IN THE SUPREME COURT OF FLORIDA

TIMOTHY ALEXANDER ROBINSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 74,945

FILED
SID J. WHITE
MAR 6 1991
CLERK, SUPREME COURT
By _____ Deputy Clerk

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

# ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

On February 28, 1989, Timothy Alexander Robinson, Michael Coleman 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 400 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 corrected indictment was filed May 23, 1989. (RA 2106). A number of pretrial motions were filed in Robinson's behalf, including a motion to compel; motion to appointment experts; motion for individual and sequestered voir dire; motion to vacate the death penalty; motions in limine; motions for disclosure of grand jury proceedings; motion for statement of aggravating circumstances; motion for production of favorable evidence; motions regarding the appropriateness of the death penalty; a motion for a list of prospective jurors in advance of trial; motion to produce photographs; motion for production of police reports; motion for pretrial rulings on admissibility of penalty phase evidence; a motion for additional peremptory challenges; a motion to declare 921.141, Fla.Stat., unconstitutional; a motion to declare 922.10, Fla.Stat., unconstitutional; motions to suppress in-court

identification of Timothy Robinson; a motion to suppress evidence of DNA typing; a motion to compel production of records, documents, manuals and other evidentiary materials; a motion to dismiss the indictment and a motion for change of venue.

Trial commenced on May 22, 1989, and verdicts were returned on June 1, 1989. (RA 2415-2423). The penalty phase of Robinson's trial commenced on June 2, 1989, culminating in a jury's recommendation of life by a 6-6 vote (TR 2096). The trial court imposed the death penalty over the jury's recommendation and on September 26, 1989, entered its written findings. (RA 2582-2587). A guidelines scoresheet was also prepared. (TR 2581). Robinson filed his notice of appeal October 24, 1989.

The facts as set forth by Appellant are supplemented with the following recital. This Court's attention is directed to the findings of fact provided by the trial court in its sentencing order as a succinct accounting of what transpired leading up to and during the commission of the crime on September 20, 1988. (RA 2582-2584). The trial 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 employeed intermediate associates to oversee street-level employees responsible for the distribution and sale of quantities of cocaine which were usually sent from Miami in minimum 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 Alphonso Douglas. Shortly after the safe and its 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 all the cocaine and money stolen from the enterprise. When his demands went unanswered, Robinson began to stab Hill while the other

defendants physically assaulted some of the other hostages with kitchen knives. 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' 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 conscience, she heard several shots and then Mildred Baker plead with Robinson to spare her life. She then heard another shot and nothing further from Baker. Immediately thereafter, someone came up behind Amanda and shot her 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, mutiliated bodies of Hill, Douglas, McCormick and Baker, each of whom had been slashed, stabbed and shot and 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 remained a fugitive. At the conclusion of the guilt phase of the trial, Robinson 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 400 grams of cocaine; one count of armed burglary of an occupied dwelling; and two counts of armed robbery." (RA 2582-2584).

Additional facts were derived from a number of witnesses who testified to the drug dealings that occurred in Pensacola, Florida, and to the parties involvement in said dealings. Arabella Washington was called by the State and testified that on September 20, 1988, Bruce Frazier's brother, Darrell "Yoge" Frazier stopped by her house and asked to use her phone. 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 clothing purchased from 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 testifed that she knew Michael Coleman (TR 1147-1148), and that before Thanksgiving in 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 police authorities. (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 testified that she knew Amanda Merrell for approximately five years (TR 1178). She met Derek Hill and Morris "Bo" Douglas at the dogtrack several days prior to the date 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 the took the safe out of the trunk, brought it in the back yard and opened it. Although Darlene did not actually see the safe being opened, she did observe that after Bo and Derek went to the back yard, 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 in a pillow case in the closet of one of the bedrooms and Bo and Derek took the drugs and put it in a green duffle bag belonging to Darlene's 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 dogtrack at approximately 7:00 p.m. (TR 1184). After all the races were run, they left the dogtrack at approximately 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 on a tape when suddenly there was a knock at 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 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 clothing, she got dressed and was then carried back into the living room. They tied her up and carried her out the front door. (R 1187-1188). Bruce and Darrell Frazier accompanied Darlene Crenshaw to her home. (TR 1189). When she got there, one of the black men went to her front door and gained entry. When he could not 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 men then left. (TR 1192). While she was at the apartment, and told to undress, the men took 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 as the men left her home, 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 had awakened her but he wanted to retrieve a package Tina had left there that afternoon. Darrell Frazier walked in 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 there were whispering and she could not make out what was being said. 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 had a good look at him because he was standing under the porch light. She testified that he was about five feet eight inches tall but did not observe any gold teeth in his mouth (TR 1241).

Amanda Merrell testified that she met Bo and Derek in August of 1988, at the Pensacola Dog Track. She again saw them on September 20, 1988, at the dogtrack when the 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 carporch and did not see them 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 the closet in the house and they 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 dogtrack (TR 1290-1291). After they left the dogtrack 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 little guy named "Jit", all carrying guns except for "Gas". (TR 1294). Michael McCormick ("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 shut up. Everyone was made to strip and one of the men searched the area looking for guns. When no one would talk as to where the stuff was, "Red", Timothy Robinson, started to beat up McCormick.

Amanda Merrell was able to positively identify "Red" as Timothy Robinson and "Max" and Michael Coleman (TR 1296). "Red" told everyone to start talking and then he went into the kitchen and returned with a knife. He 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 and three guys that had entered the apartment, "Gas", "Jit" and the girl who had just been brought in the apartment, Mildred, were present (TR 1298). "Red" told Darrell Frazier and his brother, Bruce, to take Tina to the apartmente 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). Everyone was tied up with extension cords

and electrical wiring at their hands and ankles and they were made to lie face down on the floor.

The men 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 he could not. He made her stand up and then 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 in 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 testified that Michael Coleman came to 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 Amanda heard another shot. Someone then walked back into the bedroom,

kicked Amanda's legs 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 go to 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 payphone booth and dialed 911. (TR 1305). Amanda testified that "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" looked different at the time of the trial than he did the evening of the murders, however, she was still 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. (TR 1307).

On cross examination, Amanda 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 she never saw anyone get shot, she heard shots on September 20, 1988. She said she did not know who actually shot her because she was afraid to look up. (TR 1334). She testified she tried no to panic and did not lose conscienseness when she was shot (TR 1335). 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 Coleman had walked out of the room and then somebody walked into 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. Michael McCormick suffered cuts on the forehead and over his left cheek. McCormick had five major cuts to his neck area, two stab wounds to his shoulder and one to his left arm. He also had a gunshot wound to the posterior portion behind his right ear, and had two stab wounds on his back. Dr. Cumberland testified Michael McCormick died from a gunshot wound and the two stab wounds to the back. (TR 1397).

Morris Douglas, had two stab wounds to the neck, three cut wounds to the neck, and four to five cuts wounds to the back side of his left leg. There were two stab wounds to the back plus a number of small wounds about the back and chest area. It was the gunshot wound to the left posterior head area behind the left ear. (TR 1398). Dr. Cumberland testified Douglas died because of a gunshot wound to the head and the stab wounds to the neck. (TR 1401).

Mildred Baker, a black female, had bruises and abrasions to the head area and major scrapes on her back. She suffered a gunshot 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 the posterior portion of his thigh. He had stab wounds about his arms and two stab wounds to 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, however he testified all died from gunshot wounds (TR 1402).

As part of Robinson's defense, Pam Harris was called. She was employed at University Hospital and took blood, hair samples and saliva samples from Robinson on February 8, 1989. (TR 1524) Willa Crenshaw was also called and testified that she thought Amanda Merrell had told her that "Red" had cut Amanda's throat. (TR 1529, 1530, 1532).

Ernest Miles, Timothy Robinson's uncle, was called to the stand and testified that he and his wife lived in Newark, New Jersey. (TR 1536). He brought with him telephone bills from August and September of 1988 which reflected calls made from his home. (TR 1536-1537). Mr. Miles testified Robinson came to visit him in September 1988 and actually arrived the last Sunday in August when Miles picked Robinson up at the airport. He testified Robinson stayed from the end of August until the end of September and left the day before hunting season, October 1,

1988. (TR 1538). While Robinson was there, he stayed in Mr. Miles' daughter's room and he testified he did not remember a night that Robinson was not home. (TR 1539-1540). He observed that Robinson had no place else to stay and therefore he was home every night. Miles informed the jury that a number of calls were made to New York and Miami and that he had to talk to Robinson about making them. Robinson said he would help pay for the calls and eventually Robinson gave Miles' wife a hundred and fifty dollars for the calls. (TR 1540). On cross examination, Ernest Miles testified that he did not know how old Robinson was and was not really very close to him. (TR 1541). He said that while Robinson was at his house, Robinson just layed around and slept and ate all day. Robinson had no other place to go. (TR 1542). When asked why he had not come forward with this information sooner, Mr. Miles said no one spoke to him about this and he had no idea that Robinson was charged therefore, Miles never told anyone that Robinson was in New Jersey (TR 1543-1544).

On redirect, Miles testified that he became a witness when defense counsel contacted him about the phone calls. (TR 1551). At this point, the jury was taken out and defense counsel moved to have the shackles removed from Robinson's legs since he was going to testify. At this point, Coleman's counsel renewed his motion to severe because the DNA evidence presented at trial showed that Robinson was present; fingerprint evidence showed that he was present and the credibility of Coleman's defense was in jeopardy based on Robinson's alibi evidence. (TR 1553). The trial court had Robinson's shackles removed and he took the stand and testified in his own behalf. (TR 1554).

Timothy Robinson was born August 27, 1966, in Miami, Florida. At the time of trial he was twenty-two years old. He testified that his entire family lives in Miami and that he was approximately 5'11" or 5'11½" tall. Defense counsel asked him to walk up to the jury box and show the jury how tall he was (TR 1555). He testified that on August 27, he had a birthday party until August 29, and then he left for Newark, New Jersey, to live with his uncle. He observed that his brother had just recently been killed and that he needed a little time to get away because he was under alot of pressure and his mother was under alot of pressure due to his brother's death. He stayed with his mother's brother, Ernest Miles, from the end of August until the end of September in Newark, New Jersey. He was there to relax (TR 1556). He related that he had only stayed out that one night during the time he stayed with his uncle and that was the night he was at the college campus. (TR 1558). Robinson testified that he made a number of phone calls which became the subject matter of a problem between he and his uncle. While he was in New Jersey he called his mother and called the rest of his family a number of times. The telephone records reflect that on August 30 he called his mother and his cousin, Prissy, and his aunt Dixie (TR 1559). On August 31, he called his cousin in New York and made other calls he did not recall. On August 31, he also called his cousin Marilyn in New York and also called her on September 1. He made several calls on September 1 and September 3 to Miami, and on September 4, he called his aunt Tammy May in Miami (TR 1560-1561). On September 7, he called his mother and

at this time his uncle started complaining about phone calls. (TR 1561). He started calling again on September 23 to Miami and on September 24, to his aunt Kit (TR 1561). On September 25, he called his mother and on September 28, he called Atlanta (TR 1562). His call to Atlanta was from a phone booth and he called Deborah Teller to tell her he was coming to Miami. (TR 1563). While in New Jersey, Robinson said he never left New Jersey. (TR 1563). He affirmatively testified he was not in Pensacola, Florida, on September 20, 1988, but rather was in New Jersey with his uncle. (TR 1564). He observed that the only time he was in Pensacola was in June or July of 1988 when he met some people there to go attend a concert. (TR 1567). He met Ronald "Trick" Williams while they were both incarcerated and made arrangements to meet him in Pensacola so that they could go to this concert together. He saw Gwen at the concert who he had met after they had gotten out of jail. Robinson testified that after they went to the concert, they returned to their hotel and smoked some reefers and had a good time. That evening they also went to the Beauclerc Apartment and that's when his fingerprints must have been placed in the apartment. (TR 1567). He had gone to the apartment to visit Darrell Frazier but Darrell never showed up. Robinson said he had not been in Pensacola since that time. (TR 1568).

Robinson testified that he had met Ronald Williams when he was incarcerated at a youthful offender camp and occasionally thereafter saw Ronald Williams. (TR 1566). He knew Darrell Frazier from the youthful offender camp in 1981, and saw Michael

Coleman a couple of times in Miami. (TR 1566). Robinson admitted that he went to prison for burglary and larceny when he broke into a car and stole a pocketbook from it. He was never arrested for dealing in drugs and has never dealt drugs. (TR 1569). He also recalled that he was involved in possession of a concealed weapon, a knife. (TR 1570). He testified that he never saw Amanda Merrell before and that he never met any of the people that were killed. (TR 1571). He admitted that his nickname was "Big Red" but testified that his mother was also known as "Big Red" and that he knew alot of other people who were called "Red" and who had gold teeth. (TR 1572).

On cross examination, Robinson admitted staying out one night while he was in New Jersey. (TR 1572). He admitted that he went to Pensacola to go to a concert but said that he never came to Pensacola in August. (TR 1574). He testified that he went to New Jersey because he was under alot of stress due to the death of his brother who had been shot and killed in Orlando, Florida. (TR 1576). Although he knew "Trick" and Keith Rozier he did not know Bo or Mildred Baker nor "Gas". (TR 1577, 1580). He testified that he wore a pendant containing diamond and ruby jewels and that he gave the pendant to his sister. (TR 1581-1582). He admitted that he did nothing for a living because he had just gotten out of prison. (TR 1582). On redirect, Robinson stated that when he was arrested, he was wearing his jewelry however, once he returned to Pensacola and the police secured his personal property, he had them send it to his mother. (TR 1584-1585). On recross he observed that based on the telephone

records, no telephone calls were made by him from September 16 through September 23. (TR 1587). On redirect he explained that no calls were made because his aunt told him not to make any more calls until he paid his bill. (TR 1589). The defense rested their case following the introduction of the Hospitality Inn receipts dated July 28, 1988, reflecting that Robinson had been in Pensacola in July 1988. (TR 1594).

On June 2, 1989, the penalty phase of Robinson's capital murder trial commenced. Robinson's counsel was allowed to take a witness out of turn at which point Dr. Larson, a psychologist from Pensacola, testified. (TR 1996). He stated that on March 7 and March 14, 1989, he examined Timothy Robinson in the Escambia County Jail for one hour each time. (TR 1997). He collected a personal history from Robinson and found out that Robinson was born in a ghetto area of Miami and raised by his mother. (TR 1997). Robinson had trouble in school and saw a psychologist for evaluation. Robinson was placed in a special education class because he was hyperactive. Robinson discussed very little about his father and Dr. Larson noted some bitterness when Robinson discussed his father. Robinson told Dr. Larson that his mother did a good job raising seven children and he denied any drug or alcohol problems. (TR 1998). On the Wechsler Adult Intelligence Scale he scored a verbal IQ of 79 which Dr. Larson said was borderline. (TR 1999). Robinson told the doctor there was no abuse and Dr. Larson concluded that based on the defendant's age he was immature for his age. (TR 2000-2001). Dr. Larson judged him as falling within the "real low average range" of

intelligence and although he knew he quit school when he was in junior high school, the doctor did not know whether Robinson received his GED. (TR 2002).

On cross examination, Dr. Larson affirmed that he only conducted two one hour interviews with Robinson and that he was not clear whether Robinson actually got his GED. (TR 2002). There was no indication that Robinson used drugs or alcohol to excess or was abused. (TR 2003).

At this point, the State called Amanda Merrell to the stand at the penalty phase and she testified that Robinson knocked McCormick on the floor and began beating him. She also recalled that it was Robinson and Darrell who tied everybody up in the apartment and it was Robinson who started stabbing Derek. (TR 2005-2006). On redirect, she testfied that the last thing she heard Mildred Baker say was "She said Red, I'll tell what I know, I'll tell you what I know. And he said get down, bitch." She next heard a gunshot. (TR 2009).

Mary Robinson was next called in behalf of Timothy Robinson. Mrs. Robinson, 44, is Timothy Robinson's mother. (TR 2012). She testified that she had seven children, six of them still alive. When Robinson was growing up, they lived in a bad neighborhood in Liberty City and that Robinson's father was never there for him or the other siblings. Mrs. Robinson testified that after twenty years of marriage, she divorced her husband. (TR 2013). Following that, they moved to a better neighborhood in North Miami however, throughout his life, she testified Robinson's father treated him badly. (TR 2014). She recalled

one occasion when Robinson's father broke his mother's jaw and Robinson told his father to leave and told his mother that he (his father) would never hurt her again. (TR 2015). All the children saw the father's violence toward Mrs. Robinson and at one point, apparently, Robinson's father told Robinson he was not his real father. (TR 2015). Mrs. Robinson said that was not true. She testified that Robinson was religious and went to church when he was a child and that he managed to get his GED and started attending Bible College in Miami. (TR 2016). She said that Robinson wanted to be a minister. (TR 2016). After the falling out with his father, Robinson started changing and she thought that he was using drugs. (TR 2017). Mrs. Robinson testified that Timothy was a sweet child all his life and that although her other son was killed in Orlando, no one ever told her about what happened. (TR 2018). After Timothy's brother's funeral, Robinson packed up to go live with his uncle. (TR 2019). Mrs. Robinson testified that Timothy did not tell her he did these crimes. When Robinson was a youth, he worked at the Miami Lakes Country Club also at something Teen Clean. She testified that all the children bought their own clothing for school. (TR 2020). She asked the jury for mercy for her son, and to please forgive him for what he did. (TR 2021). On recross, Mrs. Robinson said her son who died in Orlando was nicknamed "Blade" and that he died on August 29. The funeral was August 30. (TR 2022). The defense rested its penalty phase case. (TR 2022).

At closing, Robinson's counsel argued that the jury's vote and recommendation on the death penalty was very important.

> It may be an advisory opinion, but it's one that the judge is going to weigh heavily and one that if he rejects is going to have to write opinions and written opinions for why he's going over that recommendation if you recommend life for Timothy Robinson and the others.
>
> What I have to tell you is this, that your vote for life before death is a very solem vote. Even though you all don't have to agree, it's just like you recommend life or you say based upon the facts on Mr. Robinson here, I could pull the switch. That's basically what it amounts to.

(TR 2083).

He observed that no one had spoken to the victim and though there must be a great loss to the victims and their families, he had no intention of minimizing the severity of the offense. (TR 2083-2084). He reviewed the evidence that indicated there was testimony that his client was not responsible for the murders and that "we know based upon the evidence that we'll never know exactly what happened or who did what." (TR 2084). Mr. Beroset argued that Mr. Robinson had an automatic weapon and that the others had pistols and that the pathologist said that a pistol was used to shoot everybody. He observed that the jury should give Mr. Robinson the benefit of the doubt. (TR 2085). He argued that Mr. Robinson ought to get the benefit of a recommendation of life because he was twenty-two years old. Although Robinson had been incarcerated twice, neither incarceration was for a violent offense. "There is no significant prior history of violent offenses. He was arrested

once for grand theft and once for burglary. Dr. Larson testified that he tested him and he found that he was borderline to low average intelligence, 79 IQ, which would indicate that he is in the eighth to tenth percentile of persons and intelligence in his age group of twenty-two." (TR 2085). Mr. Beroset reminded the jury that they were not limited to the mitigation or any mitigating factor. He recalled that Robinson was raised in the ghetto "that doesn't mean that everybody raised in a ghetto turns out or is involved in something like this, but you can consider that as a factor." (TR 2085). He further argued, you can "consider as his mother told you that he saw violence early in his home, about how he had a confrontation with his dad over the violent behavior with his mother. You can consider those as mitigating factors." (TR 2085). Beroset also argued that the fact that his father told him he was not his father was a mitigating factor and the jury could consider "the fact that he was probably under great emotional distress back in August and September and October of 1988, if you believe he was there and your verdict indicates that. He had just lost a brother. A brother had been shot a month before. None of these things justify any of these people being involved in this, but those are things that you can consider in mitigation." (TR 2086).

Defense counsel noted that the death penalty does not deter people. "Mr. Robinson clearly, if in prison, could get four life sentences on just the murder charges. Four consecutive twenty-five year minimum sentences. A minimum of a hundred years without parole, without gain time, without anything." (TR 2086).

Defense counsel further observed that "if the death penalty were a deterrent then we wouldn't have these problems." (TR 2086).

He further observed:

> I hear people everyday talking about if you were in this country and you stole something your hand would be cut off. Look at those countries. Look at the countries that dish out capital punishment and severe punishments such as Iraq and Iran and many of the Moslim countries. When you have a government that tolerates death by the government how can you expect people in some of these circumstances to respect life when they see the government kill other people?
>
> Any what I'm asking you in this case is to maybe find some compassion, some mercy, some sympathy for Mr. Robinson, for his family that wasn't provided or didn't happen that night. Ask to weigh, consider those mitigating factors and recommend to the court a life sentence on behalf of Mr. Robinson and the others.

(TR 2087).

The jury returned a recommendation of 6-6 for life in Timothy Robinson's case. They also voted 6-6 for life in Coleman's case and 11-1 for life 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 violence to the person of Amanda Merrell and Darlene Crenshaw who was 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 the killing of the four victims were without provocation and senseless since the stolen contraband had been recovered; therefore, it is concluded the killings were committed 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 detail 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 torso's, 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 a manner already described, were clearly calculated acts done with premeditation. *Rutherford v. State, 545 So.2d [sic] (Fla. 1989); Bolender v. State, 422 So.2d 833, 838 (Fla. 1982).*

Findings Related 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 activity even though he has not been previously convicted of a violent crime. *Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985).*

(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 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 the these acts were not relatively minor.

(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-two years and is not a factor. Indeed, defendant was clearly the ringleader and person who directed the other participants. *Lamb v. State, 532 So.2d 1051 (Fla. 1988).*

Findings 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 establishes that defendant has maintained close family ties throughout his young life and has been supportive of his mother. The remaining contentions are not borne out by the evidence, 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; his low IQ did not impair his judgment or actions; he was not an abused child and this factor cannot serve to mitigate his conduct. Finally, the victims' background can not be used to mitigate the sentence to be imposed and warranted under these facts. *Bolender v. State, supra, at 837.* Even if any such factors were 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.*

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)*. 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. *Bolender v. State, supra, at 837*.

(TR 2584-2587).

## SUMMARY OF ARGUMENT

The judicial override of the jury's 6-6 vote was appropriate **sub judice** and satisfies the **Tedder** standard. No evidence in mitigation exists that would overcome the aggravation presented. Moreover, a rational juror could not conclude that death was inappropriate.

The admission of DNA evidence to show Robinson's presence in Pensacola, Florida on September 20, 1988, was proper. Robinson has not demonstrated the trial court abused its discretion in the admission of said evidence.

The court took extraordinary measures to insure the jury not see the defendant's shackled ankles. No error has been demonstrated. Moreover, Robinson's requests for a continuance of trial were not well-taken and the court did not abuse its discretion in denying this request.

The prosecutor's display of the knives used in these murders was germane to remarks made during closing. No violation resulted from the display of this evidence to the jury.

Robinson's motion to sever and motion for change of venue were properly denied on the record.

Terminally, the trial court did not err in denying Robinson's motion for judgment of acquittal as to Count XIV, conspiracy to traffic in 400 grams of cocaine.

## ARGUMENT

### POINT I

WHETHER THE TRIAL COURT IMPROPERLY IMPOSED THE DEATH PENALTY THEREBY OVERRIDING THE JURY'S 6-6 RECOMMENDATION OF LIFE?

Appellant argues the trial court abused its discretion in overriding the jury's recommendation of life because, "the jury had several reasonable basis upon which it could have relied in making its recommendation of life and further, because the trial court supplied an insufficient basis in it sentencing order." (AB, p. 13). Citing **Tedder v. State**, 322 So.2d 908 (Fla. 1985), Appellant argues that in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. The instant case presents such a fact scenario. The trial judge in his written order (TR 2582-2587), provided a detailed summary of the facts of this case and also discussed the aggravating and the mitigating factors and why the override was warranted. The record reflects that the jury provided a non-conclusive 6-6 vote. Albeit, a 6-6 vote constitutes a life recommendation, it can hardly be said that this case, where four murders occurred, does not, beyond per adventure, satisfy the **Tedder** standard. Robinson points to a number of factors upon which he asserts the jury could have based his recommendation. For example, the fact that Robinson "maintained close family ties throughout his young life and was supportive of his mother" or the fact that Robinson grew up in a crime ridden area of Liberty City, Miami, and that his

relationship with his father was not good. Robinson points to the fact that his father beat his mother repeatedly over the years and that Robinson was affected by the death of his brother immediately prior to the offense for which he was convicted. He points to the testimony of Dr. James Larson who testified he examined Robinson and found that although he had difficulty in school, and Robinson had a borderline range of intellectual development, he obtained his GED. Robinson points to his age of twenty-two at the time of the offense and argues that might have been a reason why the jury was unable to make a recommendation of death. Moreover he argues that the trial court finding that he was the ringleader and the person who directed the other participants was not an accurate assessment. He further argues that the testimony at trial shows that he could not have shot anyone because he had the wrong gun and consequently, "there is not evidence to establish that Appellant was your actual perpetrator of the murders or that Appellant knew that the victims were going to be murdererd and not later released." (AB, p. 20-21). He further observes that he had no prior felony convictions for crimes of violence having been previously convicted of burglary of an automobile and theft of a pocketbook, (however, he forgets the other capital murders that occurred during this criminal episode). Terminally, he challenges the correctness of the aggravating factors that the murder was committed for the purposes of preventing or avoiding a lawful arrest while not specifically challenging the fact that the murders were committed in a cold, calculated and premeditated

manner or that the murders were especially heinous, atrocious or cruel, or that the murders were committed while he was engaged or was an accomplice in the commission of a robbery, sexual battery, burglary and kidnapping, for which he also stands convicted.

The court, in its order, considered and reviewed Robinson's family ties, his health, his education or lack thereof, his intelligence, his upbringing and his emotional development. In reviewing these factors, the court found that none of the statutory aggravating factors were present and as to non-statutory mitigating factors: while Robinson maintained a close family relationship with his mother, the record bore no evidence that he was abused or used alcohol or drugs. His intelligence was borderline low average and his upbringing, although "impoverished" "cannot be used to mitigate the sentence to be imposed and warranted under these facts." (TR 2586). Even defense counsel observed,

> You can consider that he was raised in a ghetto and **that doesn't mean that everybody raised in a ghetto turns out or is involved in something like this**, but you can consider that a factor. You can consider as his mother told you that he saw violence early in his home, about how he had a confrontation with his dad over the violent behavior with his mother. You can consider those as mitigating factors.

(TR 2085) (emphasis added).

While those factors may be considered, they could not in any possible way overshadow the enormity of the murders **sub judice**. **Harmon v. State**, 527 So.2d 182, 189 (Fla. 1988). 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, the instant case constitutes the exception to the rule. Nothing in Robinson's background mitigated the enormity of the criminal acts and aggravating circumstances found in this case. Robinson may have had an IQ of 79, but his mother testified that he got his GED and he started attending Bible College in Miami. He was supportive of his family and got along well with his mother. He disliked his father but there was no evidence of abuse, drug use or alcohol problems. He was under "stress" because of the recent death of his brother, however, that did not stop him from leaving his mother and going to visit his uncle in New Jersey where he spent a month just laying around eating and sleeping. There is no evidence in this record explaining how "he was stressed out" by the death of his brother. In fact, the record reveals that either the day of his brother's murder or the day of his funeral, August 29 or August 30, Robinson left his grieving mother's side and went to New Jersey.

Robinson testified that he was not in Pensacola, Florida, on September 20, 1988, and that the last time and only time he had been in Pensacola was in July 1988. Physical evidence presented at trial reveals not only did Amanda Merrell postively identify Robinson as one of her assailants, but physical evidence such a fingerprints and DNA testing also proved that he was present in Pensacola, Florida on September 20, 1988.

At the penalty phase, Dr. Larson did nothing more than indicate that Robinson was immature for his age and his intelligence fell within the "real low average range." (TR 2001).

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 not provide a reasonable basis for a jury recommendation of life imprisonment. In the final analysis, this was a contract killing conducted in a professional manner by and underworld crime boss. With five valid aggravating circumstances, no statutory mitigating circumstances and very little non-statutory mitigating evidence, the trial court override was legally found.

553 So.2d at 158.

**Sub judice** there is not a scintilla of mitigating evidence that would support a "rational" juror's determination for life. Four murders occurred and Robinson fully participated in the crimes. Not only did he take the initiative in having each victim undressed and tied up, but he commenced to torture one of the victim's in an attempt to secure the location of the stolen drugs. Amanda Merrell testified that Mildred Baker's last words asked "Red" not to kill her. Amanda Merrell heard a single gun shot following those words. None of the aggravating factors have been seriously challenged and none of the mitigation that Robinson points to constitutes a sufficient basis upon which a jury or this Court should conclude that death is not the appropriate sentence. Robinson was a full participant in this crime and in fact directed the murders to be committed if he did not personally do so himself. Robinson sexually abused the two women victims and engaged in the torture by stabbing and beating about the body of the victims. **See White v. State**, 403 So.2d 331 (Fla. 1981).

In **Torres-Arboledo v. State**, 524 So.2d 403, 413 (Fla. 1988), this Court sustained a jury override in a similarly circumstanced case. 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 constitued a discernible mitigating factor" for the jury's life recommendation. This Court found that the record refuted such a contention.

Herein, Robinson was a main actor, fully aware of what was transpiring and had no "significant" non-statutory mitigating evidence except that he was a "sweet child" in the words of his mother. **See Brown v. State**, 473 So.2d 1260 (Fla. 1985). The jury override must be sustained.

Appellant argues that the trial court's override was insufficient on its face and points to the fact that the aggravating factor that the murder was committed to avoid or prevent lawful arrest is wanting. The record reflects that the murders **sub judice**, were execution-style and were perpetrated for no other purpose but to avoid detection. Robinson and his codefendants had retrieved their "stuff". It was Robinson, however, who said he had to do it. It was Robinson who told the others to "open up". It was Robinson who Amanda Merrell heard Mildred Baker beg "not to kill her". Pursuant to **Correll v. State**, 523 So.2d 562, 567 (Fla. 1988), and **White v. State**, 403 So.2d at 338, Appellee would respectfully submit this aggravating factor was properly found.

## POINT II

WHETHER THE TRIAL COURT IMPROPERLY ADMITTED THE RESULTS OF DNA TESTING?

Appellant has a two-pronged attack regarding the admissibility of DNA evidence which positively demonstrated that he was present in Pensacola, Florida, on September 20, 1988. First, Appellant argues that the trial court erred in admitting this evidence because it did not conduct an evidentiary hearing regarding its admissibility - the reliability of this scientific evidence. Second, Appellant asserts that the trial court committed error in refusing to grant a continuance due to receipt of the information concerning the DNA evidence immediately prior to trial. On both contentions, Robinson is entitled to no relief.

Pretrial, Robinson filed a motion for continuance on May 11, 1989, asserting that:

> On Tuesday, May 9, 1989, a telephonic deposition was taken of Cellmark employees, Paula Yates and Dr. Forman, in regard to DNA typing and proported comparisons of the defendant Timothy Robinson's and vaginal swabs of two of the alleged victims.
>
> Cellmark employees testified as to positive findings with regard to the defendant, Timothy Robinson.
>
> The defense has requested copies of Cellmark's standard operating procedures, all notes and records of the tests performed by Cellmark, including autoradiographics and statistics generated on black Americans. . . .
>
> . . . the defendant needs substantial additional time to consult independent experts on DNA typing and testing, and if necessary, the defendant needs additional time to obtain independent blood tests of the

> defendant and provide those to an independent source to examine and make comparisons of the defendant's blood and samples of the evidentiary swabs obtained from the victims. . . .

(TR 4355).

On May 22, 1989, defense counsel called up his motion for continuance asserting that although they had received all the documents they had requested, sufficient time was not provided in order that they might have an opportunity to talk to someone else regarding what the autoradiographs meant and what effect they would have on the defense's case (TR 14). With regard to Robinson's motion for continuance based on the DNA materials, the State responded:

> With regard to the DNA being a late issue, I would note and call the court's attention to the record and my motion to compel samples which I believe was filed back on February 27, 1989. I state in there that these samples appear to be sufficient for DNA testing. In order to have the samples compared, it is necessary to have the blood of the defendant's. For that reason, Your Honor, clearly they have been on notice that DNA testing is going on, and I don't think that they can complain about it. They could have asked at that time that they have an opportunity to participate in the selection of who did the DNA testing. They could have asked at that time that they have someone test or that their expert be able to participate in the testing by the State. None of those requests were made, and I don't think they should be allowed to sit back and wait until the results are unfavorable and then move for a continuance. This is particularly true in the DNA testing which takes a pretty extended amount of time.

(TR 24-25).

With regard to the motion to compel, the court allowed defense counsel an opportunity to receive a copy of Cellmark's operating manual. (TR 35-37).

Prior to the introduction of the Cellmark testimony through Paula Jean Yates and Dr. Forman, defense counsel moved to suppress the admission of DNA material. (TR 869). Defense counsel argued the admissibility of this new scientific evidence was suspect and has "failed to gain general acceptance throughout the United States." (TR 871). Defense counsel further acknowledged, however, that the Third District Court of Appeals has accepted this scientific evidence but argued:

> . . . the fact that a third district accepted it doesn't mean that it should be accepted in this courtroom. The techniques and methods and standard operating procedures for Cellmark are confidential and company secrets have not been generally accepted, and its our position that they have to establish that its widely accepted.
>
> And, number two, before they can proffer this into evidence, I submit that they have to proffer to the court that they follow the proper procedures, because if they haven't followed the proper procedures, then it could be prejudicial to the defendant to have this information put before the jury. So we would move to exclude or suppress it. I use the term suppression in the general term to keep it out of evidence.

(TR 871).

Defense counsel further asserted that although they took depositions of the witnesses telephonically on May 9, they did not receive the notes and the autoradiograms at that time nor did they consult an expert to review said materials. (TR 872-873). The Court concluded,

> . . . now, insofar as your motion to exclude evidence, really your relying on the provisions contained in §90.705(2), of the Florida Rules of Evidence, which provides that prior to a witness, that is, an expert witness, giving his opinion, a party against

> whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for his opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for his opinion, the opinions and inferences of the experts are inadmissible unless the party offering the testimony establishes the underlying facts or data. That's how we'll proceed.
>
> Now, with respect to the other prong of your motion concerning the issue of whether or not the DNA testing is sufficiently reliable to have gained acceptance as a basis for testimony in courts in Florida, the court is just going to abide by the decisions already existent in Florida, particularly those from other districts, and rule that as a matter of law, assuming other predicate facts can be established, that this testimony would be admissible. . . .

(TR 874-875).

On May 31, 1985, defense counsel renewed all motions including his renewed motion to "exclude the testimony about DNA from Paula Yates and Dr. Forman based upon the fact that the evidence is not generally accepted in the scientific community and the other grounds we state in our motion. . . ." (TR 1634). In furtherance of this motion, defense counsel Pitts observed:

> . . . in addition I would like to recall the fact that the report from the DNA people was received by Mr. Beroset on the Sunday before jury selection. As soon as we got any kind of oral preliminary report, their deposition was scheduled, but that was a preliminary type deposition, wasn't one that covered their report because we didn't even have it at the time.
>
> In addition to their report, the autoradiographs were received on Sunday, and, in fact, one of the autoradiographs that were used by the witnesses during their testimony was prepared after the report was dated. I would like to call that to the court's attention.

The court, in denying relief, observed that there had been no showing of prejudice:

> The Court will note that insofar as defendant Robinson, Mr. Pitts, the court is authorized and had authorized several thousand dollars in investigative expenses which were renewed several times. You had plenty of time to consult or retain an independent expert insofar as any DNA testing. Apparently, you elected to await the outcome of the State's own testing to see whether or not you would pursue anything further.

(TR 1642).

On this score, the record reflects vaginal swabs from Amanda Merrell were taken on September 20, 1988 (TR 852), and blood was drawn from Robinson on March 7, 1989 (TR 851). Those samples were sent to Cellmark for analysis. Dr. Lisa Forman was called on behalf of the State to testify regarding the DNA testing procedures. Robinson's defense counsel voir dired Dr. Forman with regard to her credentials and her testing procedures (TR 893-906). As the result of that voir dire, the court held that:

> . . . the subject matter of the witness' -- or to be presented by the witness' testimony is proper for expert testimony, that is, that it will assist the trier of fact in understanding the evidence or determining a fact at issue in this case, and the court is satisfied on other legal decisions which have already been rendered that there is a reliable body of scientific or other specialized knowledge in the area of genetics or population genetics which have been developed to support any opinion that might be ventured.
>
> And, secondly, the court is satisfied that the witness is a person who is qualified by knowledge, skill, experience, training or education to render or venture an opinion on the subject matter to be inquired to. So the court at this point will permit the witness to proceed with other testimony in the case

> and to offer any opinion that the parties wish to elicit from the witness.

(TR 907-908; see TR 917).

On May 26, 1989, direct examination continued of Dr. Forman with regard to her educational background and her procedures in applying DNA testing to blood samples. (TR 919-937). Cross examination commenced at TR 937, at which point defense counsel extensively inquired of Dr. Forman as to her genetic testing and the standards utilized by Cellmark in making DNA comparisons. (TR 937-965).

Paula Yates was next called and testified that she was a molecular biologist employed by Cellmark Diagnostics (TR 970), and that her duties were to perform DNA analysis on evidence from forensic cases to be compared with standards from that forensic case. (TR 971). As a result of her testing, the DNA bands taken from the blood of Robinson matched the anal swabs and vaginal swabs taken from Amanda Merrell. (TR 1029). Dr. Forman was recalled and confirmed the results that the vaginal swabs taken from Amanda Merrell matched those blood samples taken from Timothy Robinson (TR 1038).

In **Andrews v. State**, 533 So.2d 841 (Fla. App. 5th DCA 1988), the court, in minute detail, reviewed the admissibility of DNA testing. The court observed:

> . . . in applying the relevancy test, it seems clear that DNA print results would be helpful to the jury. §90.702, Fla.Stat. (1988). Each of the State's witnesses was accepted by the trial court as an imminently qualified expert in the field of molecular genetics. The critical question here is whether the probative value of the testimony and test is substantially outweighed by the

potential prejudicial effect. In this regard, the indicia of reliability referred to in *Kruse* come into play.

As noted in *Downing*, under the relevancy approach where a form of scientific expertise has no established 'track record' in litigation, courts may look to other factors which bear on the reliability of the evidence. (cite omitted). One of these is the novelty of the technique, i.e., its relationship to more established motives of scientific analysis. DNA testing has been utilized for approximately ten years and is indicated by the evidence to be a reliable, well-established procedure, performed in a number of laboratories around the world. Further, it has been used in the diagnosis, treatment and study of genetically inherited diseases. This extensive non-judicial use of the test in evidence tending to show the reliability of the technique. *Downing, 753 F.2d at 1239*.

Another factor is the existence of specialized literature dealing with the technique. The record reveals that a great many scientific works exist regarding DNA identification. According to Dr. Baird, Lifecodes maintains a file on all scientific journal articles and publications with regard to DNA testing and he was unaware of any that argue against the tests reliability.

A further component of reliability is the frequency with which a technique leads to erroneous results. *Downing, 753 F.2d at 1239.* The court there noted:

> At one extreme, a technique that yields correct results less often than it yields erroneous ones is so unreliable that it is bound to be unhelpful to a finder of fact. Conversely, a very low rate of error strongly indicates a high degree of reliability. In addition to the rate of error, the court might examine a type of error generated by a technique.

. . . the frequency by which given DNA bands appear in population is calculated by using an established statistical database,

> employing a statistical formula known as the Hardee-Weinberg Equilibria. This principle is used for determining other genetic characteristics such as blood type or Rh factors, dating back to the 1920's and has been generally accepted in the scientific community as being accurate for this calculation. . . . Admittedly, the scientific evidence here, unlike that presented with fingerprint, footprint or bite mark evidence, is highly technical, incapable of observation and requires the jury to either accept or reject the scientist's conclusion that it can be done. While this factor requires courts to proceed with special caution (cite omitted), it does not of itself render the evidence unreliable.
>
> The trial court did not abuse its discretion in ruling the test results admissible in this case. In contrast to evidence derived from hypnosiss, truth serum and polygraph, evidence derived from DNA print identification appears based on proven scientific principles. Indeed, there was testimony that such evidence has been used to exonerate those suspected of criminal activity. Given the evidence of this case that the test was administered in conformity with acceptable scientific procedures so as to ensure to the greatest degree possible a reliable result, Appellant has failed to show error on this point.

533 So.2d at 849-851. **See also Martinez v. State**, 549 So.2d 694 (Fla. App. 5th DCA 1989).

**Sub judice**, Robinson had every opportunity to not only voir dire the experts presented by the State, but he also had the where-with-all and ability to do his own testing. Albeit, he chose not to have an independent tester, that was a choice he made. It does not bring into "question" the correctness of Dr. Forman's testing protocols or Paula Yates' results. **See also Correll v. State**, 523 So.2d 562, 567 (Fla. 1988).

With regard to Robinson's contention that the trial court erred in refusing to grant a continuance due to receipt of information concerning the DNA evidence just prior to trial, relief should also not be forthcoming. The record reflects that defense counsel knew that blood samples were being taken for DNA testing early on. As the trial court indicated, defense counsel just sat back and waited for the State's DNA results before they moved forward. The record reflects that the final report and Cellmark's operating procedure manual were provided by May 21, 1989, the day before trial. The record also reflects that testimony regarding the DNA materials were not introduced until May 25 and May 26, at least three to four days after trial commenced. Defense counsel had telephonically deposed both Dr. Foreman and Paula Yates on May 9, 1989, regarding the test results as well as testing procedures. To suggest that they were entitled to a continuance and that the trial court erred in allowing the admissibility of the DNA testimony based on the aforenoted, is erroneous. The instant case is unlike **Hill v. State**, 535 So.2d 354 (Fla. 5th DCA 1988). In **Hill**, no evidence was known to the defense prior to 5:00 p.m., on Sunday night before the Monday trial commenced. The court concluded:

> . . . On the morning of trial, Appellant asked for a continuance of the trial in order to try to form a defense, if he could, to the expert testimony. The denial of that motion for continuance was error because fairness, state and federal constitutional due process rights, and the Florida Rules of Criminal Procedure require that witnesses be disclosed and made available to a defendant in a criminal case in sufficient time to permit a reasonable investigation regarding the proposed testimony. This is especially true

> in a case where innovative scientific evidence is the subject. . . .

535 So.2d at 355.

Similarly, assuming for the moment this Court finds that error occurred, said error in the admissibility of DNA testimony, is harmless beyond a reasonable doubt. Amanda Merrell testified at trial that Timothy Robinson was one of two persons who sexually battered her and Mildred Baker on September 20, 1988. (TR 1300-1301). Amanda Merrell further testified that it was Timothy Robinson who took her jewelry the night of the murder. (TR 1305-1306). Pursuant to **Jones v. State**, 569 So.2d 1234, at 1237 (Fla. 1990), if error at all, the admission of the DNA testimony was harmless beyond a reasonable doubt. Terminally, the State would submit there were no discovery violations **sub judice**, and as such, all relief should be denied. **DuFour v. State**, 495 So.2d 154 (Fla. 1986).

## POINT III

WHETHER THE TRIAL COURT ERRED IN REQUIRING THAT APPELLANT BE SHACKLED DURING TRIAL?

Appellant next argues that the trial court erred in requiring Robinson (and his other co-defendants) to be shackled at the ankles during trial. The first objection to the defendants being shackled came by Coleman's defense lawyer prior to voir dire when he asked that handcuffs and leg shackles be removed during the presence of jurors and prospective jurors. (TR 31). The court held that the handcuffs would be removed but that the leg restraints would stay. (TR 31). Defense counsel for Mr. Robinson objected to Robinson being shackled at the feet.

> When I walked in the courtroom I noticed there was cardboard under there and wondered why it was there.

(TR 32).

The court observed that it had taken this measure to alleviate the problem by putting a cardboard front in front of the table so that jurors would not see the shackles on the defendant's ankles. (TR 32). The next day on May 23, 1989, the court revisited the issue of the leg shackles and observed:

> . . . There was some objection made yesterday to the fact that the defendants were required to wear ankles shackles while seated in the courtroom, and the record should reflect at this time that the court has taken measures as it had yesterday to ensure that the lower portion of counsel's table where the defendants are seated was covered with a non-transparent material so that the jurors, when seated in the courtroom, would not view or observe the condition of the defendants ankles or feet while seated.
>
> MR. BEROSET: Your Honor, we still object to this because they are going to have to be led in and out of the courtroom, possibly go to the witness stand. Jurors and witnesses are going to be walking behind counsel table. There are going to be people seated in here this morning. They may be asked to stand during the course of voir dire and the chains will makes noises. It will be obvious to them, and so we want to note our objection.
>
> THE COURT: All right, sir. Well, your objection is noted. I just want the record to reflect that the court has taken every precaution to safeguard against such extraneous matters being injected into the jury's view, but on balance, the rights of the defendants to sit in the courtroom here unfettered must give way to the court's paramount right to insure proper court security. And the court has in its possession certain information which would not be accessible to counsel and the court can only certify for purposes of the record that these measures, extreme measures, are

> **necessary and warranted under the circumstances.** All right.

(TR 214) (emphasis added).

No further specific objection was raised by defense counsel nor did counsel seek to inquire further as to the nature of the trial court's information regarding the security need for the shackles.

Moreover, when Robinson was called to the stand during the trial portion to testify in his own behalf, the jury was removed from the courtroom and Robinson shackles were removed during the course of his testimony. (TR 1554). The only other incident that occurred during closing argument when the cardboard barrier in front of Mr. Robinson came down and he attempted to put it back up. Defense counsel Pitts objected and moved for a mistrial. The court denied the motion. (TR 1876).

In **Diaz v. State**, 513 So.2d 1045 (Fla. 1987), the court observed that trial courts are obligated to maintain safety and security in the courtrooms and must weigh under the proper circumstances whether the risk of security measures such as shackling are necessary to control a contumacious defendant citing **Illinois v. Allen**, 397 U.S. 337 (1970). In **DuFour v. State**, 495 So.2d 154, 162 (Fla. 1986), the court similarly found that shackles were necessary in view of DuFour's planned escape attempt from the Orange County Jail and his past criminal record of two murders in Mississippi and a subsequent placement on death row. The court, relying on the trial court's efforts to minimize any harm coming to anyone in the courtroom, held:

> The court did attempt to minimize any prejudice accuring to the Appellant by granting defense counsel's request to place a

> table in front of the defense table in order to hide the leg shackles. Under these circumstances, and from the lofty stance of appellate review, we will not second guess the considered decision of the trial judge. We therefore reject Appellant's claim.

495 So.2d at 162.

In **Stewart v. State**, 549 So.2d 171 (Fla. 1989), a case most closely resembling the instant case, the Florida Supreme Court held that:

> Though we recognize that shackling is an "inherently prejudicial practice," *Holbrook v. Flynn, 475 U.S. 560, 568, 106 S.Ct. 1340, 1345, 89 L.Ed.2d 525, 534 (1986)*, the trial court, in this instance, properly exercised its discretion to insure the security and safety of the proceeding.

549 So.2d at 174.

In **Stewart**, the court detailed the initial in-court exchange concerning the shackling as follows:

> THE COURT: It has been requested by defense counsel that his client's leg shackles be removed. I have, apparently, the defendant has complained that they are too tight. I have had Mr. Morone check those. Mr. Morone, how tight are those ankle shackles?
>
> THE BAILIFF: I can pass my finger down between his shackles and legs. I have very large fingers. - - -
>
> MR. BARBAS: It gives a false impression to the jury that, in fact, he is already under some type of sentence, is another reason.
>
> THE COURT: I disagree that it gives a false impression he is under sentence. I think the fewer comments made is the better procedure here. The court has had problems with this particular defendant in the past, where there has been allegations he may attempt to run. I am having him shackled in the courtroom.
>
> MR. SKYE: Maybe it would not bring more attention if you didn't ask him to stand, like you normally do.

> THE COURT: I will prefer to have him standing. His feet are wide enough apart. If they are going to see them, they are going to see them.
>
> Later, on Stewart's motion for a new trial, the court, after hearing argument from both sides, ruled that the shackles were both unobtrusive and necessary. The judge pointed out that Stewart had remained stationary during the trial, thus giving the jury no opportunity to see him walk in shackles, and that the shackles were barely visible under the table. The judge was also aware that Stewart had on a previous occasion slipped off his manacles, and was facing charges of escape and attempted escape. The judge therefore had reason to believe that Stewart was a high risk prisoner who had previously tried to escape and thus presented a security risk.

549 So.2d at 173-174.

In the instant case, the trial court indicated that he had reasons for maintaining high security in the courtroom during the course of this multi-defendant trial. Defense counsel at no point in time, after the trial court alluded to his reasons, made any request of the court to expand on the basis for the shackling. The trial court attempted to insure that the jurors would not see the shackled ankles of the defendants. When Robinson was called to the stand to testify, the jury was removed from the courtroom, Mr. Robinson's shackles were removed, and he was allowed to testify unshackled. The only other circumstance that occurred where the jury may have seen the shackles occurred during closing arguments when the cardboard barrier apparently moved. The trial court observed this occasion and observed that he did not believe the shackles were seen. Appellee would submit that this Court's decision in **Stewart, supra,** and any other authorities herein cited, mandate no relief as to this claim.

Robinson's reliance on this court's decision in **Bello v. State**, 547 So.2d 914 (Fla. 1989), is distinguishable. In **Bello**, the court found that although defense counsel objected to the shackling and requested that an inquiry be made, the trial court refused to do so. The court, deferring to the sheriff's apparent judgment that such restraint was necessary, made no further inquiry with regard to why the defendant was shackled. The court further observed that there was no reason evidenced in that record to support the need for such restraint. The court held:

> Because the trial judge in this case made no inquiry into the necessity for the shackling, the defendant is entitled to a new sentencing proceeding before a jury.

547 So.2d at 918.

While not unmindful of **Elledge v. Dugger**, 823 F.2d 1439 (11th Cir. 1987), **cert. denied**, 108 S.Ct. 1487 (1988), Appellee would submit that contrary result is not controlling. **See Elledge v. State**, 408 So.2d 1021 (Fla. 1981).

Based on the foregoing, no relief should be forthcoming as to this point.

## POINT IV

WHETHER APPELLANT WAS DENIED A FUNDAMENTALLY FAIR TRIAL PURSUANT TO HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE THE TRIAL COURT REPEATEDLY DENIED APPELLANT'S REQUEST FOR A CONTINUANCE OF HIS TRIAL?

Appellant next argues that he was denied a fundamentally fair trial because the trial court repeatedly denied his requests for continuance of trial. This assertion is premised on three circumstances: (a) that not all of the witnesses listed were

deposed; (b) that he had not received trial transcripts of those persons that he did depose, and (c) that he did not receive the results of the DNA testing until just prior to trial. Appellee would submit Robinson is entitled to no relief. For example, he points to no material witness that testified at trial that he could not or did not have an opportunity to depose, nor can he demonstrate how he was prejudiced by not having the transcripts of the deposition he took. Moreover, with regard to the DNA testing, defense counsel extensively voir dired Dr. Forman and Ms. Yates with regard to their qualifications and their testing methods. He telephonically deposed these witnesses, eleven days prior to trial and knew early on that blood drawn from Mr. Robinson would be used for DNA evaluations. To suggest now that in some manner his constitutional rights to a fair trial were deprived because he did not receive a continuance is totally wrong.

As observed in **Woods v. State**, 490 So.2d 24, 26 (Fla. 1986):

> Granting or not granting a continuance is within a trial court's discretion. *Lusk v. State, 446 So.2d 1038 (Fla.), cert. denied, ___ U.S. ___, 105 S.Ct. 229, 83 L.Ed.2d 159 (1984); Williams v. State, 438 So.2d 781 (Fla. 1983), cert. denied, 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 146 (1984); Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1522 (1982).* A trial court's ruling on a continuance will not be disturbed unless an abuse of discretion is shown. *Jent*. Woods has demonstrated no such abuse here. The trial court granted Woods his first motion for continuance, but refused the next one. Woods' counsel argued that he needs more time to investigate the possibility of an inmate group having coerced Woods into attacking the victims. A prison investigation, however, had never connected Woods to that group, and counsel's contentions amount to nothing more than

> conjecture and speculation. This case is a far cry from *Valle v. State, 394 So.2d 1004 (Fla. 1981)*, where counsel had only twenty-four days to prepare for trial, and our review of the record reveals no abuse of discretion here.

**See also DuFour v. State,** 495 So.2d 154 (Fla. 1986) (requisite showing of a palpable abuse of the court's discretion in denying a continuance was not made); **Diaz v. State,** 513 So.2d 1045, 1047 (Fla. 1987) (one week notice before trial of State's witness not sufficient to warrant continuance); **Lusk v. State,** 446 So.2d 1038 (Fla. 1984), and **Bouie v. State,**. 559 So.2d 1113, 1114 (Fla. 1990), wherein the court observed:

> Defense counsel deposed Edwards on Wednesday evening and on Thursday evening deposed other inmates who had been in the holding cell. The State called Edwards to testify on Friday afternoon. Defense counsel moved for both a continuance in order to investigate the confession issue further and for a mistrial. The court found no prejudice in the State's handling of the matter, denied both motions, and allowed Edwards to testify. Defense counsel cross examined Edwards and, during the defense's case to rebut Edwards' testimony. . . .
>
> . . . We find no abuse of discretion here. The State's good faith and diligence in this matter have been established. Moreover, although having days to develop a confession issue, defense counsel used his time well. He effectively cross examined Edwards and brought Edwards' prior record to the jury's attention. His examination of the other inmates also cast doubt on Edwards' credibility and placed the question of whom to believe squarely before the jury. Bouie has shown no undue prejudice caused by the court's ruling. We hold, therefore, that the trial court did not err by failing to grant the continuance.

559 So.2d at 1114.

**Sub judice,** Robinson has failed to make a colorable showing that the trial court abused his discretion. Based on the foregoing authority, all relief should be denied.

## POINT V

WHETHER THE TRIAL COURT IMPROPERLY ALLOWED THE STATE TO PLACE BLOODY KNIVES ON THE JURY BOX THEREBY DENYING APPELLANT HIS RIGHT TO A FAIR TRIAL?

The record reflects that during a lengthy closing argument, the State placed several knives on the bar of the jury box within the jurors view. (TR 1855). Defense counsel objected on the basis that the jury's view of the knives was prejudicial and not proper rebuttal. (TR 1855-1856). The court overruled the objection but did ask the State to put the knives away following the State's brief reference during its closing arguments to the tools used to brutally torture and murder the victims. (TR 1856-1857).

Robinson has presented no authority that would support a conclusion that he was denied a fair trial by the display of the bloody knives. **See Spriggs v. State,** 392 So.2d 9 (Fla. 4th DCA 1981), cited by Robinson. The display of the knives did not become a feature of closing argument nor did the display of the knives interject facts and circumstances not divulged at trial. Unless Robinson can demonstrate the trial court abused its discretion in overruling the objection made, no relief can be forthcoming.

## POINT VI

WHETHER THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S MOTION TO SEVER HIS CASE FROM THAT OF THE CO-DEFENDANTS?

Robinson next argues that his motion for severance of offenses and for severance of defendants prior to trial should have been granted because he was not involved in drug trafficking in cocaine. Specifically, he asserts that he was denied a fair trial with regard to a determination of his guilt or innocence, **not based on a joint trial on the murder charges** but rather, **because** he and his other codefendants were charged with **one** count of conspiracy to traffic more than 400 grams of cocaine. In light of the fact that this was a seventeen count indictment, four of which charging first degree capital murder, it is difficult to ascertain how one count of trafficking in drugs impacted Robinson's ability to have a fair trial with regard to the murder charges. This is especially true where he was convicted on all counts. "De minimus at best" is the most accurate description of the State's case with regard to the drug trafficking charge, when compared to the State's capital murder case.

In fact, the only reference to drugs in the trial court's sentencing order was made not that this was one of the capital felonies for which the defendant was engaged when the murder occurred, but rather "the 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." 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, 365 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 defendant's with an absolute right, upon request, to seperate 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 of 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 a trial court, and 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, affects a codefendant for which the jury 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 (cite omitted)*.

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 defendant might have a better chance of acquittal or a strategic advantage if he tried separately does not establish the right to a severance. (cite omitted). Nor is hostility among defendants, or an attempt by one defendant to escape punishment by throwing the blame on a codefendant, a sufficient reason, by itself, to require severance. (cite omitted). If the defendants engage in a swearing match as to who did what, the jury should resolve the

> conflict and determine the truth of the matter.

416 So.2d at 806.

Indeed, no severance is required where evidence of other crimes make up a transaction and become a part of a crime in an episodic offense. **Fann v. State**, 453 So.2d 230 (Fla. 4th DCA 1984); **Parker v. State**, 421 So.2d 712 (Fla. 3rd DCA 1982).

**Sub judice**, testimony was presented that Robinson was part of and associated with a drug enterprise in Pensacola, Florida. Robinson and his codefendants entered the apartment that September 20, 1988, morning to retrieve their "stuff" (TR 1294-1295). In fact, the record reflects that Robinson went into the kitchen and retrieved a knife and started to stab at Derek Devon Hill to find out where the "stuff" was (TR 1297). At that point, Tina Crenshaw raised her hand and said she knew. She was taken by Robinson to another room and questioned. Robinson then told the Frazier brothers to take Tina Crenshaw to retrieve their stuff and while they were gone, Timothy Robinson and Michael Coleman sexually battered both Amanda Merrell and Mildred Baker. (TR 1298-1303). When the Frazier boys returned to the apartment, they informed the group that they got their "stuff, let's go." Robinson said, no, "he had to do this", at which point Amanda Merrell heard Robinson tell someone to "open up" and gun shots followed. (TR 1303-1304). Beyond per adventure, the trial court did not err in denying the motion to sever the trafficking count from the murder counts for trial. Robinson's reliance on **Kritzman v. State**, 520 So.2d 568 (Fla. 1988), is misplaced. A casual reading of **Kritzman**, 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 the 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.

The instant case is controlled by this Court's decision in **McCrae, supra**. Clearly, "the evidence presented was not so complex that the jury could 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 claim.

## POINT VII

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE?

Robinson argues the trial court erred in denying his motion for change of venue because pretrial publicity surrounding the case was overwhelming. The basis for this analysis arose when defense counsel moved to strike the entire jury panel because of the nature of publicity in the case. (TR 301). Specifically, defense counsel argued . . .

> . . . and while I submit to the court that everyone in this courtroom has some knowledge about this case, it's impossible for the defendants to get a fair trial. All of these jurors have some knowledge about the facts of this case that they are not going to obtain solely from evidence here, and it's very difficult in a case of this nature to put that aside no matter what the jurors say. On that ground, we move to strike the panel.

(TR 302).

In response to said motion, the court concluded:

> . . . In response the court will say that first it had been presented with no legal authority by counsel to support the argument and contentions that have been made. At this point the record is completely devoid of any showing of prejudice that will entitle you to the relief that you requested. Motions are denied. . . .

(TR 303-304).

Defense counsel was persistent and asserted:

> I haven't any case that would say general knowledge in and of itself would be enough to exclude them. The case I was looking for that I can't find, I thought I had with me, was the one that the court obviously has the discretion to grant an individual voir dire to question them about the details of what they know and what they have read. That's what I request.

(TR 306).

The court, following further argument, concluded:

> . . . There are sufficient safeguards, and again as discussed in *Provenzano v. State, 497 So.2d 1177,* its a 1986 Florida Supreme Court decision, is a factual situation and scenario as probably as egregious as you are going to get as far as the type of offense committed and the attendant pretrial publicity. Now, while it goes to the motion for change of venue issue, it contains a good discourse and a correct statement of the law here in this state, and within the United States concerning pretrial publicity.
>
> I think that the voir dire that you are entitled to conduct this point is certainly adequate to assure a resolution of the issues concerning pretrial publicity. . . .

(TR 309).

The court further observed:

> I am not going to foreclose you if something really turns up in a response where you think further voir dire is warranted because of an

> answer that's elicited. I'll let you explore it further if you think it needs to be done at side bar. But I'm just saying I'm not going to allow individual voir dire.

(TR 309).

As voir dire continued, defense counsel again moved to strike the jury (TR 507-508), premised on the fact that the expression "Miami Boys" was used during a conversation with the jury. The court denied the motion, observing that:

> You have all indicated that these defendants are from the Miami area and the reference to Miami Boys could just as easily have a connotation of being from the Miami area as opposed to any association with any gang. There has been no testimony entered, no evidence presented that the Miami Boys signify some gang association. So I'll note your objection and your motion, but that motion will be denied.

(TR 507-508).

Moreover, during this same colloquy, defense counsels moved for additional peremptory challenges. The court, in denying additional challenges, observed:

> The record will reflect at the time these motions were made, that defendant Coleman had used seven (peremptory challenges), the defendant Frazier six (peremptory challenges), and the defendant Robinson eight (peremptory challenges).

(TR 518).

Immediately thereafter, each defendant's counsel, including Mr. Robinson's, accepted the jury. An alternate juror was then selected and at no point thereafter was there any specific objection to the jury with regard to their ability to sit and fairly judge based on pretrial publicity. (TR 562).

In **Provenzano v. State**, 497 So.2d 1177, 1182-1183 (Fla. 1986), this Court discussed the issue of pretrial publicity and the need for a change of venue. Citing to **Copeland v. State**, 457 So.2d 1012 (Fla. 1984), the court observed that the critical factor is the extent of prejudice or lack of impartiality among potential jurors that may accompany the knowledge of the incident. The court further noted that pretrial publicity is expected in capital murder cases and standing alone, does not "necessarily" require a change of venue. **Straight v. State**, 397 So.2d 903 (Fla. 1981). The court opined that the test found in **McCaskill v. State**, 344 So.2d 1276, 1278 (Fla. 1978), is:

> Whether the general state of mind of the inhabitants of the community is so infected by knowledge of the incident and accompanying prejudice, bias and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence in the courtroom.

The court held that the burden was on a defendant to raise a presumption of partiality. The court observed:

> An atmosphere of deep hostility raises a presumption, which can be demonstrated by either inflammatory publicity or a great difficulty in selecting a jury. *Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975).* Provenzano has failed to meet this burden. An evaluation of pretrial publicity and voir dire reveals that a fair and impartial jury was ultimately empaneled.

497 So.2d at 1182. **See also Holsworth v. State**, 522 So.2d 348 (Fla. 1988).

Terminally, Robinson's reliance on **Woods v. State**, 497 So.2d 24 (Fla. 1986), is misplaced. The jury issue involved in **Woods** dealt with a **Neil** issue and the State's exercise of its

peremptory challenges solely on the basis of race. No such contention has been made **sub judice**. The instant case is controlled by **Provenzano, supra**.

## POINT VIII

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE CONSPIRACY COUNT AS THERE WAS INSUFFICIENT EVIDENCE OF THAT CONSPIRACY?

Lastly, Robinson argues that he was wrongly convicted on Count XIV of the amended indictment, to-wit: conspiracy to traffic in more than 400 grams of cocaine. He asserts that the evidence was insufficient to prove beyond and to the exclusion of every reasonable doubt that he conspired with other persons to traffic in cocaine. He further argues:

> The crux of the State's evidence is circumstantial evidence surrounding the murders, and the fact that the murders were apparently motivated by Ronald Williams and Bruce Frazier's desire to retrieve their cocaine. Circumstances presented do not exclude the possibility that Appellant was at most an aider and abetter in the drug trafficking. Simply because Appellant may have aided or abetted in the trafficking or in some other manner assisted is not tandamount to conspiring to traffic. (cite omitted). Likewise, mere presence is insufficient to establish conspiracy absent evidence connecting Appellant to the planned agreement.

(Brief of Appellant, page 49).

In **Voto v. State**, 509 So.2d 1291 (Fla. App. 4th DCA 1987), the court held that a conspiracy may not be inferred from aiding and abeting. Conspiracy requires evidence of both intent and and agreement. In **Voto**, Voto never was seen in possession of any cocaine and he denied any knowlege of what had taken place. Yet,

the court found that there was sufficient evidence to prove that he intentionally participated as an aider and abetter. In the instant case, however, Robinson was more than an aider and abetter. He, in fact, agreed and conspired with Darrell Frazier and Michael Coleman to retrieve their "stuff" from Derek and Bo who had "wrongfully " procured the "stuff" and hidden it in Tina Crenshaw's car and home. In furtherance of retrieving the "stuff", they tortured, sexually battered and ultimately killed four people. The murders occurred after they had retrieved and secured their "stuff". In **Ellis v. State**, 528 So.2d 1327 (Fla. App. 5th DCA 1988), the court therein found the evidence sufficient to convict for conspiracy to traffic in drugs where evidence was adduced at trial that:

> . . . Ellis had agreed with one John Ventura in advance to store an 'item' in Ellis' home for one week for $2,000. The item, of course, was marijuana. This was sufficient to sustain the conspiracy count. *See Bragg v. State, 487 So.2d 424, 426 (Fla. 5th DCA 1986).*

528 So.2d at 1328.

Timothy Robinson, Darrell Frazier and Michael Coleman, and others, were involved in a major cocaine trafficking scheme. The murders **sub judice** were only the tip of the iceberg, however, facts and circumstances surrounding the murders provided evidence beyond a reasonable doubt of the conspiracy. Timothy Robinson had accompanied Michael Coleman, Ronald Willliams and Darrell Frazier in mid-August when drugs were being secured. Indeed, Gwen Cochran testified she was with Timothy Robinson, Darrell Frazier and Ronald Williams in a motel room in Pensacola, using drugs; to-wit: cocaine, she had been brought from Miami. (TR 719-720, 735; Charlene Grandison's testimony TR 740-741).

Based on the foregoing, the trial court did not err in denying a judgment of acquittal as to the conspiracy count to traffic in cocaine.

## CONCLUSION

Appellant's conviction and sentence should be affirmed in all respects.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Laura E. Keene, Esq., BEROSET & KEENE, 417 East Zaragoza Street, Pensacola, Florida 32501, this 6th day of March, 1991.

CAROLYN M. SNURKOWSKI
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