IN THE SUPREME COURT OF FLORIDA

EDDIE EUGENE ALVIN,

Appellant,

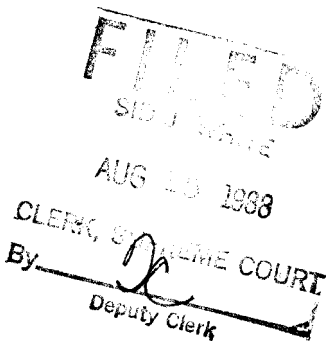
vs.

CASE NO. 71,637

STATE OF FLORIDA,

Appellee.

_____/



ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

POINT I: Of four black veniremen, two were properly excused by the court for cause due to medical reasons and due to an automatic rejection of the death penalty. A third person was excused for cause by the court upon motion by appellant's co-defendant. The state used one of ten peremptory challenges to strike the remaining black potential juror. Appellant failed to sustain his initial burden of establishing a strong likelihood that this person was excused solely on the basis of race. Even if his initial burden has been met, the state offered a neutral and reasonable explanation that is supported by the record.

Counsel's ~~voir dire~~ was not significantly limited. The court and counsel propounded several questions concerning the venire's attitudes toward the death penalty. The single question appellant was not permitted to ask was improper and irrelevant. Any error is harmless.

POINT 11: Wesner Remy's statement to law enforcement officers the day after his arrest was admissible as a prior consistent statement offered to rebut an implication of recent fabrication due to the immunity agreement. To the extent it was inconsistent and prejudicial to the defense, the statement would have been admissible under section 90.608(2), Florida Statutes (1987). Any error is harmless because it could have been admissible under this section, and further, because it was cumulative to other testimony and did not give significant additional weight to Wesner Remy's testimony.

POINT 111: Cross-examination of prosecution witnesses by

exceeding the scope of direct examination is not an acceptable vehicle for presenting defense evidence. Any error is harmless since the defense later called the witness to present the testimony properly excluded on cross-examination.

POINT IV: Viewing the evidence in the light most favorable to the state, there was ample evidence of attempted armed robbery to submit the case to the jury.

POINT V: The trial court properly admitted the weapons, photographs and post-arrest statements of appellant. Alvin has no standing to contest the search of the vehicle because he was a passenger and he does not claim the initial stop was invalid. Even if Alvin does have standing and if his arrest was without probable cause, the evidence was admissible because it would have been inevitably discovered through wholly lawful, independent means.

POINT VI: Appellant was not entitled to a jury instruction on alibi because he failed to sustain his burden of production for this affirmative defense. His statement that he was asleep does not establish that he was elsewhere.

Appellant failed to preserve for review the issue of whether the jury was properly instructed on excusable homicide and culpable negligence as part of the manslaughter charge, a lesser included offense of first degree murder. No error is presented because there was no claim that this murder was committed by accident or in self-defense. Any error is harmless because appellant was found guilty of first degree murder as charged.

POINT VII: The capital sentencing statute is

constitutional. A state need not adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances and the advisory opinion need not be unanimous.

Even if appellant is correct that the court improperly found the capital murder created a great risk of death to many persons, the sentence should nonetheless be affirmed. He does not assail the remaining aggravating factor found by the court nor does he dispute the absence of any mitigating factors. Moreover, there are two other valid aggravating circumstances present in this case, and so the result of the weighing process could not have been different.

This death sentence is proportional to other capital sentences affirmed by this court. Since this is not a jury override case, the sentences received by appellant's less culpable co-defendants are immaterial.

The jury was properly instructed that six votes recommended an advisory sentence of life imprisonment. Any error is harmless.

ARGUMENT

POINT I(A)

APPELLANT FAILED TO MEET HIS INITIAL BURDEN TO PROVE THAT THE STATE EXERCISED A PEREMPTORY CHALLENGE SOLELY ON THE BASIS OF RACE. EVEN IF THE BURDEN SHIFTED, THE STATE GAVE A NEUTRAL AND REASONABLE EXPLANATION WHICH WAS SUPPORTED BY THE RECORD.

Appellant alleges that the trial court and the state systematically excluded potential jurors solely on the basis of race in violation of the state and federal constitutions. State v. Neil, 457 So.2d 481 (Fla.1984); Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The defendants are black, as were four potential jurors. The impaneled jury was composed of white persons.

The state did not remove all four black veniremen by exercising peremptory challenges. The first man, unidentified except by race, was excused by the trial court because he was on medication for a heart condition, including valium (R 18-19).[1] The man told the court his doctor advised him to avoid stressful situations. No objection was made to removing this person for cause.

Another black man, Mr. Gatie, was also excused for cause without objection (R 569). Appellant's co-defendant's counsel moved to excuse Mr. Gatie for cause because he had indicated he

[1] (R) refers to the record on appeal.

knew the victim (R 555) and had been exposed to pretrial publicity (R 560). He also expressed reluctance at sitting on the jury (R 557, 565). For these reasons, Mr. Brown's attorney successfully moved to challenge Mr. Gatie for cause. This situation is identical to an issue in Woods v. State, 490 So.2d 24 (Fla. 1986). Woods' co-defendant excused a potential black juror for cause. That challenge cannot therefore be attributed to either the state or the court.

The two remaining black potential jurors were Ms. Tompkins and Ms. Gray. Ms. Tompkins was excused for cause by the trial court (R 598, 600). During ~~voir dire~~, she stated twice that she would automatically vote against the death penalty without regard to the evidence or instructions based upon her religious objections (R 590-591). The state challenged her for cause, citing Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968). ~~See also~~, Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (R 592, 596). The court explained her automatic rejection of the death penalty, and not her race was the basis of her excusal for cause (R 598). Appellant compares Ms. Tompkins to a white venireperson, Ms. Monnen. As the trial court explained, Ms. Monnen's responses were much different from those given by Ms. Tompkins (R 596). Ms. Monnen initially expressed reservations about the death penalty, but unlike Ms. Tompkins, stated that her opinion would not interfere with her consideration of the verdict and repeatedly stated that she would set aside her feelings and decide the case on the evidence and instructions (R 389-390, 404, 410, 433). It is not

error to exclude a prospective juror like Ms. Tompkins who is inalterably opposed to capital punishment. Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986): DuBoise v. State, 520 So.2d 260 (Fla. 1988): Nibert v. State, 508 So.2d 1 (Fla. 1987).

The only black venireman excluded by the state using a peremptory challenge was Ms. Gray. The state used ten peremptory challenges in all. Appellee recognizes that even striking one single black juror for racial reasons can be reversible error. See, State v. Slappy, 522 So.2d 18, 21 (Fla. 1988). Nevertheless, no error is presented in this case.

In State v. Neil, supra, this court delineated the procedure a trial court must follow when faced with a challenge to the use of a peremptory strike on the basis of race alone. The objecting party must show that the challenge was used against a member of a distinct racial group, identifying the venireman in question. Appellant sustained this burden by identifying Ms. Gray. However, he failed to meet the second part of his initial burden by showing a strong likelihood that she was challenged solely because of her race. It is true that ". . . any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor.'' State v. Slappy, 522 So.2d at 22: Tillman v. State, 522 So.2d 14 (Fla. 1988). As with Ms. Tompkins, however, valid reasons for excusing Ms. Gray are apparent in the record. She knew one of the potential witnesses in the case (R 174-175). Even though her acquaintance began some years in the past, she nevertheless remembered her.

When the state struck Ms. Gray with a peremptory challenge, the defense asked for a Neil hearing (R 438-439). The state argued that appellant failed to demonstrate that there was a substantial likelihood that the peremptory challenge was being exercised solely on the basis of race, but even if the burden had shifted to him to demonstrate neutral and reasonable reasons, such reasons existed (R 440-441). The prosecutor stated the following grounds for exercising a peremptory challenge:

> She said she knew one of the witnesses that the State is going to call and I want to make sure that they rule upon the evidence, upon the facts given in the trial and Your Honor's instructions. I don't want any previous positions as to any witnesses in mind.
>
> No one else on this panel ever said they knew any witnesses, lay witnesses, and I'm afraid any opinion she may have, good or bad, could influence her and weigh credibility to her own opinion as opposed to the opinion of the law given by Your Honor and that is the reason. (sic)
>
> That does fall within the case of Neal versus State. (sic) (R 439)

The appellant did not sustain his initial burden of demonstrating a substantial likelihood that Ms. Gray was excused by the state solely on her race. This record reflects nothing more than a normal jury selection process. Parker v. State, 476 So.2d 134 (Fla. 1985); see also, McCloud v. State, 517 So.2d 56 (Fla. 1st DCA 1987). The trial judge listened to the witness, heard counsels' argument and evaluated the credibility of all

concerned. King v. State, 514 So.2d 354 (Fla. 1987). "We see no reason to disturb his ruling on excusing this prospective juror or his ruling that no systematic exclusion had occurred . . ." Id. at 357. This court should not reweigh factual findings by the trial court inherent in this ruling. DeConingh v. State, 433 So.2d 501, 504 (Fla. 1983); Wasko v. State, 505 So.2d 1314, 1316 (Fla. 1987).

Even if appellant's initial burden has been met, the proffered reasons are not only neutral and reasonable but are also supported by the record. Some reasonable persons would agree that a person who knows a witness would unduly emphasize that witness' testimony. There is also record support for this neutral and reasonable explanation. Therefore, appellant has failed to demonstrate an abuse of judicial discretion that warrants reversal.

POINT I(B)

THE JURY WAS THOROUGHLY QUESTIONED REGARDING THEIR ATTITUDES TOWARD THE DEATH PENALTY SUCH THAT ANY ERROR WAS HARMLESS.

The trial court conducted extensive examination of the venire, and informed them that this was a potential death penalty case (R 41-42). The court explained the bifurcated proceedings and the jury's role in recommending an advisory opinion (R 199-202). Then, the court asked each juror individually whether they had any religious, moral or conscientous objections to the death penalty, and whether there were any circumstances under which they would automatically refuse to impose the death penalty or

automatically refuse to recommend mercy (R **73-84: 199-207: 383-390).** Each attorney asked questions concerning the penalty phase and the jury's advisory opinion (R 101, 157, **211-212).** During the second round of questioning potential jurors, counsel for appellant asked several questions concerning the death penalty, including whether the juror was "bothered" by it, whether "it is right for society to take a person's life if they're guilty of certain crimes," and whether the venire had "any qualms" about the death penalty (R **234-235).** Then counsel moved from questions requiring yes or no answers and asked "What do you feel society's right is with regard to taking someone's life?" **(R 235)** The trial court interposed and ruled that he was not going to require jurors to explain their philosophical thoughts about the death penalty since each juror had already stated that they would base their decision solely upon the evidence and instructions.

No contemporaneous objection was made. The next morning, counsel moved for a mistrial on the basis of the limitation of voir dire **(R 258-259).** Several other motions were made at the same time **(R 261-265).** The trial court denied the motion for mistrial **(R 277).** Appellee contends that the motion was untimely and therefore this issue is not preserved for review.

Given the series of questions from defense counsel propounded immediately preceding the "what do you feel . . ." question, no significant limitation on voir dire is presented (R **234-235).** The court and both counsel asked several questions concerning the death penalty and the venire all agreed they would not automatically recommend either life or death and would follow

the judge's instructions. Moreover, the question is irrelevant. Society, through the legislature, has already determined that the death penalty is the law of the state. Counsel could have asked the venire about their own feelings concerning the death penalty, but the trial court had already extensively delved into that area. The court has the power to control voir dire. See, Peri v. State, 426 So.2d 1021 (Fla. 3rd DCA), pet. for rev. denied, 436 So.2d 100 (Fla. 1983). No error is demonstrated.

Even if preserved, no reversible error is presented. Unlike Thomas v. State, 403 So.2d 371 (Fla. 1981), juror bias and prejudice does not appear in the record. In light of the entire ~~voir dire~~, any error is harmless beyond a reasonable doubt. Gore v. State, 475 So.2d 1205 (Fla. 1985).

> The jury was thoroughly questioned in regard to their attitudes toward the death penalty and whether they would follow the court's instructions and make sure the circumstances were proved to support it before they would consider it. Gore has not shown that his jury was made of one or more persons unalterably in favor of the death penalty or that any of the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Id. at 1207-1208.

The court need not excuse a potential juror unless he or she is irrevocably committed to voting for the death penalty if the defendant is found guilty of murder or otherwise is unable to follow the judge's instructions in the penalty phase.

Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983). In this case, each juror was questioned individually and stated without hesitation that he would not automatically vote for death and would follow the court's instructions. Compare, Hill v. State, 477 So.2d 553 (Fla. 1985). Appellant has failed to demonstrate reversible error.

POINT II

THE PRIOR CONSISTENT STATEMENT OF WITNESS REMY WAS PROPERLY INTRODUCED IN EVIDENCE. ANY ERROR IS HARMLESS.

Wesner Remy was in the vehicle with Brown, Alvin and Simmons during the trip from Jacksonville to West Palm Beach and witnessed the murder in Daytona Beach. Remy is Haitian, and although he has been in America since **1975,** he had difficulty being understood (R **874, 893).** He testified for the state at trial pursuant to an immunity agreement. After he testified, the state sought introduction of a statement made by Remy the day after his arrest to rebut an implication of recent fabrication. Appellant contends introduction of this statement constituted reversible error.

To demonstrate how this issue arose, appellee relates the following facts. At trial, Remy testified he rode from Jacksonville to West Palm Beach in a white Volvo driven by Marvin Brown: Alvin was the front seat passenger and Simmons sat beside Remy in the back (R **875-876).** Brown wanted to stop in Daytona Beach because "he got a friend he was looking for." (R **877–878)** There were several weapons and ammunition in the vehicle (R **879-881).** Remy testified he did not know why Brown was looking for the person (R **881, 898-903).** Remy said he didn't pay attention or didn't remember why Brown wanted to see his friend (R **899).** He stated once in Daytona, Brown drove around for thirty to forty-five minutes looking for his friend (R **906).** Brown asked a lady if she knew where to find the person and when

she replied in the affirmative, Brown asked her to get in to help look for him (R **882, 900).** They finally saw the person Brown was looking for in a parking lot talking on the telephone (R **883-884).** Brown pointed at the man and told Alvin, that's the man (R **884, 916).** Brown backed up the car in front of the man (R **917).** Alvin told the man to get in the car, but he ran (R **885-886).** Remy saw and heard Alvin and Simmons jump from the car and fire their weapons. He did not hear Simmons say "It's a jack" (robbery) as Powell testified (R **922).** When the men returned to the car, Remy asked why they shot and was told by Alvin that it was none of his business (R **888).** Upon arrest, Remy was charged as an accessory after the fact (R **891).**

On cross-examination, Remy was impeached with a post-arrest statement concerning where the lady sat in the car and when and where he started driving the car (R **907, 913).** Remy was asked whether he had been handed a gun and whether he received immunity for his participation (R **909-911).** He was asked whether he knew he would be sent back to Haiti if convicted of a felony (R **915).**

On redirect, the state asked whether he had given a statement to detectives immediately after his arrest, and he answered yes (R **918).** There was an objection that this line of questioning was a "rehash" of direct examination, and another objection that the question was leading, both of which were overruled (R **918-919).**

Recross examination by Mr. Dinitz again referred to Remy's statement the day after his arrest (R **924).** Further redirect by the state revealed Alvin and Brown told Remy to keep quiet but he

told the detectives about the murder despite these warnings (R 925-926). Remy was then excused and the jury sent out (R 927).

During the break, the state asked to proffer the testimony of Greg Smith, the detective to whom Remy spoke, to introduce Remy's prior consistent statement to rebut the implication of recent fabrication due to the immunity agreement (R 929-930). A long discussion ensued (R 930-949). The court admitted the tape recording as a prior consistent statement, relying on Wilson v. State, 434 So.2d 59 (Fla. 1st DCA 1983). Alvin's counsel posed several objections, including that some statements on the tape were inconsistent and it contained hearsay or irrelevant matters (R 931, 933). The state repeatedly stated that it wanted to ask Smith questions rather than play the entire tape, but the court ruled that the tape was the best evidence (R 932, 937-938 949). Brown's attorney objected to the entire tape coming in and asked for leave to move for a mistrial if prejudicial matters came in (R 940).

Detective Greg Smith was called and his testimony proffered (R 941). He stated that on January 24, 1987, he travelled to West Palm Beach and took a statement from Wesner Remy (R 942-943). The tape of this statement was then received in evidence (R 945). Alvin's attorney objected to the chain of custody (R 945). Another objection was then posed to playing the entire tape, but the court responded that the whole tape was already in evidence (R 946-947). The court opined that the tape was largely unintelligible anyway (R 949). The tape was then played, apparently before the jury (R 950).

After the trial was recessed for the evening, Alvin's attorney made a motion for mistrial which was joined by Brown's attorney (R 956-958). He claimed two matters were revealed to the jury which were prejudicial and required a mistrial: 1) "this was to take dope or about dope", and 2) discussion concerning a "jack" (R 956). The court agreed that Remy's testimony on direct indicated he didn't know why Brown was looking for his friend, yet on the tape he said they were looking for him to either buy drugs or to take drugs (R 960). Later, Alvin's attorney read from the transcript of the tape concerning the exchange (R 964). The state responded as to the second matter that Remy said on the tape that Brown was not into "jacking" people and Remy was confused why the murder took place (R 969). After further argument, the court considered the motion for mistrial, then denied it (R 977-978).

On appeal, Alvin contends that admission of the tape was improper because it was inconsistent with his trial testimony and thus constituted impeachment by the state of its own witness. He claims that the statement provided a motive and helped establish the underlying felonies. Alvin relies upon Gillis v. State, 518 So.2d 962 (Fla. 3rd DCA 1988) for reversal.

The taped statement is included in the record on appeal as state's exhibit 12 (R 2132). During this statement, Remy said Brown was looking for the person "cause he got the dope . . . He buy it or take it from him." Remy explained that he was handed a gun but did not shoot because there were witnesses. Had the witnesses not been present, he might have helped Alvin and

Simmons "cause I'm looking for money too." He stated Simmons, his friend, was "not into jacking people." Brown knew "the dope man". The balance of the statement is consistent with his trial testimony.

This taped statement was properly admitted as a prior consistent statement. Section 90.801(2)(b), Florida Statutes (1987) states:

> A statement is not hearsay if the declarant testifies at trial or hearing and is subject to cross-examination concerning the statement and the statement is consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive or recent fabrication.

The statement was made the day after arrest, before Remy met with the Daytona Beach Assistant State Attorney and before immunity negotiations were entered into. See, Wilson, supra: see also, Quiles v. State, 523 So.2d 1261 (Fla. 2d DCA 1988). The statement is essentially consistent with his trial testimony. The immunity agreement was discussed at length, implying recent fabrication. The statement was admissible to rebut this inference. Dufour v. State, 495 So.2d 154 (Fla. 1986): Gardner v. State, 480 So.2d 91 (Fla. 1985): Wilson, supra.

The cases relied upon by appellant, Gillis, supra and State v. Delgato-Santos, 497 So.2d 1199 (Fla. 1986) concern prior inconsistent statements admitted under 90.801(2)(a) as substantive evidence. Those cases hold that police interrogation is not a "trial or hearing" within the meaning of that

subsection. But, see, Diamond v. State, 436 So.2d 364 (Fla. 3rd DCA 1983) [written statement under oath taken by state attorney qualifies under § 90.801(2)(a)]. As the court explained in Webb v. State, 426 So.2d 1033 (Fla. 5th DCA 1983), prior inconsistent statements were admissible only for impeachment purposes before the adoption of 90.801(2)(a).

Appellee contends that the taped statement is consistent and admissible under section 90.801(2)(b). However, to the extent that it is inconsistent, appellee agrees that it would not be admissible under § 90.801(2)(a) because police interrogation is not a trial or hearing. Gillis, supra: Delgato-Santos, supra. Nevertheless, the inconsistent portions of the prior statement would be admissible during the state's case in chief[2] pursuant to section 90.608(2), which states:

> A party calling a witness shall not be allowed to impeach . . . (except) if the witness proves adverse, such party may contradict the witness by other evidence or may prove that the witness has made an inconsistent statement at another time, without regard to whether the party was surprised by the testimony of the witness.

Even if appellant is correct that the state impeached its own witness through inconsistent statements, no error is presented. Although the procedure for declaring a witness adverse was not followed it is within the court's discretion to declare a witness

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[2]See, State v. Price, 491 So.2d 536 (Fla. 1986): Sloan v. State, 491 So.2d 276 (Fla. 1986).

adverse. Lowe v. State, 130 Fla. 835, 178 So. 872 (1937). This court should nonetheless consider this argument in determining whether any error was harmless. § 924.33, Fla. Stat. (1987). Under 90.608(2), the tape would have been admissible solely for impeachment purposes and not as substantive evidence, unlike Gillis and Delgato-Santos. If these statements are so prejudicial to the defense, their absence must have been adverse to the state's case. See, Austin v. State, 461 So.2d 1380 (Fla. 1st DCA 1984). If appellant claims that the statements were not inconsistent enough to qualify under this section, then the state's argument that they are consistent is bolstered. See, Parnell v. State, 500 So.2d 558 (Fla. 4th DCA 1986).

Since section 90.608(2) does not preclude hearsay, pretrial statements to law enforcement officers inconsistent with trial testimony are admissible. See, Brumbley v. State, 453 So.2d 381 (Fla. 1984). See also, Williams v. State, 443 So.2d 1053 (Fla. 1st DCA 1984). It is well established that statements which are not admissible under 90.801(2)(a) can be admissible under 90.608(2). Mazzara v. State, 437 So.2d 716 (Fla. 1st DCA 1983), rev. denied, 444 So.2d 417; McNeil v. State, 433 So.2d 1294 (Fla. 1st DCA 1983). Merely because evidence is inadmissible for one purpose does not make it inadmissible for another purpose. Breedlove v. State, 413 So.2d 1 (Fla. 1982).

Even if it was error to admit the taped statement, any error is harmless. Powell testified that one man mentioned "jack", meaning robbery. The location of the murder, Bellevue and Campbell Streets in Daytona, is a well-known area of narcotics

activity. The reasonable inference is that drugs were somehow involved in the murder. If the objectionable consistent statement is cumulative to other evidence, the error is harmless. Teffeteller v. State, 439 So.2d 840 (Fla. 1983). Motive is not an element of a crime, and the felonies were established by evidence other than this tape, Moreover, the taped statement "did not give significant additional weight to (Remy's) testimony, and its admission was, therefore, harmless error." Parker v. State, 476 So.2d 134, 137 (Fla. 1985). Since there was no reference in the taped statement to killing Powell, the state fails to see how it could have helped to establish premeditation. There was eyewitness testimony that Alvin fired the fatal bullet from both Powell and Remy. Any error was harmless in light of this overwhelming evidence establishing guilt of premeditated murder.

Remy's statement to law enforcement officers the day after his arrest was admissible as a prior consistent statement offered to rebut an implication of recent fabrication due to the immunity agreement. To the extent it was inconsistent and prejudicial to the defense, the statement would have been admissible under section 90.608(2), Florida Statutes (1987). Any error is harmless because it could have been admissible under this section, and further, because it was cumulative to other testimony and did not give significant additional weight to Remy's testimony.

POINT III

THE TRIAL COURT CORRECTLY CONCLUDED THAT THE QUESTIONS PROPOUNDED TO DETECTIVE SMITH ON CROSS-EXAMINATION WERE BEYOND THE SCOPE OF DIRECT EXAMINATION. ANY ERROR IS HARMLESS.

On direct examination, the state asked Detective Greg Smith to identify clothing worn by Alvin's co-defendant, Marvin Brown, and introduced the clothing into evidence once it had been authenticated (R 1327-1332). On cross-examination, appellant's counsel attempted to ask Smith about the fact that Letha Payne had initially picked someone other than Alvin out of a photo line-up. The trial court correctly ruled that this line of questioning was beyond the scope of direct examination.

The trial court has broad discretion in the admission of evidence. Welty v. State, 402 So.2d 1159 (Fla. 1981): Hardwick v. State, 521 So.2d 1071 (Fla. 1988). The prosecutor has absolute discretion as to what questions to propound on direct examination. That direct examination was not broad enough to permit the cross-examination desired by appellant is of no moment. Appellant was afforded the opportunity for cross-examination; he is not entitled to unlimited cross-examination that is effective in whatever way and to whatever extent the defense might wish. Kentucky v. Stincer, ___ U.S. ___, 107 S.Ct. 2658 (1987), quoting Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985).

In Steinhorst v. State, 412 So.2d 332 (Fla. 1982), this court recognized that an accused has a constitutional right to full and fair cross-examination. However, that right is not

unlimited. Questions on cross-examination must be related to credibility, or to matters brought out on direct examination.

> If the defendant seeks to elicit testimony from an adverse witness which goes beyond the scope encompassed by the testimony of the witness on direct examination, other than matters going to credibility, he must make the witness his own. Stated more succinctly, this rule posits that the defendant may not use cross-examination as a vehicle for presenting defensive evidence. (citations omitted) Id. at 337.

The trial court's ruling is almost a direct quotation of this passage in Steinhorst (R 1336). Appellant suggests he desired to attack the credibility of other witnesses through Smith, including Remy, Payne and Benjamin, but not Smith personally. Moreover, Remy and Benjamin also testified and were subject to cross-examination as to their own credibility. Payne could have been called by the defense. Smith was called as a defense witness and examined concerning the matters which were properly excluded on cross-examination.

In two recent cases, this court rejected almost identical claims concerning the cross-examination of law enforcement officers. In Echols v. State, 484 So.2d 568 (Fla. 1985), the chief investigator was asked on cross-examination, inter alia, whether alternative suspects had been developed. This court ruled that the detective's direct examination contained "no reference to or suggestion of" the matters appellant attempted to introduce on cross-examination. "(C)ross-examination of prosecution witnesses by exceeding the scope of direct

examination is not an acceptable vehicle for presenting the defendant's case in chief . . . . We see nothing in Detective McManus's direct testimony offering an opening for cross-examination (on the matters properly excluded).'' Id. at 573. Similarly, in Lambrix v. State, 494 So.2d 1143 (Fla. 1986), Agent Smith testified concerning her observations at the crime scene. On cross-examination, the defendant sought to elicit information concerning evidence found in the victim's car, which was found elsewhere. This court ruled that the questions were properly excluded as beyond the scope of direct examination. Appellant has failed to establish and relevant case law does not support the finding of an abuse of discretion in the limiting of the cross-examination of Detective Smith.

Although there was no proffer of the excluded testimony, Smith was called as a defense witness to elicit the defensive evidence properly excluded on cross-examination (R 1387-1394). Therefore, any error is harmless beyond and to the exclusion of any reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986).

POINT IV

THERE WAS SUFFICIENT EVIDENCE OF ATTEMPTED ARMED ROBBERY TO WITHSTAND THE MOTION FOR JUDGMENT OF ACQUITTAL.

Appellant contends the trial court committed reversible error by failing to grant his motion for judgment of acquittal on the count of attempted armed robbery (R 1350-1353; 1364; 1445).

The trial court should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury might lawfully take favorable to the opposite party can be sustained under the law. Lynch v. State, 293 So.2d 44 (Fla. 1974); Heiney v. State, 447 So.2d 210 (Fla. 1984). When the defendant moves for judgment of acquittal, he admits all facts in evidence as well as all inferences from that evidence favorable to the state. Busch v. State, 466 So.2d 1075 (Fla. 3rd DCA 1984); The trial judge should rarely, if ever, grant a motion for judgment of acquittal based on the state's alleged failure to prove mental intent. Brewer v. State, 413 So.2d 1217 (Fla. 5th DCA 1982).

There was sufficient evidence of attempted robbery to submit the case to the jury. An attempt to commit a crime requires an intent to commit the crime coupled with an overt act beyond mere preparation. § 777.04, Fla. Stat. (1987); State v. Coker, 452 So.2d 1135 (Fla. 2d DCA 1984). The act must amount to commencement of the crime; some appreciable fragment of it must be committed. Id. Alvin and Simmons exited the vehicle, pointed firearms at Grimes and Powell and Simmons, stating "This is a

jack, get in the car." Powell testified that "jack" meant "robbery." Powell's hasty departure prevented any further completion of the crimes attempted. This evidence is more than sufficient to create a jury question as to attempted robbery. See, Mercer v. State, 347 So.2d 733 (Fla. 4th DCA 1977). In Cooper v. Wainwright, 308 So.2d 182 (Fla. 4th DCA 1975), the defendant arrived at a prearranged meeting place, obstensibly to sell marijuana to persons he did not know were undercover police officers. When he arrived, the defendant produced a weapon and told the officers to "freeze." As in this case, no overt request for money or property was ever made. The officers quickly disarmed and arrested the defendant. This evidence was deemed sufficient to present a jury question as to attempted armed robbery.

The cases cited by appellant are distinguishable. In Spanish v. State, 67 Fla. 414, 65 So. 457 (1914), the state alleged the specific denominations of the bills robbed from the victim, but failed to establish this allegation of the information. The supreme court concluded this omission of proof was fatal as the defendant could have been subject to a new information alleging different denominations of currency or coins. Moreover, the crime in Spanish was the completed robbery, not just attempt as is alleged in this case. Eutzy v. State, 458 So.2d 755 (Fla. 1984) is equally distinguishable because at issue in that case was whether the state established the aggravating circumstance that the murder was committed during a robbery. There was a lack of evidence in Eutzy that the cab fare was taken

by putting the driver/victim in fear. Again, the charge in this case is attempted robbery, not the completed offense. It is immaterial that the state's proof did not establish a robbery because that crime was not alleged. As the trial court observed, if appellant's argument is accepted, then anytime a defendant attempts to rob "someone that doesn't have any money in his pocket . . . he could never be charged with attempted robbery." (R 1352) Such a result is contrary to law and logic.

POINT V

EVEN IF APPELLANT HAS STANDING TO CONTEST THE SEARCH, THE INITIAL STOP WAS LAWFUL, AND THE ARREST OF HIS COMPANIONS JUSTIFIED A SEARCH OF THE CAR.

About twenty-two hours after the murder in Daytona Beach, Simmons, Alvin, Brown and Remy were stopped by Officer Matt McMillan in West Palm Beach (R 2195-2196). Simmons and Alvin were back seat passengers in the Volvo; Remy was driving (R 2202). McMillan testified he saw the Volvo parked in an alley in front of a known narcotics sales house (R 2196-2197; 2213; 2234). He saw a black male run from the house, in front of the Volvo, but because the headlights were pointing toward him, he could not tell whether the subject entered the car (R 2197, 2214). The Volvo pulled out in front of McMillan and stopped at a light (R 2297). McMillan observed that the car's temporary tag had no writing on it. It was completely blank (R 2197, 2236). In his experience, blank temporary tags indicate the car may be stolen (R 2224).

After McMillan turned on his blue lights and siren to stop the car, Wesner Remy, the driver, got out and approached McMillan (R 2198). Remy produced a driver's license but no registration (R 2198-2199). Brown said the car belonged to his girlfriend and produced loan agreement papers, but there was no female in the car (R 2199). McMillan took the vehicle identification number (VIN) from the vehicle (R 2200). He asked all occupants to exit the car, and he looked inside the car through the window but saw

nothing to c use al rm (R 2200). The subjects re-entered the vehicle. McMillan called to check the VIN and driver's license (R 2200). Remy's license was suspended and the car was registered to "a sixth person, not Miss Leach (Brown's girlfriend) nor anyone in the car." (R 2201) At this point, McMillan suspected even more that the car was stolen (R 2201).

Since Remy's license was suspended and he was an out-of-country resident, McMillan decided to issue him a citation, place him under arrest, require him to post a bond, and impound the car until ownership could be determined (R 2201-2202). No one else in the car could produce a valid driver's license; Brown's identification card was in the name Stanley Smith (R 2202).

McMillan asked the occupants to again exit the vehicle (R 2203). This time when he looked through the driver's window, he observed what appeared to be a revolver just under the seat on the floorboard of the front passenger's seat, where Marvin Brown had been seated (R 2203). After back-up arrived, he walked to the other side of the car, opened the passenger door and saw a blue steel revolver (R 2204). At this point, Remy was already under arrest. McMillan told Brown he was under arrest for carrying a concealed firearm (R 2205). Simmons and Alvin were also detained because he suspected the car was stolen (R 2205).

McMillan wanted to search the car incident to the arrest of Remy and Brown, but concluded that there was a safety hazard where they were parked (R 2206). It was 11:00 p.m. and the area was not well lit, they were on a busy three lane road with 45 mph

speed limit, over the crest of a hill (R 2206). With the assistance of another officer, he transported all four men and the car seven blocks to the police station (R 2206-2207).

Once at the station, the car was searched "incident to the arrest and prior to the impoundment of the vehicle." (R 2207) All impounded cars are routinely inventoried (R 2212). During that search, he found an open zippered bag on the back seat containing two nine millimeter weapons and ammunition (R 2207-2208). He also found money in the glove compartment and a sawed off shotgun in the trunk (R 2208). During the search, McMillan was told by another officer that the vehicle was "used in a homicide in Daytona." (R 2209) He then went upstairs and told Alvin and Simmons they were under arrest for carrying concealed firearms (R 2210).

The trial judge's written order on the motion to suppress contains findings of fact which accept the officer's uncontroverted testimony as related above (R 2095-2097). See, State v. Fernandez, 526 So.2d 192 (Fla. 3rd DCA 1988). Specifically, he found that the car was stopped because the temporary tag was incomplete, arousing his suspicion that the vehicle was stolen. The arrests of Remy and Brown were found valid. Due to the traffic hazard, moving the vehicle before the search was also justified. "Under the circumstances, to wit: the arrest of the driver and one who claimed lawful possession and the unavailability of a driver for such car, together with the question as to who the car really belonged to the officer had a right to make his routine inventory search of the vehicle

before impoundment." (R 2096)

The trial court found that Alvin and Simmons lacked standing to contest the search of the vehicle "as they were at most passengers and as such did not possess the degree of expectancy of privacy in . . . their open unzippered bag that would make a search of such bag an invasion of their right to privacy." (R 2096-2097) Alvin failed to meet his burden of establishing a legitimate expectation of privacy in the area searched pursuant to Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). ~~See also~~, State v. Rome, 500 So.2d 255 (Fla. 1st DCA 1986): State v. Davis, 415 So.2d 82 (Fla. 4th DCA 1982): State v. Bartz, 431 So.2d 704 (Fla. 1983): contra: State v. Beja, 451 So.2d 882 (Fla. 4th DCA 1984). A challenge to the legality of a search and seizure may not be asserted vicariously. State v. Sears, 493 So.2d 99 (Fla. 4th DCA 1986).

A passenger has no legitimate expectation of privacy in the interior of the car in which he is riding. Id: Rakas, supra, ~~See~~ also, United States v. McHugh, 769 F.2d 860, 864, (1st Cir. 1985) (Defendant has no legitimate expectation of privacy in a pick-up truck driven by another person despite his efforts to hide marijuana inside the truck.) However, in State v. Jones, 483 So.2d 433, 435 (Fla. 1986), this court said in dicta, "(U)nquestionably, stopping an automobile and detaining its occupant constitutes a seizure within the meaning of the fourth amendment. Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)." ~~See also~~, State v. Delaney, 517 So.2d 696 (Fla. 2d DCA 1987). The issue here is whether Alvin's

expectation is reasonable: appellee admits a seizure took place. Moreover, Delaware v. Prouse is quoted out of context because "its occupant" was the driver, the sole occupant of the vehicle. See also, State v. Scott, 481 So.2d 40 (Fla. 3rd DCA 1985). That case does not support the contention that passengers have standing to contest the search of a vehicle in which they are riding.

The trial court correctly concluded that neither Alvin nor Simmons had standing. It is well settled that one defendant does not have standing to seek suppression of evidence merely because that evidence was allegedly obtained in violation of the fourth amendment rights of a co-defendant. Alderman v. United States, 394 U.S. 165, 89 S.Ct 961, 22 L.Ed.2d 176 (1969); Robins v. State, 522 So.2d 911 (Fla. 3rd DCA 1988). Alvin does not contest the validity of the initial stop, but only claims his continued detention was unreasonable and contends that he was arrested and transported to the police station without probable cause. In order for a passenger to have standing, he must contest the validity of the initial stop. See, Rakas, supra.

The trial court further found that there was no probable cause to arrest Simmons and Alvin and transport them to the station. The motion to suppress was granted to those two as to any evidence seized before their arrest on the weapons charge. However, because the arrests of their companions was valid and because the car was lawfully searched incident to arrest and before impoundment, the weapons in the back seat were lawfully discovered through independent means. Even though Simmons and

Alvin were unlawfully detained, because their colleagues were lawfully arrested and the car lawfully searched, their weapons were inevitably discovered in a lawful manner. The weapons were "the thoroughly edible fruit of a constitutionally sound tree." State v. Fernandez, supra.

Alvin contends on appeal that the trial court properly found his detention and transport to the police station invalid. However, he claims that the court should have suppressed all evidence obtained from him between the time of his detention and his subsequent release from confinement. Appellee agrees that although the initial stop was valid, and the arrests of Brown and Remy were valid, there was no probable cause to arrest Alvin and transport him to the police station. McMillan suspected all four men were in possession of a stolen vehicle, but that founded suspicion did not rise to the level necessary to arrest Alvin and Simmons. Nevertheless, the weapons, photographs and statements were properly admitted into evidence under the independent source doctrine or the inevitable discovery rule. Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed.2d 319 (1920).

> If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale (of the exclusionary rule) has so little basis that the evidence should be received. (footnote omitted) Nix v. Williams, 467 U.S. at 444.

The state need only establish a reasonable probability that the evidence would have been discovered. State v. Ruiz, 502 So.2d 87 (Fla. 1st DCA 1987). This theory was advanced by the state below (R 2211). In United States v. Miller, 812 F.2d 1206 (9th Cir. 1987), a car was stopped and searched pursuant to an invalid search warrant. However, the evidence discovered in the search was admissible because the strong smell of chemicals emanating from the vehicle and the presence of a handgun in plain view on the floorboard provided an independent source of probable cause to search the car. These facts are legally indistinguishable from the present case.

Brown and Remy were under lawful arrest. None of the four men in the car could produce a valid driver's license. McMillan suspected the vehicle was stolen and therefore would not have released the car to Alvin or Simmons anyway. The location of the stop did not permit a safe search incident to the arrest of Brown and Remy. The weapons would have been inevitably discovered in the lawful search of the car even if Alvin had been released at the scene of the stop. Moreover, the search of the car was justified as an inventory search of a vehicle in police custody which was believed to be stolen. These wholly independent sources render the evidence admissible.

Appellee relies upon Craig v. State, 510 So.2d 857 (Fla. 1987) as further support for this proposition. In Craig, the discovery of the murder victims in a sinkhole was the derivative fruit of an illegally obtained statement. However, Craig's co-defendant had authorized his attorney to inform the police that

the bodies had been disposed of in deep water. The sinkhole was the deepest water in the area.

> We therefore conclude that the trial court was correct in admitting the bodies and related evidence, on the ground that although they were in fact found by means of appellant's statements, they would have been found independently even without the statements, by means of normal investigative measures that inevitably would have been set in motion as a matter of routine police procedure. Id. at **863.**

The photographs of appellant which were used later for a photo line-up and his post-arrest statements are analogous to fingerprints taken during booking after an illegal arrest. Appellee further relies upon Hayes v. State, **477** So.2d **77** (Fla. 2d DCA **1986)** and cases cited therein as authority for the contention that Alvin's identity would have been inevitably discovered through independent means. ~~See also~~, State v. LeCroy, **461** So.2d **88** (Fla. **1984).** Furthermore, were this case remanded for a new trial, any taint would be so attenuated that the evidence would be admissible. See, Hayes v. State, supra: Wong Sun v. United States, **371** U.S. **471, 88** S.Ct. **407, 9** L.Ed.2d **441 (1963).**

The trial court properly admitted the weapons, photographs and post-arrest statements of appellant. Alvin has no standing to contest the search of the vehicle because he was a passenger and he does not claim the initial stop was invalid. Even if Alvin does have standing and if his arrest was without probable

c use, the evidence was admissible because it would have been inevitably discovered through wholly lawful, independent means.

POINT VI(A)

APPELLANT WAS NOT ENTITLED TO A JURY INSTRUCTION ON ALIBI BECAUSE HE FAILED TO SUSTAIN HIS BURDEN OF PRODUCTION.

Appellant alleges that the trial court committed reversible error in failing to instruct the jury on the affirmative defense of alibi as requested (R 1660-1662). Appellee contends that the trial court correctly denied the request because appellant's statement was insufficient to put alibi in issue.

Alvin's post-arrest statement was admitted into evidence and provides the basis for the alleged alibi defense (R 1244). In this statement, he admitted travelling with Marvin Brown and the others from Jacksonville to West Palm Beach. He claimed he slept after leaving Jacksonville and awoke when the vehicle was stopped for speeding five miles north of Daytona Beach (R 1244). Alvin claimed he again went to sleep until their arrival in West Palm Beach. He stated he did not remember ever being in Daytona Beach. (R 1244) The only other testimony relied upon was that Letha Payne initially had difficulty identifying Alvin as an occupant of the vehicle (R 1661).

This testimony is insufficient to sustain appellant's initial burden of production to place this affirmative defense in issue. See, Yohn v. State, 476 So.2d 123 (Fla. **1985):** see also, Linehan v. State, 476 So.2d 1262 (Fla. **1985).** Alibi, like voluntary intoxication or insanity, is an affirmative defense.

In Linehan, this court stated, "(W)e emphasize that voluntary intoxication is an affirmative defense and that the defendant must come forward with evidence of intoxication at the time of the offense . . ." Id. at 1264. The state contends that Alvin's testimony was insufficient to sustain this burden. Rather, this case is analogous to the testimony presented in Dunlap v. State, 324 So.2d 692 (Fla. 1st DCA 1976), where an accomplice testified the defendant was present at the scene of the crime but did not participate in the offense. This evidence was not alibi testimony.[3] As the trial court observed, mistaken identity is not the same as alibi. The court correctly concluded that there was insufficient evidence of alibi presented to warrant a jury instruction.

POINT VI(B)

THIS ISSUE IS NOT PRESERVED FOR REVIEW. EVEN IF PRESERVED, THERE WAS NO ISSUE THAT THE HOMICIDE WAS COMMITTED BY ACCIDENT OR IN SELF-DEFENSE, SO APPELLANT WAS NOT ENTITLED TO INSTRUCTIONS ON JUSTIFIABLE AND EXCUSABLE HOMICIDE. ANY ERROR IS HARMLESS.

Appellant contends reversible error occurred in the instructions to the jury concerning manslaughter as a lesser included offense of first degree murder. The full instructions on excusable homicide and culpable negligence were not given (R

[3]Since it was not alibi testimony, no notice was required despite the state's timely demand (R 2055). See also, Hudson v. State, 381 So.2d 344 (Fla. 3rd DCA 1980).

1810-1816).

There was no request for these instructions, and in fact defense counsel affirmatively agreed these instructions should not be given (R 1604-1607). There was no objection made prior to the jury retiring to deliberate (R 1847). Therefore, this issue is not preserved for review. Fla. R. Crim. P. 3.390(d); Squires v. State, 450 So.2d 208 (Fla. 1984); Hyers v. State, 462 So.2d 488 (Fla. 2d DCA 1984).

Even if preserved, this case is distinguishable from the cases relied upon by appellant because there is no claim in this case that the murder was an accident or committed in self-defense. Both Grimes and Powell were unarmed. There is no pretense of justification or excuse. In Spaziano v. State, 522 So.2d 525 (Fla. 2d DCA 1988), the recent threats and harassment by the decedent and a defense claim of accident placed this claim in issue. In Ortagus v. State, 500 So.2d 1367, 1369 (Fla. 1st DCA 1987), "Ortagus' theory of defense was that the conduct of the deceased provoked and instigated the confrontation, and that the killing of the deceased was done as an act of self-defense." Moreover, although charged with first degree murder, Ortagus was found guilty of manslaughter, so a defect in that instruction could not be harmless error.

The Standard Jury Instructions direct the judge to read the excusable homicide instruction if in issue. Fla. Std. Jury Instr. (Crim.) p. 67. The full excusable homicide instruction states "An issue in this case is whether the killing of (victim) is excusable. . . by accident or misfortune." Fla. Std. Jury

Instr. (Crim). p.76. Since there was no issue in this case of self-defense or accidental killing, the trial court did not err in omitting these instructions. Fla. R. Crim. P. 3.390(a).

The other cases cited by appellant are distinguishable because the appellants were found guilty of second degree murder, only one step removed from manslaughter. See, Abreau v. State, 363 So.2d 1064 (Fla. 1978). See also, Bauza v. State, 519 So.2d 1099 (Fla. 3rd DCA 1988). Alvin was found guilty of first degree murder as charged, rendering harmless any error in the manslaughter instruction.

This issue is controlled by Squires v. State, supra. Where defendant is convicted of first-degree murder an error or omission in an instruction on the lesser included offense of manslaughter is not fundamental error." Squires, 450 So.2d at 211. This honorable court recently reaffirmed Squires in the decision of Banda v. State, 13 F.L.W. 451 (Fla. July 14, 1988). Even if preserved and even if error, any error is harmless.

POINT VII

APPELLANT WAS PROPERLY SENTENCED TO DEATH.

At the outset of the penalty phase, appellant's counsel made an oral motion contending that the capital sentencing statute was unconstitutional because there were no instructions as to the weight of aggravating and mitigating circumstances and because the advisory opinion need not be unanimous (R 1881-1882). Although constitutional attacks on the facial validity of a statute can be raised on appeal in the absence of objection, see, Trushin v. State, 458 So.2d 755 (Fla. 1984), attacks on the statute as applied must be properly preserved. Eutzey v. State, 458 So.2d 759 (Fla. 1984). Since counsel phrased his objection in terms of a deprivation of personal rights, appellee suggests his claim is based upon the constitutionality of the statute as applied to him. Appellee further suggests that this issue is not adequately preserved for appellate review because the motion was not made in writing and was untimely. Fla. R. Crim. P. 3.190(a).

Even if subject to review, these claims have been roundly rejected. The Constitution does not require a state to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). As the court in Spinkellink recognized, Florida has provided that aggravating circumstances must be found beyond a reasonable doubt, whereas

those in mitigation need not rise to that level. Florida's capital sentencing structure has been approved by the United States Supreme Court in Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). This honorable court has repeatedly rejected constitutional attacks upon the statute. See, e.g., Peck v. State, 395 So.2d 492 (1980); James v.State, 453 So.2d 786 (Fla. 1984). Alvin's second claim that the advisory opinion must be unanimous is equally nonmeritorious. Under Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), it is clear that the Constitution does not even require that a jury play any part in capital sentencing proceeding. This honorable court has also rejected this argument. Alvord v. State, 322 So.2d 533 (Fla. 1975).

Since appellant has carved up his remaining objections to his sentence in subissues, appellee will address them in a similar manner.

POINT VII(A)

EVEN IF ONE AGGRAVATING CIRCUMSTANCE WAS IMPROPERLY FOUND, THE OTHER, UNDISPUTED AGGRAVATING CIRCUMSTANCE, BALANCED AGAINST NO MITIGATING CIRCUMSTANCES RENDERS DEATH THE APPROPRIATE PENALTY.

In his findings of fact in support of the death penalty, the trial court determined that two aggravating circumstances existed: that the murder was committed while Alvin was engaged in an attempt to commit robbery and/or kidnapping, and that he knowingly created a great risk of death to many persons (R 2151-2153). No mitigating circumstances were found by the court.

Appellant does n t di pute the first aggravating circumstance. However, he contends that the evidence was insufficient to support the finding that he created a great risk of death to many persons.

The trial court instructed the jury only on these two aggravating factors. There was no objection to leaving out the other seven statutory aggravating circumstances. See, Bottoson v. State, 443 So.2d 962 (Fla. 1983). Indeed, it is not error to read the entire statute, and omitting inapplicable aggravating circumstances could only inure to the benefit of the defendant. Appellant contends the jury should not have been instructed on the aggravating circumstance of great risk of death to many persons. However, this circumstance depends upon factors which can be objectively determined and the judge instructed the jury that an aggravating circumstance had to be established beyond a reasonable doubt. Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983). The issue under review by this honorable court is not whether the jury was properly instructed but rather whether the trial court properly found this aggravating circumstance.

To support the finding that the defendant knowingly created a great risk of death to many persons, the trial judge found as follows:

> At the time of the shooting and killing it has been proven that the victim of the murder, Willie Grimes, and the victim of the attempted first degree murder in Count 11, Willie Powell, were both in the immediate area and there were two women proven to be in the immediate area at the time of the shooting and

> when the police officers arrived on the scene within five minutes of the shooting there were in excess of fifty people at the scene. There also were open bars in the area.
>
> That said Defendant knowingly created a great risk of death to many persons is borne out by the proven facts at the guilt phase in that it was established from the evidence that Willie Powell was in fact the intended victim of the robbery and/or kidnapping and that when Willie Powell ran the Defendant, EDDIE EUGENE ALVIN, and another co-defendant started firing randomly and Willie Powell was shot in the back at the shoulder area as he ran and the deceased, Willie Grimes, was shot twice in the leg and once in the back as he attempted to flee also. The back wound was the fatal shot and the bullet recovered from the victim, Willie Grimes, was proven to have come from the firearm being fired by the Defendant, EDDIE EUGENE ALVIN, even though it was not the victim, Willie Grimes, he was attempting to rob and/or kidnap, but rather the other victim in Count II, Willie Powell. Several other shots were fired in addition to the four shots that hit the victims. (R 2152)

Appellant correctly notes that this court stated in Lucas v. State, 490 So.2d 943, 946 (Fla. 1986) that "(t)hree people simply do not constitute 'many persons' as meant in section 921.141(5)(c)." It is also true that appellant cannot be held accountable for potential harm he might have caused to the bar patrons nearby. See, Lusk v. State, 446 So.2d 1038 (Fla. 1984). However, he is responsible for the reasonably foreseeable consequences of his actions. See, King v. State, 390 So.2d 315 (Fla. 1980). Moreover, the court found in that four persons were

in the immediate rea in addition to the four men in the car, namely, Grimes, Powell and two women. In Raulerson v. State, 420 So.2d 567 (Fla. 1982), this aggravating circumstance was properly found when four persons were present in a restaurant during a shootout between the defendant and the police. Similarly, in Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983), this factor was properly based upon the defendant shooting at the murder victim and two other men while holding others hostage. The trial court did not err in finding that the defendant knowingly created a great risk of death to many persons.

Even if this factor was improperly found, this court's inquiry is not concluded, nor is appellant automatically entitled to a life sentence or new hearing as he suggests. Appellant does not dispute the propriety of the finding that the murder was committed while he was engaged in the attempt to commit robbery and/or kidnapping. He does not dispute the finding that no mitigating circumstances are present in this case. Reversal of a death sentence is not necessary upon the negation of one aggravating factor if an additional aggravating circumstance remains and there are no mitigating circumstances. Ferguson v. State, 417 So.2d 631 (Fla. 1982). "Where an intentional murder is committed in the course of a robbery and there are no mitigating circumstances, a sentence of death is appropriate." Maxwell v. State, 443 So.2d 967, 971 (Fla. 1983). Even when the majority of aggravating factors are found invalid, when there are no mitigating circumstances, there is no necessity to remand to the trial judge for reweighing. Griffin v. State, 474 So.2d 777

(Fla. 1985). The erroneous finding did not prejudicially affect the weighing process and thus was harmless error. Kennedy v. State, 455 So.2d 351 (Fla. 1984); Brown v. State, 381 So.2d 690 (Fla. 1980); Elledge v.State, 346 So.2d 998 (Fla. 1977). When one aggravating circumstance is found, death is presumed to be the proper sentence unless it is overridden by a mitigating circumstance. State v. Dixon, 283 So.2d 1 (Fla. 1973). So long as one statutory aggravating circumstance exists, a death sentence is constitutionally permissible. Zant v. Stephens, 462 U.S. 862, 872, 103 S.Ct. 2733, 2740, 77 L.Ed.2d 235 (1983); Barclay v. Florida, 463 U.S. 939, 967-968, 103 S.Ct. 3418, 3430-3431, 77 L.Ed.2d 1134 (1983) (Stevens, J. concurring). It is only in cases where no valid aggravating factors exist that a death sentence must be vacated. Banda v. State, 13 F.L.W. 451 (Fla. July 14, 1988).

Appellee relies upon Armstrong v. State, 399 So.2d 953 (Fla. 1981) as support for the proposition that when the jury recommends death and there is only one valid aggravating circumstance balanced against no mitigating circumstances, the death sentence is the appropriate punishment. In Armstrong, the sole aggravating factor was that the murder was committed during a robbery. This court held that the erroneous consideration of certain aggravating circumstances "did not impair the process of weighing the aggravating against the mitigating circumstances because there were no mitigating circumstances to weigh. The killings took place in the course of a robbery. Death is the appropriate punishment." Armstrong, 399 So.2d at 963.

The state notes that the record on appeal demonstrates at least two other aggravating circumstances which were not found by the trial court. Since Alvin was convicted of the attempted murder of Powell prior to his sentencing for the murder of Grimes, the trial court should have found that Alvin was previously convicted of a felony involving the use of violence. § 921.141(5)(b), Fla. Stat. (1987); see Ruffin v. State, 398 So.2d 277 (Fla.1981); Wasko v. State, 505 So.2d 1314 (Fla. 1987).

Also inexplicably absent is a finding that the capital felony was especially heinous, atrocious, or cruel. § 921.141(5)(h), Fla. Stat. (1987). Grimes repeatedly begged for his life in vain (R 743, 773-774). The medical examiner testified that in addition to the fatal chest wound, Grimes was shot in the knee, rendering him unable to walk or run (R 857-9). The cause of death was exsanguination from the chest wound, which caused several pints of blood to accumulate in the chest cavity (R 860). The doctor testified Grimes lived for several minutes, possibly as long as twenty-five minutes (R 865). Two witnesses testified Grimes was conscious after being shot (R 751, 1011). The first police officer on the scene testifed that when he arrived, Grimes was gasping and making gurgling sounds. The officer tried to question him, but Grimes was unable to respond. These facts are consistent with other cases where the murder ws found to be especially heinous, atrocious, or cruel. See, e.g., Troedel v. State, 462 So.2d 392 (Fla.1984) (victim shot in legs, head); Duest v. State, 462 So.2d 446 (Fla. 1984) (victim suffered multiple stab wounds and lived a few minutes

before dying): Lusk v. State, 446 So.2d 1038 (Fla. 1984) (bleeding to death causes high degree of pain): Melendez v. State, 498 So.2d 1258 (Fla. 1986) (victim had knowledge of impending doom and pleaded for life in vain): Lemon v. State, 456 So.2d 885 (Fla.1984) (same).

The state cannot determine whether the trial court simply overlooked these two valid aggravating circumstances or whether the judge was uncertain as to whether concurrently committed crimes could be used in aggravation. Regardless, it is a well-established rule of appellate procedure that all evidence and matters appearing in the record should be considered which support the trial court's decision, Fla. R. App. P. 9.140(f); § 924.33, Fla. Stat. (1987). Moreover, this court should consider the presence of these additional factors in accordance with its responsibility to review the entire record in death penalty cases. Echols v. State, 484 So.2d 568, 576-577 (Fla. 1986). Even if it was improper to find the murders created a great risk of death to many persons, there are three valid aggravating factors in this case balanced against no mitigating factors. The result of the balancing process is unaffected. Death is the appropriate punishment for this capital felony.

POINT VII(B)

THE PENALTY IMPOSED IN THIS CASE IS PROPORTIONAL TO OTHER CAPITAL CASES APPROVED BY THIS COURT.

Alvin contends his sentence of death is "disproportionate" because two of his co-defendant's "who appear equally culpable"

received sentences of life imprisonment. Appellant misunderstands the nature of proportionality review and also neglects evidence that he played a dominant role in the murder.

In Garcia v. State, 492 So.2d 360 (Fla. 1986), a similar argument was presented. The triggerman complained that he received a death sentence while his accomplices received life sentences as a result of plea bargains. This court stated:

> Appellant's argument misapprehends the nature of proportionality review. Our proportionality review is a matter of state law. Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984): State v. Henry, 456 So.2d 466 (Fla. 1984). Such review compares the sentence of death to the cases in which we have approved or disapproved a sentence of death. It has not thus far been extended to cases where the death penalty was not imposed at the trial level. Proffitt v. Florida, 428 U.S. 242, 259 n. 16, 96 S.Ct. 2960 n. 16, 49 L.Ed.2d 913 (1976): Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984): Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 100, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). Id. at 368.

Proportionality review is not constitutionally required. Booker v. Wainwright, 764 F.2d 1371 (11th Cir. 1985).

This is not a case where the treatment of an accomplice can be a plausible basis for a jury recommendation of life: this is not a jury override case. C.f., Caillier v. State, 523 So.2d 158 (Fla. 1988); Brookings v. State, 495 So.2d 135 (Fla. 1986); but see, Craig v. State, 510 So.2d 857 (Fla. 1987). It is not unusual that jointly tried defendants receive different jury

recommendations where, as here, one defendant is the victim's prime attacker. Woods v. State, 490 So.2d 24 (Fla. 1986): Demps v. State, 395 So.2d 501 (Fla. 1981).

The evidence at trial established that after the group searched the streets of Daytona for about an hour, they located their intended prey. Alvin got out of the car alone, and asked Willie Powell, "Where's Omar." Alvin had a gun sticking out from his waistband. Appellant told Powell to get in the car several times. When he refused, Alvin and Simmons began shooting at Powell and Willie Grimes, who was standing nearby. Grimes pleaded for his life, but Alvin shot him anyway. Alvin's weapon fired the fatal bullet.

It is clear that Alvin was the dominant figure in this homicide. He did almost all the talking with the victims. Marek v. State, 492 So.2d 1055 (Fla. 1986). He fired the fatal bullet. Deaton v. State, 480 So.2d 1279 (Fla. 1985). At thirty-one years old, Alvin is several years older than either Brown or Simmons. Meeks v. State, 339 So.2d 192 (Fla. 1976). Brown, who was jointly tried with Alvin, did not exit the car and did not fire a weapon. See, Meeks, supra: Marek, supra. Therefore, this is not a case where the triggerman received a sentence of life but his accomplice was sentenced to death. See, Slater v. State, 316 So.2ds 539 (Fla. 1975). After the trial of Alvin and Brown, Simmons was tried separately and received a life sentence. However, the fact that Simmons also fired a weapon is not dispositive. Bassett v. State, 449 So.2d 803 (Fla. 1984): Jacobs v. State, 396 So.2d 1113 (Fla. 1981): see also, Brogdon v.

Blackburn, 790 F.2d 1164 (5th Cir. 1986). It is permissible for different sentences to be imposed on capital co-defendants whose culpability differs in degree. Hoffman v. State, 474 So.2d 1178 (Fla. 1985); Williamson v. State, 511 So.2d 289 (Fla. 1985).

The penalty imposed for this murder is proportional to other cases where this honorable court has upheld death sentences. In Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), several men attempted to commit a robbery, during which the victim was killed. Even though the jury had recommended life, this court affirmed the sentence of death. In Jackson v. State, 502 So.2d 409 (Fla.1986) and Melendez v. State, 498 So.2d 1258 (Fla. 1986), as in this case, several men drove around for a considerable length of time before committing or attempting to commit a robbery: in Melendez, as here, the victim begged for his life in vain. There are literally dozens of capital cases where the victim is killed during an attempted or completed robbery, and Alvin's case is in no way appreciably different. The trial court properly followed the jury's recommendation and sentenced Eddie Alvin to death.

POINT VII(C)

EVEN IF PRESERVED DESPITE LACK OF OBJECTION, THE JURY WAS PROPERLY INSTRUCTED THAT SIX VOTES RECOMMENDED LIFE IMPRISONMENT. NO PREJUDICE IS ESTABLISHED.

As his last attack on the death sentence, appellant contends that he is entitled to a new sentencing hearing because the jury was instructed that its recommendation for death or life

imprisonment must be by majority (R 2001, 2005). There was no objection to this instruction, and therefore appellee contends that it was not preserved for appellate review. Jackson v. State, 438 So.2d 4 (Fla. 1983). Even if preserved, the jury was properly instructed, and any error was not prejudicial.

The trial court instructed the jury that, "your decision may be by a majority of the jury." (R 2001) This language does not direct the jury that it must reach a majority vote as appellant suggests. Moreover, when discussing the verdict forms, the court advised that a majority must advise death, but, "on the other hand, if by six or more votes the jury determines that Eddie Eugene Alvin should not be sentenced to death your advisory sentence will be . . . life imprisonment . . ." (R 2003-2004). "As in Harich [v. State, 437 So.2d 1082 (Fla. 1983)], it affirmatively appears that the jury was not confused by the partial inconsistency of the instruction." Bush v. State, 461 So.2d 936, 941 (Fla. 1984). In Bush, the trial judge used the same language as was used in this case, that six votes recommended life. This court determined that the instruction was correct. See also, James v. State, 453 So.2d 786 (Fla. 1984). No prejudicial error was established in Bush, even though, as here, the jury recommended death by a 7 to 5 vote. This issue merits no discussion. Jennings v. State, 453 So.2d 1109 (Fla. 1984).

CONCLUSION

Based upon the arguments and authorities presented, appellee respectfully requests this honorable court to affirm the judgments and sentences, including the sentence of death, in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished, by U.S. Mail to Nathan G. Dinitz, counsel for appellant, at 600 Silver Beach Avenue, Daytona Beach, FL 32018 this 12th day of August, 1988.

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