IN THE SUPREME COURT OF FLORIDA

MICHAEL COLEMAN,

Appellant,

v. CASE NO. 74,944

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 158541

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

ok? yes
51 pages -

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITES
(Continued)

STATEMENT OF THE CASE AND FACTS

On February 28, 1989, Michael Coleman, Timothy Alexander Robinson and Darrell Frazier were indicted by a grand jury in and for Escambia County, Florida, on seventeen counts; four counts of first degree murder of Derek Hill, Morris Douglas, Michael McCormick and Mildred Baker, respectively; one count of attempted first degree murder of Amanda Merrell; six counts of kidnapping of Derek Hill, Morris Douglas, Michael McCormick, Mildred Baker, Amanda Merrell, and Darlene Crenshaw, respectively; two counts of sexual battery of Amanda Merrell and Mildred Baker; one count of conspiracy to traffic more than four hundred grams of cocaine; one count of burglary of a dwelling; and two counts of robbery of Amanda Merrell and Darlene Crenshaw. (RA 2101-2105). A plethora of pretrial motions were filed, most noteworthy to the instant appeal were Coleman's motion to sever (RA 2273), motions for individual and sequestered voir dire: for discovery of prosecutorial investigation of prospective jurors: and motion in limine to prohibit questioning of prospective jurors regarding death penalty (RA 2274), and motions to suppress in-court identification (RA 2334, 2335).

Trial commenced on May 22, 1989 and verdicts as to all seventeen counts of the indictment were returned on June 1, 1989 (RA 2415-2423). The penalty phase of Coleman's trial commenced on June 2, 1989, culminating in a jury recommendation of life by a 6-6 vote (TR 2096). The trial court imposed death over the jury's recommendation and on September 29, 1989, entered its written findings (RA 2609-2614). Coleman's motion for new trial

was filed on June 29, 1989, and was subsequently denied, and his notice of appeal was filed October 19, 1989.

Appellant's recital of the facts is brief and provides only a cursory account of what transpired on September 20, 1988. Appellee would direct this Court's attention to the findings of fact provided by the trial court in its sentencing order as a succinct accounting of what transpired (RA 2609-2611). The court observed:

"Timothy Robinson, Darrell Frazier, Bruce Frazier and Michael Coleman were residents of Miami, Florida, who supervised and were associated with a cocaine distribution enterprise headed by Ronald Williams. The enterprise reached as far as Pensacola, Florida, and employed intermediate associates to oversee street-level employees responsible for the distribution and sale of quantities of cocaine which were usually sent from Miami in minimal lots of one kilo for subsequent division and sale. On or about September 18, 1988, local members of the enterprise became concerned over the security of their operations and moved a safe containing a large quantity of cocaine and cash from one apartment to another apartment occupied by Michael Anthony McCormick, one of the enterprise's street-level employees. Adjacent to his duplex apartment resided Derek Devon Hill and Morris Alfonso Douglas. Shortly after the safe and contents were deposited at McCormick's apartment, Hill and Douglas gained entry to it and removed the safe and its contents to the home of a female acquaintance, Darlene Crenshaw.

Angered by the theft of their drugs and money, members of the enterprise, including the defendants Robinson, Coleman and Frazier, began to search Pensacola for their property. This search ultimately took them to the duplex apartment of Hill and Douglas. Near midnight of September 19, 1988, or in the early morning hours of September 20, 1988, Hill and Douglas were entertaining Amanda Merrell and Darlene Crenshaw at their apartment when they heard a knock at their door. As Hill opened the door McCormick was pushed through it by three armed men, defendants Robinson and Coleman and Bruce Frazier. In the aftermath that followed, the four occupants of the apartment along with McCormick were first completely undressed and then tied up face down with electrical cords. About this time defendant Darrell Frazier brought in McCormick's girlfriend, Mildred Baker, and she was subjected to the same treatment. Defendant Robinson began to demand the whereabouts of the cocaine and money stolen from the enterprise. When his demands went unanswered, Robinson began to stab Hill while the other defendant physically assaulted some of the other hostages with kitchen knifes. At this point, Darlene Crenshaw volunteered she knew the location of the missing property and agreed to show defendants its location. As she departed with the Frazier brothers, Robinson instructed Darrell Frazier to kill Crenshaw if she presented any problems. After they departed, Coleman and Robinson each sexually assaulted Mildred Baker and Amanda Merrell at the apartment.

In the meantime, Darrell and Bruce Frazier, having retrieved the contraband and having returned to Hill's and Douglas's apartment, informed Robinson of their success. Without provocation, there began a senseless carnage. Coleman first attempted to kill Amanda Merrell by slashing her throat several times. Still conscious, she heard several shots and then Mildred Baker pleaded with Robinson to spare her life. She then heard another shot and nothing further from Baker. Immediately thereafter, someone came up behind Merrell and shot in the back of the head, but this wound proved not to be fatal. After the assailants left the premises, Merrell was able to free herself and to summon assistance. Investigators who arrived in response to her call found at the scene the four bound mutilated bodies of Hill, Douglas, McCormick and Baker, each of whom had been slashed, stabbed and shot at the base of the skull. Merrell, along with Darlene Crenshaw, who had been able to escape unharmed from Darrell and Bruce Frazier, were able to identify their abductors and assailants. Robinson, Coleman and Darrell Frazier were eventually arrested and brought to trial. Bruce Frazier remains a fugitive. At the conclusion of the guilt phase of the trial, Coleman was found guilty of four counts of first degree murder; one count of attempted first degree murder; six counts of armed kidnapping; two counts of sexual battery with a weapon; one count of conspiracy to traffic in more than four hundred grams of cocaine; one count of armed burglary of an occupied dwelling; and two counts of armed robbery." (RA 2609-2611).

The aforecited summary was adduced based on facts presented at trial. The State called a number of witnesses who testified to the drug dealings that had occured in Pensacola, Florida, and to the parties involved in said drug dealings. Germane to the murders sub judice, Arabella Washington was called by the State and she testified that on September 20, 1988, Bruce Frazier's brother Darrell (Yoge) Frazier stopped by her house and asked to use her telephone. After he spoke to someone on the phone, Darrell Frazier asked her to take him and his buddies to the Jacksonville Airport (TR 1068-1069). On the way, they stopped at the Gateway Mall at which time three black men exited from a black mustang, went into the Zayre's Department Store and returned to her car. (TR 1071). They changed clothes in her car with stuff they had purchased at the Zayre's Department Store. (TR 1075). Ms. Washington said that the clothes they put on were beige colored uniforms. (TR 1075-1076). She gave a description of each of the individuals (TR 1099, 1100-1103), and testified that when she was first approached by the police she told them nothing because she was afraid. She knew one of the three men who entered her car to be Bruce Frazier's brother Darrell and she identified the other two people as a tall thin dark man who had gold teeth and another black man who was not as tall and a little more stocky.

Cassandra Pritchett was also called to the stand by the State. She testified that she knew Michael Coleman (TR 1147-1148), and that before Thanksgiving 1988, Coleman gave her a ring and watch. (TR 1148-1149). She ultimately turned the ring and watch given to her by Coleman over to the State. (TR 1149).

Mary Grady testified that she was acquainted with Amanda Merrell and that she had allowed Amanda to wear her ruby and diamond ring. (TR 1175-1176). Ms. Grady was able to identify the ring given to Cassandra Pritchett as the ring Ms. Grady allowed Amanda Merrell to wear just prior to the murders. (TR 1176).

Darlene Crenshaw was next called to the stand and testified that she knew Amanda Merrell for approximately five years. (TR 1178). She testified that she met Derek Hill and Morris Douglass (Bo) at the dog track several days prior to the day of the murders. (TR 1178-1179). Two days before the incident on Sunday night, Derek and Bo came over to her home and asked if they could leave something in the house. Bo and Derek took a safe from out of the trunk of their car and put it in a 1981 Honda Accord parked in Darlene Crenshaw's driveway. (TR 1180). The next day they came over and took the safe out of the trunk, brought it in the backyard and opened it. Although Darlene did not actually see the safe being opened, she did observe that after Bo and Derek went to the backyard, they returned with crack slabs broken down into twenty-three bags and a great deal of money. (TR 1181-1183). Darlene took the money and hid it in a pillowcase in a closet in one of the bedrooms and Bo and Derek took the drugs and put it in a green duffle bag belonging to her husband and left it in her car. (TR 1183-1184). Bo and Derek left for a couple of hours and when they returned, Darlene Crenshaw, Amanda Merrell, Bo and Derek all went to the dog track at approximately 7:00 p.m. (TR 1184). After all the races were run, they left the dog track

at 10:45 p.m. and went to Foster's Bar-B-Que Restaurant on Navy Boulevard. (TR **1185).** They took their food and went to Derek's apartment at Gulf **Beach** Highway in Pleasant Grove and arrived at approximately 11:05 p.m. (TR **1185).** Darlene Crenshaw testified that they started to eat their food and Derek put a tape on and suddenly these was a knock on the door. Derek answered and a "guy came in" and three other black men followed him. (TR **1186).** The three black men that followed were armed and at that point, Derek asked what was up. Derek was pushed down on the couch and Red, Timothy Robinson, told him he wanted his stuff. They were told not to say anything and instructed to undress. (TR **1186).** Darlene Crenshaw testified that it looked like the first guy who entered through the door was a hostage and that the guys behind him were holding guns on him. One of the other black men with a weapon went throughout the house searching around; another pulled electrical cords and wiring; and the third man told them all to undress. (TR **1187).** During this period, one of the black men started stabbing Derek in the shoulder. Darlene Crenshaw raised her hand and told the three men that she knew where the money was. She was immediately carried to another room and asked what she knew. **She** told them about Derek and Bo bringing the money and drugs to her home. She was given her clothes, **she** got dressed and she was carried back into the living room. They tied her up and carried her out the front door. (TR **1187-1188).** Bruce and Darrell Frazier accompanied Darlene Crenshaw to her home. (TR **1189).** When she **gat** there, one of the black men went to her front door and gained entry. When he couldn't locate the

drugs and money, he returned to the car and Darlene accompanied him back into the house and retrieved both the drugs and the money. Darlene was able to close the front door behind Darrell Frazier and lock it. The two black men left. (TR 1192). When she undressed they had taken her jewelry, in particular a watch, ring and earrings. She testified that she did not give the jewelry up willingly but did so at gunpoint (TR 1193). As soon a3 the men left her house, she took her mother and kids and left the house and rode around the remainder of the evening. (TR 1193-1195).

Willa Crenshaw, Darlene's mother, took the stand and testified that at approximately 12:20 a.m., September 20, 1988, a black man came to her door and identified himself as Terry. He said that he was sorry he woke her up but he wanted to retrieve a package Tina had left there that afternoon. Darrell Frazier walked into the house and into Tina's room where the children were asleep and after he rummaged around a moment, came back out. (TR 1235-1237). He returned a few minutes later with Tina and at that point, Tina took him to the bedroom next to the children's room. Mrs. Crenshaw testified that she heard talking but they were whispering and she could not make out what they were saying. When Tina and Frazier got to the door, Tina pushed him out and slammed the door and shut it. She positively identified one of the persons as Darrell Frazier, the individual who entered her home that evening. (TR 1238). Mrs. Crenshaw testified on cross-examination that she got a good look at him because he was under the porch light that evening and that she did not observe any

gold teeth in his mouth. She testified that his height was about 5'8" tall. (TR 1241).

Amanda Merrell testified that she met Bo and Derek in August 1988, at the Pensacola dog track. She again saw them on September 20, 1988, at the dog track when they came to pick her up and asked her to go with them to Tina's house. (TR 1286). When they arrived, they pulled their car into the driveway and took a safe out of the trunk. They brought the safe out back and opened it, using Tina's father's tools. (TR 1287-1288). Tina and Amanda were sitting on the car porch and did not see the actually open the safe. When Bo and Derek returned, however, they had drugs and money. (TR 1289). Before he left, Derek gave Tina the money to hide in a closet in the house and he hid the drugs in a duffle bag in Tina's car. Amanda Merrell testified that Bo and Derek returned several hours later around 7:00 p.m. All four went to the dog track. (TR 1290-1291). After they left the dog track at approximately 10:45 p.m. and after stopping at Foster's Bar-B-Que, they went to Derek's house at Gulf Beach Highway, approximately ten minutes away. (TR 1292). The group started eating and Derek put a tape on the VCR. Amanda testified she heard a knock. (TR 1293). Derek answered the door and Amanda Merrell testified that a big man known as "Gas" appeared at the door. Behind him was "Red", "Max" and a little guy named "Jit", all carrying guns except for "Gas". (TR 1294). Gas came in the door and said to Derek that these guys wanted their stuff and they were not playing around. (TR 1294). Red told everyone to sit down and shutup. Everyone was made to strip pursuant to

Amanda Merrell's testimony, and one of the men searched the area looking for any guns. When nobody would tell them where his stuff was, Red started to beat up Gas.

Amanda Merrell was able to positively identify Red as Timothy Robinson and Max as Michael Coleman. (TR 1296). Red told everyone to start talking and then he went into the kitchen and returned with a knife. He then proceeded to start stabbing Derek in the shoulder. (TR 1297). Amanda Merrell testified Tina raised her hand and said that she knew where the drugs and money were located. Red took her to the other room and questioned her. Moments later, Jit came out and asked which were Tina's clothes and returned to the bedroom with them. (TR 1297). Amanda Merrell testified, Bo, Derek, Tina, herself, the three guys that had entered the apartment, Gas, Jit and the girl who had just been brought in to the apartment, Mildred, were present. (TR 1298). Red told Darrell Frazier and his brother, Bruce, to take Tina to the apartment and that if she tried to escape they were to kill her. (TR 1299). After they left, Red told Max (Coleman) if anyone said anything to start shooting, starting with Amanda. (TR 1299). Amanda Merrell testified that everyone was tied up with extension cord and electrical wiring at their hands and ankles and they were made to lie face down on the floor.

They put Mildred and Amanda together and not soon after, Michael Coleman came over and put his hands between Amanda's legs and told Red that he was gonna get some of this. He then made her get on her knees and he raped her. (TR 1300-1301). Amanda Merrell testified that Red started messing with Mildred, having

sex with her on the living room floor. Thereafter, Red changed and started having sex with her and Coleman had sex with Mildred. (TR 1301). At this point, Coleman came back over to Amanda and tried to lift her up but could not. He made her stand up and then he took her to the bedroom where he untied her legs and raped her still another time. (TR 1302). Red started calling for him but he waited and then he finally left. Amanda Merrell testified that she heard someone come to the door and say that they "got the stuff, let's go''. She then heard Red say no, he had to do this. (TR 1303).

She observed that Michael Coleman was in the doorway with a knife when she heard Red tell someone to open up and at that point she heard a number of gunshots. Coleman made her get on her back. He then cut her throat from left to right. (TR 1303). He walked out and Amanda heard more shots. Coleman came back and cut her throat twice more and then left. She heard Mildred begging Red not to shoot her at which time Red asked her if Gas had anything to do with the rip-off. Mildred apparently said no. She heard Red say, get down bitch and then she heard another shot. Someone then walked back into the bedroom, kicked Amanda's leg and shot her in the head. (TR 1304). Amanda Merrell testified that she heard Red ask if anyone knew how to drive a stickshift and then heard them all leave.

She managed to get up, wiggle out of the ropes at her ankles and get out into the living room. She saw Bo in a puddle of blood. She went over and retrieved a knife from the chair and cut the ropes from her hands, She ran outside to a pay phone

booth and dialed 911. (TR 1305). Amanda testified, Red took a ring she was wearing from her hand. Amanda Merrell identified Exhibit #51 as the ring her cousin had given her to wear. The ring was taken that night. (TR 1306).

Amanda Merrell testified that Red (Timothy Robinson) looked different at the time of the trial than he did that evening however, she still was able to recognize him. She testified she had no doubt that the people she saw in court were the people that were present in Derek's apartment that evening. (R 1307).

On cross-examination, Amanda Merrell testified that she had not seen the people who had entered the apartment with guns prior to that evening. After the incident she saw a number of photo line-ups and was able to select the defendants' pictures from a number of photo albums. (TR 1372-1373). Although she testified that she never saw anyone get shot, she heard shots on September 20, 1988. She did not know who actually shot her because she was afraid to look up. (TR 1334). She testified she tried not to panic and did not lose consciousness when she was shot. (TR 1335). Amanda Merrell testified that Michael Coleman was the one who had the knife and who cut her throat. She did not know who shot her in the back of the head but she testified that Max had walked out of the room and then someone walked back in the room and shot her. (TR 1377-1378).

Dr. Gary Cumberland testified that he performed autopsies on September 21, 1988, on the four persons found at the Gulf Beach Highway apartment. He observed multiple injuries on each of the persons with multiple cuts, stab wounds and gunshot wounds

to the posterior portion of each victim's head. He testified that Michael McCormick suffered cuts on his forehead and over his left cheek. He had five major cuts to his neck area, two stab wounds to his shoulder and one to his left arm. He had a gunshot wound to the posterior portion behind his right ear, he had two stab wounds to his back. Dr. Cumberland testified Michael McCormick died from a gunshot wound and the two stab wounds to the back. (TR 1397).

With regard to Morris Douglas, the autopsy revealed that he had two stab wounds to the neck, three cut wounds to his neck and four-five cut wounds to the back side of his leg. There were two stab wounds to the back plus a number of small wounds about the back and chest area. There was a gunshot wound to the left posterior head area behind the left ear. (TR 1398). He testified that Douglas died because of the gunshot to his head and the stab wounds in the back. (TR 1401).

Mildred Baker, a black female, had bruises and abrasions to the head area and major scrapes on her back. She suffered a gun shot wound to the left side, below her left ear. (TR 1399). Dr. Cumberland testified she died pursuant to the gunshot wound to the head. (TR 1400).

Derek Hill had abrasions to his left cheek, three cut wounds to his neck, three cut wounds to one leg and a stab wound to his leg, in particular his posterior portion of his thigh. He had stab wounds about his arms and two stab wounds in his back. There was a gunshot wound to his neck on the left side. Dr. Cumberland testified Derek Hill died from the stab wounds

received to the chest and the gunshot wound to the head. (TR 1400).

On cross-examination, Dr. Cumberland testified that there was evidence that all victims had ingested cocaine prior to their deaths and that he found cocaine in each of the victims' nasal passages. (TR **1401, 1403).** He further testified that all **persons** would have died from the gunshot wounds. (TR **1402).**

As a part of Coleman's defense, Mary Tookes was called as a witness in his behalf. She testified that she moved in with Coleman's mother on September 23, 1988 (TR 1452), after she was having problems with her husband. She had known Coleman **five** months and was his fiance. (TR **1451).** She indicated that her height was 6'1½' tall and that Michael Coleman's height was 6'5½" tall. (TR **1455).** She further testified that other people in Miami looked alot like Michael, For example, a guy named Travis, who was **shorter,** but had gold teeth just like Michael. (TR 1456). On cross-examination, Ms. Tookes testified that she **was** still married but she was engaged **to** Michael Coleman. She further testified she did not know what he did for a living. (TR **1456).**

The defense also called Dolly Leverson, Coleman's mother. She **testified** that Mary **Tookes** had come to live with her on September 23, 1988, and that between September **16** and September **23, 1988,** Michael, although **not** at home all the time, was in the neighborhood. (TR **1459, 1464).** On cross-examination, Mrs. Leverson testified **she knew** that Michael Coleman was at. home in Miami and that although nothing special happened that week, she remembers every day of that week. (TR **1477).**

Michael Coleman also took the stand in his awn behalf and testified that his friend or ex-friend Travis Williams was approximately 6'3" tall and looked alot like him **and** had gold teeth like him. The bulk of Mr. Coleman's testimony was that he was in Miami on September 19th or 20th and that he recalled for the jury those events occurring during that period of time that proved he was present in Miami and not in Pensacola, Florida, on September 20, 1988.

On June 2, 1989, the penalty phase of Coleman's capital murder: trial commenced. Coleman filed a motion for severance at the penalty phase which was denied (TR 1989). Trial counsel ordered a PSI (TR 1995), and in Coleman's behalf, called Dolly Leverson, Appellant's mother, who took the stand and testified that they lived in the heart of Liberty City in Miami, Florida. (TR 2029-2030). She further: testified that Michael Coleman, quit school in the tenth grade, **and** that he was an exceptionally good basketball player. Although he was involved in other criminal activity, he always told his mother that he committed the crime if he did. Michael told his mother he did not commit this crime and that he was not guilty. Moreover, she testified that Michael Coleman could not have been in Pensacola, Florida on September 19th or 20th, 1988. (TR 2031). She further allowed that Michael Coleman was not a violent person and that you really had to push him even to get him mad and that he could not possibly kill anyone. (TR 2032).

Michael Coleman took the stand and testified that he was not in Pensacola, Florida on September 19th or 20th, 1988. **(TR**

2032). Although he was found guilty by the jury, he maintained that he did not do the crime and he further observed that his blood-type did not match the DNA that was tested. (TR 2033-2034). Defense counsel at (TR 2046), renewed his request for a continuance of the penalty phase so he could secure the services of Michael Radelet, who would not be available until the following Monday. (TR 2046). Defense counsel indicated that he only contacted Michael Radelet the day before and that Mr. Radelet would testify as to his studies concerning whether blacks are executed more often than whites in Florida. (TR 2046). The trial court denied the renewed motion for continuance. (TR 2048).

At closing, Coleman's counsel discussed all of the evidence and indicated that this was "no numbers game" regarding the aggravating and mitigating circumstances that may be considered. (TR 2075-2076). He further observed that some of the victims had participated in drug trafficking and that all the victims had used cocaine prior to their deaths. (TR 2077). He recalled that Coleman had testified twice, once at trial and at the penalty phase and on both occasions, had indicated that he was not in Pensacola, Florida. (TR 2077). Defense counsel further observed that if Coleman was Max, that "Max was a minor player" and only stood at the door with a knife while the shooting was going on. (TR 2077). Defense counsel noted that although Max cut Amanda Merrell's throat, he really didn't mean to kill Amanda because he could have and did not. Defense counsel recalled that testimony reflected that all of the bullets came from the same gun and that

further evidence was presented at trial that Mildred's last words were, "Red, don't shoot me.'' Although Mr. Coleman was maintained that if he was not there, defense counsel observed that if he was present, he was merely an accomplice, not a leader in this activity. (TR 2078).

Defense counsel also opined that a number of people have gold teeth just as Mr. Coleman does and that there was a good chance witnesses misidentified him as the person in Pensacala, Florida. (TR *2079).* He also stated that Coleman, if he did commit the crime, was acting under stress and extreme duress or domination of another person; to-wit: "Red", Timothy Robinson. Defense counsel observed that nobody said that Coleman was running the show but rather, it was run by Red or Jit and that there was no evidence that Coleman attempted to kill anyone but Amanda. (TR 2080).

The defense counsel also observed that there were other aspects of Coleman's character that was worth noting. In particular, the fact that Coleman was not a violent person based on Coleman's mother's testimony and that Coleman, as a youth, had engaged in sports and was a great basketball player. (TR 2081). Defense counsel also noted that the environment he grew up in Liberty City in the projects was difficult. He recalled that Mrs. Leverson said that her son would have told her if he was guilty of the crime because he had done so on previous occasions. Terminally, defense counsel opined that the death penalty was a horrible crime and it would be horrible to make a mistake in Mr. Coleman's case, comparing Coleman to the Richardson case.

Defense counsel recounted how Richardson had spent twenty years in jail for poisoning his children and was later determined that he did not do it. He observed that Richardson was now working with Dick Gregory in a health club and that it would be a tragedy if the real person were caught and Mr. Coleman was already put to death. (TR 2081-2082).

The jury returned a recommendation of 6-6 for life in Coleman's case, a 6-6 life recommendation in Timothy Robinson's case and an 11-1 life recommendation in Darrell Frazier's case. (TR 2096).

The trial court, in overriding the jury's recommendation of life, found the following:

> The evidence supports the findings of these following aggravating factors beyond a reasonable doubt:
>
> (1) The Defendant was previously convicted of another capital felony, i.e., the murders of the three other victims named in other counts. Correll v. State, 523 So.2d 562, 568 (Fla. 1988); or of felonies involving the use or threat of violent to the persons of Amanda Merrell and Darlene Crenshaw who were robbed, kidnapped or sexually battered. LeCroy v. State, 533 So.2d 750, 755 (Fla. 1988).
>
> (2) The four capital felonies were committed while the Defendant was engaged, or was an accomplice, in the commission of a robbery, sexual battery, burglary and kidnapping as previously recited in the foregoing summary.
>
> (3) The four capital felonies were committed for the purpose of avoiding or preventing a lawful arrest. This Court finds that the killings of the four victims were without provocation and senseless since the stolen contraband had been recovered; therefore, it is concluded that the killings occurred to prevent arrest or detection. Correll v. State, supra, at 567; White v. State, 403 So.2d 331, 338 (Fla.1981).

(4) The four capital felonies were especially heinous, atrocious or cruel. As summarized previously without graphic details being provided, this Court finds that the four victims were stripped naked, bound face down, slashed with knives and sharp objects over the length of their torsos, repeatedly stabbed and finally executed. At least one victim pleaded for her life to be spared but she was slain nevertheless. Mendyk v. State, **545 So.2d 846, 850** (Fla. **1989); Cherry** v. State, 544 So.2d 184 (Fla. 1989); **White v. State, supra.**

(5) **The** four capital felonies were committed in a cold, calculated and premeditated manner without any pretense of moral **or** legal justification. These execution-style murders, carried out in the manner already described, were clearly calculated acts, done with premeditation. **Rutherford** v. **State, 545** So.2d (sic) (Fla. 1989); Bolander v. **State, 422** So.2d **833, 838** (Fla. 1982).

Findings relating to mitigating circumstances

The evidence fails to establish the existence of any statutory mitigating factors:

(1) The Defendant had a significant history of prior criminal history including a conviction of an offense involving violence, viz., robbery.

(2) The capital felonies were not committed while the Defendant was under the influence of extreme mental or emotional disturbance.

(3) The victims were not participants in the Defendant's conduct and did not consent to any acts.

(4) The Defendant is one of the persons who committed **the** capital felonies and his participation in these acts was not relatively minor. He tied up the victims, raped two of them and attempted unsuccessfully to kill one by cutting her across the throat trice with a knife. The fact she lived is certainly not attributable to intentional acts of this Defendant to spare her life.

(5) The Defendant did not act under extreme duress or in no wise was under the substantial domination of another person.

(6) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.

(7) The age of the Defendant at the time of commission of the crimes was twenty-seven years and is not a factor.

Finding of Non-Statutory Mitigating Circumstances

The Court has considered assorted testimony relative to Defendant's upbringing, family ties, health, intelligence, personality, education and emotional development. The Court has also considered the victims' background. The Court finds the evidence established that Defendant has maintained close family ties throughout his life and has been supportive of his mother. The remaining contentions are not borne out by the evidence, and even if they were, would have no mitigating value: Defendant's education while incomplete was not altogether lacking and would not excuse or mitigate the vicious crimes committed; the evidence sufficiently linked him to cocaine trafficking; his having been reared in Liberty City is of no moment; his athletic potential does not convince the Court he could be rehabilitated and that his punishment should be mitigated. Finally, the victims' background cannot be used to mitigate the sentence to be imposed and warranted under these facts. Bolander **v.** State, supra, at **837**. Even if any such factors are found to exist under the circumstances, this Court must consider whether they are of sufficient weight to outweigh the aggravating factors. **See**, **e.g.,** Lamb **v. State**, suprua, at **1054**.

Conclusions of Law

The Court hereby finds that the aggravating circumstances far outweigh the mitigating circumstances presented and the death penalty is the appropriate sentence under Counts I, II, III and IV. The jury's recommendation of life sentences could have been based only on

> minor, non-statutory mitigating circumstances or sympathy. 'It would not be reasonable for a jury to recommend a sentence of life based only upon the evidence presented regarding these non-statutory 'mitigating factors standing alone.' **Harmon** v. **State, 527** So.2d 182, 189 (Fla. 1988). The argument that one statutory mitigating circumstance was present, i.e., defendant was not the triggerman and his participation in the capital felony was relatively minor has been thoroughly analyzed and rejected because no reasonable person could differ on this interpretation of the facts. It should be added that even if the fact-finder were to accept defendant's version that he was not one of the triggermen, it is clear he sat idly by and did nothing to prevent the massacre that ensued or to lend aid to the victims. In fact, he participated by making them immobile and defenseless. In this case the sentence of death is so clear and convincing that virtually no reasonable person could differ, and a jury override in light of the standard pronounced in Tedder v. State, 322 So.2d *908* (Fla. 1977), would be warranted. Bolander **v.** State, supra, at **837;** White v. **State, 403** So.2d **331, 340 (Fla. 1981).**

(TR 2611-2614).

Because of the numbers of players in this particular case, the fallowing list of characters and their nicknames are provided to facilitate understanding what transpired. The characters are Timothy Robinson ("Red" or "Big Red"); Darrell Frazier ("Yoge"); Bruce Frazier ("Jit"); Ronald Williams ("Trick"); Charlie Williams ("Charlie"); Clarence Oliver ("Baldy" or "Foots"); Sheldon Henry ("Fats"); James Wheeler ("Buzzard"); Michael McCormick ("Gas"); George Michael Coleman ("Mack" or "Max" or "Macgeorge"); Derek Hill ("Dog"); Morris Douglass ("Bo" or "BooBoo"); Darlene Crenshaw ("Tina" or "Darlene Lutley"), and Gwendolyn Cochran ("Gwen" or "Big Gwen").

SUMMARY OF ARGUMENT

I. The trial court did not err in denying Coleman's motion to sever because the facts and circumstances surrounding the drug activities of all defendants were the facts and circumstances leading up to and explaining the murders.

II. The trial court did not abuse its discretion in declining to answer the jury's written questions regarding the DNA testimony.

111. The trial court correctly concluded that the use of peremptory challenges by the State was race-neutral.

IV. The in-court identification by eye-witnesses were valid and not tainted by allegedly impermissibly tainted photo identification. Therefore, Coleman's motions to suppress were properly denied.

V. The trial court did not err in overriding the jury's 606 vote for life where no reasonable juror could have concluded that any sentence other than death was the appropriate sentence.

ARGUMENT

POINT I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SEVER

Coleman filed a pretrial motion to sever his case from that of defendants Timothy Robinson and Darrell Frazier (RA 2273). The motion was bottomed on two grounds: (1) that the pretrial publicity and evidence to be presented at the trial concerning defendant Darrell Frazier and his brother Bruce Frazier (Jit) made it impossible for Coleman to receive a fair trial because of pretrial publicity and evidence relating to Darrell Frazier's brother's role; (2) Coleman also asserted that he had made a statement to FDLE agents that Coleman knew Timothy Robinson and that statement could be construed according to the Bruton Rule to require a severance of trials.

In the instant point on appeal, however, Coleman seems to emphasize the fact that a severance should have been granted because he was not a major participant in a "wheel" conspiracy. Specifically, he points to the fact that "Ronald 'Trick' Williams or Bruce 'Jit' Frazier (were) the hub of the wheel and witnesses such as Lamar Eady, Gwen Cochran, James Wheeler, Clarence Oliver, Sheldon Henry and the defendants were the 'spokes'''. (Appellant's Brief at 7). While admitting that there was testimony establishing that Darrell Frazier and Timothy Robinson were involved in transporting drugs from Miami to Pensacola, and that physical evidence was presented at trial to show that there had been a rip-off with regard to the drug enterprise, Coleman asserts that since his defense was that he was not present in

Pensacola, the evidence af the drug conspiracy was prejudicial to his case. He further argues that the "attempt" to tie him into this drug enterprise was exacerbated by the fact that the jury, during deliberations, returned and questioned "whether Appellant's blood matched DNA samples taken from vaginal swabs taken from the sexual battery victims." (Appellant's Brief at 8). In sum he asserts "The court's refusal to instruct them further on that issue coupled with the jury's obvious confusion due to the misjoinder of the defendants demonstrates obvious prejudice with relation to the most critical evidence in the trial." (Appellant's Brief at 9). Appellee would submit that Coleman has failed to demonstrate a basis upon which relief may be granted and has failed to demonstrate that the trial court abused its discretion in denying Coleman's motion for severance sub judice.

In **McCrae** v. **State**, 416 So.2d **804** (Fla. 1982), the court observed:

> Rule 3.152(b)(1) directs the **trial** court to order severance whenever necessary 'to promote a fair determination of the guilt or innocence of one or more defendants . . .' as we stated in **Menendez** v. **State**, **368 So.2d 1278** (Fla. 1979), **and** in **Crumb** v. State, **398 So.2d 810 (Fla.** 1981), this rule is consistent with the American Bar Association's standards relating to joinder and severance in criminal trials. The object of the rule is not to provide defendants with an absolute right, upon request, to separate trials when they blame each other for the crime, rather, the rule is designed to assure a fair determination of each defendant's guilt or innocence. This fair determination may be achieved when all the relevant evidence regarding a criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each

> defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence. The rule allows the trial court, in its discretion to grant severance when the jury could be confused or improperly influenced by evidence which applies to only one of the several defendants. A type of evidence that can cause confusion is the confession of a defendant which, by implication, effects a co-defendant but which the jury is supposed to consider only as to the confessing defendant and not as to the others. A severance is always required in this circumstance. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).
>
> In situations less obviously prejudicial than the Bruton circumstance, the question whether severance should be granted must necessarily be answered on a case by case basis. Some general rules have, however, been established. Especially, the fact that the defendant might have a better chance of acquittal or a strategic advantage if tried separately does not establish the right to a severance. (cites omitted). Nor is hostility among defendants, or an attempt by one defendant to escape punishment by throwing the blame on a co-defendant, a sufficient reason, by itself, to require severance. (cites omitted). If the defendants engage in a swearing match as to who did what, the jury should resolve the conflicts and determine the truth of the matter.

416 So.2d at 806.

Although defenses may be mutually exclusive but not antagonistic, severance is not required. **Alphonso** v. **State, 528** So.2d **383** (Fla. 3rd **DCA 1988); O'Callaghan v. State, 429** So.2d **691** (Fla. 1983), and **Biscardo v. State, 511** So.2d **575** (Fla. **4th DCA 1987).** Indeed, no severance is required where evidence of other crimes make up a transaction and become a part of the crime in an episodic sense. Fann v. State, 453 So.2d 230 (Fla. 4th DCA 1984); Parker **v. State, 421** So.2d **712 (Fla.** 3rd **DCA 1982).**

Coleman's defense at trial was that he was not present in Pensacola, Florida on September 20, 1988. Rather, he argues that he was in Miami, Florida and therefore knew nothing about the crime. Timothy Robinson's defense was that he was not in Pensacola, Florida on September 20, 1988, rather, he was in New Jersey. Darrell Frazier's defense at trial was to require the State to prove its case beyond a reasonable doubt and to question Amanda Merrell's identification of the defendants. Michael Coleman's defense was not antagonistic to that of Timothy Robinson's or Darrell Frazier's.

The facts and circumstances leading up to the drug rip-off and subsequent murder on September 20, 1988, all were necessary to explain to the jury the motive and senselessness of the murders involved. Moreover, Michael Coleman was charged and convicted of conspiracy to traffic more than four hundred grams of cocaine. He has neither challenged the correctness of the charge nor the sufficiency of the evidence with regard to that charge. To suggest now that this "wheel conspiracy" in some way impacted on and required that his motion for severance be granted, is unpersuasive. Coleman's reliance upon the decision in Kritzman v. State, 520 So.2d 568 (Fla. 1988), is misplaced. A casual reading of Kritzman v. State reflects that this Court granted relief because " . . . allowing the State's star witness to participate in picking the jury that would eventually determine Kritzman's guilt and punishment amounts to a breaking down in the adversarial process. It is difficult enough for a jury to sift through the complex issues surrounding a murder

case; it is nearly impossible to do so when the lines between who is on trial and who is not are unclear.'' 520 So.2d at 570. Similarly, this case is unlike that of Bryant v. **State,** ____ So.2d ____ (Fla. Decided March 29, 1990), 15 F.L.W. S178, wherein the court reversed the first degree murder convictions of four defendants based on their joinder and severance claim. There, the question was the:

> redacted statements of all four Appellants were introduced. Casteel, Irvine and Rhodes testified in their own behalf while Bryant did not testify. Casteel, Irvine **and** Rhodes argued that the redacted statements were prejudicial to them and that the introduction of Bryant's statement constituted a Bruton violation. Bryant contends that the redacted version of his statement was prejudicial because it did not truly represent his version of the incidents. He asserts that his statement confused the jury because of the use of the word 'someone' and pronouns in **place** of names of each of the other appellants. The appellants argue that they were entitled to a severance because their positions were adverse and hostility existed among them.

15 F.L.W. at S181.

The court went on to observe:

> We emphasize again that hostility among defendants and the attempt by one defendant to **place** more blame on others are not justifiable reasons by themselves to require a severance. (cites omitted).

15 F.L.W. S181.

The instant case is controlled by this Court's decision in McCrae, supra. Clearly "the evidence presented was not so complex that the jury would be confused by it or incapable of applying it to the conduct of each individual defendant." 416 So.2d at 807. All relief should be denied as to this issue.

POINT II

WHETHER THE TRIAL COURT ERRED IN FAILING TO ANSWER A JURY QUESTION OR READ THEM TESTIMONY OR GRANT A MISTRIAL

Coleman next argues that the trial court erred in not answering a jury's question posited during their deliberations "asking whether the vaginal swabs taken from Mildred Baker and Amanda Merrell matched the blood taken from Appellant." (Appellant's Brief at 10).

After discussing with defense counsels and the State the appropriate action to be taken, the court concluded that it would not answer either question but instruct the jury that they must rely on what they heard based on the testimony presented. Coleman's counsel objected asserting that:

> Judge, as to the second question, I think we could stipulate that the DNA was not -- I don't have the exact answer to that, but that the blood of Michael Coleman when subjected to DNA tests was not positive or did not as far as autoradiograms indicate a match with the vaginal swabs. I think we can stipulate to that. I mean, if they missed out on that, then, you know, they missed something that's very important, I and think we could stipulate to that.

(TR 1963).

As a result of said discussion, the court instructed the jury thusly,

> Members of the jury, I have received in writing from you two questions stated as follows: Is is possible to review the testimony of Amanda Merrell; was Michael Coleman's blood compatible to any of the vaginal swabs? Let me answer these questions both in the following manner. As I stated to you some time earlier, you are the sole determiners and judges of the fact. The court cannot in any way participate in that

> decision concerning the facts. For that reason the court cannot answer any of these two -- either of these two questions for you. I'll remind you that you are to recall the testimony developed during the trial as best you can and rely on your own recollection, powers of recollection and try to resolve any conflicts in the testimony as best you can. So the court at this time will ask that you please resume your deliberations.

(TR 1966).

In Kelley v. State, 486 So.2d 578 (Fla. 1986), this Court, faced with a similar claim, concluded that the trial court has wide latitude in deciding whether to answer questions or reread testimony to jurors upon request. The court observed:

> . . . The interaction in question occurred when the jury subsequently inquired of the court whether John J. Sweet received immunity in Florida for first degree murder and perjury before he gave information on the Maxey trial and if he had anything to gain by his testimony.'
>
> The trial court, while aware that Sweet's testimony on cross-examination established the existence of such immunity, declined to explicitly answer the jury's question concerning the critical issue since formulating an answer would have required him to both interpret Sweet's testimony and make a judgment as to his motivation.
>
> Rather, the trial court offered to the jury to have Sweet's testimony read back in portions designated by the jury. We can see no abuse of discretion of such action. The court's insistence upon the jury's rather than its own choice of the passages to be re-read was proper, in light of the latter's legitimate hesitation to comment upon the evidence. The jury question here involved matters of fact, and this court has held that a trial judge need answer only questions of law raised by jurors. ***See* State v. Ratliff, 329** So.2d 285 (Fla. 1976). In rejecting Appellant's contention that the court below acted improperly in this respect, we finally note that the Florida law has given the trial

> court a wide latitude in deciding whether or not to have testimony re-read to the jurors upon request. Fla.R.Crim.P. 3.410; DeCastro v. State, 360 So.2d 474 (Fla. 3rd DCA 1978), cert. denied, 368 So.2d 1365 (Fla. 1979); Simmons v. State, 334 So.2d 265 (Fla. 3rd DCA 1976).

486 So.2d at 583. See also Henry v. State, 359 So.2d 864 (Fla. 1978).

Terminally, testimony of Dr. Forman was not as clear cut as Coleman would have this Court believe. While it is true she indicated that no match was made with Michael Coleman's blood and the DNA taken from the vaginal swabs and the anal swabs of the victims, she further testified that because there was no DNA match, that did not mean a lack of sexual activity occurred (TR 1054). Moreover, she observed that she could not conclude no sexual activity occurred between Mr. Coleman and the victims, just that Coleman's DNA was not found in any of the samples provided. (TR 1055). Based on the foregoing, the trial court did not err or abuse its discretion in declining to address the jury's questions.

POINT III

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PEREMPTORILY CHALLENGE A BLACK JUROR WITHOUT *AN* ADEQUATE RACE NEUTRAL EXPLANATION

The record reflects that the State challenged peremptorily two jurors, Velma Horne and Carolyn Freeman, both black women. Velma Borne was challenged by the State because of her knowledge of Joceyln Moltrie. She indicated she knew her and knew her family,

> Ms. Moltrie was a participant in this conspiracy. She rented the apartment where the primary -- Ms. Moltrie rented the apartment at Beauclerc Apartments for Bruce Frazier, one of the defendants' brother, for use. That is, she rented the apartment for use by Bruce Frazier in the distribution of cocaine. She also rented the house at 66 Norwood where a shotgun believed to be used in the very crimes was buried by Bruce Frazier.

(TR 443).

Beyond per adventure, Coleman cannot seriously contend it was improper to use a peremptory challenge to exclude a person who had personal knowledge of this crime or personally knew one of the conspirators in this criminal adventure. Coleman asserts that because Jocelyn Moltrie was not a witness at trial and the State did not establish whether Ms. Horne had a favorable opinion of Ms. Moltrie so as to prejudice the State in any manner, that those reasons did not count. Rather, in an effort to skew this point, Coleman asserts that the only basis the State had for excluding Velma Horne was because of her race. The record belies this contention.

Moreover, as to Carolyn Freeman, the State initially moved to strike her for cause. The State observed: "She said she could not recommend the death penalty under these circumstances." (TR 439). What followed was an attempt to rehabilitate Ms. Freeman,

> THE COURT: Now you were inquired or asked questions about your beliefs on the death penalty.
>
> PROSPECTIVE JUROR: Yes.
>
> THE COURT: Are you so firm in your convictions and beliefs concerning the death

penalty that under no circumstances could you vote or choose to recommend death as an appropriate sentence?

PROSPECTIVE JUROR: I don't think so.

THE COURT: You don't think so. Even if the court instructed you that death could be an appropriate penalty and you were to weigh certain factors, *you* are saying that you could not follow my instruction and vote to --

PROSPECTIVE JUROR: I guess if it was really, really, I guess I could follow it, but it has to be strongly.

THE COURT: That's what we need to know is simply whether you can follow the law and listen to my instructions on the law and weigh the evidence and apply the evidence and facts to the law and give a fair and just sentence if you get to that point. Are you telling me that you think you could?

PROSPECTIVE JUROR: Oh, yes, sir.

THE COURT: And what we need to know is under those circumstances if it got to the point where you had to impose a sentence that it is possible that you could recommend death a3 an appropriate sentence if the circumstances were aggravating enough in your mind to warrant the imposition of the death penalty?

PROSPECTIVE JUROR: Yes, I believe anything is possible.

THE COURT: What we need to know is notwithstanding what your personal belief is or feelings towards the death penalty, which I understand you are opposed to the death penalty?

PROSPECTIVE JUROR: Yes.

THE COURT: You are not going to let that personal belief --

PROSPECTIVE JUROR: Interfere with my decision.

THE COURT: Interfere with your decision and duty as a juror in following the law?

PROSPECTIVE JUROR: No, sir, I won't let it interfere.

THE COURT: Okay. Are there any other questions?

MR. BEROSET: Not in view of her responses.

MR. TASSONE: No, Your Honor.

THE COURT: Anything?

MR. PATTERSON: No, Your Honor.

THE COURT: Alright. Thank you ma'am. I don't mean to usurp anybody's functions, but I feel it goes faster if I ask the questions. If there is something I leave out, you will let me know. Alright. Mr. Patterson.

MR. PATTERSON: Peremptorily I strike Ms. Freeman.

(TR 439-441).

From this record one cannot seriously question that the State's legitimate race-neutral reason upon which to use a peremptory challenge on Ms. Freeman once it became clear the court would not sustain the State's cause challenge based on her opposition to the death penalty. Neither Ms. Horne nor Ms. Freeman were excluded for racial reasons. The record is quite clear on this and in fact the trial court was correct when he found:

> . . . Well, the court finds the reasons stated by the State to be sufficient with regard to Ms. Freeman. Her response and her facial reactions were such to lead the court to believe that she would have difficulty. Her response was somewhat equivocal. She says its possible, anything is possible or some such words to that effect. The court finds that the reasons given by the State for the exercise of its challenge to be sufficient and to pass muster. I'll also note that while these defendants are black,

> all of the victims in this case are black also. I believe yesterday the defendants, in exercising some of their strikes, struck some black venire also. Let's continue.

(TR 445).

In Reed v. State, 560 So.2d 203 (Fla. 1990), this Court, in **compliance** with **State v.** Neil, **457** So.2d 481 (Fla. 1984), and **State v. Slappy,** 522 So.2d 18 (Fla.), cert. **denied,** 487 U.S. 1219 (1988), reaffirmed the procedure that requires the defense make a **prima facie** showing that there has been a strong likelihood that jurors have been challenged because of their race. Once that determination has been made, the burden then shifts to the prosecution to show valid non-racial reasons why those persons were challenged peremptorily. In Reed, this Court recognized, however:

> Within the limitations **imposed** by **State v. Neil,** the trial judge necessarily is vested with **broad** discretion in determining whether peremptorily challenges are racially intended. State v. Slappy. Only one who is present at the trial can discern the nuances of the spoken word and the demeanor of those involved. Given the circumstances that both the defendant and the victim were white and that **two** black jurors were already seated, we cannot say that the trial judge abused his discretion in concluding that the defense **had** failed to **make** a **prima facie** showing that there was a strong likelihood that the jurors were challenged because of their race.
>
> Reed was not prejudice by the prosecutor having given explanations for his challenges, In fact, if it **appeared** from the prosecutor's explanation that his challenges were racially motivated, the trial judge would have been warranted in granting a mistrial despite not yet having ruled that the defense had made a prima **facie** showing. Here, Reed does not question the prosecutor's motivation for five of his eight challenges, and the reasons for the other three had at least some facial

> legitimacy. In trying to achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges, we must necessarily rely on the inherent fairness in colorblindness of our trial judges who are on the scene and who themselves get a 'feel' for what is going on in the jury selection process.

560 So.2d at 206.

Sub judice Coleman never satisfied the prima facie showing. On the face of the record without the prosecutor's explanation it was clear that Velma Horne had, if not actual, the appearance of knowledge of a person who was part of the conspiracy to deal drugs. Moreover, Carolyn Freeman opposed the death penalty and only through a torturous inquiry was able to respond that she could follow the law as instructed. There were clearly race-neutral reasons for the peremptory challenges to both these people and the trial court was correct in denying Coleman's objections.

Based on the foregoing, the State would urge Coleman's is entitled to no relief as to this issue.

POINT IV

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS IN-COURT IDENTIFICATION

Coleman filed pretrial motions to suppress the testimony of Amanda Merrell, Tina Crenshaw a/k/a Darlene Lutley, and Arabella Washington. (RA 2334-2336). The motion to suppress Amanda Merrell's identification was based on a photograph she was supposedly shown of "one of the perpertrators of the crime was impermissibly suggested because it was a full length photo which

showed numerous gold teeth and emphaized his heighth contrary to other photographs shown to her." (RA 2334). With regard to Darlene Crenshaw, Coleman objected because although she selected a picture after looking at a number of photos provided by FDLE, she stated that she was not sure if that was the perpertrator but she was sure she could identify the defendant again in person.

The objection to Arabella Washington's identification of Coleman was that although she positively identified him with Darrell Frazier and Bruce Frazier and their associates, when first approached by FDLE Agent Don West, Arabella Washington said she knew nothing about the crime. Following a charge of perjury by the State of Florida, she recalled what she saw and was able to identify Coleman from pictures she was shown. Coleman asserts that:

> Under those circumstances, the photos presented were impermissible suggestive, especially when presented in conjunction with the co-defendants so that any in-court identification would be unduly prejudicial.

(RA 2336).

As a result of said motions, a hearing was held May 22, 1989, on said motions. (TR 63-197).

The court, in denying the motion to suppress any in-court testimony, held:

> . . . Now, the court has reviewed the various exhibits including the most recent one, Joint Exhibit #1 and I have read over the cases from both the Florida Supreme Court and the United States Supreme Court, the most recent one being Edwards v. State, reported at 538 So.2d 440 (1989), Florida Supreme Court decision. I have also looked at Neil v. Biggers and Manson v. Braithwaite, both being United States Supreme Court decisions referred to in the Edwards case.

Now, in Edwards, there was a little bit of a different situation in that apparantly the trial court found that under the Wade case, the pretrial line-up identification procedure was constitutonally flawed in that it violated the right to -- the defendant's right to counsel. That's not the argument here. As 1 understand, the argument made here is that the pretrial identification procedure utilized was impermissibly suggestive, its other factors that are employed in making an assessment. And under the Neil v. Biggers situation or Manson v. Braithwaite, there are another list of factors. Even though the factors are somewhat similar, they are a little bit different.

The court has concluded that after having heard the testimony presented that the evidence shows by a clear and convincing evidece, that first, the law enforcement procedures utilized here to obtain pretrial identification were not impermissibly suggestive or suggestive in any way. Unlike the situation in State v. Cromartie, there was not a show-up procedure utilized. That is where the defendant was taken back to a scene of an alleged crime and displayed to a victim. The situation here has depicted and disclosed that the investigating officers utilized a photographic album initially and there were no identification effected through the use of the photographic albums, that they later utilized a photo-array of six or more separate individual photos. The court finds that the photos were not suggestive. There was no coercion or suggestiveness utilized during the course of the witness interviews or the identification that were -- or identifications that were subsequently made.

But if we go past the initial threshhold consideraton and go beyond that, which the court does feel is necessary or warranted because the court finds that the procedures were not suggestive, but because Edwards contains some confusion particularly if it looks at the footnotes in light of what the State argued on appeal, the court then is going to *go* to the second prong of the test that is often used in considering whether or not there was substantial likelihood of

misidentification as a result of the procedures that were utilized earlier, that is, substantial likelihood of misidentification in the courtroom because I understand that's really what the essence of the motion is to be.

There are a number of factors that Neil and Manson suggests should be considered, that is, the witnesses opportunity to view the perpertrators; the witnesses degree of attention given to the events that they observed; (c) the accuracy of the witnesses prior description of the assailants or perpertrators; (d) the witnesses level of certainty in indentifying the perpertrators; and *(e)* the length of time between commission of the crime or offense and the time of the identification.

When you look at all of these criteria in light of the testimony of the State's witnesses, Amanda Merrell, Darlene Crenshaw and Arabella Washington, again the court is satisfied by clear and convincing evidence that the witnesses had ample and sufficient opportunity to view the perpertrators in the various stages during the commission of the offense or offenses charged and the subsequent events that unfolded. The witnesses had sufficient degree of attention to the various perpertrators during the course of the unfolding of these events. The witnesses seemed to have a generally consistent, accurate prior description of the perpertrators. The witnesses level of certainty in identifying the perpertrators was acceptable and unequivocal even though the court knows through Officer West's candid statements that perhaps Darlene Crenshaw's identification was not as firm as say Amanda Merrell's, but her own in-court testimony yesterday reinforces her conclusion or identification earlier that she feels comfortable in her recognition of the perpertrators. And the length of time between the commission of the crime and the identification of the perpertrators was generally close in time, all of which in combination convinces the court that under the cases referred to that the substantial likelihood of misidentification is not present here and that the witnesses pose independent recollection of events which is

> reliable and sufficiently attenuates any in-court identification from the pretrial identification that were given. So the court accordingly for the reasons stated will deny the motions to suppress identification.

(TR 208-212).

Clearly, the trial court applied the correct standard as set forth in **Edwards** v. State, **538** So.2d 440 (Fla. 1989), referring to Neil **v. Biggers, 409 U.S. 198** (1972), which provides a balancing approach. Indeed, a two step approach to determine admissibility of identification is utilized by the courts. First, a defendant bears a burden of proving that the identification procedure used was impermissibly suggestive. Second, the court determines whether the testimony was nevertheless reliable. In determining reliability, courts consider the five factors enumerated in **Biggers** and adopted in Manson; to-wit: (1) the witnesses opportunity to view the criminal at the time of the crime; **(2)** the witnesses degree of attention at the time of the crime; **(3)** the accuracy of the witnesses prior description of the defendant; **(4)** the witnesses level of certainty when identifying the suspect at the confrontation, and (5) the length of time elapsed between the crime and the confrontation. The identification testimony is determined to be reliable when the **Biggers** indicia of reliability outweigh the prejudicial effect of any suggestive identification itself.

For example, in Neil v. **Biggers, supra,** the court held that the identification of a rape suspect did not violate due process. There, the evidence reflected that the victim had looked a twenty

to thirty photographs from which she could not identify her assailant. Police then conducted a show-up in which the suspect walked past the victim and said "Shut up or I'll kill you." The Supreme Court held the identification reliable because the victim had spent one hour with the suspect under adequate lighting and was forced to looked directly at him. In addition, she described the assailant thoroughly and testified that she had "no doubt" as to the identification. Neil v. **Biggers, 409 U.S. at 200-201. See also United States** v. Causey, 834 F.2d 1277, **1286** (6th Cir. 1987) (photo-array not suggestive when defendant's photo only picture of individual with small chain around neck, all persons pictured bearded, and defendant claimed to be clean shaven at time of robbery); Cubat v. Thieret, 867 F.2d 351, 356, **358** (7th Cir. 1989) (photo-array not impermissibly suggestive when suspect's photo less clear than other four and only suspect wore glasses, even though witness described criminal **as** wearing glasses; second photo-array not impermissibly suggestive when date on picture coincides with date of crime); and Williams v. **Weldon, 826** F.2d **1018, 1021 (11th** Cir. **1987)** (photo-array not impermissibly suggestive **when** criminal defendant identified as black man and defendant only black man in array because other participants had roughly same characteristics and features). See **also Rogers v. State,** 511 So.2d 526 (Fla. 1987), and **Blanco v. State,** 452 So.2d 520 (Fla. 1984), wherein **the** court observed:

> Appellant contends that the trial court erred in denying his motion to suppress the identification testimony of George Abdeni and Thalia Vezos. The test for determining the legality of an out of court identification is:

> (1) Did the police employ any unnecessarily suggestive procedure in obtaining an out of court identification; (2) if so, considering all of the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification. Grant v. State, 320 So.2d 341, 343 (Fla. 1980), cert. denied, 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 303 (1981). . .

452 So.2d at 524.

In the instant case at the evidentiary hearing on the motion to suppress, Amanda Merrell took the stand and testified that on September 19 and 20, 1988, she was at an apartment for about twenty minutes before four men showed up (TR 103). A few minutes later, a fourth man showed up with a girl. She testified that the first individual who walked in the door was "Red", the second individual was "Max", the third was "Jit" and they were all behind an individual named "Gas". She testified that they all had guns except "Gas" and although she didn't know them before that night, she heard them call each others names out (TR 104). When asked why she did not tell the police about the names right after the murders, she testified that she was coming out of recovery at the time. (TR 104). Right after the incident when she was hospitalized she testified that she did not remember making a recorded statement but knew that she did not hear the names of the defendants on the radio or T.V. or newspapers and only read about "Red's" name two months after she had made her statements. (TR 105). At the motion to suppress hearing, she testified that "Red" was of medium build, slender with very light

skin. She was in the presence of "Red" for approximately an hour and that he was the one that, after she took her clothes off, made her give him her jewelry. (TR 110-114). After looking at a number of photos, she was able to pick out a picture that was "Red" and she in fact initialed that photograph. (TR 126). She testified that she had never met "Red" before but she was able to pick out his picture in a photo line-up with five other pictures. (TR 128).

With regard to Darrell Frazier, the police brought her three or four photo albums to look at after she left the hospital. (TR 129). She testified that when she saw Darrell's photograph she "knew it was him". (TR 129).

With regard ta Michael Coleman, Amanda testified that when they all came in, he was the second one behind "Gas" to enter the door and he was taller than her by four or five inches. She testified that Michael Coleman was as tall as "Gas" if not taller and that he weighed approximately 175 to 180 pounds. (TR 135-136). She identified "Max's" or Michael Coleman's picture from a line-up in January or early February after looking at over two hundred photographs. (TR 137-138). In looking at these photographs, she testified that she did not remember seeing any full length photos, mostly facial photos but she did see several people throughout these pictures that had gold teeth. (TR 138). She ultimately testified that she would be able to base her identification in court on what she remembered from the September 20, 1988, incident and not from the photos she saw. (TR 139).

At the suppression hearing, FDLE Agent Don West recalled he had shown between three and five hundred pictures to the victims. (TR 143). He also detailed how he showed pictures to the victims and what pictures they pointed out. For example, he testified that Amanda Merrell had no problem positively identifying "Red" (TR **146),** and that Darlene Crenshaw could not positively identify a photograph of "Red" but said that if she saw him in person she could identify him. (TR **146).** Amanda was **also** able to positively identify Frazier on October 10, 1988 (TR 145, **147).** Amanda was **also** able to identify Michael Coleman after she was shown a number of pictures including photos of persons with gold teeth. (TR **149-152).** Tina Crenshaw positively identified Coleman's picture (TR 152). With regard to Arabella Washington, who also viewed the photo albums, she was able to pick out on May 10, 1989, photos of James Edward Wheeler, Bruce Edward Frazier, Darrell Frazier, Timothy Robinson and Michael Coleman. (TR **157).**

Darlene Crenshaw also took the stand during the evidentiary hearing and testified about the descriptions of the people she saw at the apartment that evening. She was able to give heights and weights and described the clothing that each wore. (TR 165-174).

Arabella Washington, the person who transported the defendants to the airport in Jacksonville after the murders, testified as to the description of the individuals she saw that day when she took three black men to the airport. She knew Darrell Frazier because she knew his brother "Jit" (TR 180), and was able to describe Coleman and Robinson.

It is respectfully submitted that Coleman has failed to satisfy his burden of demonstrating that there was any impermissibly suggestive photo-array shown to the aforenoted women or that their descriptions and recollections were in any way tainted by anything other than what they actually saw the day of the incident. Based on the foregoing, it is clear Coleman is entitled to no relief on this issue.

POINT V

WHETHER THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE AND IMPOSING THE DEATH PENALTY

The trial judge, in his written order (RA 2609-2614), provided a detailed summary of the facts of this case and also discussed the aggravating and mitigating factors and why the jury override, pursuant to Tedder v. State, 322 So.2d 908 (Fla. 1975), was warranted.

Coleman argues that there were a number of reasons that the jury could have relied upon to provide its 6-6 vote for a life recommendation. He points to the fact that Coleman had maintained close family ties throughout hi3 life and had been supportive of his mother and argues that that alone would be sufficient for the jury to base its recommendation upon; that Coleman had an impoverished childhood in Liberty City which was a mitigating factor although discounted by the trial court; that the victims were participants in the conduct in that they had cocaine present in their bodies; that Coleman did not shoot anybody or cause anyone to die based on a gunshot wound; that the evidence established that Timothy Robinson was the triggerman and

the ringleader of this horrible incident; that Coleman was dominated by another; and therefore not a major participant in this crime; that Coleman actually spared the life of a survivor, Amanda Merrell, because "he cut her throat in a manner inconsistent with the causation of death", and that although there was evidence that Coleman participated in the sexual batteries of the victims Baker and survivor Merrell, those acts were separate in time from the murders committed by Robinson.

The trial court found that none of the statutory mitigating factors existed in the instant case. Specifically, he found that Coleman had a significant history of prior criminal activity; that the capital felonies were not committed while Coleman was under any influence of extreme mental or emotional disturbance; that the victims were not participants in Coleman's conduct and did not consent to the acts committed upon them; that Coleman's participation was not minor, that in fact he tied up the victims, raped two of them and attempted unsuccessfully to kill one by slicing her throat three times; that Coleman in no way acted under the substantial domination of another person; that Coleman could appreciate the criminality of his conduct and that Coleman was twenty-seven years old and therefore his age was not a relevant factor.

With regard to non-statutory mitigating circumstances, the court found that he considered an assorted amount of testimony with regard to Coleman's upbringing, his family ties, his health, his intelligence, his personality, his education and his emotional development. The court also considered the victims' background. The court found:

> The evidence establishes that defendant has maintained close family ties throughout his life and has been supportive of his mother. The remaining contentions are not borne out by the evidence, and even if they were, would have no mitigating value: Defendant's education while incomplete was not altogether lacking and would not excuse or mitigate the vicious crimes committed; the evidence sufficiently linked him to cocaine trafficking; his having been reared in Liberty City is of no moment; his althletic potential does not convince the court he could be rehabilitated and that his punishment should be mitigated. Finally, the victims' background cannot be used to mitigate the sentence to be imposed and warranted under these facts. Bolander v. State, supra, at 837. Even if any such factors are found to exist under the evidence, this Court must consider whether they are of sufficient weight to outweigh the aggravating factors. See, e.g., Lamb **v. State, supra,** at **1054.**

(TR 2613).

Based on the foregoing, the trial court concluded that:

> The jury's recommendation of life sentences could have been based only on minor, non-statutory mitigating circumstances or sympathy. 'It would not be reasonable for a jury to recommend a sentence of life based only upon the evidence presented regarding these non-statutory mitigating factors standing alone.' **Harmon** v. State, **527 So.2d 182, 189** (Fla. **1988).** The argument that one statutory mitigating circumstance was present, i.e., defendant was not the triggerman and his participation in the capital felonies was relatively minor has been thoroughly analyzed and rejected because no reasonable person could differ on this interpretation of the facts. It should be added that even if the fact-finder were to accept defendant's version that he was not one of the triggermen, it is clear that he sat idly by and did nothing to prevent the massacre that ensued or to lend aid to the victims. In fact, he participated by making them immobile and defenseless. In this case, the sentence of death is so clear and convincing that virtually no reasonable

> person could differ, and a jury override in light of the standard pronounced in **Tedder v. State**, 322 So.2d 908 (Fla. 1975), would be warranted. **Bolander v. State, supra**, at 837; **White v. State,** 403 So.2d 331, 340 (Fla. 1981).

(RA 3613-3614).

It is submitted there is no reasonable basis upon which the jury could have recommended a life recommendation. While not unmindful that life recommendation overrides are very difficult to sustain, it is submitted that the instant case is the case that constitutes the exception to the rule. Nothing in Coleman's background mitigated the enormity of the criminal acts and aggravating circumstances found in this case. Coleman had a tenth grade education and was a athelete excelling in basketball. He was supportive of his family and had been in trouble with the law before. Although Coleman's mother testified that her son was not violent, the record demonstrates otherwise. Coleman's only statement when he took the stand in his own behalf at the penalty phase was that he was not in Pensacola on September 20, 1988, and that he was found guilty of something he didn't do. (TR 2032-2033). He testified that the jury was wrong because his blood did not match any of the DNA found in the vaginal swabs taken from the victims. On cross-examination, he again testified that he was not there but observed that not only did his blood not match but they found no hair samples that matched either. (TR 2035).

Defense argued in closing that his client Coleman had testified both at the guilt phase and the penalty phase that he was not there and did not do it. (TR 2077). He also alluded to

the fact that the victims were using cocaine and therefore in some way were participants in this crime. He observed that even if Coleman was the "Max" that was present in the apartment that night, "Max" had a minor role in the murders and that in fact he only stood at the door with a knife while the shooting was going on. (TR 2077). Although "Max" cut Amanda Merrell's throat, he really didn't mean to kill Amanda because if he did he could have. The jury heard testimony that the bullets came from one gun and the jury also heard that Mildred's last words were "Red, don't shoot me." (TR 2078). Defense counsel also argued that Coleman was misidentified, that any one of a number of people looked like him and had gold teeth like he had and therefore there was a grave possibility that he was misidentified as "Max". (TR 2079). But even assuming that he was there, he was under stress and extreme duress or domination of another person since everyone testified that either "Red" or "Jit" were running the show. (TR 2079-2080).

Defense counsel also argued that there were other aspects of Coleman's character that came to light that would make a difference. Specifically, that his mother testified he was not a violent person and that he was a great basketball player. (TR 2081). Defense counsel also said that the jury should consider the environment he grew up in in Liberty City in the projects and that the jury should believe Mrs. Leverson when she testified that her son always told her when he did something wrong and that this time he told her he was not guilty. (TR 2081). Defense counsel also informed the jury of how horrible it would be to

sentence Coleman to the death penalty and make a big mistake because somebody else was guilty. He recalled how a mistake had been made in the **Richardson** case where Richardson had spent twenty years in jail for poisoning his children and was later determined that he did not do it. Defense counsel, in closing, argued that if the real person were ever caught, Mr. Coleman will go free because he didn't do it and that it would be a real shame to electrocute an innocent person. (TR 2081-2082).

The most recent jury override sustained by this Court was **Thompson v. State**, 553 So.2d 153 (Fla. 1989). Therein the court, after reviewing in detail the facts and findings by the trial court, observed:

> The remaining evidence in mitigation did provide a reasonable basis for a jury recommendation of life imprisonment. In final analysis, this was a contract killing conducted in a professional manner by an underworld crime boss. While five valid aggravating circumstances, no statutory mitigating circumstances and very little non-statutory mitigating evidence, the trial court override was legally sound.

553 So.2d at 158

Similarly, in the instant case, there is not a scintilla of mitigating evidence that would support a rational jurors determination of life in this instance. Four murders occurred and Coleman stood by and either participated or did nothing to prevent these heinous crimes. None of the aggravating circumstances have been challenged and none of the mitigation that Coleman points to constitutes a sufficient basis upon which a jury or this Court should conclude that death is not the appropriate sentence. Coleman was a full participant in this

crime and in fact attempted to kill Amanda Merrell. During the stabbing and slashing of throats, Michael Coleman sexually abused the two women victims and continued to sexually abuse Amanda Merrell when he moved her from the living room to the bedroom. The fact that he may not have actually pulled the trigger, is of no moment. **White v. State**, 403 So.2d 331 (Fla. 1981).

In **Torres-Arboledo v. State**, 524 So.2d 403, 413 (Fla. 1988), this Court sustaineend a jury override in a very similar type murder. There, the court opined "Since reasonable people could not differ as to whether death was appropriate in this case, the trial judge was not bound to follow the jury's recommendation of life." Torres-Arboledo attempted to assert that his "potential for rehabilitation constituted a discernable mitigating factor" in the jury's life recommendation. This Court found the record refuted such a contention.

Herein, there is no question that Coleman was a main actor, fully aware of what was transpiring, had no significant other non-statutory mitigation (except that he played basketball). **See Brown v. State**, 473 So.2d 1260 (Fla. 1985).

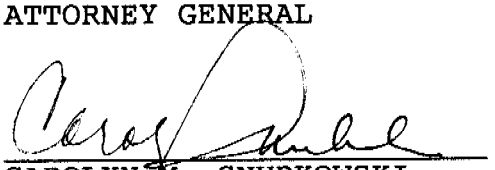
The jury override must be sustained.

CONCLUSION

Therefore, based on the foregoing, Appellee respectfully urges this Court to affirmed the trial court's judgment and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



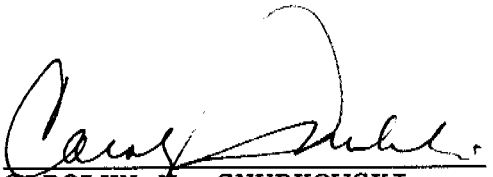
CAROLYN M. SNURKOWSKI
Assistant Attorney General
Florida Bar No. 158541

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Ted A. Stokes, Esq., Post Office Box 84, Milton, Florida 32572, this 9th day of July, 1990.



CAROLYN M. SNURKOWSKI
Assistant Attorney General