IN THE SUPREME COURT OF FLORIDA

ERNEST CHARLES DOWNS,

Appellant,

vs. Case No. 73,988

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

On Appeal From the Fourth Judicial Circuit, in and for Duval County, Florida

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TABLE OF CONTENTS

TABLE OF CONTENTS

(Continued)

TABLE OF CONTENTS

(Continued)

TABLE OF CITATIONS

CASES PAGE NO.

TABLE OF CITATIONS

(Continued)

CASES — PAGE NO.

TABLE OF CITATIONS

(Continued)

CASES — PAGE NO.

TABLE OF CITATIONS

(Continued)

CASES PAGE NO.

TABLE OF CITATIONS

(Continued)

CASES PAGE NO.

TABLE OF CITATIONS

(Continued)

STATUTES AND CONSTITUTIONS **PAGE NO.**

PRELIMINARY STATEMENT

Appellant, Ernest Charles Downs, was the defendant in the trial court and will be referred to as "Appellant" or by his proper name. Appellee, the State of Florida, was the prosecution in the trial court and will be referred to as either "Appellee" or "the State."

References to the thirteen volumes of resentencing transcript will be by use of the symbol "TR" followed by the appropriate page numbers in parentheses.[1] References to the two volumes of the record on appeal will be by use of the symbol "R" followed by the appropriate page number in parentheses. References to the two volumes of the supplemental record on appeal will be by use of the symbol "SR" followed by the appropriate page number in parentheses.

[1] One of these thirteen volumes was sealed by order of the circuit court and has not been provided to the State as part of the record on appeal.

STATEMENT OF THE CASE

Appellee agrees with the Appellant's Statement of the Case with the following additions:

In her order resentencing the Appellant to death, the trial court specifically merged the aggravating factors of murder for pecuniary gain and commission of the murder in a cold, calculated and premeditated fashion into one factor. (R 312).

Although the trial court's written order did not articulate specifically what mitigating evidence it found in this case, this Court may wish to refer to its earlier opinion in *Downs v.* ***State,*** 386 So.2d 788, 792-93 (Fla.1980), which details the trial court's original findings regarding the lack of any statutory mitigation.

STATEMENT OF THE FACTS

The Appellant has presented the Court with a fairly accurate summary of the testimony adduced during the resentencing hearing. However, Appellee must stress that the facts underlying this case have already been determined by this Court in its original opinion in *Downs v. State*, 386 So.2d 788 (Fla. 1980):

> In April, 1977, John Barfield approached Downs with an offer of five thousand dollars if Downs would kill Harris. Downs accepted the contract to kill Harris and enlisted the assistance of Larry Johnson. On April 23, 1977, at Downs' insistence, Johnson phoned Harris and identified himself as Joseph Green, from whom Harris was expecting a call, and told Harris that he wanted to talk to him about flying contraband. They arranged a meeting in Jacksonville. Downs drove down a dirt road and left Johnson there to await Downs' return with Harris. Downs picked up Harris and drove to the location where he had left Johnson. Harris exited the car and approached Johnson, at which time Downs shot Harris four times in the head with a .25 caliber automatic pistol. Together, Downs and Johnson dragged the body off the road into the bushes where Downs fired another shot into Harris' chest to make sure that he was dead. (Empahsis added).

Id. at 789-90. This Court reaffirmed Downs' role as "trigger man'' in *Downs v. State*, 453 So.2d 1102 (Fla. 1984). Writing for a unanimous court (including Justices Overton, McDonald, Erhlich and Shaw), Chief Justice Alderman noted:

> Downs had been approached by Barfield with an offer of five thousand dollars to kill Harris. He accepted the offer and, with the assistance of Johnson, killed Harris.

Id. at **1103.**

Appellant's Statement of the Facts omits testimony from Jerry Sapp, a coconspirator and convicted codefendant. Sapp told the resentencing jury that Appellant discussed the crime with John Barfield and remarked, in Sapp's presence that he was going to kill a man for $5,000. (TR **437-38).** Sapp further testified that Barfield indicated a distrust of Larry Johnson, as an accomplice. (TR **438).** The Appellant indicated that he would personally show Barfield proof of the killing in order to satisfy Barfield's concerns. (TR **440).**

On rebuttal, the State presented the evidence of two police officers, Lt. Pat Miles and Lt, Leroy Starling, detailing Barfield's confession. (TR 991, 998). These officers indicated that Barfield never mentioned Larry Johnson's name when discussing how the murder was set up. (TR 991-92, 1000). According to Lt. Miles, Barfield paid the Appellant money up front as part of the bargain (TR 992); and indicated that the Appellant provided him with the victim's drivers' license as proof of success of the murder. (TR 992).

SUMMARY OF THE ARGUMENT

The death penalty imposed against Appellant was reversed by this Court due to *Hitchcock* error in the jury instructions. The trial court, after a unanimous jury verdict for death, had previously sentenced Downs to death finding two aggravating factors and no mitigation of any nature. Upon resentencing, the jury recommended death again, this time by a vote of 8-4. The trial court found the original two aggravating factors and added the factor of cold, calculated and premeditated murder. However, she merged that factor with pecuniary gain. The court again found no mitigating evidence to outweigh these aggravating factors and imposed death.

The first two issues raised by Appellant essentially ask this Court to substitute its judgment for that of the trial court and the jury regarding the propriety of the death penalty. This was cold-blooded, execution-style murder for money. The death penalty is appropriate in situations such as this and neither of these first two claims merits much discussion.

Issue III concerns the admission of testimony which was not objected to at trial. Accordingly, it is waived for purposes of appeal. Furthermore, any error in the denial of the admission would be harmless in the context of this proceeding.

Issue IV raises the question of whether Appellant should have been entitled to subpoena State Attorney Austin and obtain his testimony so that he could "attack the State's credibility."

No Florida case law specifically addresses this point and Appellant has cited none in support of his position. Appellee relies on a decision from the Supreme Court of Wyoming which contains an exhaustive review of federal and other state law on this point. Under those cases, the standard is simply whether the trial court abused its discretion. Under the facts of this case, no such abuse can be found to exist. Furthermore, any error in this respect would be harmless given the cumulative nature of the excluded evidence.

In Issue V, Appellant argues that the court erred in excluding a perpetuated deposition from Appellant's grandmother. This deposition was agreed to by the State for the limited purpose of litigating a 3.850 motion in 1982. But for the State's limited agreement, the deposition would have never existed. Appellant should not be entitled to complain about its existence based on this earlier stipulation. Second, the deposition relates strictly to Appellant's guilt or innocence as Ms. Michael's testimony would have been an alibi for Downs at the time of the crime. This Court has already resolved that Downs was in fact the triggerman in this murder.

Review of the deposition will show it is replete with improper hearsay and other evidentiary problems all subject to timely State objection. The State would not have been able to effectively refute this hearsay by cross-examination and therefore it would not have been appropriate to allow the entire document to be read into evidence. Lastly, any error in the exclu-

sion of this deposition would be harmless because there was other testimony on the same theory.

Issue VI pertains to the whimsical doubt theory that Downs, although convicted, might not have been the triggerman. This Court has twice found that Downs was the triggerman. The trial court did not err in denying a special instruction on this theory as it gave the standard jury instruction on mitigating evidence. This Court has repeatedly approved that instruction in similar situations.

Issue VII is a complaint regarding a number of evidentiary matters. Some of the them were not preserved for appellate review. Others focused upon evidence which did not fall within even the broad range of permitted evidence under *Lockett* or *Eddings*. The trial court afforded broad leeway to the defense and any error in this context would be harmless beyond a reasonable doubt.

In Issue VIII, Appellant complains about the trial court's instruction to the jury regarding credit he would be given for time already served in prison. Appellant opened the door to this inquiry due to his improper and misleading argument to the jury during closing argument. The doctrine of invited error includes reversal on this point. Furthermore, the trial court properly instructed the jury as to its question.

Issue IX is a complaint regarding the Appellant's absence during a critical stage of trial. Although the Appellant was

absent when the jury presented its question to the court, the cases indicate that where the question is strictly legal, as was true here, the error would be harmless. In this case, the record reflects that Downs later argued his rationale for not answering the jury's question. Thus, this Court can compare his argument with that of his attorney and establish that it would not have any impact upon the trial court's ultimate decision. Accordingly, this error is harmless.

Finally, in Issue X, Appellant complains about retroactive application of the cold, calculated and premeditated aggravating factor. This Court has repeatedly rejected this argument in cases such as *Combs v. State*. Furthermore, the record reflects the trial court merged that aggravating with pecuniary gain. Thus, any error in application would be rendered harmless beyond a reasonable doubt. The same trial court had given the death penalty previously and there is nothing that indicates that the result would be different in this context.

Appellant has failed to show any violation of his constitutional rights and as such, this appeal should be denied on all points.

ARGUMENT

ISSUE I

THE COURT DID NOT ERR IN EITHER FAILING TO FIND ANY MITIGATION OR IN NOT STATING WITH UNMISTAKABLE CLARITY WHAT MITIGATION IT FOUND.

The Appellant has misplaced the focus of this entire proceeding. The case was reversed and remanded for further consideration by a jury pursuant *Hitchcock u. Dugger,* **481** U.S. **393, 107** S.Ct. **1821, 95** L.Ed.2d **347 (1987),** see Downs *u. Dugger,* **514** So.2d **1069, 1072** (Fla. **1987).** The Court's concern was that had the jury been properly instructed, it may have rendered a recommendation of life in prison as opposed to death by electrocution. Id. at **1072.**

We stress this point with the Court because it appears the Appellant is seeking to reargue points that are no longer in dispute. On two prior occasions, direct appeal and appeal of the denial of a Rule **3.850** motion, this Court has stated in no uncertain terms that Ernest Downs' culpability made capital punishment the appropriate punishment for his case. Indeed, in discussing the **3.850** appeal, this Court unanimously held that assuming that his trial counsel had not rendered him professionally competent representation, that error would not have prejudiced Downs' in either his conviction or his sentence. **453** So.2d at **1109.**

The trial court did not err in providing a sentencing order which did not specifically delineate its findings on statutory or

nonstatutory mitigating evidence. Recall the trial court initially entered a detailed sentencing order discussing the statutory, aggravating and mitigating factors and that order appears in this Court's opinion at *386* So.2d 792-93. Those findings have never been set aside by this Court and obviously reflect the trial court's findings of fact regarding statutory mitigation.

Nothing presented by Mr. Downs at his resentencing hearing would impact upon any of those findings. The evidence presented by the Appellant at his resentencing focused on three types of nonstatutory mitigating evidence:

> (1) Evidence suggesting that Downs was not the "triggerman" and might not have been present at the crime scene.
>
> (2) "***Skipper*** *v.* ***South*** *Carolina* evidence" - evidence indicating that Downs has been a model prisoner and subject to a degree of rehabilitation.
>
> (3) "Family evidence" - evidence dealing with a variety of aspects of Downs' life which was relevant to this case. Examples include the evidence concerning the pornographic pictures of his ex-wife and Dr. Krops' expert opinion regarding the impact those pictures had upon Downs; evidence indicating Downs was a loving father to his child; evidence of Downs' childhood including evidence of child abuse and lack of a strong male role model.

Downs also presented testimony seeking to soften certain of the aggravating factors. For example, Downs sought to mitigate the State's argument regarding prior conviction of a violent felony by explaining the circumstances leading up to and surrounding his

conviction for armed robbery in Kansas. However, a review of the current record should convince this Court that none of that evidence could in any way impact any of the statutory mitigating factors in this case.[2]

The trial court's written order and her comments during the hearing indicate she considered the presentation of mitigating evidence and found it did not outweigh the aggravating factors. For example, the court told Mr. Downs:

> THE COURT: I'm not going to make this long. Okay? You know certainly you, again as I said before, in this trial have shown respect to the court, and I think you have handled yourself very well. I certainly see some maturity, I guess, or good things since you have appeared before me before. You were a different man in '77 than you probably are today. It comes down to it's a legal decision.
>
> And I found the three aggravating circumstances that you probably would expect, the prior felonies, the fact that it was done for money, and also that it was cold, premeditated, and calculated, I think is the other word. And I would find that those last two merge in together in this kind of case

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[2] The jury was only instructed as to the availability of the following statutory mitigating factors: (1) the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance; (2) that the defendant was an accomplice in the offense and that his participation was relatively minor; and (3) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired. The jury was further instructed to consider "any other aspect of the defendant's character or record and any other circumstances of the offense." (TR 1136-37). There was no objection at any time by the defense to these instructions.

> because I can't think of any case where it's a murder for hire that would not involve money and would not be cold, calculated and premeditated.
>
> So, essentially, although I found three aggravating factors, I find that those two kind of merge together, and that there are two aggravating factors.
>
> As far as you are concerned, the unfortunate part is I did not find the mitigating circumstances to overcome those. And I think you deserve to know that I really cannot accept your -- I do not find credible your testimony that you were not at the scene.
>
> You know, Barfield at this trial changed a bunch of testimony, and the state I think impeached him very well from his testimony at his trial back in 77, 78 and I think that would be more believable when he was, so to speak, under the gun himself subject to the death penalty. And, of course, then your sister gave her deposition back in '77. Her testimony was impeached without the corroboration -- I just do not accept your version, and I don't believe the jury, and anyone, would have returned this recommendation if they had accepted it.
>
> Let me just say that you were the first person that I ever sentenced to death, and it took a lot out of me, and the same applies today.

(TR 1206-07). The trial court's remarks in open court are echoed in her written sentence. (R 312). In that written order, the court states "The court does not find mitigating factors to offset or overcome the aggravating circumstances in this case."

It is of course appropriate for this Court to consider the trial court's oral pronouncement in connection with the written sentencing order. *Bryan v. State,* 533 So.2d 744, 748 (Fla. 1988); *Thompson v. State,* 328 So.2d 1 (Fla. 1976). The trial court obviously considered and weighed the testimony of the witnesses presented as evidenced by her comments regarding the credibility of the witnesses and the State's ability to impeach them. This case is similar to *Rutherford v. State,* 545 So.2d 853, 856 (Fla. 1989), wherein this Court rejected a defendant's complaint that the trial court failed to consider mitigating evidence regarding background and nonviolent character:

> The evidence that Rutherford had served in the armed forces in Viet Nam may be considered by a trial judge as a mitigating factor, but need not be. The judge's order did mention a number of aggravating and mitigating factors found, but from the instruction he read to the jury it is clear that he knew this is a weighing process, not a mechanical case of addition.

The trial court's understanding of its role in assessing the propriety of capital punishment in this case is bolstered by this Court's implicit recognition in *Downs v. Dugger, supra,* that the trial court did consider nonstatutory mitigating evidence in Appellant's case. In response to the Petition for Writ of Habeas Corpus predicated upon the *Hitchcock* decision, undersigned counsel raised three arguments in support of the trial court's original order. In argument I, the State argued that there was no error with the standard jury instruction presented in this case. In argument II, the State argued that the trial court did not limit

herself to consideration of statutory mitigating circumstances in making the ultimate decision on the death penalty. Last, the State argued that any error in the *Hitchcock* context would be harmless error. A copy of the State's response to the Petition for Writ of Habeas Corpus is attached to this brief as State's Appendix A.

In resolving the Petition for Writ of Habeas Corpus, this Court addressed only the jury instruction and harmless error issues. This Court can, of course, take notice of its files regarding Downs' prior litigation in seeking to resolve this matter. Those records will clearly evidence that Judge Pate has always considered and carefully assessed any and all evidence presented by Mr. Downs in an attempt to mitigate his sentence. She has, however, found it utterly lacking in value. Accordingly, there is no error in regard to the order that she has prepared in this case. ***Bryan, supra,*** at 749.

Furthermore, the Appellant has not suggested how the lack of written finding would impact upon this particular proceeding.[3] At worst, this error would require a temporary relinquishment to allow the trial court to set down any specific matter in writing. We are confident that the Court will find no need to take this additional step.

Accordingly, Issue I should be affirmed.

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[3] Appellant could have raised this particular issue at the time of sentencing, but waived it and should not now be heard to complain at the eleventh hour.

ISSUE II

UNDER A PROPORTIONALITY REVIEW OF THIS CASE, A DEATH SENTENCE IS WARRANTED.

As the people of the State of Florida, sitting as jurors in criminal cases, continue their strong support in the imposition of capital punishment, the number of inmates on Florida's Death Row has grown. Thus, it is not surprising that on rare and isolated occasions this Court has utilized its authority as constitutional guardian of Eighth Amendment principles to declare certain cases portionally not suited for capital punishment. The standard utilized by this Court was first set down in *State u. Dixon*, 283 So.2d 1 (Fla. 1973), and further clarified in *Brown u. Wainwright*, 392 So.2d 1327 (Fla. 1981), wherein the Court held:

> Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in a independent evaluation.

Id. at 1331-32. Relying on *Menendez v. State*, 419 So.2d 312 (Fla. 1982), Appellant urges the Court to abandon its supervisory role in favor of an activist fact-finding position. The same cases and arguments presented in his Initial Brief were soundly

rejected by both the jury and Judge Pate. Their decision should be sustained on its record. *Bryan, supra,* at 749.

The facts of this case, a cold-blooded murder for hire by a bright young man with a history of violent criminal behavior, should place this case within the wide range of cases for which the death penalty is appropriate. This Court has repeatedly affirmed the death penalty in very similar circumstances. See, e.g., *Antone v. State,* 382 So.2d 1205 (Fla. 1980)(defendant masterminded a contract killing); *Byrd v. State,* 481 So.2d 468 (Fla. 1985)(victim murdered *so* that defendant could collect life insurance policies); *Hoffman v. State,* 474 So.2d 1178 (Fla. 1985)(contract killing properly found to be cold, calculated premeditated); *Koon v. State*, 513 So.2d 1253 (Fla. 1987)(contract killings); see also, *Buenoano v. State,* 527 So.2d 194 (Fla. 1988)(defendant poisoned her victim so that she could collect life insurance benefits); and *Echols v. State,* 484 So.2d 568 (Fla. 1985)(contract killing whereby defendant hoped to benefit from a share of the victim's estate).

Most recently, this Court affirmed a death sentence in, *Thompson v. State,* 553 So.2d 153 (Fla. 1989). *Thompson,* a jury override case, is similar in regards to the aggravating factors and lack of mitigation to this case. In *Thompson*, the judge found no reasonable basis for the jury's recommendation of life and sentenced Thompson to death finding, as aggravating circumstances: (1) Thompson's conviction of a prior violent felony; (2) the murder was committed while engaged in enumerated felony;

(3) the murder was committed for pecuniary gain; (4) the murder was specially heinous, atrocious or cruel; and (5) the murder was cold, calculated and premeditated. Id. at 155. The trial court also found no mitigating circumstances; rejecting evidence and expert testimony regarding the defendant's capacity to conform his conduct to the requirements of law due to substantial impairment. All other suggested mitigation was likewise rejected. In affirming the trial court, this Court stated:

> The record reflects that Thompson was in charge and that his accomplices were subordinates. Thompson ordered that Savoy be apprehended and it was Thompson, rather than his accomplices, who inflicted the fatal shot.
>
> The remaining evidence submitted in mitigation did not provide a reasonable basis for a jury recommendation of life imprisonment. In the final analysis, this was a contract killing conducted in a professional manner by an underworld crime boss. With five valid aggravating circumstances, no statutory mitigating circumstances, and very little nonstatutory mitigating evidence, the trial judge's override was legally sound.

Id. at **158**. Downs' case is similar in that it covers three of the same aggravating factors, has the same finding of no statutory mitigation, and the same rejection of impact of nonstatutory mitigation upon the trial court. Additionally, Downs' case involves a jury recommendation, for the second time, that death is an appropriate penalty.[4] The obvious impact of two separate juries returning death recommendations should not be

[4] In the initial trial, the jury's recommendation was unanimous for death. In this case, the vote was **8-4**.

taken lightly. See e.g., *Chambers v. State*, 339 So.2d 204, 208 (Fla. 1976)(England, J., concurring); and *Grossman v. State*, 525 So.2d 833 (Fla. 1988).

Finally, it should not be forgotten that this Court has previously looked at this case and determined that death was an appropriate penalty. Appellee is confident that considerations of *stare decises* have some meaning within the context of death penalty litigation and that given the lack of significant new mitigating evidence, this case will be treated for what it is, one deserving of capital punishment. Compare *Porter v. Dugger*, 15 F.L.W. S78 (Fla., February 15, 1990)("Defendants whose sentence of death have been affirmed cannot challenge their sentencing again and again each time the sentence of a later convicted murderer is reduced to life imprisonment."). This Court should also remember that despite Appellant's reference to this Court's concern over the culpability of Mr. Johnson, see *Downs v. Dugger, supra*, at 1072, this Court's original opinion makes it clear that Downs was in fact the triggerman. "It is only in the case of error that prejudicially denies fundamental constitutional rights that this court will revisit a matter previously settled by the affirmance of a conviction or sentence." *Porter, supra.*

The Appellant's reliance on *Slater v. State*, 316 So.2d 539 (Fla. 1975), is wholly misplaced. Slater was not the triggerman in his case. Likewise, this case involves a jury recommendation by an 8-4 vote for the death penalty. In Slater's case, the jury voted 11-1 for life! Furthermore, the record indicates that

Johnson's testimony, which the jury could believe completely, was that he attempted to withdraw from the crime and participated only because he feared for his own safety. (TR 554-556). Thus, proportionality is not at issue for this crime.

ISSUE III

THE COURT DID NOT COMMIT A FUNDAMENTAL ERROR WHEN IT ADMITTED THE FORMER TESTIMONY OF LARRY JOHNSON AT THIS RESENTENCING.

The trial court's ruling admitting the former testimony pursuant to §90.804(2), Fla. Stat. (1988), was an appropriate ruling based on testimony indicating the State, despite diligent effort, could not find Larry Johnson after an eleven year gap between trial and resentencing. (TR 533). The Appellant did not raise this objection at the trial court level. The complaint is therefore waived for purposes of direct appellate review. *Clark v. State,* 363 So.2d 331 (Fla. 1978); *Fredericson v. Levinson,* 495 So.2d 842 (Fla. 3d DCA 1986); *Palm Beach Aviation, Inc. v. Kibildis,* 423 So.2d 1011 (Fla. 4th DCA 1982)(issue relating to admissibility of evidence not preserved for appellate review where grounds for objection at trial were markedly different from ground presented on appeal).

Appellant's suggestion that this perceived error is of fundamental dimension is wholly without merit. As Justice Grimes noted in his recent opinion in *Smith v. State,* 521 So.2d 106, 108 (Fla. 1988), "The doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interest of justice present a compelling demand for the application." Failure to object to the presentation of testimonial evidence does not rise to such a level. *Marks v. Delcastillo,* 386 So.2d 1259, 1267 (Fla. 3d DCA 1980), *petition for review denied* 397 So.2d 778 (Fla. 1981), and, see also, *Ross v. Florida Sun Life*

Insurance Co., 124 So.2d 892, 895-98 (Fla. 2d DCA 1960). True examples of fundamental error within the criminal context would include the failure to provide a person charged with a capital offense a 12-member jury, *Nova v. State*, 439 So.2d 255 (Fla. 3d DCA 1983); or retrial and conviction of a crime for which the defendant has previously been acquitted, *State v. Johnson*, 483 So.2d 420 (Fla. 1986); or the conviction for a nonexistent crime, *Plummer v. State*, 455 So.2d 550 (Fla. 1st DCA 1984). See generally, Padavano, *Florida Appellate Practice*, §§ 5.7 and 5.8.

Furthermore, Appellant's argument on his changing motive during cross-examination based on *Hitchcock v. Dugger, supra,* is premised on false assumptions. First, it is not true that trial counsel failed to present *Lochett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), type evidence to the original jury. In *Downs v. State*, 453 So.2d at 1105, this Court found "[d]efendant's evidence at this proceeding was not restricted to statutory matters but he was allowed to present what he wanted in mitigation."[5]

Second, reference to the original trial transcript will answer the concern, raised in footnote 10 of the Initial Brief, of why trial counsel did not impeach Johnson with his prior convictions. The parties stipulated to Johnson's having five convictions and Appellant having three convictions! (Trial

[5] That finding was implicitly approved in *Downs v. Dugger, supra*, when the court limited its order on petition for writ of certiorari to a finding that the jury's instructions were inadequate. Appellant had also claimed that the trial court would not allow presentation of or consider nonstatutory mitigation.

record Vol. VIII, p. 85, 886 and 99). This tactical decision was not contested at the 3.850 hearing and is, for both reasons, waived.

Third, the current assertion that Downs lacked any motive to develop nonstatutory mitigation is false. As previously noted, this Court found evidence of a nonstatutory nature was presented without trial court restriction in the original trial. *Downs, **supra,*** 453 So.2d at 1105.

Fourth, repeated reading of Appellant's argument fails to reveal what relevant other point he could develop. The jury knew Johnson walked away a free man -- if that did not sway their thinking what could? Compare *Fuente v. **State,*** 549 So.2d 652, 657 (Fla. 1989)(no error in denial of cross-examination where state witness pled Fifth Amendment privileges at trial provided possible impeachment focused on immaterial matters).

Appellant also fails to inform this Court that Barfield changed his testimony and said Johnson was the killer. (TR 705-10). This insured the jury was presented evidence to support this theory of mitigation. Further development in this area would have been cumulative evidence. Thus, assuming error, a finding of constitutional harmlessness error is appropriate. *Ciccarelli v. **State,*** 531 So.2d 129 (Fla. 1988); ***Palmes v. State,*** 397 So.2d 648, 653 (Fla. 1981)(cumulative evidence); and ***Torres-Arboledo v. State,*** 524 So.2d 403, 409 (Fla. 1988)(admission of cumulative evidence by hearsay). Appellant was the triggerman. This Court has so ruled on two occasions. The second jury heard the theory

and rejected by a wide margin. No review of this record and the original trial record can establish reasonable doubt on this point.

ISSUE IV

THE COURT DID NOT ERR IN QUASHING DOWNS' SUBPOENAS OF THE STATE ATTORNEY SO HE COULD QUESTION HIM REGARDING HIS GRANTING LARRY JOHNSON IMMUNITY FROM PROSECUTION. (Issue restated)

Appellant's request to subpoena and question State Attorney Ed Austin regarding his decision to grant Larry Johnson immunity from prosecution was properly denied. Austin's motive is not a relevant consideration in the context of what sentence should be imposed upon Ernest Downs. The decision to prosecute or not prosecute is solely within the unfettered discretion of the prosecutor. See, e.g., *Gasset v. State,* 490 So.2d 97, 98 n. 1 (Fla. 3d DCA 1986), and the cases cited therein; *State v. Bloom*, 497 So.2d 2 (Fla. 1986)(trial court lacks authority to investigate motivation behind state attorney's decision to prosecute as a capital case).

*Lockett v. **Ohio, supra,*** and *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), provide that a defendant is entitled to present to the jury and the sentencing court any aspect of his character or record and any of the circumstances of the offense which may serve as a mitigating factor in the decision of whether to impose the death penalty. Where the proposed evidence would shed no light on the appellant's character or record or upon the offense itself, it should not be presented to the jury. *Jackson v. State,* 498 So.2d 406, 413 (Fla. 1986); see, also, *Rogers v. State,* 511 So.2d 526, 534-35 (Fla. 1987).

In *Rogers,* this Court stressed that evidence is relevant if it would reveal that similarly situated defendants received dissimilar treatment. *Id.* at 511 So.2d 535. However, this Court has repeatedly cautioned that it is not appropriate to present evidence of this nature where there is not equal degree of culpability. *Id.* The record below indicates Johnson testified that he wanted to withdraw from the crime and urged Appellant to do the same. He only remained at the scene because he feared Appellant might also shoot him. (TR 552-559). Thus, as recognized in the direct appeal of this case, Appellant was far more culpable than Johnson. *Id.* at 386 So.2d 788 and 453 So.2d 1102. Compare ***Meeks v. State,*** 339 So.2d 186, 192 (Fla. 1976).

Appellant's contention is summarized on page 31 of his Initial Brief wherein he asserts "Downs should have been allowed to attack the state's decision to grant Johnson immunity to show that it rested on questionable grounds. In short, Downs wanted to attack the state's credibility." Because this type of attack is not material under a *Lockett/Eddings* analysis, the trial court was correct in quashing the Appellant's attempt to subpoena State Attorney Austin. Appellant has failed to cite any case which supports his position, although at the resentencing, Appellant cited to ***Messer v. State,*** 330 So.2d 137 (Fla. 1976), in support of his subpoena. The trial court rejected the alleged analogy between ***Messer*** and the instant case (TR 634-636), and her ruling should be affirmed. In ***Messer,*** the defense convinced this Court that the jury should have been allowed to consider the disparate treatment between Messer and his codefendant Brown. Brown had

pled guilty to second degree murder and testified against Messer. After remand and resentencing, this Court reviewed Messer's second death sentence. *Messer v. State*, 403 So.2d 341 (Fla. 1981). The Court noted that the trial court had allowed the State to present testimony from State Attorney Golden explaining his reasons for exercising discretion in its treatment of Brown and Messer in response to Messer's argument on disparate treatment. This Court detailed the trial court proceedings and outlined the following which is pertinent to this issue:

> Following the state attorney's testimony about the reasons underlying his exercise of prosecutorial discretion, defense counsel moved that the court direct a verdict recommending life, and oppose a life sentence. The defense based the motion on the ground that the state's attorney's testimony demonstrated that he had exercised his discretion arbitrarily. A proper application of the death penalty statute, defense counsel argued, requires consistency, not arbitrary distinctions in determining the role of the culpability of joint perpetrators.
>
> The sentencing judge asked defense counsel to explain why the state attorney's exercise of discretion with regard to the case against Brown, whether it was proper or improper, had anything at all to do with the question of what sentence should be imposed upon Messer. After further argument, the court denied the motion.
>
> * * *
>
> In his initial appeal of his conviction and sentence, Messer successfully maintained that he should have been allowed to tell the jury that Brown had

> been allowed to plead guilty to second degree murder and had received a thirty year sentence. *Messer v. State*, **330** So.2d **137** (Fla. **1976).** We hold that it was within the discretion of the trial court to allow the state to explain to the jury, through the testimony of the state attorney, the reasons for the seeming disparate treatment.

Id. at **347** and **349.** The trial court correctly ruled below that Messer's case was distinguishable as the state was presenting the testimony to refute the defense theory that Brown and Messer were equally culpable and deserving of equal treatment. (TR **634-36).**

In this case the State was not the proponent of rebuttal testimony. Rather, Appellant sought to create as an issue over credibility of the State Attorney's Office.

Appellant was entitled, and was allowed, to present the relevant evidence concerning the complete immunity afforded Larry Johnson and the circumstances leading up to that granting of immunity. (TR **584-628).** Appellant was also able to question Johnson on credibility matters such as coaching by the Assistant State Attorney or payment of money for clothes. (TR **584-86).** The transcript reveals that Johnson was attacked on his role as a possible triggerman vigorously during cross-examination. (TR **592-602).** Appellant was also permitted to bring out the disparate treatment afforded other players in the scenario. (TR **608-11, 449-50, 511, 705).**

However, the Appellee contends that the trial court did not abuse its discretion in precluding the defendant's attempt to

place the elected state attorney on the stand as a defense witness given the circumstances surrounding the hearing.

While a search of Florida law reveals little authority directly on this issue, see ***State v. Johnson,*** 540 So.2d 842 (Fla. 4th DCA 1988), citing ***Parker v. State,*** 458 So.2d 750 (Fla. 1984), it is significant that no Florida cases permit or encourage this type of procedure. However, an excellent discussion of this area is found in *Montez v. State of Wyoming,* 573 P.2d 34 (Wyo. 1977). In that case, the Supreme Court of Wyoming held that the trial court did not abuse its discretion in refusing to allow the defendant to call an assistant county attorney as an adverse witness in attempting to rehabilitate one of his alibi witnesses. Specifically, the court held ". . . courts have been extremely reluctant to allow lawyers, including prosecuting attorneys, to be called as witnesses in trials in which they are advocates. Annotation, Prosecuting Attorney as a Witness in Criminal Case, 54 A.L.R.3d 100 (1973)." *Id.* at 36. Furthermore:

> And as reflected by a vast weight of authority, any decision whether or not to allow an attorney to be called is left to the discretion of the trial judge. *Gajewski v. United States,* 8 Cir. 1963, 321 F.2d 261, *cert. den.* 375 U.S. 968, 84 S.Ct. 486, 11 L.Ed.2d 416; *Fisher v. United States,* 9 Cir. 1956, 231 F.2d 99; *United States v. Maloney,* U.S.D.C., W.D. Pa. 1965, 241 F.Supp. 49; *People v. Gendron,* 1968, 41 Ill.2d 351, 243 N.E.2d 208, *cert. den.* 396 U.S. 889, 90 S.Ct. 179, 24 L.Ed.2d 164, *State v. Stiltner,* 1962, 61 Wash.2d 102, 377 P.2d 252, *cert. den.* 380 U.S. 924, 85 S.Ct. 928, 13 L.Ed.2d 810.

> Once the decision has been made, the standard on appeal against which to measure the trial judge's exercise of discretion has been articulated in several ways. In *United States v. Maloney, supra,* the court described the standard this way, **241** F.Supp. at **50:**
>
> > "The circumstances under which a Court will allow an attorney for a party, even a prosecuting attorney, to take the witness stand must be such that a compelling reason for such a move, contrary to the usual well-ordered rules for the conduct of a trial, are present. The Court may, without an abuse of discretion, refuse to allow the defense to call the prosecuting attorney as a witness on its behalf. *Gajewshi v. United States,* **321** F.2d **261** (8th Cir. **1963)".**

Id. **573** P.2d at **36.**

If these standards are applied to the instant case, it is clear that the trial court's decision to quash the subpoena was not an abuse of discretion. Appellant had a right and an opportunity to present witnesses and evidence to support his theory that the State's decision to seek the death penalty against him while treating others more leniently was worthy of a jury's consideration. The record reflects that he was able to present and develop these points. In no way would the background to the State's decision, particularly any discussion of otherwise inadmissible polygraph evidence, be material to the decision of

whether or not Downs should live or die.[6] *Francis v. State*, 473 So.2d 672, 675 (Fla. 1985).

Appellant's final argument, focusing on *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), and *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), likewise misses the mark. The trial court's ruling here was not predicated upon inconvenience to the prosecution. The trial court's ruling was predicated upon an utter lack of materiality to this case. In *Crane*, the court's concern was with the exclusion of evidence detailing the circumstances surrounding Crane's confession. *Rock v. Arkansas* involves the question of whether a state court rule of evidence can supercede a defendant's ability to present his own testimony in his defense. Neither case impacts the result below. As this Court noted in *Stokes v. State*, 548 So.2d 188, 196 n. 9 (Fla. 1989): "However, the court's decision in *Rock* was expressly limited to the testimony of criminal defendants, and therefore may have no effect on the state court's decision to exclude testimony of other witnesses." Downs wished to stress, and was able to stress through his own testimony and witnesses and cross-examination of the state's witnesses, that Larry Johnson, a coperpetrator of the murder, received immunity from the crime. This is relevant evidence for the jury to consider. It was considered and rejected by overwhelming vote. Appellant

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[6] The only appropriate attack a criminal defendant could make on prosecution credibility would be a pretrial allegation of vindictive prosecution based on race, religion or other recognized factors. *Wayte v. United States*, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). Downs did not make such an accusation below.

had no basis to argue that Austin's motivations were an appropriate consideration under *Lockett* or *Eddings*. Accordingly, the trial court did not err in its ruling.[7]

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[7] Assuming, *arguendo*, the existence of error, Appellee contends it would be harmless given a review of the entire trial and resentencing records. *Francis*, at 675; *Fuente*, at 657. See also *United States v. Antone*, 603 F.2d 566 (5th Cir. 1979).

ISSUE V

THE COURT DID NOT ERR IN EXCLUDING THE PERPETUATED DEPOSITION TESTIMONY OF BOBBY JO MICHAEL.

Appellee must again stress the obvious in order to respond to one of Appellant's arguments concerning his culpability. This Court has on two prior occasions found that Ernest Charles Downs was the triggerman in the murder of Mr. Harris. 486 So.2d 788 and 453 So.2d 1102. If it matters, four members of the current court joined Chief Justice Alderman's opinion at 453 So.2d 1102 wherein he said:

> Downs had been approached by Barfield with an offer of five thousand dollars to kill Harris. He accepted the offer and, with the assistance of Johnson, killed Harris.

Id. at 1103. At his resentencing hearing, Appellant attempted to introduce a deposition taken from Ms. Bobby Jo Michaels in 1982. This deposition was originally taken by agreement of the parties as part of Downs' attempt to set aside his conviction pursuant to Rule 3.850, *Fla.R.Crim.P.* Appellant contends "had trial counsel called her at Downs' 1977 trial, she would have said Downs was with her when the murder occurred." Initial Brief at page 38. The trial court properly excluded this evidence at the resentencing hearing because its relevancy was limited to the question of Downs' guilt. (TR 913-23).[8] Regardless of the Appellant's

[8] This Court may wish to notice its own files, case no. 64, 184, pertaining to the 3.850 appeal. In Volume XV, page 484, through Volume XVI, page 497, the original defense attorney at trial testified as to the details of his discussions with Mr. Downs.

position, a review of the supplemental record which includes the deposition clearly shows that the State Attorney's Office would not have agreed to the deposition procedure for any reason other than the **3.850** hearing.

Thus, Appellant's current premise that "who shot Jerry Harris was major issue at the resentencing hearing" is a false one. The only question for this jury was whether Ernest Downs could present nonstatutory mitigating evidence and arguments that would convince the jury to spare his life. This argument is nothing more than a restatement of the "lingering doubt or whimsical doubt'' theory of mitigation which this Court has repeatedly rejected. King *v.* ***State,*** **514** So.2d **354** (Fla. **1987),** and *Burr v.* ***State,*** **466** So.2d **1051, 1054** (Fla. **1985),** *rev. on* ***other*** *grounds,* **518** So.2d **903** (Fla. **1987).**

Finally, any error in denying the opportunity to admit this evidence would be harmless. Downs was able to present a great deal of testimony directed towards the question of his status as "non-triggerman" in this crime. (TR **705, 708,** 721, **724-25, 738-39, 842, 948-957).** Any testimony given by the Appellant's grand-

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Those details, including errors in the autopsy report, matters relating to the type of weapon used to kill Mr. Harris, disposition of the murder weapon, and other matters, lead the defense attorney to tell the trial judge that he had no doubt that Mr. Downs was present at the time that Mr. Harris was murdered. The trial judge, who has heard all the litigation pertaining to this case, would obviously recall that testimony and it certainly bolstered this Court's finding that Downs was the triggerman. This testimony also refutes any potential alibi defense. Copies of these pages of the transcript are appended to this brief for the convenience of the Court. They are contained in Appendix B.

mother, Mrs. Michaels, would have been merely cumulative on this point.

This case is unlike *Zerquera v. State,* **549** So.2d **189** (Fla. **1989),** in that this Court reversed the conviction in *Zerquera* based upon errors committed by the trial court in limiting cross-examination of a codefendant which would have impacted on Zerquera's theory of defense. *Id.* at 192. The facts of the *Zerquera* case are distinguishable in that Zerquera's theory of defense was that he merely intended to rob a cab driver and that his codefendant shot and killed the cab driver without his involvement. Because the question was obviously one involving culpability for the crime of first degree murder, this Court felt compelled to reverse as there was no other evidence involved in *Zerquera* .

This case is similar to *Torres-Arboledo, supra,* where the exclusion of evidence on hearsay grounds was not harmful given the cumulative nature of the evidence. Accord, *Palmes v. State, supra* .

Review of the supplemental record containing this deposition will show that most of the information would have been excluded on hearsay grounds even if the document itself had been admitted for jury consideration. (TR **916-917).** The State did agree to allow the reading of five pages where Ms. Michaels went into detail regarding Mr. Downs' background. (TR 917). The court agreed with the State's suggestion and allowed the defense the opportunity to read those portions of the deposition regarding Downs' childhood and family relationships. (TR **922).** Despite

that ruling, the Appellant declined the opportunity to present that evidence. (TR 922).

Based on this Court's twice finding that Appellant was the triggerman, the limitation on the State's agreement to allow perpetuation of testimony in 1982, and the harmless nature of any error given the cumulative nature of this evidence, the Appellee urges this Court to affirm on this issue.

ISSUE VI

THE COURT DID NOT ERR IN NOT DENYING AN INSTRUCTION TO THE JURY THAT THEY COULD CONSIDER ANY DOUBT THEY HAD THAT APPELLANT WAS THE TRIGGERMAN AS A MITIGATING FACTOR. (Issue restated).

Appellant recognizes that this Court has repeatedly denied the propriety of consideration of lingering doubt. *King v. State, supra; Burr v. State, supra;* and the United States Supreme Court's agreement with that view, *Franklin v. Lynaugh*, **487** U.S. ____, **108** S.Ct. ____, **101** L.Ed.2d **155 (1988).**

The trial court instructed the jury with the *Standard Florida Jury Instruction* for discussing nonstatutory mitigating evidence and how it should be considered. (TR **1135-1140).** The Appellant has raised no objections to those instructions. This Court has previously addressed a similar complaint in *Mendyk v. State,* **545** So.2d **846** (Fla. **1989).** The Court unanimously rejected Mendyk's complaint that the trial court improperly denied him special jury instructions concerning the weight to be given consideration of the sentences provided to codefendants. *Id.* at **849-850** n. **3.** The Court squarely rejected the claim finding:

> . . . standard jury instructions on mitigation tell the jury that they may consider any significant aspect of the defendant's life and character urged by the defense. Moreover, it is clear in this instance that appellant's codefendant was not equally culpable with appellant did not actually participate in the murder itself. Thus, the trial court did not abuse its discretion in refusing to give this instruction.

Id. at 850. This decision echoes the previous decision in *Jackson v. State*, 530 So.2d 269 (Fla. 1988), where the Court unanimously held:

> In his third point, appellant argues that the standard jury instruction on mitigating circumstances, which included an instruction to the jury that it could consider any other aspect of the defendant's character or record, or any other circumstances of the offense, was inadequate. Further, appellant claims it was constitutional error for the trial court to refuse to instruct the jury according to a written list of nonstatutory mitigating circumstances prepared by appellant. We find these contentions without merit. *Florida's Standard Jury Instruction* complies with the constitutional principles set forth in *Lochett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Id. at 273. See also *Lemon v. State*, 456 So.2d 885 (Fla. 1984), and *Parker v. State*, 456 So.2d 436 (Fla. 1984). Given the lack of a showing that the trial court abused its discretion, based upon some unique fact in this case, it is clear there was no error in refusing to grant this special instruction request.

ISSUE VII

THE COURT DID NOT ERR IN EXCLUDING CERTAIN EVIDENCE FROM THE JURY'S CONSIDERATION DESPITE CLAIMS THAT THE EVIDENCE WAS RELEVANT TO NONSTATUTORY MITIGATION. (Issue restated).

Appellant correctly cites the controlling authorities of *Lockett* and *Eddings* as a prelude to his argument. However, Appellant's argument must fail because the evidence which was excluded from this hearing was either not presented during resentencing or was simply immaterial for purposes of deciding whether the death penalty was appropriate.

First, Appellant complains that the trial court excluded evidence regarding Johnson's alcoholism from consideration. Appellant fails to cite the record to support this proposition and Appellee can find no evidence of it in the record. Thus, it appears the complaint was not presented to the trial court and is waived. Appellant does mention activity regarding this evidence in the 1977 trial. However, that complaint should have and could have been raised on direct appeal, and is not now subject to further review.

Were the Court to ignore the obvious default, Appellee contends that the trial court did not err. The fact that Larry Johnson may have been an alcoholic does not reflect upon the Appellant's background or character and certainly does not reflect upon the crime.' The utter speculation of this argument

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[9] Indeed, if Johnson had been in an alcoholic stupor, that would mitigate the degree of his culpability, vis-a-vis Downs. That

is hard to comprehend when contrasted with the record. From his own mouth, Appellant told the jury that Larry Johnson had given up drinking during this time period and only started drinking again after the murder when they were in Texas. (TR 963). Johnson's trial testimony, which was read to the resentencing jury, fails to indicate any confusion or lack of awareness on his part due to drinking. This is a desperate attempt to create error and should be summarily denied.

Secondly, these facts are similar to *Torres-Arboledo, supra*, wherein this Court found that the exclusion of evidence on hearsay grounds was not harmful given the cumulative nature of the evidence. Accord *Palmes v. State, supra.*

Appellant's contention that evidence that John Barfield tried to have the Appellant murdered in 1977 was also properly excluded at resentencing. Downs proffered the following in support of presenting the evidence to the jury:

> The reason I called this witness, I asked Mr. Barfield if he ever conspired to have me killed, and the record reflects that prior to my trial he did conspire to have me killed, and a gun come into the Duval County Jail that he tried to smuggle in to get me killed.
>
> What I'm trying to establish here a mitigating factor -- John Barfield has received a life sentence, even though he is a codefendant in this thing. His ef-

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Downs would go along with such an alleged drunken plan while perfectly sober would obviously place greater moral culpability on his shoulders than already exists.

> forts still persist in trying to do something to me.

(TR 833-34). The trial court's ruling was also based in part upon the proffered testimony of the witness who would reveal this evidence. (TR 832). Apparently, Barfield, who was on trial for the same offense and facing the death penalty, became angry with Downs ". . . he said that he felt like he could have cut you loose, or at least got he a lesser charge by pointing out who the triggerman was in the murder." *Id.* The specific objection and argument presented in the Appellant's brief were not presen-ted to the trial court and are therefore waived. Even this new argument is without merit given the specific proffer. This is nothing more than a further attempt to relitigate that which is clearly known, that Ernest Downs was the triggerman in this murder. Barfield was facing the death penalty despite the fact he did not shoot anyone. He was angry that Downs was not up front because he obviously felt that if Downs had admitted to being the triggerman, he, Barfield, would have received more favorable treatment from the authorities. That incident has nothing to do with whether Appellant deserves the death penalty.

Appellant's third complaint focuses upon the alleged exclusion of testimony from his mother regarding his mental state at the time of this crime. Appellee directs this Court to that section of the transcript, (TR 772-779), wherein this particular matter is discussed. The trial court did not exclude the testimony of Appellant's mother regarding his emotional state at a time soon after this offense. Rather, the trial court

sustained two very narrow State objections, the first to the pornographic photos of Downs' wife and, second, to the ultimate conclusion of Mrs. Smith that her son was "a totally changed person at that time.'' Nonetheless, the witness was able to express to the jury the specific details of her observations of Appellant at the time. Had the Appellant sought to convey the information currently argued (but not argued at the trial court) to the jury, the questions could have easily been restated and evidence presented.

Furthermore, exclusion of this evidence would be harmless error. Dr. Kropp testified to the jury as to his opinion for Appellant's troubles which is based in part upon Mrs. Smith's observations. When coupled with Mrs. Smith's detailing of the event, it is clear that exclusion of her opinion as to her son's complete change could in no way impact upon the jury's deliberation in this case. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986).

Lastly, Appellant complains about the trial court's exclusion of evidence from his trial attorney that the Appellant did not exhibit signs of violence and/or satanism or brutality or psy-chiatric instability that he had seen in other defendants. (TR 807). Noting for the record that she was giving the Appellant "great leeway" in the presentation of mitigating evidence, the trial court nonetheless sustained the State's objection to this testimony on grounds of relevance. That ruling is not an abuse of discretion and should be sustained. Theodore Bundy was always polite and courteous with the judges and lawyers

involved in his case. In fact, review of his crimes indicate that it was his friendliness which lured his victims to their destination. The same was true of this Appellant. The State never contended that his cruelty or brutality aggravated this crime. This evidence would only have been relevant to rebut such allegations. Because everyone accepted the fact that Ernest Downs was an otherwise everyday person who just happened to commit violent crimes does not mitigate against the death penalty. Compare *Rogers v. State*, 511 So.2d at 535; *Jackson v. State*, 498 So.2d 406, 413 (Fla. 1987); and *Hill v. State*, 515 So.2d 176, 178 (Fla. 1987)(per curiam).

Furthermore, exclusion of this testimony would have been harmless given its cumulative nature. *Tori-es-Arboledo, supra.* Appellant was able to present testimony from a number of witnesses including coworkers, family members, and the Secretary of the Florida Department of Corrections, which all were directed towards the same point. Significantly, Appellant's activities as his own attorney also conveyed a sense that he was a peaceable prisoner who could continue to exist in a controlled society. The jury and the trial court simply chose not to find that evidence to be significant.

On either of these points, the trial court should be affirmed.

ISSUE VIII

THE COURT DID NOT ERR IN INSTRUCTING THE JURY THAT DOWNS WOULD BE GIVEN CREDIT FOR THE TIME HE HAS ALREADY SERVED IN PRISON.

Trial counsel opened the door to this inquiry by his lengthy and detailed argument to the jury that a vote for life imprisonment, as opposed to death, would insure that Downs remained in prison for another **25** years. Specifically, defense counsel told the jury that Appellant was forty years old at the time of the resentencing and that he would die in prison before his **25** years expired. He further told the jury that Appellant would never see his unborn granddaughter graduate from college and, finally:

> By recommending a life sentence without parole you will be punishing Downs to the fullest extent and you will be protecting society from him for the next **25** years. . . (Emphasis added).

(TR **115-16** and **1133).** Appellant should not be entitled to benefit from what was obviously a tactical choice that did not survive close scrutiny by the jury. Appellant was the one who mislead the jury and the trial court's action merely clarified for them an accurate assessment of the law on the minimum mandatory portion of a sentence.

Furthermore, this Court has recognized that it can be appropriate for the jury to learn of the specific parameters involved in a so-called "life" sentence under Florida law. In *Harvey v. State,* **529** So.2d **1083, 1086-87** (Fla. 1988), this Court unanimously held:

> Harvey also asserts that the court erred in refusing to grant his motion in limine to prohibit the state from suggesting to the jury that he would become eligible for parole after 25 years if the death sentence were not imposed upon him.
>
> * * *
>
> Any suggestion that Harvey would never become eligible for parole if sentenced to life imprisonment would have been sheer speculation. The prosecutor's argument accurately reflected the sentencing alternatives for those convicted of capital felony, and therefore, there was no error in denying the motion in limine or the motion for mistrial.

The standard of review for trial court error on reinstruction is abuse of discretion. *Garcia v. State,* 492 So.2d *360, 366* (Fla. 1986). The current suggestion that the court erred is one that Appellant should have considered in presenting his misleading closing argument to the jury. The jury's question was fairly predicated upon that argument and the trial court's answer accurately rebutted those misstatements.

ISSUE IX

THE COURT DID NOT ERR IN NOT REQUIRING DOWNS' PRESENCE DURING THE DISCUSSION REGARDING A QUESTION THE JURY ASKED. (Issue restated).

The record reflects that Downs was not originally present when the jury's question was tendered to the court. The record also indicates that his attorney did not seek to have his presence at the hearing. Thus, the issue should be considered waived. However, Appellee recognizes that this Court has placed special emphasis on the defendant's role in the trial process during critical stages. See, e.g., *Garcia v. State, supra.* *Garcia* holds that the burden upon the State is to show ". . . beyond a reasonable doubt that the error [absence] was not prejudicial." *Id.*

In this case, the record specifically informs us what it is Appellant would have attempted to add to the argument over answering the jury's question. When the question first arose, the lawyers argued over the propriety of an answer. (TR 1144-1148). Defense counsel argued that it would be inappropriate to answer the question because of the implications that would arise from sentencing on the conspiracy count. Counsel's argument focused on the potential for a conspiracy sentence to run consecutive to life imprisonment with a minimum mandatory 25 for the murder. (TR 1145). Later, Appellant personally raised the question. He told the trial court:

> I also feel them asking about the 25 to life, maybe it was one juror, maybe it

> was 12 jurors, I can't help but think I lost by a 8-5 vote, I may have lost two or three jurors because their thinking was, which Mr. Arias argued 25 to life, but if we give the man 25 to life, this man may be out in 12 years. And I can't help -- and that's not true, and I can't help but think that affected some of the jurors decision in this case.

(TR 1193). These remarks clearly refute any doubt over the role that Downs would have played during the question session. The issue was legal in nature pertaining to the appropriateness of an instruction on the length of the penalty for first degree murder. Appellant and Arias both served as attorneys on the case and by the time question arose, Appellant had vacated his role as attorney in favor of Mr. Arias. (TR 851).

Florida courts have repeatedly held that the absence of the defendant during the discussion of a legal issue can constitute harmless error. ***Roberts*** *v.* ***State,*** 510 So.2d 885, 890-91 (Fla. 1987); ***Meek*** *v.* ***State,*** 487 So.2d 1058 (Fla. 1986); ***Stano*** *v.* ***State,*** 473 So.2d 1282 (Fla. 1985); and ***Junco v. State,*** 510 So.2d 909, 911-12 (Fla. 3d DCA 1987)(court finds absence harmless where jury questions involve legal definitions and both attorneys were present when answers were delivered to jury). See also, ***Garcia,*** *supra*, at 363. These cases emphasize that when a legal ruling is made by the trial court, the defendant's role is not as critical as it might be when, for instance, jury selection is involved. Compare ***Francis*** *v.* ***State,*** 413 So.2d 1175 (Fla. 1982), wherein this Court found it could not determine the degree of prejudice suffered by the defendant. Here, the record reflects that Downs

argued the same point which his counsel argued. The real question is not whether Downs' presence was harmful error. Rather, the issue is summarized in Issue VIII - whether the trial court erred in answering the question. There being nothing indicated by the Appellant at trial or in his brief indicating what he might have added to the exchange between the court and the attorneys, his absence cannot be deemed harmful. Affirmance is appropriate.

ISSUE X

THE COURT DID NOT ERR IN FINDING THAT THE AGGRAVATING FACTOR OF COLD, CALCULATED AND PREMEDITATED MURDER APPLIED IN THIS CASE. (Issue restated).

Appellant concedes that this issue has been repeatedly resolved against him. *Combs v. State,* 403 So.2d 418 (Fla. 1981); *Smith v. State,* 424 So.2d 726 (Fla. 1982); and *Justus v. State,* 438 So.2d 358 (Fla. 1983). However, he requests reconsideration in light of recent federal court decisions.

The United States Supreme Court has reviewed this claim and found it lacking. *Justus v. Florida,* 465 U.S. 1052, 104 S.Ct. 1332, 79 L.Ed.2d 726 (1984). There is no basis to relitigate an obviously settled point of law.

Second, Appellant's argument based on Art. X, Sec. 9 of the Florida Constitution was not raised in the trial court. Thus, it is waived. *Trushin v. State,* 425 So.2d 1126 (Fla. 1982).

Furthermore, Downs should not be heard to complain as he requested a new sentencing hearing. In making his request through a habeas corpus petition, Downs was well aware that the law had changed in the interim between his sentencing and today. His decision to seek a second sentencing hearing opened the door for the State to present this evidence. Appellant's case is unique from those cited in his brief in that he is not being sanctioned under a law that was different at the time of the sentencing.

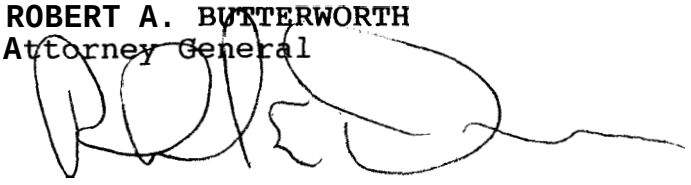
Finally, any error in this context would be harmless. It is clear from the original sentencing order that the trial court found the death penalty appropriate based on the original two aggravating factors, prior violent felony and commission for pecu-niary gain. In that the trial court's order reflects a merger of the cold, calculated and premeditated factor with the pecuniary gain, it is clear that her weighing process limited the impact that this new factor would have on her judgment. Coupled with the trial court's specific rejection on credibility grounds of testimony of Appellant and many of his witnesses as well as the utter lack of significance in the testimony of Dr. Kropp regarding Appellant's mental state, it should be clear beyond and to the exclusion of any reasonable doubt that an error in this regard would be harmless. Accordingly, affirmance is requested.

CONCLUSION

Based upon the above cited authority, Appellee prays this Honorable Court affirm the trial court's sentence of death entered against the Appellant in this cause.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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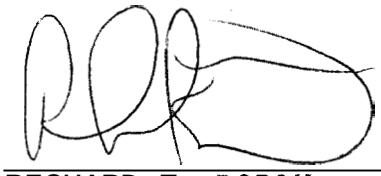
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to MR. DAVID DAVIS, Esquire, Assistant Public Defender, Office of the Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 6TH day of March, 1990.



RICHARD E. DORAN