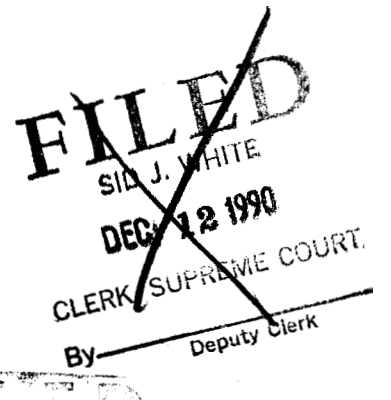
IN THE SUPREME COURT OF FLOR.IDA



CASE NO. 73,340

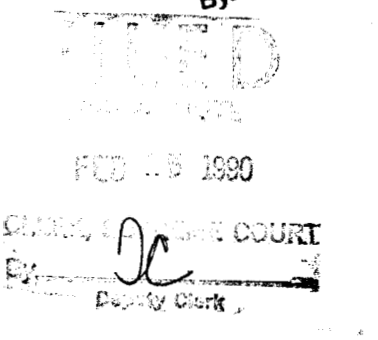
LAWRENCE LEWIS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee



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ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant was the defendant, and Appellee the prosecution, in a criminal prosecution in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida. The parties will be referred to as they appear before this honorable court, except that Appellee may be referred to as the state.

The following symbol will be used:

"R" Record on Appeal

All emphasis has been added by the state unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and Facts to the extent it is non-argumentative and supported by the record, and subject to the following clarifications.

Detective Carr testified that he did not seek an arrest warrant for Appellant, as he was concerned that if he waited Appellant would flee, since there were a lot of people who knew Appellant who were aware that Appellant was a suspect (R 198).

During the hearing on the motion to suppress Mayberry's identification of Appellant, Mayberry testified that just because the photo of Appellant showed him bare chested and turned sideways did not mean to him that the photo would stick out (R 460). Mayberry recognized the face of the person in the truck with him as Appellant (R 462). Mayberry stated that he was not mistaken about the identification (R 469). Judge Kaplan found that the photo lineup was not suggestive (R 480).

Detective Gill told Mayberry to see if the person he remembered from the incident was in the lineup (R 485-486). Mayberry identified Appellant almost instantly: within 3 - 5 seconds (R 487). The court held that although there were differences between the photos, the lineup was fair, and denied the motion to suppress (R 500).

At trial, Norwood Lancaster testified that when he found Gordon's body, there was a large amount of blood near Gordon's face, and a tire jack next to the body (R 847-850). Deputy Haywood stated that it was obvious that the body had been there

for a while (R 863). There was a ratchet section of a jack near the body (R 866).

Dr. Larry Grady Tate, the deputy chief medical examiner for Broward County, and a forensic pathologist, performed the autopsy on Michael Gordon (R 1286). Gordon had been dead for 36 hours when he was found (R 1306, 1345). There was swelling to Gordon's right eyelid, and blood and fly eggs in his hair (R 1328). There was blood on the grass near the body (R 1329). Gordon's head injuries were sustained when he was alive (R 1331). The right side of his head showed bruising. There were a total of five lacerations to the head, including one beneath the left eye. The scalp had been torn loose from its attachments. Gordon had sustained bruises (R 1336). Gordon had injuries to the top of his left shoulder, and to his left forearm (R 1339, 1342). There were bruises on his right thumb, and a hemorrhage beneath the skin of his left thumb (R 1345-1346). A blunt object caused the trauma to the forearm and hands. There were defensive wounds (R 1348). Gordon was alive when these injuries were inflicted, and lived for a while afterward, as evidenced by hemorrhage in the area (R 1349, 1361-1362). These injuries would have "hurt like hell" (R 1362). The bone in the forearm was broken in two, and would have protruded through the skin (R 1363-1364). Gordon's brain had contusions caused by skull fractures. There was subdermal bleeding in his brain (R 1357). A photo showed the bone fragments caused by the multiple skull fractures (R 1359-1360). Gordon died from blunt head trauma which would have caused respiratory and cardiac abnormalities (R 1366).

Tracy Markum testified regarding the events of the evening (R 1580 et seq.). Appellant returned to her house, and pulled up in front of the house and beeped the truck's horn. He asked her where David Ballard was (R 1588). Appellant told her to tell David when he returned that he needed to go fix Appellant's jeep for him (R 1589). Appellant said the jeep was on Flamingo Road and needed gas. There was another guy in the truck that was hurt. He was on the passenger side of the truck on the floor (R 1590). The guy in the truck asked for water, and said he was in pain (R 1592). Appellant told Tracy not to speak to the guy (R 1593).

When Appellant returned to Tracy's house later between 12:00 and 2:00, he did not appear drunk (R 1598-1599). He seemed fine. Appellant watched TV for a while, then took a shower and changed his clothes (R 1599). When David Ballard asked Appellant what happened, Appellant replied that "he left [some guy] on US 27", and that he left the truck in a canal (R 1600). Tracy heard something about a broken arm (R 1601, 1609). Later, Appellant painted his blue jeep black at Tracy's house (R 1612).

Chuckie Hedden testified that when he returned to Holly Lakes, he found Appellant in a beat up pickup truck (R 1700). Appellant pulled David aside, and said he'd been in a fight, and thought he hurt the guy. There was a guy in the truck on the passenger side floorboard (R 1702). The guy's arm looked like it was broken; there was a bone sticking out. Appellant grabbed the guy's arm, and the guy yelled. Appellant told the guy not to

make any noise (R 1704). The next day Chuckie had a discussion with Appellant, who told him he may have killed someone (R 1712).

Howard Seiden of the Broward Sheriff's Department crime lab testified that there was blood and head hairs on the jack found next to Gordon's body (R 1789, 1805, 1817).

James Mayberry testified regarding the attack by Appellant. He saw Appellant come at Gordon with his hand behind his back, and then attack Gordon with a pipe (R 1864). Appellant was chasing after Gordon as Gordon ran back towards the truck. Appellant was swinging the pipe at the truck. Mayberry slid to the driver's side, and started up the truck (R 1865). He stopped to pick up Gordon, who climbed into the back of the truck. Appellant tried to get in the cab of the truck with Mayberry (R 1866). Mayberry took off in the truck, with Appellant in the cab. Appellant told Mayberry to stop, and said "[y]ou're going to die tonight, motherfucker." (R 1867). Mayberry jumped out of the truck (R 1868). Mayberry described his assailant as a white male, dark hair, medium build, five feet ten inches tall, wearing jeans and a plaid shirt (R 1871, 1874). Mayberry identified Appellant in court as the guy who attacked him (R 1874). Mayberry identified Appellant's jeep as the jeep he saw with Appellant (R 1914).

Wendy Rivera testified that when she and Appellant went to get his jeep, he told her that he had killed someone. He said "[y]ou know I have a temper." (R 2251-2253).

At the sentencing phase, Appellant personally declined to present any evidence (R 3154). The state introduced into

evidence a certified copy of a prior judgment adjudicating Appellant guilty of two counts each of kidnapping and robbery (R 3161).

SUMMARY OF THE ARGUMENT

I. The trial court properly denied Appellant's motion to suppress James Mayberry's identification of Appellant's photo from a photo lineup since the lineup was not unduly suggestive. Under a totality of the circumstances test, the identification was reliable.

II. The trial court properly ruled that Appellant's proffered testimony by an expert witness on eyewitness identification should not be admitted at trial, since eyewitness identification is within the normal realm of jury experience. Appellant has failed to reach the requisite showing of clear error in the trial court's exercise of its discretion.

111. There was no abuse of discretion by the trial court in allowing James Mayberry to recite to the jury a poem he had written about his prison and drug use experience, as Appellant had impeached Mayberry during cross-examination regarding his drug use, and reading the poem was proper rehabilitation. Further, the introduction of the poem would constitute harmless error at worst.

IV. The trial court properly denied Appellant's motion to suppress statements, as Appellant's arrest was lawful, and the statements were voluntarily and spontaneously made, and were not the result of custodial interrogation.

V. Although several district courts of appeal have held that the short form instruction on excusable homicide can be misleading, any error in this case was invited by Appellant who declined the court's offer to read the long form instruction which would have cured the error.

VI. The jury instruction on reasonable doubt in the standard jury instructions is presumptively correct, and Appellant has failed to preserve any objection to the instruction in any event.

VII. The jury instruction on weighing aggravating and mitigating factors in the standard jury instructions properly reflected Florida law that a jury weigh the totality of the circumstances in determining its advisory sentence.

VIII. The death penalty was properly imposed on Appellant since three aggravating factors were present, and no mitigating factors were found by the trial court.

POINT I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS THE OUT OF COURT AND IN COURT IDENTIFICATION OF APPELLANT BY JAMES MAYBERRY

Appellant argues that James Mayberry's identification of him in a photo lineup should have been suppressed since the lineup was unduly suggestive, and that Mayberry's in court identification of him should also have been suppressed since the photo lineup influenced the later identification. The State maintains that the photo lineup was conducted without any impropriety or suggestiveness, and that the identification of Appellant was properly admitted at trial. Further, even if there was a problem with the photo lineup, Appellee asserts that the in court identification would not have been tainted by the photo lineup.

This issue can be resolved by applying a two-pronged test. It must be determined whether the police used an impermissibly suggestive procedure in obtaining the identification, and if so, whether that suggestive procedure gave rise to a substantial likelihood of an irreparable mistaken identification. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Appellee maintains that Appellant has met neither prong of the test. The United States Supreme Court has established certain nonexclusive factors to be considered in evaluating the likelihood of misidentification. These include: the opportunity of the witness to view the criminal at the time of the crime, the

witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Neil v. Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972). See also, Grant v. State, 390 So.2d 341, 343 (Fla. 1980).

During the motion to suppress, James Mayberry stated that just because the photo of Appellant was the only one where the subject was barechested and turned sideways does not mean to him that it would stick out from the other photos in the lineup (R 460). He stated that he could recognize the face of the person who was in the truck with him (R 462), and that he was not mistaken about the identification (R 469). The trial judge who had the benefit of viewing the actual photo pak used in the lineup held that the lineup was not suggestive (R 480).

Detective Gill was the detective who showed the photo lineup to Mayberry. He told Mayberry to see if the person was there that he remembered from that evening (R 486). Mayberry picked out the photograph of Appellant almost instantly: within three to five seconds (R 487). Based on this testimony, Judge Kaplan denied the motion to suppress identification, finding that although there were some differences in the photos, the differences did not make the identification unreliable (R 500). This finding was proper. Perez v. State, 539 So.2d 600 (Fla. 3d DCA 1989).

Florida has adopted the totality of the circumstances test to determine whether there has been a substantial likelihood of

misidentification. Rose v. State, 472 So.2d 1155 (Fla. 1985). The State maintains that under this test there can be no real question about the suggestive nature of the photo lineup, and would also note that Rose was also a capital case, so Appellant's argument that there should be a different standard is unavailing.

Even if the lineup could have been held to be impermissibly suggestive, the identification would still be admissible if the State could show that the identification was otherwise reliable and based upon Mayberry's independent recall. Edwards v. State, 538 So.2d 440 (Fla. 1989); Rose v. State. Mayberry was able to give a good description of the man who attacked him and Gordon: a white male, medium build, five feet ten inches tall, wearing jeans and perhaps a plaid shirt (R 1871, 1874). Mayberry identified Appellant in court (R 1874). Mayberry got a good opportunity to observe his assailant when the assailant was in the truck cab with him. The credibility of Mayberry's identification was properly one for the jury to determine.

The trial court properly denied Appellant's motion to suppress identification.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING THAT THE TESTIMONY OF APPELLANT'S IDENTIFICATION EXPERT WAS INADMISSIBLE

Appellant argues that the trial court erred in not allowing him to present the testimony of a Dr. Blinder who would have testified regarding the reliability of James Mayberry's eyewitness testimony. Appellee maintains that the trial court acted properly within its discretion by precluding the admission of this testimony since Dr. Blinder's testimony would not have aided the jury in determining a matter which is outside normal experience.

Expert testimony is used at trial to assist a jury in resolving issues which are beyond the ordinary experience of the jury. Johnson v. State, 393 So.2d 1069, 1072 (Fla. 1980), cert. denied 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191, rehearing denied 454 U.S. 1093, 102 S.Ct. 660, 70 L.Ed.2d 632 (1981). A trial court has broad discretion in determining the range of subjects on which an expert witness may be allowed to testify and unless there is a clear showing of error, a trial court's decision will not be disturbed on appeal. Id. This court has previously held that a trial court did not abuse its discretion in excluding the testimony of an expert witness who would have testified regarding the reliability of eyewitness identification, because

> a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and

> cautionary instructions, without the aid of expert testimony.

Johnson v. State, 438 So.2d 774, 777 (Fla. 1983). See also, Johnson v. State, 393 So.2d at 1072, and Rodriquez v. State, 413 So.2d 1303 (Fla. 3d DCA 1982). The Eleventh Circuit also does not allow the admission of expert testimony regarding identification. United States v. Benitez, 741 F.2d 1312, 1315 (11th Cir. 1984), cert. denied 471 U.S. 1137, 105 S.Ct. 2679, 86 L.Ed.2d (1985).

Dr. Blinder's proffered testimony showed that he was a psychiatrist practicing primarily in San Francisco (R 1959). He had "good working knowledge of the processes by which witnesses form their identifications" (R 1963). Dr. Blinder testified that he could "only offer general comments that apply in the case of common wisdom about how any witness arrives at his conclusions", but "there is no way [he could] testify for the reliability of any specific witness." (R 1965). After Appellant gave Dr. Blinder a lengthy hypothetical generally tracking the evidence in this case regarding Mayberry's account of the evening, Dr. Blinder responded "let me emphasize that even in this hypothetical situation I cannot say whether this witness is reliable" (R 1988). After listening to the proffered testimony and argument, the trial court declined to allow the testimony to go before the jury (R 2012).

The State asserts that the trial court ruling was correct. There was nothing in Dr. Blinder's testimony which would have aided the jury in determining the reliability of Mayberry's

testimony since the reliability of any eyewitness identification is within the ordinary experience of a jury.

POINT III

THE TRIAL COURT DID NOT ERR IN HOLDING THAT A POEM WRITTEN BY JAMES MAYBERRY WAS RELEVANT TO THE ISSUES AT TRIAL SINCE IT WAS PROPER REBUTTAL TO APPELLANT'S IMPEACHMENT OF MAYBERRY ABOUT HIS DRUG USE

Appellant argues that he was prejudiced by the trial court's ruling allowing James Mayberry to recite to the jury a poem he wrote in prison about his life and drug use. Appellee maintains that the poem was properly read as a rebuttal to Appellant's impeachment of Mayberry about his drug use.

Mayberry freely admitted on direct examination that he had used both heroin and cocaine prior to the incident involving Mayberry, Michael Gordon, and Appellant, and that he regularly used drugs (R 1839-1840, 1844, 1850-1851). On cross-examination, pursuant to 890.608 (1)(d), Fla. Stat. (1987), Appellant repeatedly questioned Mayberry about his drug use prior to the incident, prior to giving his statement, and his daily habit in general (R 2020-2021, 2022, 2024, 2145, 2148, 2150). Just as the impeachment was proper, it was proper for the state to attempt to rehabilitate Mayberry on redirect examination by having Mayberry read the poem. Edwards v. State, 548 So.2d 656 (Fla. 1989).

It is also questionable how much the recitation of the poem helped the state's case since it told of Mayberry's repeated visits to prison, and the great hold that opium derivatives had on him (R 2165-2166). The introduction of the poem was proper since Appellant opened the door to evidence about Mayberry's drug use on cross-examination. Even if the trial court abused its

discretion in allowing the admission of the poem, it can not be said that the recitation of the poem would have affected the jury verdict, and any error would be harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

POINT IV

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS SINCE THE STATEMENTS IN QUESTION WERE MADE VOLUNTARILY AND APPELLANT'S ARREST WAS LAWFUL

Appellant argues that his arrest was unlawful because no one told him what he was being arrested for. This position conveniently ignores the evidence at the motion hearing, and the findings made by the trial judge. He further argues that his statements, although spontaneously and voluntarily made, should have been suppressed anyway. The state asserts that the trial court's ruling was correct.

Detective Carr testified at the motion hearing that Appellant was told he was being arrested for murder (R 208). This testimony was noted by Judge Kaplan in his order denying the motion to suppress, but Judge Kaplan went on to find that even if Appellant had not been told the reason for his arrest, such a neglect would have been justifiied under the facts attendant to the arrest (R 3421). Appellant's representations to this court regarding the trial court's finding are erroneous, at best.

The trial court's ruling was correct. The police were justified in arresting Appellant without a warrant since there was a reasonable belief that a felony had been committed, and that Appellant had committed it. g901.15, Fla.Stat. (1987). Detective Carr complied with 6901.17, Fla.Stat. (1987)when he told Appellant that he was being arrested for murder (R 208). Even if Detective Carr were mistaken in his testimony, the

failure to immediately advise Appellant of the nature of the charges against him at the scene of the arrest would not render the arrest unlawful, since giving him the information may have imperiled the arrest. Id., Kirksey v. State, 433 So.2d 1236 (Fla. 1st DCA 1983); Flowers v. State, 152 Fla. 649, 12 So.2d 772 (Fla. 1943); City of Miami v. Nelson, 186 So.2d 535 n.1 (Fla. 3d DCA 1966). Even if the officer inaccurately described the offense for which he was being arrested to Appellant, the arrest would still be lawful. Roberts v. State, 318 So.2d 166 (Fla. 2d DCA 1975). The lateness of the hour of Appellant's arrest, and the remote area in which he was arrested, would certainly justify not having an extended conversation regarding the circumstances of the arrest until Appellant and the officers were safely in the confines of the Sheriff's office.

At the office, Detective Gill began to advise Appellant of his Miranda rights (R 51). Appellant nodded his head yes to Detective Gill stating that he was a police officer, Appellant had the right to remain silent, Appellant had the right to have an attorney and that an attorney would be appointed for him (R 52-54). Appellant then volunteered the statement that he did not need an attorney, and inquired as to what he was being arrested for. Detective Gill told him that he was being arrested for the murder of Michael Gordon on U.S. 27. Appellant stated that that was not a murder, it was more like a fight, and that he was pissed off (R 54). These voluntary statements, which were not made in response to any kind of custodial interrogation, were properly admitted at trial. See Castillo v. State, 412 So.2d 36

(Fla. 3d DCA 1982); Spikes v. State, 405 So.2d 430 (Fla. 3d DCA 1981).

Although Detective Gill testified originally that he completed the reading of rights to Appellant, and that Appellant refused to sign the rights form (R 54), the issue was muddied on cross-examination by his statement that he did not complete the last section (R 178). Although this court must look at the facts in the light most favorable to the prosecution, even if Appellant were right in his assertion that the rights form was never completed, the voluntary nature of the spontaneous statement would not be affected, and the statement would still have been properly admitted at trial.

Appellant's statements to the effect that it was not a murder, but was more like a fight, and that Appellant had been pissed off were properly admitted at trial as voluntary admissions not made in response to any interrogation. Further, even if the statements should have been suppressed, their admission would not have affected the jury verdict, and any error would be harmless. State v. DiGuilio.

POINT V

ANY ERROR IN THE JURY INSTRUCTION ON EXCUSABLE HOMICIDE WAS INVITED BY APPELLANT AND WOULD BE HARMLESS IN ANY EVENT

Appellant alleges that the jury instruction on excusable homicide was misleading and confusing to the jury. Appellee acknowledges the case law which provides that the short form of the jury instruction on excusable homicide can mislead the jury as the jury could interpret the phrase "without any dangerous weapon being used" to modify the entire instruction. Blitch v. State, 427 So.2d 785 (Fla. 2nd DCA 1983); Bowes v. State, 500 So.2d 290 (Fla. 3d DCA 1986), review denied, 506 So.2d 1043 (Fla. 1987). However, this problem can be cured by the giving of the long form instruction on excusable homicide which clearly provides that the use of a dangerous weapon precludes a finding of excusable homicide under the sudden combat alternative (Florida Standard Jury Instructions in Criminal Cases, p.76) Blitch v. State; Bowes v. State. In the case at bar, Appellant, through counsel, declined the trial court's offer to read the long form instruction (R 2775). Therefore, any error was invited by Appellant.

In the case at bar, the uncontradicted testimony of James Mayberry was that Appellant hit Michael Gordon with a pipe on the forearm (R 1864). This injury severed Gordon's forearm in two, which would have totally prevented him from being able to engage in sudden combat (R 1363). Accordingly, the sudden combat alternative of excusable homicide was inapplicable to this

murder. As noted in Blitch v. State, 427 So.2d at 787, n.1, since sudden combat did not occur, reading part three of the long form instruction would have prevented any misinterpretation of the summary instruction.

The state contends that Kingery v. State, 523 So.2d 1199 (Fla. 1st DCA 1988) is in conflict with Blitch, and is wrongly decided. Kingery held that the long form of the excusable homicide instruction is also misleading. A simple reading of the instruction mandates the conclusion reached in Blitch, that the long form correctly instructs that the use of a dangerous weapon only precludes a finding of excusable homicide under the sudden combat criteria. Appellee also notes that this court recently addressed the issue of the necessity of giving an instruction on excusable and justifiable homicide when instructing on manslaughter, and failed to address the issue raised here regarding the alleged misleading nature of the short form instruction. Rojas v. State, 14 F.L.W. 577 (Fla. November 22, 1989).

No reversible error occurred regarding this jury instruction.

POINT VI

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO REASONABLE DOUBT

Appellant argues that the jury instruction on reasonable doubt contained in the standard jury instructions denied him a fair trial because the instruction states in one place that if the jury has a reasonable doubt, it should find the defendant not guilty. Appellee maintains the correctness of the Florida standard jury instructions, and that the use of these instructions in Appellant's trial did not deprive Appellant of the due process of law.

The Florida Standard Jury Instructions in Criminal Cases come to this court with a presumption of correctness. This court approved the reasonable doubt instruction in In re Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981). Appellant has raised nothing here that should cause this court to recede from this prior approval.

Moreover, Appellant failed to object to this reasonable doubt instruction, and is thus precluded from raising this issue on appeal. Harris v. State, 438 So.2d 787 (Fla. 1983); State v. Heathcoat, 442 So.2d 955 (Fla. 1983). Even if Appellant had preserved this issue, he still is entitled to no relief. Appellant's reliance on Thomas v. State, 494 So.2d 240 (Fla. 4th DCA 1986) is misplaced. The issue in Thomas was whether the trial court erred in denying the appellant's special jury instruction regarding reasonable doubt and identification. In finding that there was no error, the district court quoted the

actual jury instruction given by the trial court which erroneously substituted the word "must" for the word "should" in the last paragraph. The district court did not pass on the propriety of the instruction, except to find that it adequately covered the special instruction asked for by the appellant.

As noted by Judge Glickstein in his special concurrence in Thomas v. State, 525 So.2d 945, 546 (Fla. 4th DCA 1988), a defendant does not suffer any meaningful prejudice by the use of the word "should" rather than the word "must" in the final paragraph. Such is the case here.

Even the federal district court case relied on by Appellant does not support his position. Gilmore v. Curry, 523 F.Supp. 1205 (S.D.N.Y. 1981). In Gilmore, the court held that a supplemental charge on reasonable doubt which stated that the jury "may" acquit the petitioner if the jury found a reasonable doubt was not legally correct, but went on to find that it was harmless in light of the entirety of the reasonable doubt charge which used the word "must." 523 F.Supp at 1208, n.5. The word "may" is permissive, but the word "should" imposes an obligation, and the two should not be equated.

Appellant has suffered no prejudice by the standard reasonable doubt instruction given to the jury.

POINT VII

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO ITS DUTY DURING THE PENALTY PHASE

Appellant argues that the standard jury instruction regarding the balancing of aggravating circumstances against mitigating circumstances improperly shifts the burden of proof to the Appellant. That is not the case.

The trial court tracked the standard language contained in Florida Standard Jury Instructions in Criminal Cases at pp. 80-81 (R 3192-3194). As noted in Point VI, supra, the standard jury instructions come to this court clothed with a presumption of correctness. This court has previously approved the jury instruction complained of by Appellant. Appellant gives this court no reason to recede from this approval. Further, the jury instruction given by the trial court comports with the requirement of this court that a jury "weigh the 'totality of the circumstances' in arriving at a reasoned judgement as to whether the facts warranted imposition of the death penalty or life imprisonment". Jackson v. Wainwright, 421 So.2d 1385, 1389 (Fla. 1982).

The jury instruction properly followed Florida law as ,to the imposition of the death penalty, and Appellant's sentence should be affirmed.

POINT VIII

THE DEATH PENALTY WAS PROPERLY IMPOSED ON APPELLANT AS THE TRIAL COURT FOUND THREE AGGRAVATING FACTORS AND NO MITIGATING FACTORS

Appellant argues that the death penalty was imposed on him arbitrarily and disproportionately. Appellee responds that the trial court found three aggravating factors which were supported beyond a reasonable doubt by the evidence at trial, and that the trial court did not abuse its discretion by failing to find any mitigating factors. The trial court followed the advisory verdict given by the jury in a vote of ten to two.

In his detailed order, Judge Kaplan set forth his analysis of the aggravating and mitigating factors applicable to this case. He found that Appellant had been previously convicted of two counts of robbery and two counts of kidnapping arising out of a single episode which supported the aggravating circumstance that Appellant had previously been convicted of a crime involving the use of violence (R 3562). This was supported by the certified copy of the judgment of conviction introduced by the State at the sentencing phase (R 3167). Judge Kaplan found that the instant murder was committed in the course of a kidnapping (R 3563). Ample evidence was adduced at trial to support this finding: Appellant beat up Michael Gordon, stole his truck, and drove around Broward County with Gordon in the cab, injured.

The trial court also found that the murder of Michael Gordon was especially heinous, atrocious and cruel (R 3564). This finding was supported by the testimony of the medical

examiner that the blows to Gordon's forearm which caused the complete severance of the bone occurred while Gordon was still alive (R 1349, 1361-1362, 1363). The medical examiner also testified regarding the severity of the blows to the head which were evidenced by the crushing of Gordon's skull, and the defensive wounds on Gordon's hands (R 1348, 1359-1360). This evidence supported the finding of this aggravating factor. Lamb v. State, 532 So.2d 1051 (Fla. 1988); Cherry v. State, 544 So.2d 184 (Fla. 1989). Tracy Markum testified that when Appellant drove to her house in Gordon's truck, Gordon was lying on the floor of the passenger side of the truck. When Gordon asked for water and said he was in pain, Appellant told him to be quiet and told Tracy not to talk to him (R 1590-1593). Chuckie Heddon testified similarly, and that Gordon's arm bone was sticking out of his arm (R 1702-1704). This testimony shows that Michael Gordon was injured and in fear prior to his death. This also supports a finding of H.A.C. Jackson v. State, 522 So.2d 802 (Fla.), cert. denied __U.S.__, 102 L.Ed.2d 153 (1988); Scott v. State, 494 So.2d 1134 (Fla. 1986); Swafford v. State, 533 So.2d 270 (Fla. 1988).

The trial court properly rejected the mitigating factors set forth in Appellant's brief, especially in light of the fact that Appellant failed to avail himself of the opportunity to present evidence at the sentencing phase. Appellant states that he was under emotional distress because of his relationship with his girlfriend. This is unsupported by the evidence at trial, and is not a statutory or nonstatutory mitigating factor in any

event. Appellant also argues that he was substantially impaired at the time of the murder, as he had been drinking all evening. This does not constitute a mitigating factor, since there was testimony by Tracy Markum that Appellant was not drunk later in the evening, and evidence that Appellant was able to discuss the murder with David Ballard and Wendy Rivera (R 1598-1599, 1600-1601, 1609, 1712). Kokal v. State, 492 So.2d 1317 (Fla. 1986). Lay testimony of alcohol and drug use does not support a finding of drug dependency necessary to create a mitigating factor. Hardwick v. State, 521 So.2d 1071 (Fla. 1988). Appellant also claims that the fact that he was "in his early twenties", and gainfully employed is a mitigating factor. This is not so. Appellant was twenty-five years old at the time of the crime (R 3568). This court has repeatedly held that murderers as young as eighteen can not avail themselves of this statutory mitigating factor. See e.g. Deaton v. State, 480 So.2d 1279 (Fla. 1985); Garcia v. State, 492 So.2d 360 (Fla.), cert. denied 479 U.S. 1022, 107 S.Ct 680, 93 L.Ed.2d 730 (1986); Scull v. State, 533 So.2d 1137 (Fla. 1988).

In view of the three strong aggravating factors, and the absence of any mitigating factors, the trial court properly followed the jury advisory recommendation of a death sentence in this case. Cherry v. State; Chandler v. State, 534 So.2d 701 (Fla. 1988).

CONCLUSION

Wherefore, based upon the foregoing argument and authorities, Appellee respectfully requests that this honorable court AFFIRM Appellant's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been sent by U.S. Mail to EDWARD M. KAY, Esquire, Kay and Bogenschutz, P.A., 633 Southeast 3rd Avenue, Suite 4F, Fort Lauderdale, FL 33301 this 12 day of February, 1990.