IN THE SUPREME COURT OF FLORIDA

CASE NO. 74788

RICKEY BERNARD ROBERTS,

Petitioner,

vs.

RICHARD L. DUGGER,

Respondent.

_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Respondent, **Richard L. Dugger,** by and through undersigned counsel, and hereby responds to the petition for writ of habeas corpus as follows:

Petitioner's totally skewed factual assertions require Respondent to present, at the outset, a somewhat detailed recitation of the facts of this case.

SUMMARY OF EVIDENCE

Sixteen year old Michelle Rimondi, her best friend Jammie Campbell (also 16), and 20 year old George Napoles drove to the beach along Rickenbacker Causeway in Miami the night of June 3-4, 1984. (T.2121, 1840). George was an acquaintance of Jammie's (T.1830) but had just met Michelle. (T.1831). Sunday evening, June 3, one of the girls called George after he finished work at Domino's Pizza and asked him to come to Joe Ward's house, where they were staying. (T.2130, 1837, 2020).

After George arrived, Joe's roommate, Ian Riley, asked the trio to leave so he could entertain a lady friend. (T.1581, 2140).

On the way to Key Biscayne George brought some Wild Irish Rose wine. (T.2140-1, 1839).

After passing through the toll on the Rickenbacker, George turned left through the median strip and onto the sand (T.2142, 1841), beyond a strip of trees. He parked with the back of his Dodge Omni toward the water and close to it. (T.2143-44, 1841).

Jammie, who was sitting in the front passenger seat, fell asleep a few minutes after their arrival at about 12:30 a.m. June 4 (early Monday morning). (T.1839, 2149). She had a little of the wine, but Michelle and especially George drank most of it. (T.2149). Michelle tried to wake Jammie after a while by pushing her arm but she continued to sleep. (T.2150-51, 1843).

The wine was having a strong effect on George, who eventually threw up on the ground near a tree, drank some more wine, got sick again, and finally got into the back seat of the four-door Omni (Jammie was reclined in the right front (T.1842)), and lay down on the seat with his left foot resting on the sill of the open left door. (T.2153-55).

Michelle sat in the driver's seat as George tried to sleep off his wine. (T.2154).

At 2:40 a.m. by the car's clock a car headed onto the Key, crossed the median and came toward them, lights on. (T.2156). Michelle watched as the car passed them on the beach, bright lights on. (T.2158). George said he could drive, *so* Michelle got out of the driver's seat to let him get in. (T.2157-58). Jammie continued to sleep. (T.1882).

The cruising car, a brown 1975 Toyota (T.2219), came up within some 8-9 feet of the Omni (T.2158, 2160), facing the driver's side. (T.2160). The occupant, a man, got out and asked what they were doing. (T.2161). Michelle said they were relaxing, drinking wine. (T.2161). The man leaned in to look at the sleeping Jammie and asked about her. (T.2161). Then he asked them for identification. (T.2162). George produced his from his back pocket but Michelle had none. (T.2162-63).

Michelle thought that the stranger was an undercover beach patrol officer: he was very clean, dressed in white shorts, light blue T-shirt with "Rick" on the front, and a light blue baseball cap, and he seemed to know what he was doing. (T.2163-64). He was tall, well built, had a very thin mustache and long sideburns, and had a little hair on his chin. (T.2167-68).

The stranger took George's driver's license over to his own car and examined it under the interior light while George and Michelle stood silently by the Omni. (T.2166).

After turning out his lights the man came back to the pair and told George to get on his car in the frisk position, hands on car, legs spread. (T.2167, 2169). George obeyed, by the back door, and the man patted him down. (T.2169-70). He patted Michelle down where she stood, alarming her because she knew female police officers customarily searched females. (T.2171). He touched her on breast and thighs. (T.2171). George asked the man for his I.D., and the stranger readily agreed. When George went to his car to see it the man reached through the open window and pulled out a baseball bat from the back seat. (T.2172). He grabbed George's arm and brought him back to the Omni where he ordered Michelle to face the interior and not to turn around. (T.2173).

George was standing to Michelle's right. (T.2174). She heard the man tell George to assume the frisk position again, and then could see them by peering under her right arm. (T.2175-76).

She saw defendant (T.2235) hold George by one arm and hit him in the head with the bat. (T.2177). George stumbled and Defendant hit him again, in the back. (T.2178). George fell,

cupping his hands over the back of his head where he had been hit, landing face down on a rock (T.2178), his hands still on his head (T.2180), as Defendant continued to hit him in the head (T.2180). George moaned. (T.2180). Michelle tried to scream but could not. (T.2180-81, 2185). She tried to run but she couldn't move. (T.2185).

The man pushed George along the beach behind the car (T.2186), and then, still holding the bat, he pulled Michelle to the ground, telling her to take her clothes off or she would get the same treatment as George. (T.2187).

She began to remove her pants, as ordered. (T.2188-89). The man, hearing a car approach, told her to dress, staying low. (T.2190). He searched George's wallet for money. (T.2191). After pulling Michelle in the car and locking the door, the killer backed along the beach for some distance. (T.2191, 2193). He stopped, came around to the passenger side, and told her to undress again. (T.2193). He himself dropped his pants, pushed the seat back and had intercourse with her. (T.2194). She did not resist. (T.2195). The bloody bat was still in the back seat where he had put it before the rape. (T.2195-96).

The rape took a couple of minutes, then they dressed before he drove the short distance back to George's car. (T.2195-2197). She stayed in his car as he looked at George's body, then he looked in on sleeping Jammie. (T.2197-98).

On the way off the Key he threw George's wallet out the passenger window. (T.2200). As they travelled south on U.S. 1 she asked defendant if George was alive. (T.2201). Appellant responded, laughing, that George Napoles, 20, was "dead as a doorknob" (T.2201). Michelle asked Defendant to take her home. (T.2201). He described himself as a professional hitman who killed people **for** a living. (T.2202).

Defendant said he was married to a 19 year old white prostitute with two children who would, he claimed, never have to work because of his (Defendant's) job. (T.2204). Realizing then that he did not have his wallet, he insisted that she go back with him to find it. (T.2205-06).

Back at the beach she offered to hold his hand to convince him she would not flee while he searched for the wallet. (T.2210). They found his brown wallet containing a great deal of cash. (T.2211).

Appellant turned George over with his foot, listened to his chest and felt a pulse in his throat. (T.2212). George was still breathing some 1 1/2 - 2 hours after the encounter had begun. (T.2212).

In looking in on the still-sleeping Jammie Defendant leaned into the Omni. (T.2213).

On leaving the Key this time defendant and Michelle passed two uniformed police officers who were standing close to Michelle's side of the car. (T.2215-16). Appellant told her not to even think about calling to them, pointing to a small gun beside his seat. (T.2216). He said he could cut her tongue out with the knife he had in the dashboard, but it was, he said, too much torture. (T.2217).

Near Kendall and 117th Avenue defendant stopped and raped Michelle again, as before. (T.2223). She did not know if he ejaculated either time. (T.2224). Afterwards he told her that he would kill her and her family if she called the police. (T.2225).

As soon as she got inside the house, Michelle ran to the room where she was staying, grabbed a blanket, went to a corner, put the blanket over her head and cried and cried. (T.2227). Then she woke Ian, they locked all the doors and windows, Ian got out his gun, and they called the police. (T.2227-28).

At about this time Jammie woke up to find herself alone on the beach in the car. (T.1843). She looked for George and Michelle for about an hour, did not see George, and drove in the Omni to Cherie Gillotte's house. (T.1846). She and Cherie then returned to the Key. (T.1849-50).

Miami Detective Louise Vasquez was at the scene when Jammie and Cherie returned to the beach Monday morning. George's body had been found at about 6:15 a.m. (T.1616). Defendant's palm print was later found on the roof of the Omni. (T.1627).

Vasquez got a telephone tip as to defendant's name and work place, Jason's Lounge. (T.1635). She and Lt. Mike Gonzalez met defendant there the next day. (T.1636).

Defendant voluntarily went to the Miami Police Department with Vasquez and Gonzalez (T.1640), and gave voluntary fingerprint standards and photographs. (T.1647). Michelle identified his car. (T.1646). The defendant said he was at Jason's Lounge until midnight, then went straight home, where he remained all evening. (T.1644). Confronted with car identification and palmprint, defendant denied being on Key Biscayne in the past two months. (T.1648-49). He gave no further statements to the police.

Defendant was then arrested and later indicted for George's murder, Michelle's rape and kidnapping, and two counts of robbery. (R.1-3).

State witness Sean Brown (T.1731) and State rebuttal witness Jimmy Horan (T.2930) testified that at 11:30 p.m. on June 3rd,

1984, approximately three hours before the crime occurred, the defendant had been in the pool area at Kendall Arms Apartments, and during a discussion about South Miami, the defendant had stated that he a baseball bat in his car that would take care of any trouble he might find in that locale.

Thomas Murray, another State witness, testified that at 12:30 a.m. on June 4th, 1984, approximately two hours prior to the murder, he was at the Sonesta Beach Hotel on Key Biscayne, about a mile from the murder scene, when the defendant approached him at the hotel's beach area. He talked with the defendant for about a half hour, and the defendant gave him his business card, then departed around 1:00 a.m.

A search warrant was executed on defendant's apartment. Seized were a T-shirt with "Rick" on it, white shorts, a baseball cap, and a brown wallet. (T.1655). A search warrant executed on defendant's car yielded, inter alia, a photograph of defendant, taken June 3, wearing a T-shirt with "Rick" on it, white shorts and a baseball cap. (T.1659, 1812, R.314).

Defendant was ticketed on May 24, 1984, in the same area of Key Biscayne at 5 am. (T.1769, 1774-76). He was cruising the beach, driving without lights at 5 mph. He identified himself as Less McCullars. (R.319).

Rhonda Haines, defendant's live-in girlfriend, testified that defendant came home at 5:00 a.m. June 4. (T.2377). He told her later on June 4, that he thought he had killed a man that evening (T.2381). On a later jail visit, he told her that he met George and Michelle and sleeping Jammie, did cocaine with George and Michelle, and had consensual sex with Michelle. George became upset when defendant "hogged" Michelle, and defendant responded by hitting George with his baseball bat. (T.2389-90). Defendant took Michelle home. (T.2389). Rhonda had seen, before June 4, a baseball bat and a small handgun in defendant's car. (T.2387). Defendant threw the bat off a bridge after the murder, he told Rhonda. (T.2389).

Rhonda was in the photograph taken with defendant June 3 (R.314, T.2392). He shaved the mustache and sideburns off June 4. (T.2396).

Defendant testified that he went out to Key Biscayne the night of June 3-4 to Sundays on the Bay but it was closed. (T.2761). He had no gun or baseball bat and only a small pocketknife in the car. (T.2760).

He met Tom McMurray on the beach and after a friendly conversation gave him his business card. (T.2763). He recalled meeting Sean Brown earlier in Kendall but denied saying he had a bat in his car as a weapon. (T.2757).

On the way off the Key after meeting Tom, he met Michelle hitchhiking. (T.2767). She wanted a ride home because her friend had passed out in the car. (T.2768). Defendant went with her when, she said, she wanted to get her purse out of the Omni. (T.2768). He leaned into the car looking at the sleeping Jammie. (T.2768).

Then he and Michelle got into his car and he drove her home. (T.2771). He then stopped at a 7-11 for coffee and some arthritis medicine for Rhonda and went home. (T.2771, 2784). He denied all crimes and denied admitting them to Rhonda. (T.2809). Defendant denied ever seeing George. (T.2838-39).

On cross-examination, the defendant admitted that he lied to Detective Vasquez about not being on Key Biscayne (T.2815). He denied telling Vasquez that he returned home from Jason's Lounge at midnight, and remained there for the entire evening. (T.2816). On direct the defendant had said he put his hand on the roof when he leaned into the victim's car to look at the sleeping Jammie. (T.2769). On cross he said he had looked in through the front driver's side window. (T.2837). Technician Evans had testified that the defendant's fingerprint was found OR the roof above the rear window (T.1937), along with defendant's palm print on the top rear portion of the roof. (T.1937, 1980, 2007).

The defendant admitted shaving off his sideburns, moustache and partial beard the morning of the murder. (T.2855). He denied ever having shown the rape victim his wallet (T.2859), although she had described it (she observed it when the defendant drove her back to the murder scene to find his wallet, which they found) as a "medium, brown leather wallet with -- it folded once, then twice, then once over that." (T.2210). She then was shown the defendant's wallet, and identified it. (T.2211).

Blood test showed:

DEFENDANT: Type A, non-secretor

MANNY CEBEY: Type A, secretor

GEORGE: Type B, non-secretor

MICHELLE: Type A, secretor

Vaginal aspirate from Michelle could have come from defendant, but not George. (T.2492). Sperm was found (T.2490), indicating intercourse within 12 hours (sperm is extremely unlikely to be found in the vagina after 12 hours. (T.2551)). Manny, Michelle's boyfriend, had sex with her not later than 8 a.m. on June 3, more than 24 hours before she was tested at the Rape Treatment Center. (T.2108, 2126, 2544).

Defendant's shorts had blood, semen and possible vaginal fluid on them. (T.2504). The blood was type B, as was George's, whereas the defendant's blood is type A (T.2492). There was

human blood in defendant's back seat (where Michelle said he put the bat after beating George), but not enough to type it. (T.2498).

The cause of death was injury due to blunt trauma. (T.2614). There was one massive unblocked blow, and two or more with hands (at least two fingers were consequently broken) defensively covering the wound. (T.2625). The wound was 3 1/2 inches long, Y-shaped, with the skull fractured in several directions. (T.2587, 2596). A baseball bat was consistent with the object used: rounded, hard, smooth. (T.2626).

George lingered for one to two hours or more, in and out of consciousness, not comatose and in considerable pain. (T.2601, 3265). Medical intervention early could well have saved him. (T.3268). Eventually, blood clotting in the brain stem slowed and then stopped one life function after another until George Napoles finally died. (T.2598-99). George's facial wounds were consistent with falling face down on a rock (T.2584), as described by the victim after George received the initial blow.

In his opening statement and closing argument, defense counsel theorized that either the rape victim's boyfriend, Manuel Cebey, or Joe Gary Ward, at whose house the rape victim and Jammie Campbell were staying that weekend, had murdered the victim because they were jealous of his being with the rape

victim that evening, and that the rape victim blamed the defendant to protect either one or both of them.

Joe Gary Ward testified that he left Miami early Saturday morning with his girlfriend Anna Casuso, to travel to Gainesville to get Anna's furniture from storage, and then return it by Ryder rental truck to Miami. (T.2020-2023). They stayed at the home of Kathy Anthony. On Monday, while still in Gainesville, Ward received a call around noon from his roommate Ian Riley. (The crime occurred Monday morning between 2:40 a.m. and approximately 4:30 a.m.), and Riley told him about the murder and rape. (T.2023-2035). He returned to Miami either Tuesday or Wednesday. Ward stated he never even met the murder victim. (T.2026-2028).

Ward's testimony was confirmed by his roommate, Ian Riley, who testified that Ward had left that weekend for Gainesville, where Riley reached him by telephone between 11:00 a.m. and noon the morning of the murder. (T.1581-1584, 1608).

Ward's testimony was totally corroborated by Anna Casuso, who traveled with him to Gainesville in order to retrieve her stored furniture, stayed with him at Kathy Anthony's house, was there when they received the call from Ian Riley, and who returned with Ward to Miami on Wednesday. (T.2062-2065). Ward's testimony was further corroborated by the rape victim, who

testified she was staying at Ward's house while he was away in Gainesville, and that of Jammie Campbell, who did not see Ward at any time that weekend. There was in fact no evidence that Ward had anything to do with this case, rather only the arguments of counsel.

Manuel Cebey testified that he met the murder victim for the first time that Saturday, had a friendly introduction, after which the murder victim left with Jammie Campbell. Cebey never saw the murder victim again. (T.2103-2108). Cebey spent Saturday night with the rape victim, and went home to his parent's house early Sunday morning, and did not see her again until after the murder. This testimony was corroborated by both the rape victim, Jammie Campbell, and Ian Riley, who all testified that the only people present at Ward's/Riley's house that Sunday evening were the two victim's, Jammie Campbell, Ian Riley, and Riley's girlfriend. Again, as with Ward, there was absolutely no evidence that Cebey was involved in the murder, the only connection being the lively imagination of defense counsel.

ARGUMENT

CLAIM I

EXCLUSION OF EVIDENCE OF VICTIM'S PRIOR SEXUAL ACTIVITY.

This issue was fully explored on direct appeal, wherein this Court held:

> [9] We recognize that if application of Florida's Rape Shield Law interfered with Roberts' confrontation rights or otherwise operated to preclude Roberts from presenting a full and fair defense, the statute would have to give way to these constitutional rights. *See Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). However, we reject Roberts' contention that the "specifics" of his conversation with Rimondi were necessary to refute her depiction of a "forced and hostile dialogue" and thus, exclusion of that aspect of his version of the conversation impermissibly limited his ability to present a full and fair defense. Rimondi had testified that during the drive from the causeway, Roberts had told her that he was a "professional hit man" and that he had threatened to harm her and her family. Roberts was allowed to give his account of this conversation and to refute every aspect of Rimondi's testimony. Roberts testified that they "had general conversations about occupation." The only limit on Roberts' testimony was on the specific type of employment Rimondi was allegedly engaged in. We find that the exclusion of this one otherwise irrelevant and highly prejudicial aspect of Roberts' version of the conversation in no way hindered Robert's presentation of a complete defense.

(emphasis added) Roberts v. State, 510 So.2d 885 at 892 (Fla. 1987).

This Court fully recognized that when evidence of prior sexual conduct is relevant to the case, the rape shield law must yield to the confrontation clause. Here the victim's alleged activities as a prostitute were totally irrelevant. The defendant's defense was that either the rape victim's boyfriend or Joe Ward, whose house the rape victim was staying at, became jealous of the murder victim for being with her that evening, and that they murdered the victim and then had either forced or consensual sex with her, after which she either agreed or was intimidated into blaming it on the defendant. Defense counsel was not restricted in any way from cross-examining Ward, Cebey or the rape victim concerning their relationships vis-a-vis each other (Cebey and the rape victim both testified they had sex 24 hours prior to the crime). The rape victim's alleged activities as a prostitute had nothing whatever to do with the "source of the semen" or any other issue in this case. Defense counsel simply wanted to portray the rape victim as a slut lowlife runaway, whose character demonstrated that she was unworthy of belief. That is precisely what the rape shield law was designed, properly, to prevent.

Olden v. Kentucky, 488 U.S. ___, 102 L.Ed.2d 513, 109 S.Ct. 480 (1988), in no way changed any established confrontation clause principles and does not require a reconsideration by this Court. In Olden the defendant, a black man, claimed that the

white victim had consented to the sexual activity, and he wanted to bring out, on cross-examination of the victim, that at the time of the offense she was living with another black man, and that she accused the defendant of forcible sex so as to prevent repercussions from her boyfriend. This cross-examination was forbidden, and hence the defendant was unable to demonstrate a motive for the victim to lie. Had such been anything close to the facts in this case, this Court would not have hesitated to reverse, but such was definitely not the case.

CLAIM II

PREVENTING DEFENDANT FROM TESTIFYING THAT VICTIM ALLEGEDLY TOLD HIM SHE WORKED FOR AN ESCORT SERVICE.

This issue was directly addressed on appeal and as stated above under claim I, there is no basis to re-examine it in this proceeding.

CLAIM III

"ALIAS" ISSUE

The defendant has managed to omit virtually every fact relevant to this "claim," if it can be called that.

Prior to trial the State agreed to strike the alias "Less McCullars" from the indictment (T.673, 674). At that point the

parties had to decide what name to use in the indictment, and it certainly was an interesting question. Defense counsel pointed out that when questioned by the police after the murder, the defendant said his name was Less McCullars (and as will be seen, he signed the Miranda consent forms with that name), (T.674), but that others knew him as Ricky Roberts, his real name. (T.674, 675). When ticketed on Key Biscayne ten days before the murder, he gave the name Less McCullars. (T.675). Defense counsel then stated "I think Ricky Roberts is his legal name, but we have to keep out reference to Less McCullars," to which the prosecutor responded "We intend to use that evidence." (T.675). The prosecutor then said that the mere striking of Less McCullars doesn't preclude the State from bringing in evidence that the defendant presented himself as a different person to various witnesses in the case, and the court said it agreed. (T.676).

At trial Detective Vasquez, the lead detective, stated that when she interviewed the defendant after the crime, he said his name was Less McCullars, but that everyone called him Rick. (T.1639). No objection from defense counsel. The defendant signed his rights waiver form Less McCullars, which form was admitted into evidence. (T.1641).

The defendant identified himself to witness Thomas Murray as "Rick". (T.1750). He identified himself to Officer Ortiz,

who ticketed him on Key Biscayne ten days before the crime, as Less McCullars. (T.1768). Because of the defendant's use of Less McCullars with Detective Vasquez, the fingerprint cards with his prints all bore the name Less McCullars. (T.1992-1995). Rhonda Haines, the defendant's girlfriend to whom he confessed the murder, stated that the defendant told her he was Less Cullars. (T.2369), but she referred to him as "Rick" (T.2372) during her testimony. None of the above testimony was objected to by defense counsel.

The most fascinating testimony concerning the Rickey Roberts/Less McCullars duo came from the defendant on direct examination by defense counsel. After having admitted to two prior felony convictions (T.2804), defense counsel asked what his real name was. The defendant replied "Rickey Bernard Roberts." When counsel asked about his use of the name Less McCullars, the defendant said it was his cousin's name, which he used "for just strictly business purposes," for his driver's license, etc. (T.2805), because it avoided "problems" raised by his prior conviction, "but I always tell people, you know, my name, Rick" (Id). Obviously, one of the "problems" with using Rickey Roberts was that he had jumped parole in Maryland and had an outstanding parole violation warrant from that State, but more on that later. The bottom line here is that if the defendant chooses to use different names with different people, he can hardly complain when they refer to him in court by the name he used with them, be it Rickey Roberts or Less McCullars.

CLAIM IV

LIMITATION OF CROSS-EXAMINATION CONCERNING STATE WITNESSES CRIMINAL RECORD.

There is no question that the confrontation clause requires that cross-examination as to motive and bias must be given the widest scope, particularly where a state witness has pending criminal charges or is under some legal restraint, such that it might be reasonably inferred that the witness may be testifying favorably to the State in the hope of benefit to his own case. Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986); Davis v. Alaska, 415 U.S. 308, 39 L.Ed.2d 347 (1974); Alford v. United States, 282 U.S. 687, 51 S.Ct. 218 (1931), Greene v. Wainwright, 634 F.2d 272 (5th Cir. 1981); United States v. Crumley, 565 F.2d 945 (5th Cir. 1978).

However, Cross-examination into motive and bias is not an unlimited right, for where such cross-examination is irrelevant or only marginally relevant, the trial court retains wide discretion. As the United States Supreme Court stated in Van Arsdall, supra:

> It does not follow, of course that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar

> as the Confrontation clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish," Delaware v. Fensterer, 474 U.S. 15, 20, 88 L.Ed.2d 15, 106, S.Ct. 292 (1985) (per curiam) (emphasis in original).
>
> 475 U.S. at 679, 89 L.Ed.2d at 683.

The bottom line, as always, is relevance: are a witness' pending charges or legal restraint reasonably related to his motive or bias in testifying. In all of the above cited cases a definite reasonable relationship, or logical nexus, existed such as to render the proffered cross-examination relevant.

Thus in Van Ardall, the witness had a public drunkenness charge dropped in exchange for his testimony, and testimony concerning this agreement was excluded. There the agreement itself provided the logical nexus from which the jurors could infer bias. As will be discussed below, Van Arsdall is also important because it mandates a harmless error analysis, and the specific format for that analysis, where this type of alleged

confrontation clause violation occurs. In Davis the witness himself was a suspect in the burglary for which the defendant was charged, and the witness was also on probation for burglary. Thus, the witness' probationary status was extremely relevant, as it provided a motive to blame the defendant, and thereby forestall a possible violation of his own probation should the defendant be acquitted and the investigation then focus on himself. In Alford the defendant was charged with Federal Wire Fraud, and his former accountant testified against him. Defense counsel had reason to believe the accountant was in the custody of Federal authorities, but the trial court refused to allow defense counsel to even inquire as to where the witness was staying. Had the jury learned that the accountant, who testified in depth as to the defendant's illegal activities and thus was a potential accomplice, was in Federal custody, the jury might reasonably have concluded that the accountant was selling the defendant down the river to escape his own guilt. Again, the logical nexus is clear. In Greene, the witness was the man the defendant claimed committed the crime, and the defendant wished to impeach the witness (both Greene and the witness were police officers) by showing the witness had committed other uncharged crimes near in time to the one for which Greene was on trial, and that the witness was accusing Greene in order to throw suspicion off himself as to the uncharged crimes. Again, a logical connection. Likewise in Crumley, defense counsel was not permitted to elicit information

that the witness himself, who was not a co-defendant, was involved in the defendant's criminal activity, and thus testifying in order to impress the government with his cooperative spirit, and thereby remain unindicted

In the instant case the State moved in limine to prohibit the defendant from questioning the rape victim about a pending grand theft charge which arose three weeks prior to trial. There is no question that Michelle Rimondi had this charge, and there is also no question that her grand theft case was totally unrelated. At the hearing on the motion in limine the prosecutor who filed Rimondi's grand theft case, and referred her to P.T.I.[1], testified that he had no contact with the prosecutors in this case, and that his decision to charge grand theft, and to refer her to P.T.I., was based strictly on the facts of that case, and that he did not learn she was a witness in another case until after he had determined to refer her to P.T.I. (T.635-645). In sum, the cases were totally unrelated. Michelle Rimondi was not given favorable treatment by the State nor, at the time of trial, did her pending charge give her any motive to slant her testimony in the State's favor: she knew exactly what she needed to do to have her grand theft charge

---

[1] P.T.I. is Florida's Pretrial Intervention Program for first time felony offenders, where the offender participates in a rehabilitative/good citizenship type program, which if successfully completed results in the charges being nolle prossed by the State.

dropped, i.e., attend her P.T.I. classes and complete the program.

It should also be noted that Michele Rimondi identified the defendant as the assailant a year and a half prior to trial, and had given detailed statements to Detective Vasquez and two sworn depositions, all prior to the existence of her grand theft charge. She could hardly have altered her testimony to make it more beneficial to the State because it was already as damaging as it could possibly get. In this vein, had defense counsel sought to demonstrate that she was changing her story as a result of her recent arrest, charge and referral to P.T.I., in order to curry favor in that case, the State could have then admitted, pursuant to F.S. 90.801, her two depositions, and had Vasquez testify as to her statements immediately after the crime, in order to "rebut an express or implied charge against him of improper influence, motive or recent fabrication ..." F.S. 90.801(2)(b).

In the petition the defendant attempts to sidestep the above points by arguing that the pending charge gave her a motive to continue giving false statements favorable to the State. This argument is beyond ludicrous. If Rimondi, purely for purposes of argument, had been lying all along, including two prior sworn depositions, she would hardly need any additional motive to continue her story at trial, considering

the dire consequences she would face should she admit to a year and a half worth of perjury, not to mention being an accessory to murder and possible retribution from the "real" killers. The defendant's instant counsel is simply clutching for straws in the worst way.

The State would also point out, and perhaps should have done so at the outset, that trial counsel, when arguing why he should be able to question Rimondi about her grand theft charge, did not argue he wanted to show motive or bias, as per Davis v. Alaska, supra. Rather, he wanted to go into the facts of that case, including her admission to the arresting officer that she took the property in question, in order to show she was a thief, and therefore dishonest, and therefore a liar. (T.664-666). Counsel wasn't arguing motive or bias, he was arguing bad character for truthfulness based on prior bad acts, which is totally improper under Florida law. You can attack truthfulness with reputation evidence and prior inconsistent statements (F.S. 90.608, 90.614), not prior bad acts (F.S. 90.404, 405), unless they result in a conviction (F.S. 90.610). Davis v. Alaska, supra, speaks only to motive and bias, not general character for truthfulness.

Even assuming arguendo, that a confrontation error occurred, the test for harmless error is as stated in Van Arsdall, supra:

> Accordingly, we hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. Cf. Harrington, 395 U.S. at 254, 23 L.Ed.2d 284, 89 S.Ct. 1726; Schneble v. Florida, 405 U.S. at 432, 31 L.Ed.2d 340, 92 S.Ct. 1056. (emphasis added).
>
> Id. 475 U.S. 684, 89 L.Ed.2d 686, 687.

In this case there was no "damaging potential'' to show motive or bias, as cross-examination as to her grand theft charge would have shown that Rimondi got no special treatment, and that she was in P.T.I. and need only complete the program to get the charges dropped. Indeed, the prosecutor could have then admitted her depositions and had Vasquez then relate the statements of Rimondi the day of the offense. Rimondi's

testimony was crucial, but there was a slew of corroborating evidence, all of which is set out at length above. With the exception of her prior sexual activity, defense counsel was given wide latitude in cross, including her drug use. Finally, the strength of the State's case, as outlined above, was overwhelming.

In sum, there was no confrontation clause error, but even if there was, it was harmless beyond *any* doubt.

JOE GARY WARD

With regard to the criminal history of State witness Joe Ward, the defendant again misinterprets the rule of Davis v. Alaska, supra, which allows liberal cross-examination into pending charges or legal restraint, in order to show motive or bias due to the witness' possible desire to gain favor with the State in his own case. With regard to Joe Ward, the defendant sought to question Ward about a 1972 case (Circuit No. 72-5703), dealing in stolen property, for which Ward was placed on five years probation, adjudication withheld (T.2048-2052).[2] Defense

[2] When reading the probation order to the Court, the prosecutor mistakenly stated "it indicates that on February 8th of 1983, Judge Alfonso Sepe withheld adjudication on this particular case" (T.2049). The date was in fact February 8th 1973, and if the defendant wishes to dispute that fact the State will be happy to supplement with the probation order. The State's point is that Ward was not on probation in June of 1984, when the crime occurred, or in December 1985, when trial was held, or at any time in between.

counsel wasn't attempting to show motive or bias, as per Davis v. Alaska, supra, rather defense counsel wanted to question Ward about the specifics of the 1972 case (T.2051) because it was a crime involving dishonesty. This line of attack is totally improper. You cannot use prior instances of conduct to attack a person's character, as outlined above.

In this same vein, defense counsel was in possession of arrest forms from several cases in the period 1978-1982, whereby Ward had been arrested for leaving the scene of an accident with injuries, aggravated battery, possession of a firearm, and possession of marijuana (T.2051-2056), all of which were either no actioned (no formal charges filed) or nolle prossed by the State long before the instant case arose. Once again, defense counsel wanted to question Ward about the specific facts (his conduct) which resulted in the arrests, in order to demonstrate that Ward was a violent person. Again, this is totally improper. Counsel's proposed attacks did not involve proper impeachment, but rather blatant character assassination based on prior instances of bad conduct which did not result in a conviction. As stated above, such tactics are forbidden by Florida's rules of evidence, and Davis v. Alaska, supra, is totally inapplicable to the instant setting.

It should be noted that Ward admitted to four prior felony convictions; three counts of battery on a police officer, and

one count of resisting arrest with violence, all four of which resulted from a single episode. (T.2026, 2027). His roommate, Ian Riley, who was present when these crimes occurred, testified as to the facts surrounding his fight with the police, and that Ward was a violent man who sometimes carried a firearm (T.1595-1600). The rape victim, Michelle Rimondi, also testified that Ward had a bad temper and was a violent person. (T.2269).

MANUEL CEBEY

In his petition, p.25-26, the defendant states that State witness Manuel Cebey "had been charged with crimes that related to his reputation for truth telling. Over Objection, these offenses were never revealed to the jury" (emphasis added). The State obviously has a different transcript than defendant's current counsel. In the transcript possessed by the State, the prosecutor moved in limine (T.2099, 2100) to prohibit questioning of Cebey regarding his "one or two" prior arrests, none of which resulted in convictions. In response, defense counsel stated "with Cebey I agree with the motion in limine", and then " I agree with the motion in limine. I don't contest it." (T.2101).

In sum, the State frankly does not know what the defendant's current counsel is talking about, and the fact that its argument contains no record cites relative to Cebey is most illuminating.

CLAIM V

ALLEGED NEIL/BATSON/SLAPPY CLAIM.

The defendant again fails to identify key facts which any fair presentation would surely include. The "issue" unfolded as follows.

Mr. Howell, one of the prosecutor's, stated that after discussion among the prosecution team, they had decided to backstrike Mr. Taylor. (T.1242). Defense counsel then objected on the basis of Neil (Id), stating that there was nothing objectionable about Taylor, a black man, and that the State should be required to state its reasons for striking him (T.1243). The Court then noted that this was the first black struck by the State, and that the defendant had also struck one black prospective juror. The court then, referring to the threshold requirement of State v. Neil, 457 So.2d 481 (Fla. 1984), stated that a single strike was insufficient, and though it used the term "systematic striking" (T.1243) the court was talking strictly about the prospector's use of peremptories in this case, not the old "systematic exclusion" standard of Swain v. Alabama, 380 U.S. 202 (1965).

The prosecutor then reiterated that he had so far used four peremptories and of the four only Mr. Taylor was black. (T.1244-1246). He explained that Mr. Taylor had originally been

acceptable, but that he had displayed visible agitation when the trial court had dismissed other jurors, and he was not amongst them. (T.1246). The court then stated that it saw no evidence of a Neil violation at this point, but that if such evidence later arose, he would reconsider the issue. (T.1247). He again used the term "systematic exclusion," but he was clearly referring solely to the prosecutor's conduct in this case, vis-a-vis ~~Neil~~, not Swain. The court noted that Mr. Taylor did not appear hostile to him, but that the prosecutor may have seen something that the court did not. (T.1248).

The State did not use another peremptory on a black juror until its strike of the second alternate juror, Ms. Moss. Defense counsel then immediately renewed his Neil challenge (T.1496), claiming there was nothing objectionable about Ms. Moss. He demanded that the State announce its reasons, which the State stated it would be glad to do. (T.1497). The trial court then pointed out that the jury contained five (actually four, as is announced later) blacks, and that it saw no evidence of systematic exclusion in this case, but that it would inquire of the State its reasons for striking Moss. (T.1497):

> MR. HOWELL: Ms. Moss is a young, unemployed, single female which are my basic reasons for striking her. If you look, there are no young, unemployed, single persons whether male or female on the jury at this time.

Ms. Moss was black. If she was white or green or yellow spots, I would not allow that person of that makeup to be on the jury if I can stop it.

THE COURT: Young and single as opposed to married?

MR. HOWELL: Young, single and unemployed.

THE COURT: That's a strategic move on your part.

Id.

The prosecutor then reemphasized his reason for backstriking Mr. Taylor:

And as to Mr. Taylor, I would like-- I have already made a record, but I'll do it again since Mr. Lange has mentioned it.

THE COURT: Mr. Taylor was there.

MR. HOWELL: He was one of the first strikes we exercised a long time ago, two days ago.

MR. LANGE: He was backstriked.

THE COURT: He was--

MR. LANGE: He was a Dade County School Board plumber.

THE COURT: I remember him.

MR. HOWELL: Mr. Glick and I accepted him. We discussed it and accepted him.

It was later that we talked about the hostility that he exhibited and I know your Honor has made a finding

that he was not verbally hostile, but obviously your Honor did not see Mr. Taylor's reaction.

I don't know if Mr. Lange saw it or not.

MR. LANGE: I didn't see any of it.

MR. HOWELL: I did and Mr. Glick informed me he did too. We discussed it. His anger and hostility when he was told that some people were going to go--allowed to go home and he was not and at that time we decided to exercise a peremptory challenge.

THE COURT: Do you think he would be hostile to the--

MR. HOWELL: He was a hostile individual. I really fear hostile people on a jury and he appeared to be hostile.

THE COURT: The question is whether or not he was struck because he is black; for racial reasons.

MR. LANGE: There is no record to support his bare allegation. You see, it is like an officer that has a pretextual reason for stopping someone and says, I saw him do something, and it is really a pretext.

It is a shame and--for a racially motivated strike.

THE COURT: I don't believe the record will reflect that if I remember the man's answers. He could fit in on the profile on the people that the State would want to hear a case and it is just that the State saw anger on his part when he felt that he had to come back or was not going to be excused.

> This is a strategic move and the mere fact we have a number of black on the jury indicates that the State did not--and I will rule in accordance with the directions under Neil and find that there is no backstriking and relieving jurors because of their race.
>
> I think the State has not done that and I'm so ruling noting your objection--I'm sure counsel for the defense--
>
> (T.1498-1500).

The prosecutor then noted that it had ten challenges remaining (Id). Defense counsel responded to a query by the court, stating that jurors 3, 8, 9, and 10 were black. (T.1500, 1501).

The above facts may be succintly summarized as follows:

> 1) Of the six black jurors in a position to be amoung the twelve member jury, all six were originally accepted by the State.
>
> 2) Of those six, one was peremptorily stricken by the defendant.
>
> 3) Of the remaining five, the State backstruck black juror Taylor because, although he was originally acceptable, both prosecutors had noticed him act agitated when the names of the dismissed jurors were read, and he was not amongst them. In other words, he was upset about having "made the cut."
>
> 3) The twelve member jury thus contained four blacks.

5) After both sides agreed as to the first alternate juror, Ms. Moss was presented as the second alternate, and the State exercised a peremptory because she was young, unemployed and single, the only person with such characteristics remaining on the panel.

6) The trial court found that the strikes of Taylor and Moss were for valid, nondiscriminatory reasons.

The instant claim is for ineffective assistance of appellate counsel in not raising this issue on direct appeal. The State submits that appellate counsel was not ineffective because the issue is entirely without merit.

The ruling of the trial court should definitely be viewed as a finding tha the defendant failed to establish a threshold or prima facie case of discrimination, under Neil, supra, and State v. Slappy, **522** So.2d **18** (Fla. **1988).** Even though the trial court asked the State about its reasons for striking Ms. Moss, the second alternate juror, the court clearly did so strictly for the purposes of providing a record for appellate review. Nothing said by the trial court even remotely suggests that the defendant had met the threshold inquiry, and indeed everything the court said indicates the opposite. This trial occurred in **1985,** and the trial court did not have the benefit of later decisions refining Neil, but two things are clear: the trial court found no evidence that the two strikes in question

were racially motivated, and it found that the State's explanations were race neutral and based on legitimate, nonracial concerns, as indeed they were.

Even if this Court finds that the trial court made no specific finding concerning the "prima facie" issue, or that its finding was erroneous, the explanations of the prosecutor, taken together with his acceptance of five of the six black jurors bound for the actual twelve member jury, are sufficient to satisfy Slappy, supra, Batson v. Kentucky, **106** S.Ct. **1712** (1986), or any other case the defendant might wish to rely on.

As to Mr. Taylor, who was originally acceptable to the State based on his answers on voir dire, both prosecutors noticed that he became upset at not being excused and sent home with the other stricken jurors. The prosecutors reasonably believed that his behavior indicated Taylor was not thrilled about sitting through the two week trial, so they elected to strike him. If this was pretextual, what explains the State's acceptance of ~~all~~ ~~five~~ of the other panel members slated for positions on the twelve member jury?

As to Ms. Moss, it must be stressed that she was the second alternate. Though not determinative, it is certainly highly relevant to the prosecutor's intent, that she was the second alternate. If the prosecutor wanted to keep blacks off the

jury, why would he wait until selection of the second alternate, whose chances of having a say in the verdict are virtually nil? More importantly, the prosecutor's reason for striking her, that she was the only young, single unemployed person on the panel, is entirely race neutral. It is perfectly reasonable for a prosecutor to believe that people with those characteristics do not have the necessary level of maturity, responsibility or stake in the community necessary to remain diligent during a grueling two week trial. This reason satisfies the five part test of Slappy, supra, as does the backstrike of Mr. Taylor.

In sum, the defendant did not demonstrate the prima facie showing required by Slappy, and in any event the trial court's finding, that the prosecutor's stated reasons were based on legitimate, racial neutral strategy, is totally supported by the evidence. Appellate counsel did not pursue a Neil claim because there was no Neil violation.

CLAIM VI

PROSECUTORIAL COMMENTS DURING GUILT AND SENTENCING PHASE ARGUMENTS.

None of the prosecutor's comments cited by the defendant were objected to by defendant's trial counsel, and appellate counsel thus cannot be faulted for failing to present an issue not preserved for appellate review at trial. Bertolotti v. Dugger, 514 So.2d 1095 at 1097 (Fla. 1987).

As for the prosecutor's unobjected to comments about Ted Bundy, which occurred during his rebuttal closing argument at the guilt phase, the prosecutor was directly responding to defense counsel closing argument. Therein, defense counsel had argued that the defendant's normal behavior the day before and after the murder[3], was totally inconsistent with an enraged baseball bat murderer. The prosecutor in rebuttal pointed out that many killers, like Ted Bundy, can be normal one minute, commit a brutal murder, then immediately return to a normal pattern of behavior. The bottom line, however, is that there was no objection. In passing the State notes that at the sentencing phase, counsel argued that the chair is reserved for killers like Bundy (T.3490), thus counsel had a good strategic reason not to object, as he planned on getting some mileage out of Bundy himself.

---

[3] Counsel argued that the killer was a crazed vicious psycho (T.3001), but the defendant's behavior was totally inconsistent with this profile, i.e., he was acting happy and carefree at the Goombay festival (T.3003), his cousin, Jimmy Oliver, testified he was not angry or upset that day (T.3004), his conversation with Thomas McMurray on Key Biscayne, an hour before the murder, was a friendly talk about their business interests (T.3005), the defendant would not have worn a T-shirt with Rick on it if he was out to bash someone's head in (T.3007), the defendant's behavior was absolutely normal that day (T.3008), the next day his girlfriend testified that the defendant was not upset, and that he went to work as usual that day (T.3016), and that when he spoke to the Detective that day, he was calm and cooperative (T.3017).

The prosecutor's "bullshitter" comment was not objected to, although the court admonished the prosecutor to watch his language (T.3090, 3091). As for the "but the defense of lying hits in the face", again not objected to, the prosecutor was referring to the defendant's assertion, in opening statement, that the rape victim was lying (T.2967). As for the prosecutor's numerous references to the defendant being a flaming liar, that is what the evidence showed, there was no objection, and defendant's counsel had a good reason not to object: he spent a good part of his closing argument calling the rape victim a flaming liar (T.3028, 3030, 3033, 3039, 3048, 3049, etc.).

The bottom line is that the issue of these comments was not preserved at trial.

CLAIM VII

BOOTH V. MARYLAND VICTIM IMPACT EVIDENCE CLAIM.

The rape victim's testimony about her ordeal at the hands of the defendeant, her emotional condition on the witness stand, and her emotional condition when she first related what happened immediately after the event, are not "victim impact evidence" by any stretch of the imagination. As to the Maryland detective's testimony about why the Maryland rape/attempted murder victim

wasn't present to personally relate what the defendant did to her, defendant s present counsel again fails to discl se the pertinent facts.

On direct examination of the Maryland Detective, Sheriff Dyne, the State asked nothing about the impact of the rape and stabbing on the Maryland rape/attempted murder victim. On cross-examination, the defendant's counsel began as follows:

CROSS EXAMINATION

BY MR. LANGE:

Q. Yes, sir. Good afternoon, sir, Officer. Miss Hardy, the woman that we're talking about as the victim in this rape, you didn't see her today. She's not here, is she?

A. No. I did not see her.

Q. You're the only Maryland person that's down here as far as you know, correct?

A. As far as I know, correct.

Q. You didn't attempt to get a hold of her to bring her here, did you?

A. No, I did not. I just received a subpoena for myself.

The above questioning was clearly calculated to raise the inference that the State did not want the jury to hear the whole picture, and that the State had deliberately refrained from

calling Miss Hardy for this reason. On redirect the following occurred:

REDIRECT EXAMINATION

BY MR. HOWELL:

Q. Mr. Lange asked you about this lady, Brenda Hardy; have you at our request or my request ever contacted Brenda Hardy?

A. Yes.

I believe Mr. Sam Rayborn contacted her.

Q. Did you ask Brenda Hardy to come to Miami to participate in this hearing?

A. This was the first time I received this subpoena. Yes, I was in contact with her and asked her if she would come down, travel down with me to participate, that's correct.

Q. Did you ask her that?

A. Yes, I did.

Q. Did you go out and see her?

A. I saw her at work and then called her at home.

Q. Was she willing to come in?

A. No.

Q. Can you tell us why?

A She just said she never got over the assault. She fell apart when she found out that Ricky had been released from prison.

> She thought he was in forever and she found out he was out and she was just lost, was hysterical, just about, and I had to go call her at home giving her a couple of days to settle down.
>
> She just said she did not want to come. She said she couldn't face it again.
>
> MR. LANGE: Objection to all this hearsay since she's not here, to physically testify here.
>
> **THE COURT:** Overruled. Go ahead.
>
> (T.3302-3304).

There was no further testimony along these lines.

The first relevant point is that the sole basis for defense counsel's objection was hearsay, and thus the claim that the testimony violated Booth v. Maryland, 107 S.Ct. 2529 (1987), was not preserved. The second and overriding consideration was that this redirect testimony was in direct response to defense counsel's questions on cross-examination regarding the absence of the Maryland victim. See Bertolotti v. Dugger, 3 F.L.W. Fed. C1281, 1291 (11th Cir. August 31, 1989), (alleged "Booth" evidence properly admitted as rebuttal to defendant's argument).

As a final point, the trial court was well aware of the dictates of Booth v. Maryland, for when the prosecutor attempted to introduce a letter from the Maryland victim, he excludedd it as improper victim impact evidence. (T.3508-3510).

As for the testimony of the murder victim's father, which was heard only by the trial court; first, there was no objection, second, the trial court gave absolutely no indication it was relying on that testimony (and given the above ruling as to the Maryland victim's letter, it is clear he would not have relied on such testimony), and third, the defendant's assertion in his brief, "the sentencing judge also considered and relied upon what the prosecutor had urged to the jury, the pain and suffering of the victim and his family and friends" (petition, p.42), which again lacks any record cite, is a pure product of current defense counsel's imagination. The prosecutor made no such argument to the jury, and the trial court made no such finding in its sentencing order.

CLAIM VIII

MAYNARD V. CARTWRIGHT, CLAIM AS TO HAC AGGRAVATING FACTOR.

The defendant did not object to the standard instruction on HAC. The only argument present at trial concerning HAC was that the facts did not support the finding of this factor, an argument rejected by this Court on direct appeal. 510 So.2d at 894. The instant claim is thus procedurally barred. Adams v. State, 543 So.2d 1244, 1249 (Fla. 1989), and Atkins v. State, 541 So.2d 1165, 1166 (Fla. 1989).

Additionally, this Court has rejected this claim on the merits in Smalley v. State, 14 F.L.W. 342 (Fla. July 6, 1989), and the Eleventh Circuit has done the same in Bertolotti, supra, at 1290.

CLAIM IX

ALLEGED "BURDEN SHIFTING" IN PENALTY PHASE INSTRUCTION.

Contrary to the defendant's assertion, at p.60 of his petition, that "Such instructions which Mr. Roberts objected to shifted ...", the State could locate no objection to the standard instruction regarding the balancing of aggravating and mitigating factors. (Although undersigned counsel thought he saw such an objection in its original reading, he could not relocate it in subsequent readings). Thus, the issue was probably not preserved by objection at trial. As to the merits, the trial court gave the standard instructions, which the Eleventh Circuit recently held did not constitute burden shifting. See Bertolotti, supra, at C1289, 1290, and cases cited therein. Adamson v. Ricketts, 865 F.2d 1011 (9th Cir 1988), and Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988) involve situations where the jury was instructed that if they found one aggravating factor, death was presumed to be the proper penalty. That is definitely not the case here.

CLAIM X

"NO SYMPATHY" COMMENTS AND INSTRUCTIONS AT GUILT PHASE WHICH ALLEGEDLY AFFECTED GUILT PHASE.

All of the comments and instructions cited by the defendant in his petition, p.66, relate entirely to the guilt phase, and specifically the jury's deliberations during the guilt phase. None of these voir dire questions nor the guilt phase "...prejudice, bias or sympathy, are not legally reasonable doubts..." (T.3165) instruction were objected to by the defendant, and the "issue" was thus not preserved at trial. Nothing was said concerning mercy or sympathy at the penalty phase, and defendant's present counsel recognizes this, stating "At the penalty phase the jury was not instructed that sympathy or mercy could be considered during their sentencing deliberations" (petition, p.66, 67). No such instruction was requested by the defnedant, and no court has ever held that such an instruction is required. What the cases do hold, with California v. Brown, 479 U.S. 538, 107 S.Ct. 837 (1987), being chief amongst them, is that the jury cannot be instructed to disregard mercy if the effect of the instructions, taken as a whole, are such that the jurors' consideration of mitigating factors may have been restricted. There is absolutely nothing to support such a claim in this case. A virtually identical claim was rejected by the Eleventh Circuit in Julius v. Jones, 3

F.L.W. Fed. C763 (11th Cir. May 31st, 1989), see appendix at C768.

CLAIM XI

CALDWELL V. MISSISSIPPI CLAIM.

None of the comments of the prosecutor were objected to, nor did defense counsel object to the court's instruction, Florida's standard instruction, in this regard. The issue is thus procedurally barred. See Dugger v. Adams, 489 U.S. ___, 109 S.Ct. ___, 3 F.L.W. Fed S105 (February 28, 1989), and innumeral cases from this Court cited therein. See also, Bertolotti, supra, at C1287, upholding Florida's procedural bar on this issue.

CLAIM XII

ALLEGED UNDUE WEIGHT OF "UNDER SENTENCE OF IMPRISONMENT" AGGRAVATING FACTOR.

Defense counsel specifically agreed to the instruction on the "under sentence of imprisonment" aggravating factor (T.3217), and in argument he conceded the factor does apply (T.3482). He did not ask for an instruction to the effect that "being on parole is not as bad as escaping from prison," or whatever instruction defendant's current counsel thinks should have been given. In Songer v. State, 14 F.L.W. 262 (Fla. May

25, 1989), there was only one aggravating factor, under sentence of imprisonment, and several mitigating factors. This Court nored that this single aggravating factor was not especially compelling, given that the defendant had merely walked away from work release. Songer in no way suggest that the jury must be given an instruction that "parole is not as bad as a breakout," even had one been requested, which was not the case here. It should also be noted that the defendant herein was not simply on parole; he had violated lifetime parole for rape and attempted murder, only a year after being placed thereon, by fleeing the State of Maryland. See trial court's sentencing order (R.581), and parole revocation and parole violation warrant (R.539, 541).

In sum, this claim is utterly frivilous.

CLAIM XIII

"AUTOMATIC" AGGRAVATING FACTOR BASED ON FELONY-MURDER.

This identical claim has been repeatedly rejected by this Court, and in Bertolotti, supra, at 1291, the Eleventh Circuit agreed that this claim is totally without merit.

CLAIM XIV

TRIAL COURT'S FAILURE TO FIND MITIGATING EVIDENCE.

The trial court's refusal to find the statutory mitigating factors of "extreme emotional distress," and "inability to conform his conduct to the requirements of law," was raised and decided on direct appeal. 510 So.2d at 894, 895.

The defendant now claims the trial court refused to consider his medical testimony about alleged brain damage and drug abuse. This claim is ridiculous. The judge obviously considered this evidence, because he spent 2 1/2 pages explaining why he believed the defendant's medical "brain damage" evidence was entitled to no weight whatever (R.586-588), and also pointing out that the defendant had not provided any information as to his mental state or drug use prior to or during the crime (they did not even discuss the crime with the defendant). (R.586). The point is that the court considered it, i.e., he evaluated it, and found it to be totally lacking any mitigating value.

CLAIM XV

JUDGE'S REFUSAL TO ALLOW DEFENDANT'S EXPERT TO TESTIFY TO CONTENTS OF LETTER FROM DEFENDANT'S PRIOR COUNSEL IN THIS CASE.

Thomas Scott represented the defendant through much of the pretrial stage of this case. He had written Dr. Stillman a letter in conjunction with obtaining Stillman's services as an

expert. At the penalty phase Dr. Stillman began to comment on the contents of that letter (T.3376), and the State objected, which objection was sustained (T.3376). The State has found no case on point, however the State asserts that communications between defense counsel and a defense expert are not a proper subject for testimony by the expert. Dr. Stillman testified extensively as to the basis of his opinion: He conducted three separate mental health examinations (T.3359, 3360), and had the defendant examined by a neuropsychologist **(Id).** He reviewed the defendant's psychiatric records from his stay at Patuxent Institute in Maryland. (T.3364). He reviewed the defendant's history as given by the defendant and family members (T.3365). At his direction the defendant was administered Rorschach tests and an Electroencephalogram (T.3365, 3366), from which he concluded that the defendant had damage to his temporal lobes and left parietal precueous. (T.3367, 3368). He reviewed the findings of Dr. Crown (T.3372), and reviewed police reports and "a lot of other material." (T.3387).

In sum, Scott's letter had no place in Dr. Stillman's testimony, and in any event Dr. Stillman gave an exhaustive account of the sources of his opinion.

CLAIM XVI

ALLEGED IMPROPER PROSECUTORIAL ARGUMENT AS TO LACK OF REMORSE AND ALLEGED RELIANCE BY TRIAL COURT ON LACK OF REMORSE.

The first relevant point is that none of the prosecutorial comments cited at p.103 of the petition were objected to, and thus the issue as to those comments was not preserved for appellate review. More importantly, the comments of the prosecutor during argument, and the cited statement of the trial court in its sentencing order, when viewed in context, were perfectly proper responses to the defendant's assertion that his crimes were not the work of a cold psychopath, but rather the product of a brain damaged induced, uncontrollable rage response, during which he suffered an extreme emotional disturbance and could not conform his conduct to the requirements of law.

Dr. Stillman testified that the defendant's brain damage causes violent rage reactions which the defendant is unable to control. (T.3367-3376):

> Q. The isolated, explosive anti-social conduct like a rape, like murder, a violent crime, would be as a result of the involuntary action of the person because of the brain damage?
>
> A. Yes. It goes beyond his ability, beyond his ability to control ones self based on several properties. It's like igniting a match. When its ignitied you can't put it out until it burns out.
>
> (T.3376).

Dr. Toomer offered similar findings as to the defendant's brain damage causing isolated explosive behavior which the defendant could not control (T.3326-3328, 3349).

In his sentencing argument, defense counsel argued that the defendant experienced an isolated rage reaction which he could not control, and that the defendant was under an extreme emotional disturbance and could not conform his conducts to the requirements of law. (T.3482-3485, 3490-3491).

The State's argument at the penalty phase, aside from arguing the aggravating factors, also focused in on the defendant's supposed brain damage/rage reaction mitigation. The State's position was that if the attack was due to an uncontrollable rage, why did the defendant joke and brag with the rape victim immediately afterward, and show no concern for the murder victim even though the defendant checked several times and knew the victim was still alive (T.3457-3462):

> In fact, when Michelle Rimondi returned to the beach to look for his wallet, to look for Ricky Roberts he was, the young man was still alive because as you recall Ricky Roberts went over to him, he listened to him, he heard his heart and was listening to his breathing.
>
> He told Michelle Rimondi, "He's still breathing. I think he's alive."

PAGE(S) MISSING

(T.3456-3458).

It should be noted that the prosecuter had stressed to the jury that the only factors it could consider in aggravation were those listed in the statute, and that in this case only four aggravating factors were applicable. (T.3443, 3444).

Not only was the defendant's behavior during the hour and a half it took the victim to die relevant to rebut the "rage reaction" mitigating evidence, his disregard for the suffering of the semi-conscious (but still in considerable pain, T.2601, 3265) victim, was also relevant to the aggravating factor of heinous, atrocious and cruel.

The comments of the trial court in its sentencing order (R.587), cited at page 103 of the petition, are made in the context of the trial court's rejection of the two mitigating factors allegedly proven by the brain damage/rage reaction expert testimony:

> The witnesses for the Defense opined that the defendant has "lesions on his brains" which resulted in organic brain damage. They further opined that this condition existed at the time of the offense and that the use of alcohol and/or drugs would have caused this defendant to act in a violent rage-like state when confronted with a stressful situation and as a result of his "organic brain damage," the

defendant would be under the influence of extreme mental or emotional disturbance and could not appreciate the criminality of his conduct or conform his conduct to the requirements of the law.

The Court rejects these opinions and points out that the defendant gave no information to these witnesses as to:

(a) Whether he was using drugs during or before the commission of this crime;

(b) Whether he was using alcohol during or before the crime was committed;

(c) His mental state prior to, during, or after the event.

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

(2) The Court feels that the evidence in this record is that the defendant is a sociopath who can commit crimes with no care for the victims. This is evidenced by the testimony of the Sexual Battery victim as to the defendant's attitude and demeanor after the murder. There is and was not one shred of caring or mercy for George Napoles by Ricky Roberts after the beating. The defendant could have summoned aid, even anonymously, once he was away from the scene, but he did not. This is further evidenced by a review of the defendant's prison, school, psychological and

> psychiatric records. These records tell this Court that the defendant has an anti-social personality and not brain damage.

In sum, the comments of the prosecutor (not objected to) and the trial court were directly related and responsive to the alleged mitigating factors argued by defense counsel.

CLAIM XVII

ALLEGED HEARSAY VIOLATIONS AT PENALTY PHASE.

In Rhodes v. State, 14 F.L.W. 342 (Fla. July 6, 1989), this Court specifically held that the police officer could relate the details of the prior offense. The error in Rhodes was to admit a tape recording of the victim in the prior case, because a tape recording cannot be cross-examined.

As usual the defendant's petition leaves out the most salient fact: the most damaging part of Detective Dynes' testimony was not hearsay, but rather consisted of Dynes' description of the defendant's confession in that case:

> Q. (By Mr. Howell) Did you ask him, Ricky Roberts that is, whether or not he had committed these kind of crimes which you have just described?
>
> A. That's correct.

Q. And at that time did he admit to you that he had committed those crimes?

A. Initially his first statement was that he had done nothing and wouldn't tell me anything that happened to him. Then he told us that he did not know anything about East Williams and had never been there, and we confronted him with the crime of rape.

I told him, "I think you're the one that raped the girl."

He said, "Did she tell you she was raped?"

I said, "She said yes."

I waited.

He tries to tell me, he said, "I did not rape her, I just beat her."

Then he gave -- at a later time we took him to headquarters and he gave a written statement, at which time he related to me that he had gone to the apartment house, knocked on her door and asked if John was home, referring to a gentleman by the name of John Bradshaw who lived in Apartment 6 and who worked at the restaurant the same with Ricky.

Q. Did you interview Mr. Bradshaw?

A. Yes, I did interview Mr. Bradshaw.

Ricky Roberts said, "She said 'No and *go* to hell,'" at which time he said he pushed her, she fell back on the bed and he hit her.

He admitted he raped her and he said he was going to rape her, but she told him, "Don't hurt me. Just get it." He said he did.

Q. These are his words? That's what he told you in his statement?

A. He said that when he finished she started fighting and that he hit her in the head with a glass, at which time he grabbed the pair of scissors and said he put the scissors in her back, at which time he ran out, walked home and bathed, changed clothes and went to work.

Then we showed up on the job and picked him up.

(T.3297, 3298).

In short this issue is frivilous.

CONCLUSION

Each and every issue in the petition is without merit. Additionally, as to each issue that this Court finds procedurally barred, the State would request a specific finding to that affect, as per Harris v. Reed, 489 U.S. ___ 109 S.Ct. ___, (3 F.L.W. Fed. S74) (February 22, 1989).

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

RALPH BARREIRA
Florida Bar No. 0374490
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS was furnished by mail to MARTIN McCLAIN, C.C.R., 1533 South Monroe Street, Tallahassee, Florida 32301 on this 24 day of October, 1989.

RALPH BARREIRA
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

/ml