatening phone calls. The "over our objection'' (R. **1513)** notation is not in reference to the phone calls, but rather to testimony that Savoy, the victim, told his son he had stolen a safe. (R. **1505-1513).** The references to the "threats" did not elicit any testimony as to who made the calls or the contents thereof. Defense counsel waived any contention now made

on appeal. There was no error in the admission of this testimony.

9. (R. **1519).** On cross examination of Richard Savoy, defense counsel asked ''You testified about a threatening phone call you received; did you not?" (R. **1519).** The answer was yes, and no further reference was made. There was no resulting prejudice.

Appellant created nine false subissues on appeal regarding reference to his bad character and propensity to commit crimes. These references are only in Appellant's mind, on the one hand, or on the other, were not preserved for argument on appeal, either by not making any objection nor motion for mistrial, Johnston v. State, **497** So.2d **863** (Fla. **1986);** or by waiving objections. Appellee requests affirmation of Appellant's conviction and sentence. The trial court did not err in admitting the contested testimony.

B. Testimony about Witness Protestion Programs

The trial court was correct in admitting testimony regarding witness protection program. United States v. Nahoom, **791** F.2d **841** (11th Cir. **1986)** Appellant references five incidents of improper reference to witness protection programs.

1. (R. **828).** John Peterson of the FBI (R. **814)** testified on direct examination that Savoy spoke with him and he, Peterson, consequently "contacted the U.S. Attorney's Office relative to possible witness protection program for him." (R. **828).** No objection was made, this contention is not preserved and

therefore the issue is improperly before this Court. Clark. Defense counsel did not cross examine this witness.

2. (R. 831-833). At a side bar conference, out of the jury's presence, defense counsel moved for a mistrial without objection, to the above-referenced testimony as to a witness protection program for Savoy. (R. 828). The motion was denied. Appellee states that the lack of objection and untimely mistrial motion waived this issue on appeal.

> A motion for a mistrial is addressed to the sound discretion of the trial judge and should only be granted in the case of absolute necessity.

Johnston v. State, 497 So.2d 863, 869 (Fla. 1986). The trial court heard argument from both the defense and prosecution. Defense argued that reference to a witness protection program for Savoy disparages the character of Appellant, leading the jury to believe he is a dangerous man involved with organized crime. The prosecution stated, and the trial court's denial of the mistrial motion indicate concurrance, that Savoy was on the run at the time and no reference was made to organized crime. The testimony was regarding what the FBI agent did. (R. 832).

> If the defendant fails to object or if, after having objected, he does not ask for a mistrial, his silence will be considered an implied waiver.

Clark v. State, 363 So.2d 331, 335 (Fla. 1978). This Court should deny this aspect of Appellant's appeal as this question

was not preserved and it is yet another non-issue presented for review.

3. (R. 990). Witness Bobby Davis testified that he asked the agents investigating the crime for protection for his family. (R. **990).** Defense counsel object and motioned for a mistrial. **A** side bar was held. Defense argued again, that the "only possible inference of that is to the dangerousness of Mr. Thompson because of his cooperation with the authorities." The court denied his motion stating "If you were to go to turn State's evidence and expose a murder wouldn't you be worrying about your family." (R. **991).** Defense argument as to relevancy are without merit. Davis went to the FBI for help and to turn in evidence in return for charges being dropped against him. The testimony about protection for his family corroborated testimony regarding the crime charged against Appellant. The trial court's ruling was well within the realm of its sound discretion and should be upheld. Johnston at **869.**

4. (R. **1182).** Bobby Davis was testifying. On cross examination defense counsel was impeaching his credibility by questioning him as to payments he received in return for cooperating with authorities. (R. **1037-39).** On redirect, the prosecution elicited that the money received was part and parcel of witness protection.

> Q: Now, the costs that Mr. Black had indicated, the 30 some thousand dollars: was your family ever put in any type of program?

A: Yes, sir, they have been.

Q: What type of program is that?

A: Its the witness protection program.

Q: Is that the cost he's listed in here and indicated the amount of cost?

A: Yes, sir.

(R. 1181, 1182). A side bar conversation on defense's motion for mistrial, without objection, ensued. Prosecution's argument that defense had opened the door to this line of questioning was a proper ground for the denial of Appellant's mistrial motion.

> Had defense counsel confined himself to an attack upon the credibility of the witnesses rather than to attack the State for entering into the plea agreements by the State Attorney's Office, he would be on firm ground. The State, however, was not required to sit silently by and accept the attack without clarifying and explaining their general purpose for entering into such agreements. It remained for the jury to determine from the evidence whether or not the defendant was guilty of conspiracy to traffic in cannabis or was an innocent victim of a frame-up between the State and the two witnesses. The defense attorney made his charged frame-up an issue before the jury by the nature of his opening statement.

Tosh v. State, 424 So.2d 97, 99 (Fla. 1st DCA 1982); Huff v. State, 495 So.2d 145, 148 (Fla. 1986). Sub judice, defense counsel opened the door as to money received by witness Davis for his "testimony". The prosecution clarified the purpose for which the money was expended.

5. (R. 1716). Robert Tippie testified on redirect examination that the expenses he received from the government were, in part,

related to the witness protection program. (R. 1715-16). Defense counsel objected, without a motion for mistrial. (R. 1716). The objection was overruled. No grounds for the objection were given. "[T]he general objection ... were not made with the required specificity to apprise the trial court of error or preserve the objection for appellate review. Ferguson v. State, 417 So.2d 639 (Fla. 1982) ... ." Johnston v. State, 497 So.2d 863 (Fla. 1986). Beyond the non-preservation of defense's objection, Appellee maintains the same argument, number 4 above, as to defense's opening the door (R. 1708-11) to the prosecution's query as to the purposes of the money paid to Tippie.

Appellant has not been prejudiced by any testimony regarding the witness protection program. Any prejudice, and Appellee strongly suggests the absence thereof, is vitiated by the probative value of the evidence; and further the testimony was, for the most part, rehabilitative. There was no evidence admitted as to Appellant's bad character or propensity toward crime. This Court should affirm.

C. Testimony Regarding Huge Sums of Money.

Appellant argues that he was prejudiced by witness testimony as to the amount of money he was known to have, and yet admits the tangential nature of the testimony. (Appellant's brief at 22). Testimony as to the amount of money Appellant was known to have indicates that he had the amount of money stolen.

The stolen money was the reason for the murder for which Appellant was convicted.

1. (R. **891).** Appellant objected to Bobby Davis' reference to large sums of money on the basis of prejudice, untimeliness of the reference, in relation to the charged crimes, and relevance. The trial court's ruling that the circumstantial evidence is necessary to show Appellant had the funds stolen by Savoy should be upheld. Johnston v. State, supra at **869.** There is no support to Appellant's contention that the jury had to reach the "inescapable conclusion **...** that Appellant must be engaged in some illegal business to generate that kind of money and, therefore, probably committed this crime as well.'' (Appellant's brief at **22).** The evidence that Appellant always had money on pay day (R. **892)** corroborates the prosecution's theory that Appellant was the boss of this group of people who rounded up Savoy and did Appellant's bidding.

2. (R. **1688-89).** Appellant did not object to Robert Tippie's testimony that Appellant was seen with large amounts of money (R. **1688),** but rather to Tippie's nonresponsive answer when first asked whether Appellant was seen with large amounts of money. Tippie stated "One time he dropped off some. Well, the bag was **__"** (R. **1688).** The basis of the objection is not the basis of the point on appeal. Sapp v. State, 411 **So.2d 363** (Fla. 4th DCA **1982).**

One may not tender a position to the trial court on one ground and successfully

offer a different basis for that position on appeal.

Sapp. at **364.** The time element of the spotting of large amounts of money was narrowed down. Prior to the non-responsive objection (R. **1688),** Appellant objected to the proximity in time of the witness' reference to large amounts of money to the crime for which Appellant was convicted. The court sustained that aspect of the objection (R. **1687),** contrary to Appellant's allegations. Clark. The testimony was properly admitted into evidence. (#1 above).

3. (R. **1703-1706).** Appellant argues that witness Tippie's testimony on direct examination was inconsistent with his deposition. The deposition testimony was that Appellant told him there was five million dollars in the suitcase, whereas at trial he testified that he saw the five million dollars. Appellant's trial counsel did not want to cross examine this witness fearing prejudice to his client. The cross examination, according to trial counsel, would bring out "goings on at the Amity Marina that involved marijuana smuggling **... ."** (R. **1703).** The prosecution maintained the source of the money was drugs, and it was perfectly admissible, yet he refrained from going into it. (R. **1706).** The trial court overruled Appellant's objection and motion for mistrial based on Appellant's right to cross examine the witness. The fact that defense counsel chose not to cross examine this witness is not grounds for granting a mistrial. "It is clearly established that a mistrial should not be granted for

prejudice flowing from a defense attorney's tactics which are prejudicial to his own case.'' United States v. Cook, **461 F.2d 906, 912** (5th Cir. **1972).**

4. (R. **1954).** Witness Robert Sheer testified that he saw Appellant with four five hundred thousand dollars in **1980** or **1981.** There was no objection to this testimony (R. 1954), and as noted (See #1), the evidence that Appellant had large amounts of money helps prove the feasibility of his having the large amount of money stolen, thereby giving a motive to Savoy's murder. The probative value of this testimony far outweighs any alleged prejudicial impact.

5. (R. **2033).** Witness Robert Stephens testified, that he saw Appellant with $150,000, over defense objection based on irrelevancy. The objection was overruled and as noted, supra, the evidence of Appellant's possession of large sums of money was an intregral aspect of the prosecution's case.

Appellant's argument regarding Appellant's payments to Bobby Davis, an employee, and to Bobby Tippie, an employee, are without merit. Prosecution theories included proving that both Davis and Tippie, among others, worked for Appellant. These men were on the inside and knew what Appellant had done, first to find Savoy, and subsequently, to orchestrate his murder.

Defense counsel did not object to witness Tippie's reference to the money he made working for Appellant (R. **1718)** and therefore, this allegation was not preserved for appeal.

Clark. Bobby Davis' testimony as to receiving **$15,000** as his first payment was not objected to contemporaneously to the response. (R. **887).** No motion was reserved as to this objection. The defense counsel's argument on other objections (R. **896),** that were reserved are not valid as each reference to Appellant's holdings and payments to people tied into all of the prosecutions arguments. Bobby Davis, for example, referenced Omar's Styling Salon. Witness Barraclough (R. **1556)** owns Al and Don's Lock and Key Shop. He also installs safes. He installed a safe at Omar's (R. **1560),** as well as at Savoy's tack shop. (R. **1561).** A pattern, or a web, was spun by Appellant, and each reference to another aspect of Appellant's life -- his money, his homes, his associations, his businesses **--** brings this web into light and forms the bases of the prosecution's case. Each facet further indicates Appellant's involvement in Savoy's murder, See McCrae v. State, **395** So.2d **1145** (Fla. **1986)** where, unless the evidence shows propensity to commit crime, the probative value outweighs the alleged prejudice. The probative value far outweighs any prejudice, sub judice.

D. Testimony Concerning Alcohol and Drug Abuse.

Appellant states that witness testimony as to their substance abuse habits has cast great dispersion upon him. Appellant's reference to Bobby Davis' testimony regarding his Uzi machine gun (R. 110) was brought out on cross examination by defense counsel, as was drug abuse testimony. (R. **1106, 1152,**

1206-07). Appellant cannot now object to testimony which his own counsel elicited on cross examination. Cook, supra. The prosecution's reference to drugs and weapons (R. 1197, 1200) was entirely appropriate, as defense counsel opened the door to this line of questioning. Defense counsel did not object to references made at R. 1197, 1200, other than an objection to a proposed proffer. Clark.

References to witness Tippie's drinking habits (R. 1781), and parties at Appellant's home (R. 1719) were not objected to, and further, were elicited on redirect examination, subsequent to defense counsel's opening the door on cross examination. (R. 1713). There was no error in the admission of this testimony.

Reference to Robert Sheer's drug and alcohol use was brought out on cross examination by defense counsel. (R. 1955-1957). Redirect examination which referenced the drug use was in response to the cross examination and there was no objection made. The issue is not preserved for appeal.

E. Testimony about Other Homicides

Appellant maintains that witness reference to their testimony in other cases, as well as this one, is prejudicial. Appellant also acknowledges that such testimony, in and of itself, is innocuous, but in conjunction with other allegations of character malignment becomes highly prejudicial to him.

The testimony about other homicides was non-specific to Appellant. As Appellant admits, it was the witnesses who stated they made plea agreements whereby they were obligated to give testimony in different homicide cases. This cast dispersion, not on Appellant's, but rather, on their own credibilty. Appellant broadly states the cumulative impact has prejudiced his case, yet has actually failed to demonstrate as much. Jacobson v. State, So.2d 1133, 1134 (Fla. 3rd DCA 1979) states that the initial burden is on Appellant, not Appellee.

There is no Williams v. State, 110 So.2d 654 (Fla. 1959) violation. No other crimes committed by Appellant were brought out.

> [W]e find that the testimony purporting to link the [Appellant] to the act of [other murders] was not prejudicial. This testimony did not implicate the [appellant] ... but was introduced to establish the motivation of the witness in cooperating with the State.

Jacobson at 1135. As in Jacobson, witness testimony did not prejudice the Appellant. Appellant's conviction should be affirmed.

POINT III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS.

Appellant's bold, but bare boned allegation of purposeful goading of defense counsel to declare a mistrial in Appellant's first trial, thereby warranting dismissal based on double jeopardy grounds, is without merit. On May **16, 1986** the trial court heard the defense counsel's motion to dismiss. (R. **750-769).** It was the court's ruling that the Prosecution did not engage in any "governmental action which was intended to provoke a mistrial." (R. **768).** The trial court's ruling is presumed correct. DeConingh V. State, **433** So.2d **501** (Fla. **1983).**

In Oregon v. Kennedy, **465** U.S. **667 (1982)** the Supreme Court stated that the "manifest necessity" standard used in the determination as to whether a second trial, following mistrial, is barred based on double jeopardy grounds, is inapplicable where the "defendant himself has elected to terminate the proceedings against him **... ."** Id. at **672.** The Court, invoking a standard applicable sub judice, appplied a new standard that considers prosecutorial intent. Id. at **675.**

> [W]e hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for mistrial was intended to provoke the defendant into moving for a mistrial.

Id. at 679. There is no indication that the prosecutor, at the first trial, intended defense counsel to move for a mistrial. The hearing on Appellant's Motion to Dismiss clearly provides valid reason for the witness answer that led to the mistrial. (R. 751).

> A: [Witness] I was asked what questions I was asking of a witness that had been developed, a new witness, Robert Tippie, and in the context of that I said that I asked him if he had information of any homicides.
>
> Q: [Prosecution] Why did you use homicides with a plural?
>
> A: As in technique of interviews and interrogations, we are taught to ask open-ended questions. I would ask that of any newly developed witness that I had in the investigation not wanting to close off his responses. If I knew of one homicide I won't want to tell him I only knew of one. I wanted to leave it open so that he would tell me perhaps of some I didn't know about or all he knew about.

(R. 752).

The precise prosecutorial question is not of record, other than Witness Special Agent Shomers was asked what question he asked Tippie. One question asked by Shomers was what Tippie knew of any homicides. The above explanation negates allegations of intent, and as further alleged, misconduct designed to buy the prosecution more time. Nothing presented by the Appellant established malevalent intent, and Appellee maintains that there exists no preclusion to further investigation should a mistrial be declared. Further investigation is merely a manifestation of

a fastidious prosecution. There is no indication, nor allegation, that further investigation reaped the prosecution any benefits, rendering harmless any alleged state misconduct, although Appellee strongly denies any misconduct. The questioning of Agent Shomers by defense counsel at the dismissal hearing is indicative of innocent intent. (R. **755, 756).** The alleged purpose of further investiation was to find a corpus delicti. No body or car parts were found before, or after, the mistrial negating Appellant's argument.

Defense counsel, at the first trial, denied the trial court's numerous efforts to formulate a curative instruction designed to dampen the exaggerated effects of an opened ended reference to homicides. (R. **768-69).** There is nothing to demonstrate that the prosecutor provoked the mistrial. Defense could have accepted the curative instruction fashioned by the Court.

> [T]he kind of statement by a prosecutor which invokes double jeopardy is not the mere utterance of an intentional or purposely made statement, but additionally it must be made in bad faith and intentionally designed to provoke a mistrial.

State v. Howe, **432** So.2d **795, 796** (Fla. 4th DCA **1983).** There is no valid basis for Appellant to now claim that double jeopardy barred the prosecution below.

POINT IV

THE TRIAL COURT HAD JURISDICTION OVER A HOMICIDE COMMITTED ON THE HIGH SEAS.

Appellant's argument regarding jurisdiction over crimes committed on the high seas is based on exclusive federal jurisdiction, on the one hand, and on the other, alternatively, notwithstanding that concurrent jurisdiction may exist, the trial court improperly instructed the jury. Appellant's contention ignores the lucid precedent as to exclusive versus concurrent jurisdiction. See also §910.005(2), Fla.Stat. Appellee maintains that Appellant's position on exclusive federal jurisdiction is erroneous, as is his stance regarding the improriety of the charge to the jury. (R. 3150).

In Leonard v. United States, 500 F.2d 673 (5th Cir. 1974) the Court held that "[a] sovereign has jurisdiction to try an offense where only a part of that offense has been committed within its boundaries." Id. at 674. This Court has extended Leonard to mean that where essential elements of a crime are committed with two separate jurisdictions, there is concon-current, not exclusive jurisdiction.

> By section 910.005 [Fla.Stat.], we have broadened our jurisdiction to allow the trial of the homicide offense when the death occurs in the state or when an essential element of the homicide occurs in Florida even though the fatal blow was struck outside the state.

Lane v. State, 388 So.2d 1022, 1027 (Fla. 1980). Keen v. State, 504 So.2d 396 (Fla. 1987) reiterates the meaning of Lane's

holding as to the essential elements of a crime: "whether an essential element of the offense occurred within the state is a factual question to be determined by the jury under appropriate instructions." Keen at **399.** As in Keen, it is apparent from the record "that the essential element of premeditation occurred within Florida." Id. at **399.** The Appellant undertook to find the victim, Savoy (R. **926, 1074, 1080-81, 3324)** and to kill him. (R. **953, 1691).** Appellant directed the kidnapping of Savoy, transporting him to his boat and keeping him there (R. **952)** in order to take him out to sea and kill him. (R. **950-954).** The planning of the execution is an essential element of the homicide which occurred in and around Hallendale, Florida, Broward County, thereby negating Appellant's jurisdictional claims. The jury was instructed that the crime had to have been committed in Broward County, Florida. (R. **3150).**

The jury instruction given, and alleged by Appellant to be insufficient, was proper. Preliminarily Keen's mandate of a proper jury instruction is that the jury must find that an essential element of the crime occurred in Florida before a guilty verdict is returned, if there is a question as to jurisdiction at trial. The record, sub judice, indicates a jury instruction on venue. (R. **3150).** The charge conference (R. **2362-2425)** is without reference or request for an instruction as to jurisdiction. The trial court is not required to fashion an instruction to give to the jury, Davis v. State, **13** F.L.W. **157**

(Fla. 1988). The Appellant did not object to the venue instruction as contemplated (R. 2402, 2423) or as given (R. 2583, 2591) and has not preserved the jurisdiction instruction allegation, as no request was made for an instruction as to jurisdiction. Bailey v. State, 21 So.2d 217, 220 (Fla. 1945).

Appellee respectfully suggests to this Court that the jury instruction as given is proper. Further, no objection to the venue instruction was forthcoming, thereby waiving this issue on appeal. Clark. The state and federal government's jurisdiction is concurrent. Accordingly, Appellee requests this Court's affirmance of Appellant's conviction.

POINT V

THE TRIAL COURT'S OVERRIDE OF THE JURY'S RECOMMENDED SENTENCE WAS PROPER GIVEN FIVE AGGRAVATING, AND NO MITIGATING, CIRCUMSTANCES.

Appellant maintains that the trial court's override of the jury's recommendation of life imprisonment for the crime committed is erroneous, as the jury allegedly had sufficient evidence upon which to base its sentence. This argument is without merit. The trial court properly found the alleged mitigating circumstances not applicable sub judice, and further reiterated the substance of the aggravating factors.[6]

[6] Appellant states the Appellee presented evidence of only one aggravating factor (Appellant's brief at 29). This is not accurate as the Prosecutor explicated five aggravating circumstances. (R. 2849-2855). Appellant perhaps means the physical evidence of a prior conviction of rape.

This Court holds that it is not improper for the trial court to override a jury recommendation of life imprisonment where there are no mitigating circumstances. Lusk v. State, 446 So.2d 1038 (Fla. 1984). "The jury's recommendation of life was not based on any valid mitigating factor discernible from the record and therefore it was proper for the trial judge to decline to follow their recommendation." Id. at 1043. In the instant case, as in Lusk, the record is devoid of valid mitigating factors upon which to base a life sentence as opposed to the capital punishment meted out by the court.

The defense presented evidence of Appellant's alleged mental disorder. "Appellant suffered from paranoidal grandiosity, extreme stress which led to two serious heart reactions, and in March 1982, was living and acting under severe mental and emotional disturbance." (Appellant's brief at 30). The testimony of psychiatric deficiencies is without substance as it is based almost exclusively on Appellant's input. (R. 2943-2947). At the penalty phase of the trial, the trial court and jury heard testimony that Appellant was greviously affected by the death of his young son. (R. 2709). Appellee does not contest the enormous grief potential of the death; but instead, points out to this Court that the death occurred subsequent to the murder upon which the sentence of death has been imposed. (R. 2861). The murder occurred in March of 1982, the Appellant's son was killed in December 1982. (R. 2784). The Appellant's

son was killed in December **1982.** (R. **2784).** The Appellant's family, his mother, father, stepson and two sisters each testified that in March **1982** the Appellant was not so substantially impaired as to understanding what is, or is not, a crime. (R. **2785, 2807, 2822, 2834, 2843).** The family testimony contradicts Dr. Stillman's conclusion that Appellant was unable to appreciate the criminality of his actions. As noted by the trial judge upon pronouncement of sentence:

> All of the credible evidence that was introduced indicate that the Defendant was able to appreciate the criminaltiy of his conduct and was able to conform his conduct to the requirements of law if he so desired.

(R. 2948). Appellee points out that Dr. Stillman was with the Appellant for a maximum of one hour and twenty minutes (R. **2935),** one week before the penalty phase hearing. (R. **2724).** Dr. Stillman never spoke to Appellant's family (R. **2943),** he never listened to the tape recording of Appellant and Bobby Davis. (R. **2728, 2943).** Of Appellant's two heart reactions, the first one occurred <u>after</u> the murder. (R. **2733).** The basis of Dr. Stillman's opinion that Appellant suffers from organic brain damage is based on his one conversation with Appellant, where he interpreted <u>Appellant's</u> words and body language. **(R. 2725, 2943-44).**

> The possibility of organic brain damage, which James now claims he has, does not necessarily mean that one is incompetent or that one may engage in violent, dangerous behavior and not be held accountable. There are many people suffering from varying degrees of organic

> brain disease who can and do function in today's society. We therefore find no merit to this issue.

James v. State, 489 So.2d 737, 739 (Fla. 1986). See also, Witt v. State, 465 So.2d 510 (Fla. 1985). Dr. Stillman found Appellant's poor memory an indiction of organic brain damage - Appellant could not list all the presidents of the United States from Reagan to Eisenhower. (R. 2710). Yet upon cross-examination Dr. Stillman himself left out one or two presidents from the group. (R. 2858). Dr. Stillman did not know where the Appellant was working in 1982 (R. 2767) and could not, on the limited information, provided by only Appellant and a Dr. Kelly (R. 2728) who saw Appellant after his son's death in 1983 (R. 1732), determine Appellant's mental state in March of 1982. (R. 2723).

The evidence of Appellant's drug use, used as a rationalization for his actions in March of 1982, does not obviate the obvious lack of substantial impact the drugs had on Appellant. As noted, supra, all of Appellant's family members testified that Appellant was not so impaired as to not know a criminal act from a non-criminal act. Other evidence contradicting the allegations of brain damage due to drugs and alcohol interfering with Appellant's capacity to appreciate legalities and to normally function, is that in March of 1982 Appellant was the "boss" of 50 to 60 people. (R. 2946). He masterminded, from the inception, the victim's kidnapping and murder. (See Point 11). Pursuant to Tedder v. State, 322 So.2d 908 (Fla. 1975),

there is no reasonable basis to support the jury's recommendation of life. Appellant's reference to Ferry v. State, 507 So.2d 1373 (Fla. 1987) is not an appropriate precedent ~~sub~~ judice. Ferry was a schizophrenic who had very "real" delusions, confusing reality and non-reality. ~~Id~~, at 1376. The first mitigating factor proferred, sub judice, was found to be without substance. (R. 2947).

"The trial court has broad discretion in determining the applicability of mitigating circumstances urged." Roberts v. State, 510 So.2d 885, 894 (Fla. 1987). The expert testimony may be accepted by the trial court or may not be. ~~Id.~~ ~~Sub~~ judice, there was trial testimony that there were parties at Appellant's house, but the only information of his actual use of drugs came from the Appellant or his family members at the penalty phase of the trial. More importantly, as in Roberts:

> There is no testimony in this record, from any witness, that the defendant was exhibiting any of the behavioral characteristics at the time of the murder, which would support a corroborate the bald assertions of the existence of extreme emotional or mental disturbance.

Roberts at 895. The trial court properly found this mitigating factor -- mental or emotional disturbance -- to be inapplicable; this Court should uphold that finding.

Appellant next alleges that the victim precipitated the whole chain of events. (Appellant's brief at 31). This allegation is without merit as to mitigation. "That the victims were armed cocaine dealers does not justify a night of robbery,

torture, kidnapping and murder." Bolender v. State, 422 So.2d 833, 837 (Fla. 1982). Likewise, the fact that the instant victim allegedly stole Appellant's money, at least a half year prior to his kidnapping and murder, should not be considered in mitigation of Appellant's sentence.

Appellant next claims that his age at the time of the crime, 52, should have been found to be a valid mitigating factor. The trial court found otherwise and should be upheld. (R. 2948).

> We have previously addressed this question of whether age, without more, is to be considered a mitigating factor, ... but the question continues to be raised. It should be recognized that age is simply a fact, every murderer has one, and it can be considered under the general instruction that the jury may consider any aspect of the defendant's character or the statutory mitigating factor, section 921.141(6)(g), Florida, Statutes (1981). However, if it is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime such as immaturity or senility. In this case, for example, we see nothing in the record that would warrant finding any truly mitigating significance in the appellant's age. On the contrary, appellant's age, along with the other evidence, suggests that appellant is a mature, experienced person of fifty-eight years, of sound mind and body who knew very well what he was undertaking and, equally, that the undertaking was without any pretense of moral or legal justification.

Echols v. State, 484 So.2d 568 (Fla. 1985) (citations omitted) (emphasis added); see also Eutzy v. State, 458 So.2d 755 (Fla. 1984). Appellant has not linked his age to another characteristic of himself or the crime. Accordingly, the trial

court properly rejected this factor as a mitigator and that ruling should be upheld.

Appellant states that a non-statutory mitigating factor should have been validated in that he was a "devoted loving parent to his son and stepson and suffered the incomparable tragedy of losing his young son." (Appellant's brief at **33).** Appellee posits that, in addition to the fact that his son died subsequent to the murder, supra, Appellant was not such a good father, as his stepson was aware of his father's cocaine use. (R. **2817).** Although Appellant's parents testified (R. **2779, 2794, 2795-2811)** neither parent was emphatic as to Appellant's good characteristics. Neither parent was certain as to the nature of their son's profession. (R. **2803-04).** Appellant's mother did state that he helped in the garden as a young boy and watched over his young brothers. (R. **2798).** This alleged mitigating circumstance is nothing more than a comment on the fact that Appellant functioned as a family member. There was no evidence that should have lead the court to accept this as a mitigating factor.

The fact that Appellant's co-defendants did not receive the death sentence is Appellant's next line of defense stating this disparity should be considered a non-statutory mitigating factor. Appellee maintains the disparity in sentencing was proper under the circumstances of this case. "[A] jury may not compare treatment of those guilty of a different, lesser crime

when weighing the propriety of the death penalty. Eutzy v. State, 458 So.2d 775 (Fla. 1984)...." Brookings v. State, 495 So.2d 135, 143 (Fla. 1986). As in Eutzy, the trial court was confronted with a situation where the culpability of Appellant and the parties receiving lesser sentences is disparate. Appellant was convicted of murder and kidnapping. He was the "boss" and the others who plead guilty merely functioned at his command. (See point II).

> For a jury recommendation of life to be reasonable, based on lenient treatment accorded an accomplice, the jury must have been presented with evidence tending to prove the accomplice's equal culpability. ... The jury may reasonably compare the treatment of those equally guilty of a crime; it may not compare treatment of those guilty of a different, lesser crime in weighing the propriety of the death penalty. Because the record is devoid of any evidence which would show that [another] was a principal in the first degree in the murder, we must reject the argument that the jury's recommendation of life could reasonably have been based on the disparate treatment of [others].

Eutzy at 760. In the case at bar it was Appellant's money that was stolen; he decided to send his workers to Boston to find the man who stole his money (R. 902), he took out a contract on Savoy (R. 1693), he questioned Savoy as to the whereabouts of the money (R. 951, 956), he directed B. Davis to hit Savoy (R. 957) and finally, he got his money revenge by shooting Savoy in the head. (R. 959-960). "It is permissible for different sentences to be imposed on capital co-defendants whose culpability differs in degree." Williamson v. State, 511 So.2d 289, 293 (Fla.

1987). Accordingly, it was proper for the trial court to find no support for this non-statutory mitigating factor.

Contrary to Appellant's bold assertion (Appellant's brief at 34, 35) that the "jury arrived at the recommendation of life in part based on ... inconclusive evidence of who the shooter was[]" Appellee maintains, for the reasons given above, that the evidence is clear that the murder of James Savoy was a result of the scheme and action of Appellant. Unlike the situation in Malloy v. State, 382 So.2d 1190 (Fla. 1979) where there was conflict as to who the triggerman was; the facts sub judice, indicate, beyond a reasonable doubt, that it was Appellant's stolen money and his desire to avenge. In Malloy, no one of the three defendants had an interest in the victim's murder more than any other. Here, Appellant was looking out for his own interest; he was the boss--Savoy was brought to his house, put on his boat and brought out to sea on his demand. Bobby Davis and the rest of his workers were facilitating Appellant, at his demand, for the final shot. Under the facts of this case, the trial court properly imposed the death penalty. Witt v. State, 342 So.2d 497 (Fla. 1977).

The factors given in mitigation are all inapplicable sub judice. The trial court's override of the jury's recommended life sentence was proper and should be upheld as Appellant's

death sentence is supported by "facts ... so clear and convincing that no reasonable person could differ." Tedder at 910.

AGGRAVATING CIRCUMSTANCES

The aggravating circusmtances applied sub judice are:

> 1. [Appellant] was previously convicted of another capital felony or felony involving the use or threat of violence to another person. (R. 2936).
>
> 2. [T]he crime for which the [Appellant] is to be sentenced was committed while the [Appellant] was engaged in the commission of a kidnapping. (R. 2936).
>
> 3. [T]he crime for which the [Appellant] is to be sentenced was commited for pecuniary gain. (R. 2937).
>
> 4. [T]he crime for which Mr. Thompson is to be sentenced is especially heinous, atrocious or cruel. (R. 2938).
>
> 5. [T]he crime for which the [Appellant] is to be sentenced was committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification. (R. 2940).

The trial court found substantial support for each of the foregoing five reasons. Appellant's allegations in negation are without merit.

Appellant states that the trial court's reliance on a 1950 rape conviction is too remote; and therefore an invalid aggravating circumstance. In Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986), the Supreme Court of Florida found a similar argument to be without merit. Although, in Melendez the crime was committed ten years, as opposed to thirty-two years, after

the aggravating conviction, the Court did not qualify its opinion as to the span of years or even remoteness in time. The time span is irrelevant. The fact there has been a prior conviction "of another capital felony or of a felony involving the use or threat of violence to [a] person ..." is sufficient to fill the statutory requirement. §921.141(5)(b), Fla. Stat. (R. 2936).

Appellant next alleges that the trial court erroneously aggravated Appellant's sentence for three separate reasons based on one set of facts. The trial court did not err. Appellant's reference to Thomas v. State, 456 So.2d 454 (Fla. 1984) is inapposite as to this point on appeal. In Thomas the trial court aggravated the sentence pursuant to §§921.141(5)(e)(g), Fla.Stat.--avoidance of arrest and interferrance with governmental functions. Thomas at 459. The prosecution in Thomas conceded, under the facts of that case, that that defendant's avoiding arrest was an interferance with a governmental function. Sub judice, such is not the case. The three aggravating factors that Appellant alleges overlap are §§921.141(5)(d),(h) &(i), Fla.Stat.

In Suarez v. State, 481 So.2d 1201 (Fla. 1985) the Court held, as to a slight overlap in that defendant's flight and subsequent avoidance of arrest, that there were "[s]ufficient distinct facts [to] support and make relevant both these aggravating circumstances." Id. at 1209. Even in Thomas, supra, after disallowing the two aggravating factors cited as over-

lapping, the Court upheld the capital sentence based on four aggravating factors, two of which are appropo sub judice -- the murder was especially heinous, atrocious, or cruel; and the murder was committed in a cold, calculated and premeditated manner without pretense of legal or moral justification. Thomas at 461. Appellant insists that these two factors, in conjunction with the kidnapping of Savoy, render the Court's reliance on these factors erroneous. Clearly, kidnapping is separate from the other factors, which, in and of themselves, are not overlapping. Thomas. Appellant's claim is bogus and flies in the face of precedent. In Jennings v. State, 512 So.2d 169 (Fla. 1987) the Court affirmed the use of three aggravating factors:

> The judge determined the following aggravating circumstances:
>
> 1. The murder was committed by appellant while he was engaged in the commission of ... kidnapping ... .
>
> 2. The murder was especially heinous, atrocious or cruel.
>
> 3. The murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

Jennings v. State, at 176 (Fla. 1987). Sub judice, the cited aggravating circumstances were used in addition to two others. The trial court should be affirmed. The trial court did not use the same set of facts for these three aggravating circumstances. The kidnapping is based on one set of acts. (R. 2936-37). The crime was especially heinous, atrocious and cruel as

Savoy was tied up, beaten, threatened and told he could die easy or die hard. Weights and chains were wrapped around his body prior to his murder-- a point blank shot to the back of his head. It is unkown if Savoy died instantly. (R. 2938-39). The cold, calculated and premeditated aggravating factor (R. 2940-41) is based on Appellant's intent from the first to kill Savoy (R. 902); he put out a contract on his life (R. 1693) and even went to Boston to hunt him down. (R. 903). The underlying basis of each aggravation is disparate and valid.

Although Appellant argues only the overlapping nature of these three aggravating circusmtances, Appellee posits that the trial judge gave substantiated reasons for his acceptance of the statutory aggravating circumstances. (R. 2936-41). Appellant claims that the judge erroneously found as an aggravating factor the fact that the crime was committed for pecuniary gain. (Appellant's brief at 36). Appellant had $600,000 stolen; he sought out James Savoy who was in possession of the money; prior to killing Savoy, Appellant questioned him, extensively, as to the whereabouts of the money. (R. 951, 956). If, as alleged by Appellant, he did not want the money, the questioning as to its whereabouts would not have taken place. Duality in purpose--revenge and pecuniary gain--are not mutually exclusive. Contrary to Appellant's statement that there was no evidence that the murder was committed for pecuniary gain, Appellee refers this Court to the record where Appellant is shown

to have questioned Savoy regarding the money. (R. 951, 956). Had Savoy not stolen the money, there would have been no reason for his being kidnapped and subsequently killed. This aggravating factor is properly applied sub judice.

The jury had no reasonable basis upon which to base the life sentence. The factors in mitigation were all found to be without merit. (R. 2941-2949). The Court grounded its override, in addition to the lack of substantiated mitigating circumstances, on the emotional impact to the jury of defense counsel's argument at the end of the penalty phase. (R. 2949).

> Ladies and gentlemen, the decision that you will make in this case must be, has to be the most important decision that you will ever make in your entire life. I mean there really can't be any question but that is the case and you are not making a decision about your own life. You know, we all have a right to make decisions about our lives. What we do. What we say. Where we go. What our profession is. But now you are asked to make a decision about somebody else's life and not just an important decision in their life as to what they are going to do but whether or not that person ought to live or die. (R. 2464).
>
> I mean [this has] got to be the most important decision anyone of you will ever have to make in your lives. And the responsibility I believe is immense in a case like this. You have to make a life or death decision ... . (R.2464).
>
> [B]ut what happens if you make a mistake in a case like this where somebody's life hinges on the outcome of the case ... ? (R. 2465).
>
> When you look back on this case and whether it be six months from now or five years from now or when if they should ever happen to execute Raymond Thompson, you

> wouldn't want to look back on this case and say oh, my God, I may have made a mistake in that case because you can't afford to make a mistake in this case. (R. 2524).

In Cannady v. State, 427 So.2d 723, 732 (Fla. 1983) this Court conversely found that since the trial judge did not specifically find that the jury based its recommendation of life sentence upon emotional sympathy ... instead of upon the proven statutory-mitigating circusmtances [,] [i]t is conceivable that the jury [could have relied on mitigating circumstances]." Sub judice, the judge made the emotional appeal finding and found that the mitigating circumstances did not apply. Where the jury's advisory recommendation is a life sentence which the court deems inappropriate under the law, the court "not only may, but must overrule the jury ... ." Brookings v. State, 495 So.2d 135, 145 (Fla. 1986). The override will be sustained where the facts are "clear and convincing that virtually no reasonable person differ," Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Clearly, in the case at bar the trial court properly considered all evidence in mitigation of Appellant's sentence but properly found the weight of evidence to support death. The trial court's decision is supported by competent substantial evidence. No reasonable person could differ as to the necessity of the death sentence based upon the weight assigned by the court. Defendant is really asking this Court to re-weigh the evidence which can not be done. "Mere disagreement with the force to be given [mitigating evidence] is an insufficient basis

for challenging a sentence," Porter v. State, 429 So.2d 293, 296 (Fla. 1983); Quince v. State, 414 So.2d 185, 187 (Fla. 1982).

The case at bar presents extreme aggravating factors and, at best, speculative and/or unsubstantiated mitigating factors. The aggravating factors clearly and convincingly outweigh the mitigating factors so that no reasonable person could differ as to the penalty of death. Echols v. State, 484 So.2d 568, 577 (Fla. 1985); Torres-Arbodelo v. State, Case No: 66,354 (Fla. March 24, 1988), slip op. at 14.

POINT VI

THE DEATH PENALTY IMPOSED PURSUANT TO §921.141, FLA.STAT. IS CONSTITUTIONAL FACIALLY AND AS APPLIED.

Appellant maintains that §921.141, Fla.Stat. is unconstitutional facially and as applied, thereby suggesting that a reversal of his capital punishment sentence is mandated. This Court recently reaffirmed the constitutionality of Florida's capital punishment sentence. Grossman v. State, Case No. 68,096, opinion filed February 18, 1988 at p. 6, 7.

Although, facially, the Constitutionality of the statute authorizing capital punishment §921.141, Fla.Stat. has been upheld numerous times by this Court, Appellant specifically alleges the Florida law to be in contravention of Furman v. Georgia, 408 U.S. 238 (1972). In McCrae v. State, 395 So.2d 1145 (Fla. 1980), cert. denied 454 U.S. 1041 (1980) this Court

referenced State v. Dixon, 283 So.2d 1, 11 (Fla. 1973), wherein the Florida law was upheld in negation of Furman claims of unconstitutionality. See, Proffitt v. Florida, 428 U.S. 242 (1976) reh. denied 429 U.S. 875.

Contrary to Appellant's allegation of unconstitutionality, as applied, §921.141, Fla.Stat. is valid and constitutional. Appellant attempts to bootstrap a federal court's "acquittal" of a racketeering count in a wholly separate case (R. 2916) to the instant case. Brian McCormick, was one of the attorneys for the United States Department of Justice prosecuting Appellant in United States v. Raymond Thompson. (R. 2915). He testified that, in the federal case, Appellant was "convicted of 18 to 19 counts that went to the jury." (R. 2916). His acquittal on the racketeering count was due to the jury's failure to find that Appellant committed all five of the elements requisite to finding him guilty of racketeering.

> It is imprecise to say that the jury found that Mr. Thompson didn't commit the James Savoy murder. I don't know. It could have been any of the five elements that had reasonable doubt.

(R. 2918). For Appellant to claim that he was acquitted of killing James Savory in federal court, and thereby maintain the death penalty is unconstitutionally arbitrary as applied, is a misstatement.

> In the [federal] case Mr. Thompson was charged with committing the predicate acts of importing marijuana and he was also charged with predicate acts of kidnapping and murder of James Savoy, the predicate act of murder of Mr. Harris and kidnapping and murder of Mr.

> Bolt as well as the state offense of conspiracy to kidnap and murder Harvey Mattel.

(R. 2916) (emphasis added). Appellant was not charged with the Savory murder in one separate count in the federal case. (R. 2918). A day, or at the most, a day and a half, was devoted to the Savoy murder in the federal five week trial, whereas sub judice, the trial lasted four weeks on that one murder alone. (R. 2919). Additionally the jury, again in the federal case, "found Mr. Thompson guilty of RICO conspiracy Count I and RICO conspiracy had as part of its manner and means the murder of James Savoy." (R. 2923, 3259).

Appellant alleges that arbitrariness in the imposition of the death penalty is unconstitutional. Such contention was negated in Proffit v. Florida, 428 U.S. 242 (1976) reh. denied, 429 U.S. 875..

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida to determine independently whether the imposition of the ultimate penalty is warranted. Songer v. State, 322 So.2d 481, 484 (1975).

Proffit at 252, 253.

As Appellant's allegations of the unconstitutionality, both facially and as applied, of §921.141, Fla.Stat. are wholly without merit, Appellee respectfully requests this Court to affirm the judgment and sentence below.

CONCLUSION

Based on the foregoing reasons and citations of authority, the Appellee respectfully submits that the judgment and sentence of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished by United States mail to JANE D. FISHMAN, ESQUIRE, Counsel for Appellant, 8243 Northwest Eighth Place, Plantation, Florida 33324 this 1st day of April, 1988.

Of Counsel