IN THE SUPREME COURT OF FLORIDA

MIGUEL HERNANDEZ,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 75,127

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, MIGUEL HERNANDEZ, was the defendant in the trial court and will be referred to herein as "Appellant." Appellee, the State of Florida, was the prosecution in the trial court and will be referred to herein as "the State." References to the pleadings will be by the symbol "R," references to the transcripts will be by the symbol "T" and references to the supplemental transcripts will be by the symbol "ST" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State is in substantial agreement with Appellant's statement of the case and facts, but would add the following:

1) On January 28, 1989, before Escalera's trial, the State took Escalera's sworn statement as part of a potential plea bargain agreement. The State indicated to Escalera that, if the State was satisfied that he was testifying truthfully, then the State would offer a plea to the lesser-included offense of second-degree murder with a recommended sentence of forty years in the Department of Corrections with no mandatory minimum for the firearm. The State emphasized that its plea offer did not require Escalera's testimony at Appellant's trial. However, the State indicated that it would call Escalera as a witness at Appellant's trial and would expect him to testify truthfully. (ST 8-10).

After being duly sworn, Escalera testified that he was seventeen years old at the time of the statement and that he had a juvenile record. (ST 12). With respect to the burglary of the Farmer's Market and the murder of John Giblan, Escalera indicated that he went to the Farmer's Market between 11:30 p.m. and 12:00 a.m. with Appellant; Appellant's brother, Radimus; Cindy Mitchell; and Michael LaPierre, also known as "Italian Mike." They all drove to the Farmer's Market in Cindy Mitchell's blue Camaro with the intent to "break in." (ST 13). Escalera stated that it was Appellant's idea to break into the Farmer's Market, and that Appellant and LaPierre had been planning to do it for a long time. (ST 13).

On the day of the burglary and murder, Escalera, Appellant, Radimus Hernandez, LaPierre, and Cindy Mitchell were hanging out in an abandoned crack house, where Escalera and Appellant were smoking crack cocaine. While there, Appellant and LaPierre began discussing a burglary at the Farmer's Market. During the discussion, Appellant began playing with a silver .357 handgun. (ST 13-19).

Radimus Hernandez asked Escalera if he wanted to go, and Escalera indicated that he did. His understanding, however, was that he would wait in the car while Appellant and LaPierre went inside the Farmer's Market. According to Escalera, Appellant and LaPierre had been to the Farmer's Market that day and believed that there were two security guards. They went to the Farmer's Market and parked in the parking lot behind the Plush Pony around 11:15 p.m. Appellant and LaPierre went over to the Farmer's Market, but La Pierre changed his mind and returned to the car. Appellant became upset and asked Escalera if he wanted to do it. Because he needed money for crack cocaine, Escalera agreed to go inside with Appellant. (ST 19-26).

About 12:30 or 1:00 a.m., Escalera and Appellant crawled up on a dumpster and then onto the roof of the Farmer's Market. Appellant broke out a window, and they entered the building. Escalera indicated that he did not have a gun and that he did not know Appellant had a gun until they were inside the Farmer's Market. At some point, Appellant told Escalera that, "'if the security guard came, to let him handle it.'" Appellant said, "'I'm going to kick his ass.'" Once inside, however, Appellant pulled out the silver .357 and said, "'In case the security guard comes, we might have to do something.'" (ST 26-36).

They went to the Gold Junction, where Appellant pulled up the orange curtain used to secure the store, and Escalera crawled under. Once inside the store, Escalera held the curtain up, and Appellant crawled under. While Escalera crouched down on the floor acting as a lookout, Appellant raided the jewelry cabinets, putting the jewelry into a pillowcase. After about ten or fifteen minutes, Escalera saw the security guard approach and told Appellant to "watch out." According to Escalera, the security guard fired the first shot through the south curtain of the Gold Junction, hitting Escalera in the left leg. Appellant then fired two shots at the security guard, the security guard returned a shot, and Appellant shot again. At that point, Escalera pulled up the curtain and crawled out, running for the front door of the Farmer's Market. (ST 36-52).

While running, Escalera heard someone say, "'Let me go; let me go.'" Appellant caught up to him, and they both ran for the front door. Appellant picked up something, which was later identified as a Coke canister, and threw it at the front door, breaking the glass. They ran across the street through an alleyway between a store and the Plush Pony. Appellant was carrying the pistol and the pillow case. As they ran by several people, Escalera said to Appellant in Spanish that Radimus was not there, and Appellant responded in Spanish that he was somewhere around there. They crossed the street and got into Cindy Mitchell's car, at which point Appellant said, "'I killed him, I killed him. Let's go.'" (ST 52-60).

They went to Appellant's sister's house, where they talked about buying some crack cocaine. Escalera and Appellant left in

Cindy Mitchell's car and drove to a woman's house to trade the jewelry for crack. However, the woman refused to trade, because she said the jewelry was fake. Then they drove to the abandoned house and picked up Cindy Mitchell and Radimus Hernandez. At some point, Appellant asked Escalera if he should kill Mike LaPierre. Escalera told him not to. Eventually, Escalera left for Puerto Rico. He did not know where Appellant went. (ST 61-102).

On February 1, 1989, Escalera entered a plea of guilty to second-degree murder and was sentenced to forty years in the Department of Corrections, with no mandatory minimum for the firearm. The State nol prossed all other charges against Escalera. (ST 106-25).

2) During the penalty phase, Appellant called Dr. John Perry, a Ph.D. in clinical psychology, as a witness. After extensive questioning regarding his qualifications, Dr. Perry was declared an expert witness in neuropsychology. (T 748-56). The witness testified that he met with Appellant on three separate occasions for a total of five and one-half hours. Based on the results of a battery of tests, Dr. Perry believed that Appellant showed "contingency evidence of brain damage." (T 757-59). On cross-examination, Dr. Perry admitted that he was not licensed in Florida in psychology, but rather was licensed in marriage and family therapy. (T 1791). In fact, Dr. Perry was ineligible for licensing in Florida, because Florida does not accept his educational background from Union Graduate School in Cincinnati, Ohio. Although Dr. Perry denied that Union Graduate School was a correspondence-type college, he admitted that he had never lived

in Cincinnati. Moreover, although the witness was not a licensed psychologist, he admitted that he was interpreting a psychological test. (T 1792-97).

Dr. Perry further admitted that a subject's motivation in taking the tests was a very significant factor in the reliability of the test results. In fact, if motivated, some people can fake brain damage. Although there are tests to rule out malingering, the witness did not perform any of those tests on Appellant. Moreover, although the Luria Nebraska test, which was performed on Appellant, has a Spanish version, Dr. Perry did not use it. Rather, Dr. Perry performed a version of the test, based on English-speaking, American, Anglo-Saxon ethnic groups. (T 1797-1809). In interpreting the test results, Dr. Perry also agreed that a person's IQ is a function of actual intelligence plus environment plus motivation. In addition, he agreed that emotions can effect test results, as well as examiner bias. (T 1809-11).

Dr. Perry admitted that he would be paid about $1,700 for his services as an expert witness, and that he knows Susan LaFehr-Hession from an internship at the Palm Beach Sheriff's Office jail where she was working. (T 1831-32). Finally, Dr. Perry admitted that he had ordered an MRI and a CAT scan, but had not bothered to get the test results. (T 1832-33). Over Appellant's objection, Dr. Perry admitted that Appellant's MRI test result was "normal" and did not support his findings. (T 1845-55).

3) Appellant also called Susan LaFehr-Hession as a witness during the penalty phase. On cross-examination, Ms.

LaFehr-Hession admitted that she was not an M.D. or Ph.D. and was not licensed in psychology in Florida. Moreover, the witness admitted that she had been appointed to help the defense. Prior to his conviction, Appellant would not cooperate with the witness. However, after the conviction, his attitude changed. (T 1938-49).

As with Dr. Perry, Ms. LaFehr-Hession admitted that she gave Appellant an IQ test based on English-speaking Americans, rather than a Spanish version, and that motivation to falsify and cultural biases affect the test, Ms. LaFehr-Hession admitted giving an MMPI, but claimed that the results were invalid. This happened to be the only test that incorporated a scale to determine malingering. (T 1970-81).

SUMMARY OF ARGUMENT

Issue I - The trial court did not abuse its discretion in excusing Mr. Kutlik for cause without providing defense counsel an opportunity to question him further.

Issue 2 - Only one of Appellant's arguments on appeal was made below. This argument--that no gun was proved to be in his possession for purposes of the burglary while armed charges--is without merit. Vicarious possession of a firearm is sufficient to sustain the convictions.

Issue 3 - Contrary to Appellant's assertion, he did not object to the flight instruction given below. Regardless, instructing the jury on flight was harmless error.

Issue 4 - An unnamed juror's alleged sight of Appellant being led into the holding cell was not so prejudicial that it required the juror to be stricken or a mistrial to be granted.

Issue 5 - The trial court did not abuse its discretion in leaving juror Mannos on the jury.

Issue 6 - Since Appellant's admitted purpose in having his co-defendant declared an adverse witness was solely to impeach that witness with otherwise inadmissible evidence, the trial court did not abuse its discretion in refusing to do so. Appellant made a tactical decision not to introduce Lisa Stubbs' testimony. This decision cannot be imputed to the trial court as error.

Issue 7 - The evidence did not support an instruction on third-degree murder. Regardless, any error was harmless. The aggravation instruction for the firearm was superfluous in light of the fact that the first-degree murder charge could not have

been enhanced, and the verdict form should not have reflected a choice for first-degree murder without a firearm, since there was no question that one of the two perpetrators had the firearm used to kill the victim. Appellant's other requested special instructions were embraced within the standard instructions. Case law has long established that the verdict form need not include separate choices for premeditated and felony murder. Appellant's requested special instruction on independent act was not supported by the evidence. And the withdrawal instruction proposed by the State was a correct statement of the law.

Issue 8 - Carawan does not apply because the burglary of the Farmer's Market and the burglary of the Gold Junction were separate acts which constituted a single transaction.

Issue 9 - The three-year mandatory minimum terms of imprisonment imposed for the noncapital offenses must be stricken because there was no evidence to establish that Appellant had actual physical possession of the firearm.

Issue 10 - The trial court made the requisite findings of fact for sentencing Appellant as a habitual felony offender on the noncapital offenses.

Issue 11 - The State maintains its position that the capital sentencing statute does not require contemporaneous written findings and respectfully requests that this Court reconsider its decisions to the contrary. Such a purely technical violation exalts form over substance and gives Appellant a disproportionate sentence. At the very least, Appellant's case should be remanded for resentencing.

Issue 12 - When there are one or more aggravating circumstances and none in mitigation, as in this case, death is presumed to be the appropriate penalty. Escalera's lesser sentence, which resulted from a plea bargain, does not render Appellant's sentence disproportionate.

Issue 13 - In one way or another, all of Appellant's evidence in mitigation was controverted by other evidence. This Court should affirm the trial court's rejection of this evidence where such rejection is supported by the record.

Issue 14 - The fact that Appellant could have received consecutive life sentences for the noncapital offenses was not proper argument in mitigation.

Issue 15 - The jury was fully instructed as to Tony Escalera's plea agreement.

Issue 16 - Appellant had already presented testimony that he was "well-behaved" while awaiting trial, and that he would do well in a structured environment like prison. Thus, the testimony of the two deputies was unnecessary and properly excluded.

Issue 17 - Because there was no evidence to relate Appellant's age at the time of the offense to some characteristic of Appellant or the crime, the trial court properly refused to instruct the jury on this statutory mitigating factor.

Issue 18 - The trial court specifically stated that it was combining the felony murder and pecuniary gain aggravating factors.

Issue 19 - The evidence clearly supported the "pecuniary gain" aggravating factor.

Issue 20 - The evidence clearly established that Appellant and Escalera killed the victim solely to eliminate him as a witness and to prevent their detection and lawful arrest.

Issue 21 - During Appellant's penalty phase case, Appellant presented a taped interview of his To rebut this testimony, The State properly presented the testimony of Appellant's former probation officer to rebut the testimony of Appellant's common-law father-in-law, who described Appellant as "a good boy." Moreover, since it did not constitute a discovery violation, no Richardson hearing was required.

Issue 22 - Appellant did not object when the State called a correctional officer to give testimony at Appellant's final sentencing hearing. In fact, Appellant stipulated that marijuana was brought in by a member of the defense team and given to Appellant. Thus, Appellant cannot now be heard to complain that the State elicited the details of that transaction. Even if it were error, it was harmless beyond a reasonable doubt. Likewise, even though the PSI contained a victim-impact statement, to which Appellant did not object below, there is no evidence that the trial court considered it. Thus, error, if any, was harmless.

Issue 23 - Only the prosecutor who negotiated the plea agreement with Escalera could have testified to the basis for the plea. Thus, if preserved for review, it was not improper law witness opinion testimony.

Issue 24 - This Court has repeatedly rejected the constitutional claims raised by Appellant. It should do so once again.

Issue 25 - At the time of the trial, case law did not require a limiting instruction on the doubling of aggravating factors. Since new law to the contrary merely clarified existing law, it should not be applied retroactively to this case. Appellant's other requested special instructions relating to the weighing of aggravating and mitigating factors and the burden of proof for each were adequately addressed by the standard instructions. The alleged disparate treatment of a codefendant is a nonstatutory mitigating factor; thus, a separate, specific instruction is not warranted. The advisory nature of the jury's recommendation is adequately covered by the standard instructions. The "avoid arrest" instruction is adequate even though it does not necessarily incorporate judicial refinements in the law. Appellant's cautionary instruction on the use of his prior convictions was not necessary. And the jury had already determined Appellant's culpability for the murder; thus, a reinstruction on the felony murder standard was not warranted.

Issue 26 - It is well-established that testimony is admissible concerning the events underlying the prior violent felony convictions used as aggravation. They did not amount to overkill in this case.

Issue 27 - Appellant did not object below to the use of his prior conviction for attempted sexual battery with slight force. Thus, his argument on appeal has not been preserved. Even if it had been, it is wholly without merit.

Issue 28 - To rebut Appellant's contention that he had organic brain damage, the State showed his expert witness the results of an MRI which indicated no abnormalities. This was not

error. Neither Appellant nor the witness questioned the reliability of the results, they did not constitute privileged work product, and the State's decision not to enter them into evidence was not improper.

Issue 29 - The Florida Evidence Code expressly authorizes the use of deposition testimony when the witness is unavailable for trial. Where the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony by examination, as did Appellant, no confrontation violation occurs.

Issue 30 - All of the comments complained of by Appellant during the State's closing argument were correct statements of the law or fair comment on the evidence. Even if they did include improper argument, such error was cured by the trial court's instructions to the jury.

Issue 31 - Since the jury had already found Appellant guilty of burglary, the trial court was not required to reinstruct the jury during the penalty phase on the elements underlying the burglary offense.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN EXCUSING JUROR KUTLIK FOR CAUSE (Restated).

On May 8, 1989, jury selection in Appellant's trial began. Initially, the potential jury members were questioned individually concerning their knowledge of the case, any opinions they may have formed about the case, their opinion about the death penalty, and their ability to follow the law. During the individual voir dire, one juror, Henry Kutlik, indicated that he had heard about the case, but had formed no opinions about it. When asked how he felt about the death penalty, Mr. Kutlik responded, "I think if it's necessary, it is necessary." (T 389-90). The trial court asked whether he could recommend the death penalty if the facts were aggravated enough, or if he could recommend life imprisonment if they were not. Mr. Kutlik responded that he could. Thereafter, defense counsel questioned him only about his knowledge of the case. (T 390).

After the individual voir dire, the parties questioned the venire as a group. Initially, the state requested that each person stand and give information about himself or herself. When it got to Mr. Kutlik's turn, the following comments were made:

> MR. KUTLIK: I have lived [here] about twenty years. I have never been on a jury before.
>
> Now that I have thought about it, the question you asked me about believing in capital punishment, I don't.
>
> [THE STATE]: So you feel like if you had to make that decision, you couldn't do it?

MR. KUTLIK: I couldn't.

[THE STATE]: Thank you for being honest with me.

(T 457-58).

After all of the potential jurors had given a short life history, counsel approached the bench and discussed potential challenges for cause.[1] During this discussion, the court apparently made reference to Mr. Kutlik, though not by name. Thereafter, the following discussion was had:

THE COURT: What about this guy? He changed his mind. He said he couldn't do it.

[DEFENSE COUNSEL]: I would like the opportunity to question him. He is saying he couldn't do it, but people were asked earlier and they said they couldn't do it and when they were questioned further -- we have tons of people left.

[THE STATE]: He was pretty adamant about it.

THE COURT: He might have figured out the right answer to get excused. It seems to me like --

[DEFENSE COUNSEL]: I would like a shot at him.

THE COURT: Okay. I'm going to get rid of him.

(T 462-63). Thereafter, Mr. Kutlik and others were excused from the panel. (T 463-64).[2]

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[1] Prior to Mr. Kutlik, four venire members had been successfully challenged for cause by the State based on their opposition to the death penalty: Kathleen Kaye (T 284-86), Loretta O'Brien (T 363-66), Kenneth Russell (T 368-70), and Frances Williams (T 391-95).

[2] Susan Hutchinson was removed for cause because her husband had been killed by a drunk driver and she thought the death penalty should have been imposed upon the driver. (T 460-62). Jane Forrester was excused for cause because her husband's vacation

In this appeal, Appellant claims that the trial court impermissibly precluded him from questioning Mr. Kutlik after the State had an opportunity to do so; thus, reversal of his conviction is warranted. **Brief of Appellant** at 34-36. Initially, the State would note that, even were the trial court in error, reversal of the conviction would not be the appropriate remedy. Messer v. State, 439 So.2d 875, 878 (Fla. 1983). More fundamentally, however, the State submits that the trial court did not abuse its discretion in excusing Mr. Kutlik for cause without further questioning by defense counsel, because it is apparent from the record that the juror was resolute in his determination that he could not vote to impose the death penalty. On his own accord, Mr. Kutlik voluntarily confessed his opposition to the death penalty. Moreover, in response to the State's follow-up question, Mr. Kutlik did not equivocate; he adamantly stated that he could not make the decision to recommend death if required to do so. In the face of such adamancy, which was more readily ascertainable in the juror's presence than in these cold transcripts, the trial court obviously determined that the juror's views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). After all, "[u]nder this standard, it is clear from Witt and Adams, the progeny of Witherspoon, that a juror who in no case would vote for capital punishment, regardless of his or her

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started the following week and she did not believe she could concentrate on the case. (T 431-32, 460, 463-64).

instructions, is not an impartial juror and must be removed for cause." Morgan v. Illinois, 504 U.S. ___, 119 L.Ed.2d 492, 502 (1992) (emphasis added). See also Singer v. State, 109 So.2d 7, 23-24 (Fla. 1959) ("[I]f there is basis for any reasonable doubt as to any juror's possession that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its own motion.").

What the federal and state constitutions guarantee to every defendant is a trial by an impartial jury. Witt, 469 U.S. at 423; Ross v. Oklahoma, 487 U.S. 81, 85 (1988). See also Piccott v. State, 116 So.2d 626 (Fla. 1959) ("Seldom, if ever, will excusal of a juror constitute reversible error[,] for the parties are not entitled to have any particular jurors serve. They are entitled to have qualified jurors. No complaint is made here that the jurors who served were not qualified."), cert. denied, 364 U.S. 293 (1960). As in Piccott, Appellant has made no claim that the jury ultimately selected was not impartial.[3] Thus, there can be no legitimate claim that the excusal of a juror predisposed to recommending life, who surely would have ultimately been excused by the State peremptorily, had any effect on the partiality of the panel ultimately seated. See Ross v. Oklahoma, 487 U.S. 81 (1988) (where the trial court's refusal to excuse a juror seemingly predisposed to recommend death was cured by the defendant's subsequent excusal of that juror peremptorily

[3] The State would note that Appellant did not even use all of his allotted peremptory challenges in selecting the jury. (T 641-47).

and by the absence of a claim to the partiality of the selected jurors); Graham v. State, 470 So.2d 97, 98 (Fla. 1st DCA 1985) (finding that, even if the dismissal of the juror was error, it was harmless, because the juror was replaced with an alternate "and no prejudice was shown to have resulted from the substitution").

This case is not like that of O'Connell v. State, 480 So.2d 1284 (Fla. 1985), where the trial court excused two "death-scrupled" jurors for cause without providing defense counsel any opportunity to question them. Nor is it like Francis v. State, 579 So.2d 286 (Fla. 3d DCA 1991), the case cited to by Appellant, where defense counsel was totally precluded from questioning the prospective jurors individually. Here, Appellant had an opportunity to, and did in fact, question Mr. Kutlik during individual voir dire. He merely chose not to expand on the trial court's cursory examination as he had done with other venire members. Thus, Appellant's election not to question Mr. Kutlik more fully cannot be equated to O'Connell's or Francis' preclusion from questioning the venire members at all.

Nor is this case like that of Morgan v. Illinois, 504 U.S. ___, 119 L.Ed.2d 492 (1992), where the trial court refused to ask the jurors whether they would automatically impose the death penalty upon finding the defendant guilty. In that case, the defendant was potentially faced with jurors on the panel who would automatically vote for death. Here, conversely, Appellant was merely precluded from attempting to seat a juror predisposed to vote for life imprisonment, regardless of how the law applied.

The State has just as much right as Appellant, however, to seat an impartial jury that will follow the law. Thus, since Appellant has failed to establish any prejudice by the trial court's excusal of this juror, or any partiality in the jury ultimately selected, Appellant's convictions and sentences should be affirmed.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL (Restated).

After the State rested its case-in-chief, Appellant moved for judgment of acquittal. As to Count IV, Grand Theft, Appellant claimed that the state had presented improper proof of value because the owner of the Gold Junction relied on an inventory of an employee to estimate the loss, but the inventory was never admitted into evidence. Appellant's motion with respect to Count IV was denied. (T 1157-59). As to all other counts, Appellant claimed that the state had presented improper proof of venue. Although a witness had said Palm Beach County, the witness failed to say "Florida." The motion was denied, and the trial court took judicial notice that Palm Beach County is in Florida. (T 1159-60). With respect to Count I, which charged first-degree premeditated murder, Appellant claimed that there was no evidence of premeditation and that there was insufficient proof of the identification of the victim. The trial court denied the motion as to both grounds. (T 1160-62). Regarding Counts II and III, charging burglary of the Farmer's Market and the Gold Junction, respectively, Appellant alleged that no gun

was proved to be in Appellant's possession. The trial court denied the motion on this ground as well. (T 1162). At the close of all the evidence, Appellant renewed his motion for judgment of acquittal "on the same grounds . . . previously stated." Again, the motion was denied. (T 1342).

In this appeal, Appellant presents one paragraph of argument that the trial court erred in denying his motion for judgment of acquittal. Initially, Appellant claims that the State's circumstantial evidence "linking [him] to the crimes" was not sufficient to "exclude all reasonable hypotheses of innocence," one of which "would be that Appellant's fingerprints were placed at the two locations in question at a time other than the time of the crimes." **Brief of Appellant** at 36. Appellant also claims that "[n]o evidence was presented by the state linking Appellant to jewelry taken from the Gold Junction store[,]" and "[n]o evidence was presented that Appellant was armed with a firearm." Id. at 37. As is evident from the record, however, only the latter of these arguments was presented to the trial court below. Thus, the first two are not cognizable in this appeal. See Tillman v. State, 471 So.2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

With respect to the argument that was preserved below as to Counts II and III only--that no gun was proved to be in Appellant's possession--the State submits that actual physical possession of the firearm was not required for conviction of armed burglary. Under the principal theory, relied upon by the State, Appellant and Escalera were equally culpable of committing the charged offenses with a firearm, regardless of who actually possessed the weapon. See Dixon v. State, 432 So.2d 779 (Fla. 1st DCA 1983) ("Vicarious possession is sufficient to sustain the conviction [for armed robbery]."); Hough v. State, 448 So.2d 628 (Fla. 5th DCA 1984) ("There was sufficient evidence presented at trial to find appellant guilty of the crime charged because, despite a dispute in the evidence is to which of three participants actually had possession of the single gun employed in the robbery, if any one of them carried the firearm during the commission of the crime, all of them are guilty as principals under section 777.011, Florida Statutes (1981)."). Therefore, Appellant's convictions for burglary with a firearm should be affirmed.

ISSUE III

WHETHER APPELLANT OBJECTED TO THE JURY INSTRUCTION ON FLIGHT, AND, IF SO, WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GIVING THE INSTRUCTION OVER APPELLANT'S OBJECTION (Restated).

During the initial charge conference, the State asked whether an instruction on flight would be given. The trial court responded affirmatively, and Appellant made no objection. (T 1319). Shortly thereafter, the trial court commented, apparently

to defense counsel, "While you were out, they have a flight instruction that sounds good to me." (T 1321). Again, however, Appellant made no objection. A third reference was later made to the flight instruction, but no objection was registered by defense counsel. (T 1323).

Appellant did object, on the other hand, to the State's proposed instruction in withdrawal, which included a reference to Appellant's flight from the scene of the crime. (T 1323). Appellant claimed that the defense of withdrawal would be foreclosed if the defendant was unable to communicate to his co-perpetrator his intent to withdraw. (T 1325-30). When the charge conference was resumed the following day, Appellant was discussing the verdict forms when the following comments were made:

> THE COURT: That's right. The one we changed, I got lesser included crimes [of] attempted murder, second degree; manslaughter, flight, burglary.
>
> [DEFENSE COUNSEL]: Judge, something on flight. If you are going to give the instruction to the jury over our objection, I would ask you to white out the flight. I would ask you to white out the flight.

(T 1431-32).

When read in context of the entire charge conference, it is apparent that Appellant's reference to flight relates to the withdrawal instruction, and not to the separate flight instruction. Other than this single ambiguous reference to flight, the State could find no other comments which suggest that

Appellant objected to the "standard" flight instruction. Although Appellant claims that it was given over his objection, **Brief of Appellant** at 37, he provides no record citation to his alleged objection. Thus, the State submits that Appellant has failed to preserve this issue for review, since he failed to pose a contemporaneous objection to the flight instruction given in this case. See Castor v. State, 365 So.2d 701, 703 (Fla. 1978).

Moreover, the State submits that this is not one of those "rare cases" in which the invocation of the fundamental error doctrine is warranted. Not only was there sufficient evidence to support the flight instruction, but there was sufficient evidence independent of his flight to support the convictions. Thus, even if the trial court erred in giving an instruction on flight, it did not "amount to a denial of due process," i.e., it was harmless beyond a reasonable doubt. Id. at 704 n.7. See also Chapman v. California, 386 U.S. 18 (1967).

Appellant takes great comfort in the fact that this Court recently condemned the use of flight instructions in Fenelon v. State, 594 So.2d 292 (Fla. 1992). However, this Court specifically directed that a flight instruction not be given in future cases. The present case was tried in 1989. Thus, Fenelon should not be used to invalidate convictions long since obtained where no objection was made and the evidence supports the instruction. See Power v. State, 17 F.L.W. S572 (Fla. Aug. 27, 1992). Rather, this Court should affirm Appellant's convictions.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO EXCUSE AN UNNAMED JUROR WHO ALLEGEDLY SAW APPELLANT BEING LED TO THE LOCKUP BY SHERIFF'S DEPUTIES (Restated).

During a short recess in the testimony of the State's third witness, defense counsel moved that an unnamed juror be stricken from the panel because he or she saw Appellant going into the holding cell. The trial court denied the motion. Thereafter, defense counsel moved for a mistrial, which was also denied. In denying the motion, the trial court made the following comments:

> I will say for the record, that what I say every time this happens is that there used to be a body of law that says if a juror saw a defendant in shackles and in prison garb, that was grounds for a mistrial. That was because back in the day that we did one trial a year in a courthouse and the theory was the jury would believe that he was a mad dog and had to be confined and so forth. Today juries watch television and see people being escorted down hallways. In any case we have never been without fewer than two deputies armed to the teeth in here. I think juries are sophisticated enough that they know that people waiting for trial are presumed innocent, but many are in jail.

(T 924-25).

Appellant claims that the trial court's ruling denied him his right to a fair trial. **Brief of Appellant** at 39-40. The State disagrees. In a case similar to this one, where members of the jury saw the codefendants handcuffed together while being escorted to the courtroom, the Second District mirrored the trial court's comments in this case:

> The incident was momentary and inadvertent. Furthermore, members of a jury know that bail is not obtainable as a matter of right in all capital cases and that a sheriff has the right to handcuff persons in custody for murder while bringing them to and from a courtroom. Under the circumstances the trial judge did not abuse his discretion in refusing to declare a mistrial.

McCoy v. State, 175 So.2d 588, 591 (Fla. 2d DCA 1965) (footnote omitted), cert. denied, 384 U.S. 1020 (1966). As in McCoy, the inadvertent sight of Appellant being taken to the holding cell "was not so prejudicial that it required a mistrial." Neary v. State, 384 So.2d 881, 885 (Fla. 1980). Thus, this Court should affirm the trial court's ruling and Appellant's convictions.

ISSUE V

> WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO EXCUSE JUROR MANNOS WHO HAD BRIEF CONTACT WITH A SPECTATOR LATER IDENTIFIED AS A FRIEND OF THE VICTIM'S WIFE (Restated).

After the jury had been selected and the parties had presented opening statements, the trial court excused the jury for the evening. At that point, one of the jurors, Frances Mannos, asked to speak to the trial judge. Apparently, one of the parties had approached the juror about an alleged conversation between the juror and one of the spectators. Ms. Mannos indicated that she approached the spectator and said, "I remember you from somewhere. Do you work in a restaurant out on Lakeworth Road?" The spectator indicated that she did, and named the restaurant. The juror said to her, "Your name is Kitty." That was the extent of their conversation. Ms. Mannos thought

she was another juror, and told the trial judge, "I wanted you to know what I know so that it wouldn't effect anything." (T 672).

The State thereafter informed the trial court that the spectator was a friend of the victim's wife and that she had corroborated the juror's version of events. Realizing that the spectator was a friend of the victim's wife, defense counsel had a "problem" with it, but raised no objection. Both defense counsel and the State agreed that the trial judge should question the juror further about whether the spectator's presence in the courtroom would influence her decision. When asked whether it would influence her verdict, the juror responded that it would not. (T 672-76). Defense counsel made no other comments.

The following day, defense counsel revisited the issue and asked the court to "reconsider [its] ruling." (T 681). Defense counsel expressed some reservation about the nature of the encounter between the juror and the spectator because his investigator indicated that the juror and the spectator had embraced each other. The trial court discounted the investigator's characterization of the encounter and noted that the juror did not believe it would in any way affect her decision in this case. No motion was ever presented to the trial court by defense counsel, and the matter was discussed no further. (T 681-84).

Appellant frames this issue as whether "the trial court erred in denying Appellant's request to excuse a juror who was seen socializing with a friend of the wife of the deceased." **Brief of Appellant** at 40. Nowhere in the record, however, does

Appellant make any motion or ask for any relief, other than for the trial court to question the juror about any effect her relationship with the spectator might have on her ability to render a fair and impartial verdict. Perhaps Appellant requested off the record that she be excused, but such cannot be the basis for appeal, for there is no "ruling" to review. Snead v. State, 415 So.2d 887, 890 (Fla. 5th DCA 1982) ("Snead is required to obtain a trial court's adverse ruling and present this Court with a record necessary to determine the error raised by him. He did not do this." (citation omitted)); McPhee v. State, 254 So.2d 406, 410 (Fla. 1st DCA 1971) ("It has long since been the law of this state that a trial court will not be held in error because of anything occurring during the course of a criminal proceeding unless timely objection to the matter is made by the complaining party and an adverse ruling on the objection [is] rendered by the court.").

Nor does the juror's contact with a friend of the victim's wife constitute fundamental error. Juror Mannos indicated that the spectator was at best an acquaintance. The spectator told the prosecutor that she did not recognize the juror at all. Both of them recounted having a very superficial conversation which had nothing to do with the trial. Most importantly, the juror assured the trial court that neither her contact with the woman nor the woman's continued presence in the courtroom throughout the trial would have an impact on her ability to fairly try the case. Thus, excusal of the juror was not warranted, and the trial court did not abuse its discretion in concluding no error occurred.

ISSUE VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PRECLUDING APPELLANT FROM CALLING TONY ESCALERA AS A HOSTILE WITNESS IN ORDER TO IMPEACH HIM WITH AN INCONSISTENT STATEMENT (Restated).

During Appellant's case-in-chief, defense counsel moved the trial court to declare Tony Escalera an adverse witness, based on Escalera's deposition testimony that Appellant fired the shots that killed the victim. During an extensive discussion, the trial court insisted that Appellant could not call Escalera as an adverse witness solely to impeach him with his plea agreement and with a prior inconsistent statement made to Lisa Stubbs that he shot the victim. (T 1198-1207). However, at one point during the discussion, the trial court relented and agreed to call Escalera as a court witness. (T 1207). For some reason, Appellant did not accept the trial court's offer and asked for time during the evening recess to research the issues. (T 1207-19). Before the recess, however, the trial court insisted that defense counsel proffer Escalera's testimony since he had already been brought to court and his counsel was present. (T 1220).

On proffer, Escalera admitted being at the Farmer's Market on the night in question, but refused to answer any questions about the murder for fear of retribution in prison. (T 1221-35). After persistent questioning and a contempt citation, however, Escalera stated, "And if you are asking or not did I kill him, no." (T 1233). Escalera also admitted knowing Lisa Stubbs, but denied telling her that he shot the victim. (T 1236).

The following day, the trial court renewed discussions about declaring Escalera an adverse witness, and decided to postpone its ruling until the next break in the trial. (T 1244-46). After Appellant's testimony, the issue was revisited. Defense counsel indicated that he wanted to call Lisa Stubbs as a witness to say that Escalera told her he shot the victim. Since Escalera was "unavailable," because he refused to testify, Appellant believed he could introduce her testimony as a statement against penal interest. The State objected, however, because Escalera was not totally "unavailable," i.e., he would testify that he did not shoot the victim and that he did not tell Lisa Stubbs that he did shoot him. After another lengthy discussion, the trial court finally agreed to let Appellant call Lisa Stubbs to testify that Escalera told her he shot the victim. (T 1282-99).

After the lunch recess, defense counsel requested guidance from the court regarding the foundation that needed to be laid with Escalera in order to present the testimony of Lisa Stubbs. During this discussion, Escalera's attorney indicated that Escalera would testify after all, and that he would testify to the same information that he gave in his pretrial statement. Based on this representation, Appellant took a short recess, then rested his case without calling either Escalera or Lisa Stubbs. The State rested its case as well. (T 1335-41).

Appellant now claims in this appeal that he was "placed in a predicament by the trial court's erroneous rulings wherein he determined not to call the co-defendant to testify. Therefore, he was prohibited from calling Lisa Stubbs Timmerman to testify."

As a result, his constitutional rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments were violated. **Brief of Appellant** at 41-42. For the following reasons, the State disagrees and urges affirmance of the trial court's rulings.

With respect to the trial court's refusal to declare Escalera an adverse witness, the State submits that the trial court was eminently correct. In Erp v. Carroll, 438 So.2d 31 (Fla. 5th DCA 1983), the Fifth District analyzed the rule of evidence which governs the impeachment of one's own witness. During its analysis, the district court stated:

> If a party believes a potential witness, whether a party or not, will not give testimony beneficial to that party or that the potential witness is not credible, the party should not call that witness. . . .
>
> * * * *
>
> 'A party will not be permitted to put a witness on the stand knowing that his testimony will be adverse and then claim surprise in order to impeach such witness. This is particularly true when the procedure is nothing more than a device or artifice to get into evidence before the jury that which would otherwise be inadmissible.'

Id. at 37-39 (quoting Foremost Dairies, Inc., of the South v. Cutler, 212 So.2d 37, 40 (Fla. 4th DCA 1968)). See also Watson v. Builders Square, Inc., 563 So.2d 721, 723 (Fla. 4th DCA 1990) (on motion for clarification) (adopting the Fifth District's analysis in Erp); **Ehrhardt, Florida Evidence** § 608.2, at 354-56 (1992 ed.). As Ehrhardt notes in his treatise, this has long been the rule in federal courts and should be firmly adopted in Florida courts, even under the new rule which allows any party to

impeach its own witness without a showing of adversity. Id. at 355-56 & n.2.

Here, there is no question that Appellant knew that Escalera would implicate him in the actual shooting. Appellant merely needed a vehicle for admitting Escalera's plea agreement and sentence, and his alleged statement to Lisa Stubbs that he (Escalera) shot the victim. As the trial court ruled, calling Escalera solely to impeach him was impermissible.[4] Thus, the trial court did not abuse its discretion in refusing to declare Escalera an adverse witness.

As for Appellant's allegation that the trial court refused to call Escalera as a court witness, the record firmly establishes that the trial court did agree to call Escalera as a court witness. (T 1207). Appellant simply decided, for whatever reason, not to accept the trial court's offer. Consequently, Appellant cannot claim trial court error.

Having proffered Escalera's testimony and having found him uncooperative at best, Appellant next sought to introduce Escalera's statement to Lisa Stubbs as a statement against interest, an exception to the hearsay rule. For this exception to be applicable, however, the declarant must be "unavailable" within the meaning of 90.804(1). One of the definitions includes

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[4] Even if Escalera had met the requisites as an adverse witness, the rule in effect at the time of trial specifically prohibited impeachment by prior convictions. **Fla. Stat. §** 90.608(2) (1987). Thus, in order to question Escalera about his plea bargain and sentence in this case, Appellant would have had to show that such evidence was relevant to contradict his prejudicial testimony.

the persistence of the declarant in refusing to testify even though ordered to do so by the court. Id. § 90.804(1)(b). Here, however, as the State noted below, Escalera testified to the two matters of relevance--he denied shooting the victim and he denied telling Lisa Stubbs that he did shoot the victim. Thus, he was not "unavailable" within the meaning of the rule.

Although the trial court did not specifically rule that Escalera was "unavailable," it nevertheless agreed to allow Appellant to call Lisa Stubbs as a witness. For some reason, however, presumably because Appellant did not believe that Escalera was "unavailable," Appellant thought that he had to call Escalera to lay a foundation. At that point, Escalera's attorney indicated that Escalera would testify after all, but that his testimony would be the same as his previous deposition testimony in which he implicated Appellant as the shooter. With that representation, Escalera was no longer "unavailable." Thus, his statement against interest was no longer admissible under that hearsay exception. As a result, Appellant made a tactical decision not to call either Escalera or Lisa Stubbs. Again, however, this decision cannot be imputed to the trial court as an erroneous ruling. Appellant made the decision. Since the trial court's adverse rulings were correct, this Court should affirm them and Appellant's convictions.[5]

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[5] As an aside, the State would note that the trial court's adverse rulings do not violate the dictates of Chambers v. Mississippi, 410 U.S. 284 (1973). In the guilt phase of this trial, wherein this issue arose, evidence regarding who actually shot the victim was not material, since the State was proceeding under the principal theory. Thus, any error resulting from Appellant's preclusion from eliciting Escalera's statement to

ISSUE VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTIONS DURING THE GUILT PHASE (Restated).

During the initial charge conference, Appellant withdrew his request for third-degree murder, but renewed it at a later charge conference, citing the jury's pardon power as the basis for his request. (T 1305, 1416-22). After a lengthy discussion, the trial court denied his request, finding that the facts did not support the instruction. (T 1416-22). Appellant claims in this appeal, however, that "[t]he facts were susceptible to the jury drawing a conclusion that Appellant was guilty of third degree murder, in that he had committed the capital felony under a scenario where he did not intend to cause the death and had committed the crime of grand theft, rather than burglary." **Brief of Appellant** at 42.

The State submits that, contrary to Appellant's assertion, the evidence did not support an instruction on third-degree murder. There is no question, as the jury found, that Appellant was guilty of burglarizing the Farmer's Market and the Gold Junction. Appellant even admitted it on the witness stand. (T 1277). Moreover, the victim was shot while Appellant was burglarizing the Gold Junction. Thus, it is inconceivable that the jury could have found that the death occurred as a consequence of and while Appellant was engaged in the commission

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Lisa Stubbs did not amount to a denial of due process. The statement and the details of Escalera's plea bargain were later admitted during the penalty phase of the trial.

of the grand theft, or while Appellant was escaping from the immediate scene of the grand theft. Consequently, the trial court did not abuse its discretion in denying Appellant's request for an instruction on third-degree murder. Even if there was evidence to support it, however, "'any error in failing to give it was harmless because the court did instruct the jury on second-degree murder which was only one step removed from the crime of which'" Appellant was convicted. Jackson v. State, 575 So.2d 181 (Fla. 1991) (quoting Perry v. State, 522 So.2d 817, 819-20 (Fla. 1988)).

Next, Appellant claims that the trial court erred in denying his request to instruct the jury on second-degree murder without a firearm and manslaughter without a firearm, and to include those choices on the verdict form. According to Appellant, the jury could have returned a verdict for either of these offenses if it "concluded that the co-defendant was the gunman." In making this argument, Appellant cites to page 1433 of the record. **Brief of Appellant** at 42. The record does not support, however, his interpretation of the argument made below.

Beginning on line 17 of page 1430 and ending on line 20 of page 1433, Appellant requests that the verdict form include an option for first-degree murder without a firearm, since the instruction on aggravation of a felony by carrying a firearm (R 2400) indicates that two options are available--first-degree murder with a firearm as charged, and first-degree murder. There is absolutely no request that the trial court instruct the jury on second-degree murder without a firearm and manslaughter

without a firearm. Similarly, Appellant's motion below regarding the verdict form for the murder charge cannot be construed to include the argument made on appeal--that it include choices for second-degree murder without a firearm and manslaughter without a firearm. Thus, Appellant has waived the arguments made below and has failed to preserve the arguments made here. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Even if Appellant had renewed the argument made below, it is wholly without merit. The aggravation instruction that was read to the jury is based on Florida Statutes § 775.087(1), which allows the degree of an offense to be enhanced if the defendant carries, displays, uses, threatens to use, or attempts to use a weapon or firearm during the commission of a felony which does not otherwise involve a weapon or firearm. Since a capital felony cannot be enhanced, the instruction was really unnecessary as to the charged offense.[6] Moreover, since the State's case was based on, and the jury was instructed on, the principal theory, which imputes the actions of each perpetrator to the other perpetrators, including the possession of a firearm, the aggravation instruction was inconsistent with that theory. Although an offense cannot be enhanced unless the defendant has actual physical possession of the firearm, State v. Rodriguez, 602 So.2d 1270 (Fla. 1992), a defendant can be convicted of an offense while armed based on the vicarious possession of the

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[6] As read, the instruction related only to the first-degree murder charge, and not to any of the lesser-included offenses.

weapon by a coperpetrator, Dixon v. State, 432 So.2d 779 (Fla. 1st DCA 1983); Hough v. State, 448 So.2d 628 (Fla. 5th DCA 1984). Thus, in reality, the instruction should have been given only with regard to the lesser-included offenses which could have been enhanced; however, a further explanation that Appellant had to be in actual physical possession of the firearm for the aggravating factor to apply would have been necessary. In other words, the instruction as given was superfluous, and the verdict form should not have reflected a choice for first-degree murder without a firearm, since there was no question that one of the two perpetrators had the firearm used to kill the victim. As a result, the trial court did not err in denying Appellant's request.

Next, Appellant claims that the trial court erred in denying his requested instructions two, three, and four. **Brief of Appellant** at 42-43. Instruction two stated:

> If you have a reasonable doubt as to whether Miguel Hernandez was present and did knowingly aid, abet, counsel, hire or otherwise procure the commission of the burglary, then you must find Miguel Hernandez not guilty of First Degree Felony Murder.

(R 2425). Instruction three stated:

> You are instructed that in order to find Miguel Hernandez guilty of First Degree Murder, you must find from the evidence beyond a reasonable doubt that Miguel Hernandez either personally committed the killing of John Giblan or that Miguel Hernandez was present, aiding and abetting the commission of the underlying felony, burglary, alleged, when the killing occurred.

(R 2426). Finally, instruction four stated:

> At issue in this case is whether the defendant, Miguel Hernandez, was present at the scene of the alleged burglary when the homicide of John Giblan allegedly was committed.
>
> If you have a reasonable doubt that the defendant was present at the scene of the alleged burglary when the homicide of John Giblan allegedly took place, it is your duty to find the defendant not guilty.

(R 2427).

As the trial court found, the substance of all three of these instructions was "embraced in the other instructions." The standard instruction on reasonable doubt incorporates the substance of instruction two, and the standard instruction on first-degree premeditated and first-degree felony murder incorporate the substance of instructions three and four. Thus, the trial court did not abuse its discretion in denying Appellant's requested jury instructions. See Parker v. State, 456 So.2d 436, 444 (Fla. 1984).

Appellant also requested that the verdict form for the murder charge include separate choices for premeditated and felony murder. This Court has stated, however, that "[n]either constitutional principles nor rules of law or procedure require such special verdicts in capital cases." Brown v. State, 473 So.2d 1260 (Fla.), cert. denied, 474 U.S. 1038 (1985). Thus, the trial court did not abuse its discretion in denying Appellant's request.

Next, Appellant claims that the trial court erred in refusing his instruction on independent act, since "there was evidence from which the jury could have concluded that Appellant withdrew from the criminal enterprise prior to the death of the victim." **Brief of Appellant** at 43. The State submits, however, that the evidence did not support the instruction. As this Court stated in Parker v. State, "an act in which a defendant does not participate and which is 'outside of and foreign to, the common design' of the original felonious collaboration may not be used to implicate the nonparticipant in the act." 458 So.2d 750, 752 (Fla. 1984) (quoting Bryant v. State, 412 So.2d 347, 349 (Fla. 1982)) (emphasis added), cert. denied, 470 U.S. 1088 (1985). Here, as in Parker, Appellant participated in creating the circumstances which directly led to the victim's death. Appellant admitted to breaking into the Farmer's Market with Tony Escalera with the intent to steal merchandise therein. During the "original felonious collaboration"--the burglary of the Gold Junction--the killing, which was a natural and foreseeable consequence of that endeavor, occurred. There is no evidence that Appellant withdrew from the burglary, thereby severing his association with his cofelon and his culpability for the subsequent acts of the cofelon. Thus, the trial court did not abuse its discretion in refusing Appellant's requested instruction on independent act which was not supported by the evidence.

Similarly, the trial court did not abuse its discretion in giving the following instruction on withdrawal, which was proposed by the State:

> It is a defense to felony murder if the defendant withdrew from the perpetration of the felony.
>
> 'During the perpetration of a felony' refers to the entire criminal episode, even including the period of flight or attempted flight from the scene of the crime and not narrowly when the underlying felony was actually occurring.
>
> To establish the defense of withdrawal from the crime of felony murder, a defendant must establish that he abandoned and renounced his intention to participate in a burglary and that he clearly communicated his renunciation to his accomplice in sufficient time for him to consider abandoning the criminal plan.
>
> If you find from the evidence that the defendant withdrew from the entire criminal episode and that John Giblan was murdered by someone other than Miguel Hernandez and if you further find that the murder was outside the foreseeable scheme or design of the burglary or the flight from the scene of the burglary, then you should find Miguel Hernandez not guilty of felony murder.

(R 2401). Appellant claims that "[t]he portion of this instruction regarding communication is a misstatement of Florida law." **Brief of Appellant** at 44. The State disagrees.

In Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145 (1983), this Court held:

> To establish the common-law defense of withdrawal from the crime of premeditated murder, a defendant must show that he abandoned and renounced his intention to kill the victim and that he clearly communicated his renunciation to his accomplices in sufficient time for them to consider abandoning the criminal plan. For a defendant whose liability is predicated upon the felony murder theory, the required showing is the same and the defense is available even after the underlying felony or felonies have been completed. Again the defendant would have to

> show renunciation of the impending murder and communication of his renunciation to his co-felons in sufficient time to allow them to consider refraining from the homicide.

Id. at 732 (citations omitted). Since the instruction given in the instant case mirrored the language in Smith, and was thus a correct statement of the law, the trial court did not err in giving it.

ISSUE VIII

> WHETHER THE TRIAL COURT ERRED IN ALLOWING CONVICTIONS AND SENTENCES FOR BOTH COUNTS OF BURGLARY (Restated).

Citing to Carawan v. State, 515 So.2d 161 (Fla. 1987), Appellant claims that the burglary of the Farmer's Market and the burglary of the Gold Junction, a business within the Farmer's Market, constituted a single act which precluded dual convictions and sentences. **Brief of Appellant** at 44. In Carawan, however, this Court specifically stated that its holding applied "only to separate punishments arising from one act, not one transaction. An act is a discrete event arising from a single criminal intent, whereas a transaction is a related series of acts." 515 So.2d at 170 n.8 (emphasis in original). In the present case, the burglary of the Farmer's Market was one act which was completed upon entry into the Farmer's Market. The burglary of the Gold Junction was a separate act complete upon entry into the Gold Junction. Together, the two separate acts constituted a transaction. Thus, Carawan does not apply. See McInnis v. State, 17 F.L.W. D2112 (Fla. 4th DCA Sept. 9, 1992); Delorme v. State, 562 So.2d 398, 400 (Fla. 3d DCA 1990); Gladden v. State, 556 So.2d 1228, 1229 (Fla. 4th DCA 1990).

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN IMPOSING THREE-YEAR MANDATORY MINIMUMS ON THE TWO COUNTS OF ARMED BURGLARY WHEN THE EVIDENCE DID NOT ESTABLISH THAT APPELLANT HAD ACTUAL PHYSICAL POSSESSION OF THE FIREARM (Restated).

Because the evidence failed to establish that Appellant had actual physical possession of the firearm, Appellant's three-year mandatory minimum terms of imprisonment should be stricken. Bell v. State, 589 So.2d 1374 (Fla. 1st DCA 1991); Hicks v. State, 583 So.2d 1106 (Fla. 2d DCA 1991); Lopez v. State, 470 So.2d 58 (Fla. 3d DCA 1985); Hough v. State, 448 So.2d 628 (Fla. 5th DCA 1984).

ISSUE X

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT AS A HABITUAL FELONY OFFENDER ON COUNTS II, III & IV (Restated).

Pursuant to Florida Statutes § 775.084(1)(a) (1987), the trial court must find in order to sentence a defendant as a habitual felony offender that the defendant has previously been convicted of a felony or two first-degree misdemeanors in this state, that the felony for which the defendant is being sentenced was committed within five years of his previous offense(s) or his release from prison, that the defendant has not been pardoned for his previous offense(s), and that the previous conviction(s) have not been set aside in any postconviction proceeding. In addition, subsection (3) requires a finding that the defendant is a habitual felony offender and that the enhanced penalty is necessary for the protection of the public.

In Walker v. State, 462 So.2d 452 (Fla. 1985), this Court held that the trial court must make specific findings of fact upon which it based its decision to impose an enhanced sentence under the habitual felony offender statute. The trial court fulfilled its obligation in the present case. During the penalty phase, the State introduced into evidence without objection a certified copy of conviction belonging to Appellant for attempted sexual battery with slight force, which was entered on March 12, 1982, and a certified copy of conviction belonging to Appellant for aggravated battery, which was entered on November 30, 1988. (T 1567-70).[7] These two convictions formed the basis of one of the aggravating factors--that Appellant was previously convicted of felonies involving the use or threat of violence to the person--which the trial court found to have been proven beyond a reasonable doubt. (R 2529).[8] Although the trial court did not specifically state that Appellant's current offenses were committed within five years of his last felony conviction, this fact is readily apparent from the dates of conviction and is fully supported by the record. With respect to whether Appellant had been pardoned for his previous offenses or whether they had been set aside in a postconviction proceeding, this Court has held that those are affirmative defenses that must be raised by

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[7] Although these copies of conviction do not appear in the bound record on appeal, they are included in the stack of exhibits admitted at the trial. They are State's Exhibits 2 & 3, respectively.

[8] The trial court incorrectly noted the date of conviction for the aggravated battery as January 10, 1989, in its written sentencing order. (R 2529). This technical error is of no consequence.

Appellant, not proved by the State. Eutsey v. State, 383 So.2d 219, 226 (Fla. 1980). Finally, after considering Appellant's presentence investigation report, the trial court did specifically find that Appellant was a habitual felony offender and that his enhanced sentences were necessary for the protection of the public. (R 2532). This is all that the statute requires. See Walker. Thus, Appellant's sentences as a habitual felony offender on Counts II, III & IV should be affirmed.

ISSUE XI

WHETHER APPELLANT'S SENTENCE OF DEATH MUST BE VACATED BECAUSE OF THE TRIAL COURT'S FAILURE TO ISSUE A WRITTEN ORDER CONTEMPORANEOUSLY WITH THE ORAL PRONOUNCEMENT OF SENTENCE (Restated).

Although the State acknowledges this Court's decisions in Christopher v. State, 583 So.2d 642 (Fla. 1991), Stewart v. State, 549 So.2d 171 (Fla. 1989), cert. denied, 110 S.Ct. 3294 (1990), and Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989), the State nevertheless maintains its position that Florida Statutes § 921.141(3) does not require contemporaneous written findings. Section 921.141(3) provides:

> FINDINGS IN SUPPORT OF SENTENCE OF DEATH -- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

In accordance with this statute, the trial court filed a seven-page order detailing its findings regarding its sentencing decision. There is nothing in the record to suggest that the trial court did not follow the guidelines of the statute in weighing the aggravating and mitigating circumstances as required. The mandate of Christopher, Stewart, and Grossman, that a life sentence be imposed, simply does not follow from a fair reading of the statute. For Appellant's sentence of death to be vacated and a sentence of life imprisonment to be imposed automatically because the trial court deliberated on its decision to impose death exalts form over substance and gives Appellant a disproportionate sentence. For these reasons, the State respectfully requests that this Court reconsider its decisions in Christopher, Stewart, and Grossman and, at the very least, remand this case to the court below for resentencing.[9] At that time, the trial court can determine the appropriate sentence and if it imposes death again, it can then file its written order

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[9] Filing a written order after the sentencing hearing, if error, is a purely technical violation that does not deprive a defendant of any due process or other constitutional protection; thus, a life sentence is not constitutionally required.

contemporaneous with the imposition of sentence as required by this Court.

ISSUE XII

WHETHER APPELLANT'S SENTENCE OF DEATH IS DISPROPORTIONATE TO OTHERS SIMILARLY SITUATED (Restated).

In this appeal, Appellant claims that there are four reasons why his sentence of death should be found disproportionate and reduced to life imprisonment. First, Appellant claims that the jury's narrow vote of 8 to 4 does not support the trial court's finding that "if any case deserves capital punishment, it is this one." **Brief of Appellant** at 51. Regardless of the ratio, however, the jury recommended a death sentence. Moreover, the trial court, independent of any recommendation, found three aggravating factors and no mitigating factors. As this Court has previously stated, "'[W]hen there are one or more valid aggravating factors and none in mitigation, death is presumed to be the appropriate penalty.'" Diaz v. State, 513 So.2d 1045, 1049 (Fla. 1987) (quoting Jackson v. State, 502 So.2d 409 (Fla. 1986), cert. denied, 482 U.S. 920 (1987)), cert. denied, 484 U.S. 1079 (1988).

Second, Appellant claims that the trial court erred in rejecting his mitigating evidence, which, if properly considered, would outweigh the only two valid aggravating circumstances. **Brief of Appellant** at 51-52. As discussed extensively in Issue XIII, infra, the trial court did not err in rejecting Appellant's mitigating evidence as it was not supported by the record. Thus, again, death is presumed to be the appropriate penalty when there are one or more aggravating factors and no mitigating ones.

Third, Appellant claims that "the most compelling reason to reduce the death sentence to a sentence of life imprisonment in this case is the extremely disparate treatment given to the co-defendant, Tony Escalera, who was equally culpable in the eyes of the law of this murder, yet received a sentence of forty years in prison with no mandatory minimum required." **Brief of Appellant** at 52-56. For the following reasons, however, the State submits that Escalera's lesser sentence does not mandate a reduction in Appellant's sentence of death.

Initially, the State disagrees with Appellant's characterization of Escalera as equally culpable, and further disagrees with Appellant's representation of the facts allegedly supporting this claim. Contrary to Appellant's assertion, the fact that Escalera was shot in the leg with birdshot from the victim's gun, and Appellant was not, is not "consistent with the theory that Escalera was the individual who fired at the deceased." Id. at 53. Escalera testified in his pretrial deposition, which the trial court was fully aware of since it accepted Escalera's plea, that he was crouched in a corner of the Gold Junction serving as a lookout when the victim came upon them, at which point Appellant shot him several times. (ST 36-52). Further, there is nothing in the record to establish the height of Escalera; thus, Melissa Constable's testimony that the taller of the two men she saw running from the Farmer's Market with gun in hand cannot be attributed to Escalera. Finally, Escalera's alleged confession to Lisa Stubbs that he shot the victim was never established. Defense counsel alleged that Escalera had made such a statement,

but Lisa Stubbs' testimony was never proffered on this issue, and Escalera flatly denied that he made such a statement. Thus, none of Appellant's supporting facts, in fact, support his contention that Escalera was equally culpable. To the contrary, the trial court could have properly relied on Escalera's pretrial deposition implicating Appellant as the shooter and the former prosecutor's testimony that he did not believe, based on his investigation of the case, that Escalera was the shooter.

As this Court stated in Garcia v. State, 492 So.2d 360, 368 (Fla. 1986), cert. denied, 479 U.S. 1022 (1987), "Prosecutorial discretion in plea bargaining with accomplices is not unconstitutionally impermissible and does not violate the principal of proportionality." See also Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984); Brown v. State, 473 So.2d 1260, 1268 (Fla.), cert. denied, 474 U.S. 1038 (1985); Diaz v. State, 513 So.2d 1045, 1049 (Fla. 1987), cert. denied, 484 U.S. 1079 (1988). Here, there is evidence in the record to support the trial court's sentence of death. Besides the fact that there are three valid aggravating factors and no mitigating ones, the trial court was well aware of the circumstances of each case and knew that Escalera had implicated Appellant as the shooter while testifying under oath in a pretrial deposition with counsel present. Escalera's testimony, along with the former prosecutor's testimony and all of the other facts and circumstances of this case, support the trial court's finding that Appellant was the leader of the two whose role in the murder was more significant than that of his accomplice. Thus, his sentence of death was commensurate with his culpability. See Diaz; Brown.

Finally, Appellant claims that his sentence of death violates the principals of Tison v. Arizona, 481 U.S. 137 (1987) and Enmund v. Florida, 458 U.S. 782 (1982), because "[t]here is insufficient evidence in this record to establish that Appellant's state of mind was culpable enough to rise to the level of reckless indifference to human life such as to warrant the death penalty for felony murder." **Brief of Appellant** at 56-60. The State disagrees.

As this Court ordered in Diaz, 513 So.2d at 1048 n.2, the trial court made specific findings supporting the Tison/Enmund culpability requirement. After discussing the four aggravating factors, the trial court stated:

> In addition to the above, the evidence reflects that Miguel Hernandez and Anthony Escalera knew that jewelry was kept at the Gold Junction. The fact that they entered the Farmers' Market through the roof top window reflects that they were aware of the existence of a night watchman. Had there been no night watchman it would have been possible to steal the gold jewelry from the Gold Junction without engaging in the acrobatics involved in entering through the roof top window and climbing down simply by smashing the door of the Farmers' Market and entering the shop. It would have been possible to take a great deal of jewelry and make an escape even if the entry would have set off an alarm. The furtive entry was necessary to avoid detection by the night watchman. Miguel Hernandez and Anthony Escalera armed themselves precisely to avoid apprehension in the event they were discovered by Mr. Giblan.
>
> Finally, the facts of this case are also susceptible [sic] to the conclusion that the taking was by 'force, violence or putting in fear.'
>
> I, therefore, find that Miguel Hernandez intended that lethal force be employed in the event the night watchman was encountered.

(R 2530-31).

The record supports this finding. As discussed previously, Appellant was a major participant in the felony committed. Even assuming that Appellant was not the shooter, a fact which the State does not concede, his major participation, combined with his reckless indifference to human life, satisfies the Tison/Enmund culpability requirement. See Diaz; Brown; Cave v. State, 476 So.2d 180 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986); Bush v. State, 461 So.2d 936 (Fla. 1984), cert. denied, 475 U.S. 1031 (1985); Tafero v. State, 403 So.2d 355 (Fla. 1981), cert. denied, 455 U.S. 983 (1982). Thus, this Court should affirm Appellant's sentence of death.

ISSUE XIII

WHETHER APPELLANT'S MITIGATING CIRCUMSTANCES WERE SUPPORTED BY THE EVIDENCE AND WHETHER THE TRIAL COURT ERRED IN REJECTING THEM (Restated).

Initially, Appellant claims that the trial court "failed to address each mitigating circumstance as proposed by Appellant" as required by Campbell v. State, 571 So.2d 415 (Fla. 1990). **Brief of Appellant** at 60-62. In Gilliam v. State, 582 So.2d 610, 612 (Fla. 1991), however, this Court held that "Campbell is not a fundamental change of law requiring retroactive application." Thus, since Campbell issued after the order under review was rendered, it does not apply to this case.

More fundamentally, Appellant claims that the trial court failed to properly consider the evidence, and thus failed to find

mitigating circumstances which were supported by the evidence. **Brief of Appellant** at 60. First, Appellant complains that the trial court addressed the mitigating factor relating to Appellant acting under the domination of Anthony Escalera even though "it was never proposed or argued by Appellant." Id. at 62. The record reflects, however, that during the charge conference the trial court asked whether it should instruct on mitigating factor number five:[10] "What about Five, under duress or domination of a 16-year-old?" (T 2086). Defense counsel responded, "We are asking for that." As a result, the jury was instructed that one of the mitigating factors that it could consider was that "[t]he defendant acted under extreme duress or under the substantial domination of another person." (T 2176). Since the jury was instructed on it, the trial court addressed it in its sentencing order.

Next, Appellant complains that the trial court rejected his evidence regarding his low I.Q. and organic brain damage "even though it was uncontradicted by any testimony or substantive evidence." **Brief of Appellant** at 63. Initially, the State would note that "[i]n determining whether mitigating circumstances are applicable in a given case, the trial court may accept or reject the testimony of an expert witness just as he may accept or reject testimony of any other witness." Roberts v. State, 510 So.2d 885 (Fla. 1987) (citing to Bates v. State, 506 So.2d 1033

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[10] Presumedly, the reference is to the fifth mitigating factor listed in the jury instructions, which corresponds to Florida Statutes § 921.141(6)(e) (1987).

(Fla. 1987) (Expert testimony is not conclusive evidence where uncontradicted)), cert. denied, 485 U.S. 943 (1988).

Regarding this mitigation evidence, the trial court stated in its written order:

> The jury heard considerable testimony by a psychologist, by Dr. Perry and Susan LaFehr-Hessian [sic], on the issue of Miguel Hernandez's I.Q. and brain malfunction. This testimony was considered and rejected by the jury. I did not find it persuasive either. The interpretation of the test results was highly subjective and the defense did not offer any medical tests to substantiate these opinions. The defense did, however, obtain Magnetic Resonance Imaging of Miguel Hernandez's brain. The State offered in rebuttal the report of that test that no abnormalities were evident.

(R 2531). Although the State did not offer any expert witness on its own behalf to contradict the testimony of Appellant's expert witnesses, it substantially impeached their credibility on cross-examination. For example, although both witnesses were declared "experts" by the court, neither Dr. Perry nor Susan LaFehr-Hession was licensed in Florida as a psychologist; yet, they were interpreting psychological tests. Dr. Perry was a licensed marriage and family therapist, and Susan LaFehr-Hession was a licensed mental health counselor. (T 1791-97, 1893). Both witnesses admitted that the tests used to support their finding of organic brain damage were highly subjective and can be affected by the subject's motivation in taking the test, as well as the examiner's bias. (T 1797-1830, 1945-46, 1970-71). In fact, Susan LaFehr-Hession even admitted that Appellant was not at all cooperative during the guilt phase, but became very

cooperative after the guilty verdicts. (T 1845-47). Moreover, although there are tests which detect malingering, neither witness administered these tests to Appellant. (T 1806-08, 1970-89). Nor did they administer the Spanish versions of the tests, even though Appellant is of Puerto Rican dissent whose first language is Spanish. (T 1809, 1970-71). Finally, although the witnesses ordered an MRI, they did not bother to obtain the test results before trial. Over strenuous objection by defense counsel, the State had to elicit the fact that the test result was "normal" during its cross-examination of Dr. Perry. (T 1832-33, 1845-55). Although Dr. Perry claimed that an MRI would not detect the type of brain dysfunction exhibited by Appellant, Appellant presented no medical tests, or even the psychological test results, to substantiate the witness' opinions. All of this, combined with the trial court's personal assessment of their demeanor on the witness stand, supports the trial court's rejection of this mitigating evidence. See Roberts; Kight v. State, 512 So.2d 922 (Fla. 1987) (finding no error in trial court's failure to find low I.Q. and history of abusive childhood as nonstatutory mitigating factors), cert. denied, 485 U.S. 929 (1988), overruled on other grounds, 596 So.2d 985 (Fla. 1992).

Next, Appellant complains that the trial court erred in rejecting his uncontroverted evidence that "he had been an abused and battered child and suffered from a deprived childhood and poor upbringing." **Brief of Appellant** at 64. Again, however, this evidence was not uncontroverted. For example, although Susan LaFehr-Hession testified that Appellant's father was very

punitive and beat the children and their mother, Appellant's sister, Angelica, testified that their father punished them by screaming at them, but neither he nor their mother would whip them without a reason. (T 1637-42). Regardless, the trial court could have properly concluded "that [A]ppellant's actions in committing this murder were not significantly influenced by his childhood experience so as to justify its use as a mitigating circumstance." Lara v. State, 464 So.2d 1173, 1180 (Fla. 1985). See also Rogers v. State, 511 So.2d 526 (Fla. 1987) ("The effects produced by childhood traumas . . . indeed would have mitigating weight if relevant to the defendant's character, record, or the circumstances of the offense."), cert. denied, 484 U.S. 1020 (1988); Jones v. State, 580 So.2d 143 (Fla. 1991) ("Although cultural deprivation and a poor home environment may be mitigating factors in some cases, sentencing is an individualized process. We cannot say the trial court erred in finding the evidence presented insufficient to constitute a relevant mitigating circumstance."), cert. denied, 112 S.Ct. 221 (1992).

Next, Appellant claims that the trial court erred in rejecting evidence that he was a good father to his two children. Although the State would agree that this is a valid nonstatutory mitigating factor, its cross-examination of the children's mother and Lori Arce tends to show that Appellant frequently lived outside the home, especially when Appellant and Maria were fighting, and that Appellant engaged in extramarital affairs. As this Court has said, "'[t]he resolution of factual conflicts is solely the responsibility and duty of the trial judge, and, as

the appellate court, we have no authority to reweigh that evidence.'" Jones, 580 So.2d at 146 (quoting Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991)).

Next, Appellant complains that the trial court erred in rejecting his evidence that he "showed a good attitude and good conduct while awaiting trial in jail and is rehabilitatable." **Brief of Appellant** at 66. First, no one testified that Appellant was rehabilitatable. In fact, Susan LaFehr-Hession testified that "[h]e is not able to live outside of a real structured, constantly supervised setting; he is not capable of independent living. . . . [T]his is a man that needs tight, close, constant supervision; he can't conform his conduct to family rules, much less to the law." (T 1930-32). As for his good conduct while awaiting trial, the evidence presented was that he only had one disciplinary report filed against him during his pretrial detention, which apparently indicated that he had adjusted well. Post-trial, however, Appellant was caught smuggling marijuana into the jail through a member of the defense team. Again, the trial court resolved the factual conflicts and decided that Appellant had failed to present reasonably convincing evidence to support this as a mitigating factor. As this was not a palpable abuse of discretion, this Court should not reweigh the evidence. See Jones.

Next, Appellant complains that the trial court failed to consider as nonstatutory mitigating circumstances the disparate treatment of the co-defendant and the fact that "Appellant [was] not the person that [sic] actually killed the deceased." **Brief**

of Appellant at 66. Such an argument, however, assumes too much. Although the evidence at trial did not establish who actually shot the victim, it did not eliminate Appellant as the shooter. In fact, Escalera testified in his pretrial deposition that Appellant was playing with a gun just prior to the robbery/murder while Appellant and others were planning the burglary, that Appellant had the gun when they went inside the Farmer's Market, and that Appellant said to him with gun in hand, "In case the security guard comes, we might have to do something." (ST 13-19, 26-36). Thus, the trial court could have concluded that Appellant was the person who actually killed the deceased.

As for the disparate treatment of the co-defendant, the State presented testimony from the attorney who prosecuted Anthony Escalera that he believed Appellant, who was 26 years old at the time of the murder, was the leader, rather than Escalera, who was then 16 years old. One basis for his opinion included the fact that Appellant had a history of crime, whereas Escalera did not. On cross-examination, the witness testified that, although he did not know who the triggerman was, he did not believe the evidence pointed to Escalera. (T 2018-24). In addition to this testimony, the trial court heard Escalera testify on proffer during the guilt phase that he did not shoot the victim and denied telling Lisa Stubbs that he did. (T 1233-36). Moreover, the trial court was aware of Escalera's pretrial deposition wherein he detailed the events of the robbery/murder, including the fact that Appellant shot the victim. Based on this evidence, the trial court properly could have found that

Appellant had failed to establish Escalera's lesser sentence as a mitigating factor.

Finally, Appellant complains that the trial court erred in failing to find several statutory mitigating factors. As discussed in Issue XVII, because there was no link between Appellant's age at the time (26) and some other characteristic of Appellant or his crimes, this mitigating factor was not applicable, and the trial court did not abuse its discretion in failing to find it applicable. Similarly, the trial court did not err in failing to find that Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, or that he was under the influence of extreme mental or emotional disturbance. In its discussion of Appellant's alleged low I.Q. and organic brain damage, the trial court specifically rejected the testimony of Dr. Perry and Susan LaFehr-Hession, upon which Appellant relies, as it related to Appellant's mental mitigation. As noted previously in this issue, the trial court may accept or reject expert witness testimony, Roberts, and the resolution of factual conflicts is wholly within the trial court's discretion, Jones. Here, based in part on the State's cross-examination of these witnesses, the trial court properly resolved the factual conflicts against Appellant.[11] Likewise, as discussed

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[11] The State would note, contrary to Appellant's assertion, that neither Dr. Perry nor Susan LaFehr-Hession testified that Appellant's ability to appreciate the criminality of his conduct was substantially impaired. Rather, they only testified that his ability to conform his conduct to the requirements of law was substantially impaired. See (T 1778, 1931-32).

previously, the trial court did not abuse its discretion in rejecting Appellant's claim that he was an accomplice in the capital felony committed by another person and his participation was relatively minor. The record evidence upon which the trial court permissibly relied supports its conclusion that Appellant was the more dominant participant and the more likely triggerman. Thus, since Appellant failed to present reasonably convincing evidence to the contrary, the trial court was warranted in rejecting this mitigating circumstance.

In sum, the trial court did not err in failing to find either statutory or nonstatutory mitigating evidence offered by Appellant. As this Court stated in Kight, "[a] trial court has broad discretion in determining the applicability of mitigating circumstances urged." 512 So.2d 922. As in Kight, it is clear from the trial court's sentencing order that he considered all the evidence presented in both the guilt and penalty phases of the trial and all the statutory and nonstatutory mitigating circumstances urged by the defense. Because there is competent substantial evidence to support the trial court's rejection of these mitigating factors, this Court should affirm Appellant's sentence of death.

ISSUE XIV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PRECLUDING APPELLANT FROM STATING IN PENALTY PHASE CLOSING ARGUMENT THAT HE COULD RECEIVE CONSECUTIVE SENTENCES FOR COUNTS II, III & IV (Restated).

During closing arguments, defense counsel explained to the jury that Appellant would not be eligible for parole for twenty-five calendar years. Then, defense counsel stated, "But there is more than that. Remember that he was convicted of two burglaries, and three other counts, and the judge can sentence him to other sentences on those crimes to be served consecutively to this sentence." (T 2144). The State objected and moved to strike the comment, and the trial court sustained the objection and ordered the jury to "[p]lease disregard that portion." (T 2144).

In this appeal, Appellant claims that the trial court abused its discretion in sustaining the State's objection and in ordering the jury to disregard it. Specifically, Appellant claims that this was "proper argument in mitigation," citing to this Court's decision in Jones v. State, 569 So.2d 1234, 1240 (Fla. 1990). **Brief of Appellant** at 68. In Nixon v. State, 572 So.2d 1336, 1344-45 (Fla. 1990), cert. denied, 112 S.Ct. 164 (1991), decided after Jones, however, this Court found no error in the trial court's refusal of a special instruction which informed the jury of the maximum penalties for the noncapital offenses. In so finding, this Court stated that the defendant's convictions for three other crimes which carried lengthy maximum penalties were irrelevant to his character, prior record, or the

circumstances of the crime. Similarly, the fact that the sentences for Appellant's other convictions could be imposed consecutively do not relate to his character, prior record, or the circumstances of the case. Moreover, since it was not a fact in evidence, it was improper closing argument. Thus, the jury was not unduly precluded from considering this fact as a mitigating factor.

Even if it were error for the trial court to limit defense counsel's discussion on this point, any error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). As discussed previously in Issues XII and XIII, there is no reasonable possibility that the trial court's error, if any, contributed to the jury's recommendation of death in light of the fact that the aggravating factors outweighed the mitigating factors. Thus, this Court should affirm Appellant's sentence of death.

ISSUE XV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PRECLUDING APPELLANT DURING THE PENALTY PHASE FROM SUBMITTING EVIDENCE AND ARGUMENT RELATING TO TONY ESCALERA'S PLEA AS EVIDENCE OF DISPARATE TREATMENT (Restated).

During the penalty phase, Appellant sought to introduce the testimony of a private defense attorney who would testify that, because of the various types of gain time, a person sentenced to forty years in prison would likely only serve one-third of that time. The trial court found the testimony irrelevant and precluded Appellant from calling the witness. The trial court

agreed, however, to tell the jury what Tony Escalera had been charged with, that he had pled guilty to second-degree murder and been sentenced to forty years in prison, and that, because of gain time, it is possible to complete a forty-year sentence in less than 25 years. The trial court initially refused, on the other hand, to inform the jury that the State had dismissed the other charges and that no mandatory minimum penalty for the firearm was imposed. (T 1736-44).

Later that day, defense counsel asked the trial court to reinstruct the jury because, according to defense counsel, the trial court had erroneously stated that Escalera had pled guilty to all the charges when, in fact, he had only pled guilty to second-degree murder. As a result, the trial court instructed the jury that it had misspoken, that Escalera had pled guilty to second-degree murder, and that the State had dropped the other charges. The trial court again refused, however, to instruct the jury that no mandatory minimum penalty for the firearm was imposed. (T 2013-17).

Appellant now claims that the trial court violated his constitutional rights by preventing him from establishing "the full circumstances of the disparate treatment of the co-defendant," including "the dropping of the four felony counts by the state and the waiver by the state of the three year mandatory minimum prison sentence requirement for firearm offenses." **Brief of Appellant** at 69-70. To support his contention, Appellant cites to Slater v. State, 316 So.2d 539 (Fla. 1975) and Pentacost v. State, 545 So.2d 861 (Fla. 1989), neither of which are instructive.

While the disposition of a co-defendant's case is relevant, the trial court here fully instructed the jury about Escalera's plea and sentence, and the State's dismissal of the other charges. It did not find relevant, however, the State's waiver of the mandatory minimum penalty for the firearm, since that was one of many potential penalties that Escalera could have faced. In other words, the trial court's focus was properly on what ultimately happened, not what could have happened to Escalera.

As for excluding Donnie Murrell's testimony, the State submits that the trial court's brief explanation of gain time and its effect on a sentence adequately substituted for the witness' purported testimony. Thus, the trial court did not abuse its discretion by either excluding the testimony or refusing to instruct the jury regarding the State's waiver of the mandatory minimum. Even if the trial court erred, it was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Chapman v. California, 386 U.S. 18 (1967). Consequently, this Court should affirm Appellant's sentence.

ISSUE XVI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PRECLUDING APPELLANT FROM CALLING TWO DEPUTIES TO TESTIFY THAT APPELLANT WAS WELL-BEHAVED IN JAIL DURING THE GUILT PHASE (Restated).

During the penalty phase, Appellant sought to introduce the testimony of two sheriff's deputies who had transported Appellant to and from the courthouse during the guilt phase to establish that Appellant was "well-behaved" during that time. (T 1741-42,

1745-46, 2011-13). The State's objection was sustained, and Appellant now claims that this was error. The State disagrees.

Although the United States Supreme Court found that good behavior evidence may be relevant to mitigation, Skipper v. North Carolina, 476 U.S. 1 (1986), the evidence Appellant sought to admit was already before the jury; thus, the testimony of these two guards was unnecessary. For example, Sergeant Christopher Nicely, the supervisor of classification at the Palm Beach Sheriff's Office main detention center, already testified that Appellant had "adjusted well" to prison life during his incarceration while awaiting trial in the instant case. (T 1703-07). In addition, Susan LaFehr-Hession testified that Appellant would do well in prison with its structured environment. (T 1928-30). Her testimony was the very kind contemplated by Skipper. Thus, the trial court did not err in excluding the testimony of the two deputies, because the jury had already heard evidence of Appellant's good behavior while awaiting trial and his amenability to prison life. If error occurred, however, such error was harmless beyond a reasonable doubt as there is no reasonable likelihood that it would have affected the jury's recommendation or the judge's sentence. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE XVII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY DURING THE PENALTY PHASE THAT APPELLANT'S AGE AT THE TIME OF THE OFFENSE COULD BE CONSIDERED AS A MITIGATING FACTOR (Restated).

During the penalty-phase charge conference, Appellant asked for an instruction on age as a mitigating factor. Agreeing with the State, the trial court found that it did not apply to the facts of this case and rejected Appellant's request. (T 2086-87). Appellant now claims that the trial court erred in refusing to instruct the jury on this mitigating factor. The State disagrees.

In Echols v. State, 484 So.2d 568, 575 (Fla. 1985), cert. denied, 479 U.S. 871 (1986), this Court addressed age as a mitigating factor:

> It should be recognized that age is simply a fact, every murderer has one, and it can be considered under the general instruction that the jury may consider any aspect of the defendant's character or the statutory mitigating factor . . . . However, if it is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime such as immaturity or senility.

Here, as in Echols, there is nothing significant about Appellant's age as it relates to his maturity or the crimes he committed. Although Susan LaFehr-Hession testified that Appellant's tested IQ was in the borderline retarded range (T 1911), and Dr. Perry testified that a dysfunctional right hemisphere of the brain tended to affect one's maturity (T 1771-

72), neither of them made any correlation between Appellant's age and his maturity level. In fact, Ms. LaFehr-Hession believed that Appellant understood the criminality of his conduct, but simply could not conform his conduct to the law. (T 1931-32). Moreover, Appellant's own evidence in mitigation established that he was able to work and provide for his family, that he was a good father to his children, and that he often helped his mother-in-law with chores. Such evidence tends to establish that Appellant was relatively mature for his age. Consequently, because there was no link between his age and some other characteristic of Appellant or his crimes, the instruction was not applicable and the trial court did not abuse its discretion in denying Appellant's request. Echols. See also Washington v. State, 362 So.2d 658, 667 (Fla. 1978), cert. denied, 441 U.S. 937 (1979); Simmons v. State, 419 So.2d 316, 320 (Fla. 1982); Mills v. State, 462 So.2d 1075 (Fla.), cert. denied, 473 U.S. 911 (1985); Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988).

ISSUE XVIII

WHETHER THE TRIAL COURT IMPERMISSIBLY DOUBLED TWO AGGRAVATING FACTORS (Restated).

In its written sentencing order, the trial court noted that the State had argued to the jury the existence of four statutory aggravating factors, two of which were commission during a burglary and pecuniary gain. (R 2528). The trial court found that all four of these aggravating factors had been proven beyond a reasonable doubt. (R 2529-30). After finding that the fourth factor--pecuniary gain--was supported by the evidence, however,

the trial court specifically stated: "This Court is being careful not to "double-up" the aggravating circumstances of murder while engaged in a robbery/burglary and murder for pecuniary gain, Maggard v. State, 399 So.2d 973 (Fla. 1981). The Court has combined this factor with murder in the commission of robbery/burglary." (R 2531) (emphasis added).

Contrary to Appellant's belief, **Brief of Appellant** at 72-74, the trial court did not double up these aggravating factors. It is clear from the emphasized excerpt above that the trial court combined these two factors and considered them as a single aggravating factor. Thus, there was no error.

ISSUE XIX

WHETHER THERE WAS SUFFICIENT EVIDENCE TO FIND AS AN AGGRAVATING FACTOR THAT THE OFFENSE WAS COMMITTED FOR PECUNIARY GAIN (Restated).

Contrary to Appellant's assertion, the evidence in this was more than sufficient to support the trial court's finding that the offense was committed for pecuniary gain. Through the deposition testimony of Gigi Homanick, which was read to the jury in Ms. Homanick's absence, the State established that Appellant went to his brother William's house the day before the robbery/murder and asked to borrow some money, but his brother refused. (T 1595-97). The following day, while armed, Appellant and Escalera broke into the Farmer's Market and then into the Gold Junction admittedly to steal jewelry from the store. (T 1277). While inside the Gold Junction stealing jewelry, Appellant and Escalera killed the victim when he came up on them.

They then fled with loot in hand and, according to the deposition testimony of Freddie Baez, they tried to sell some of the jewelry to Mr. Baez sometime after the robbery/murder. (T 1583-84, 1588-94).

As is evident from the foregoing, the facts of this case do not remotely resemble those of Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), which is relied upon by Appellant. In Rogers, the two defendants abandoned their plan to rob the grocery store and were attempting to escape when Rogers shot a man attempting to escape out the back during the robbery. Nothing was ever stolen, and the murder was not in furtherance of the sought-after gain. Here, however, the victim was killed while Appellant and Escalera were pilfering the jewelry store. By killing the victim, they were able to escape with the loot. Under these facts, the trial court was completely justified in finding that the offense was committed for pecuniary gain, where Appellant evidenced a need for money and as a result acted upon that need by committing the burglary. See Menendez v. State, 419 So.2d 312 (Fla. 1982); Blanco v. State, 452 So.2d 520 (Fla. 1984), cert. denied, 469 U.S. 1181 (1985).[12]

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[12] Even if this Court decides that the evidence does not support the trial court's finding of this aggravating factor, Appellant's sentence should nevertheless be affirmed. Without this factor, there remains three valid aggravating and no valid mitigating factors. The trial court's intent was made clear: "[I]f any case deserves capital punishment, it is this one." (T 2216). Thus, since the error in weighing the invalid aggravating factor, if corrected, reasonably could not have resulted in a lesser sentence, reversal is not warranted. Rogers, 511 So.2d at 535. See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992).

ISSUE XX

WHETHER THERE WAS SUFFICIENT EVIDENCE TO FIND AS AN AGGRAVATING FACTOR THAT THE OFFENSE WAS COMMITTED TO AVOID OR PREVENT A LAWFUL ARREST (Restated).

In this appeal, Appellant claims that, since the victim was a security guard and not a law enforcement officer, the State had to meet a higher burden of proof, which it failed to do, to establish that the murder was committed to avoid arrest. **Brief of Appellant** at 75-79. As Appellant notes, this Court requires "strong proof of the defendant's motive" and a clear showing that "the dominant or only motive for the murder was the elimination of the[] witness." Perry v. State, 522 So.2d 817, 820 (Fla. 1988). Based on the facts of Appellant's case, the State submits that such a showing was made.

To support its finding that Appellant committed the murder to avoid arrest, the trial court made the following comments:

> The security guard, John Giblan, was armed. Killing him facilitated their escape. Had they not killed Mr. Giblan he would have brought about their arrest. Mr. Giblan was, in this instance, the functional equivalent of a law enforcement officer. One of the perpetrators was acting as a lookout. The 78-year-old security guard could have been taken by surprise and been easily overpowered. However, to avoid the possibility of arrest, John Giblan was killed.
>
> * * * *
>
> In addition to the above, the evidence reflects that Miguel Hernandez and Anthony Escalera knew that jewelry was kept at the Gold Junction. The fact that they entered the Farmers' Market through the roof top window reflects that they were aware of the existence of a night watchman. Had there been no night

> watchman it would have been possible to steal the gold jewelry from the Gold Junction without engaging in the acrobatics involved in entering through the roof top window and climbing down simply by smashing the door of the Farmers' Market and entering the shop. It would have been possible to take a great deal of jewelry and make an escape even if the entry would have set off an alarm. The furtive entry was necessary to avoid detection by the night watchman. Miguel Hernandez and Anthony Escalera armed themselves precisely to avoid apprehension in the event they were discovered by Mr. Giblan.

(R 2530-31).

The fact that the victim was not a law enforcement officer is of no import since he had the authority to detain Appellant and Escalera until the police arrived. This authority required a stealthy entry into the building and, if detected, the use of force to effectuate an escape. Trapped inside the Gold Junction, either Appellant or Escalera decided that they would not surrender. Clearly, by taking a firearm into the Farmers' Market, their intention was not to be arrested. Thus, their motivation in shooting John Giblan was not merely to extricate themselves from the building, but to prevent their lawful arrest at any time. As the trial court noted, the two could have easily overpowered the 78-year-old security guard, but instead they chose to kill him. This evidence clearly establishes that Appellant and his co-perpetrator killed Mr. Giblan solely to eliminate him as a witness and to prevent their detection and lawful arrest. Consequently, the trial court was justified in finding the existence of this aggravating factor.

Citing to Espinosa v. Florida, 112 S.Ct. 2996 (1992), as if it were directly on point, Appellant claims that the avoid arrest instruction is unconstitutionally vague. **Brief of Appellant** at 78. Initially, the State would note that Espinosa involved a challenge to the heinous, atrocious, and cruel instruction, and is not on point. More fundamentally, however, the State submits that Appellant has failed to preserve this issue for appeal, since he failed to raise this objection in the trial court. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Moreover, other than making a conclusory statement that "the jury instruction gives absolutely no definition of the aggravating circumstance and merely tracks the language in Florida Statute 921.141," Appellant presents no argument to support his position. See Lynn v. City of Ft. Lauderdale, 81 So.2d 511, 513 (Fla. 1955). Even if he had, his argument is wholly without merit.

Even if this Court decides that the evidence does not support the trial court's finding of this aggravating factor, Appellant's sentence should nevertheless be affirmed. Without this factor, there remains three valid aggravating and no valid mitigating factors. The trial court's intent was made clear: "[I]f any case deserves capital punishment, it is this one." (T 2216). Thus, since the error in weighing the invalid aggravating factor, if corrected, reasonably could not have resulted in a lesser sentence, reversal is not warranted. Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992).

ISSUE XXI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO INTRODUCE EVIDENCE DURING THE PENALTY PHASE THAT APPELLANT HAD BEEN ON PROBATION AND HAD VIOLATED THAT PROBATION BY COMMITTING ANOTHER VIOLENT OFFENSE (Restated).

During the State's rebuttal in the penalty phase, the prosecutor indicated that, as its final witness, the State wanted to call Appellant's former probation officer to testify that, while Appellant was on probation for the attempted sexual battery, he violated his probation by committing another attempted sexual battery, which was ultimately reduced to simple battery. In response to Appellant's relevancy objection, the State indicated that it was offering the testimony to rebut Appellant's father-in-law's opinion that Appellant was "a good boy" and "a good person." Believing that the witness had been at the courthouse to interview Appellant's family for the presentence investigation report, instead of to testify for the State, Appellant claimed a discovery violation and requested a Richardson hearing, which was denied. (T 2046-49). Thereafter, the witness testified that, while Appellant was on probation for the offense of attempted sexual battery with slight force, an affidavit for violation of probation was filed based on Appellant's arrest for attempted sexual battery, trespass, and obstructing an officer. Although the witness did not know the disposition of the trespass and obstruction charges, she testified that the attempted sexual battery was later reduced to simple battery. Appellant was sentenced to a year in jail for the battery and to five years in prison for the violation of probation. (T 2050-52).

Appellant first claims in this appeal that the witness' testimony "did not relate to any of the statutory aggravating circumstances and should not have been allowed." **Brief of Appellant** at 79-80. The State submits, however, that it is not restricted to presenting evidence that relates only to the aggravating factors. Rather, it is allowed to present evidence that rebuts Appellant's alleged mitigating circumstances. Here, the father of Appellant's common-law wife testified that Appellant was "a good boy." (T 1723-28).[13] To rebut that opinion, the State was properly allowed to introduce the probation officer's testimony, which showed that Appellant was not "a good boy." See Jackson v. State, 530 So.2d 269, 273 (Fla. 1988), cert. denied, 488 U.S. 1051 (1989).

Appellant also claims error, however, in the trial court's denial of his request for a Richardson hearing. Before a Richardson hearing is required, the trial court must first find that a discovery violation has occurred. See Grant v. State, 474 So.2d 259, 261 (Fla. 1st DCA 1985), rev. denied, 484 So.2d 8 (Fla. 1986) ("Because the State did not violate Rule 3.220(a)(1)(i), the trial court had no duty to conduct a Richardson inquiry."). See also Derrick v. State, 581 So.2d 31 (Fla. 1991). Here, since no violation occurred, no hearing was required. Before the State called the witness in question, it informed the trial court and defense counsel of its intentions

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[13] This witness' testimony was presented as a taped interview conducted by defense counsel. The State was not present at the interview and did not have the opportunity to cross-examine the witness regarding his knowledge of Appellant's prior convictions and violation of probation.

and explained the evidentiary connection of the witness. Defense counsel was given an opportunity to articulate any prejudice Appellant may incur because of the witness' testimony, but provided none. After all, Appellant surely told his attorney of his prior probationary status and his violation. "Thus, even though the judge did not incant the words, 'I find no discovery violation requiring further inquiry,' that is unavoidably the substance of what he did conclude." Heath v. State, 594 So.2d 332, 333 (Fla. 4th DCA 1992). This was not error.

ISSUE XXII

WHETHER THE TRIAL COURT CONSIDERED IMPROPER EVIDENCE FOR SENTENCING (Restated).

A. Evidence of Other Crimes

At Appellant's final sentencing hearing on November 3, 1989, the State called Deputy Alfred Musko as a witness, without objection by Appellant. (T 2194). Twice during the witness' testimony, Appellant raised a hearsay objection, both of which were overruled, and a standing objection on that ground was noted by the trial court. (T 2195-96). Later, after Appellant stipulated that "a package was received [by him during a visit from a member of the defense team] and marijuana was found in that package" (T 2196-97), the State was allowed to elicit, over Appellant's relevancy objection,[14] that the visitor requested a visit with Appellant, that the person represented to the guards that a manila envelope contained legal papers so it would not be

[14] No ruling was ever rendered on Appellant's relevancy objection.

searched, and that marijuana was found secreted in cigarette packs stuffed in Appellant's socks upon exiting the conference room with the member of the defense team. (T 2197-2200). At no time did Appellant argue that this testimony was "evidence of other crimes," which were not "specifically included within the statutorily enumerated aggravating factors," as he does in this appeal. **Brief of Appellant** at 81. Thus, because he did not make this argument below, he is precluded from making it for the first time on appeal. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Appellant did not object when the State called the witness to testify and then stipulated that Appellant obtained a package from a member of the defense team which contained marijuana. He should not now be heard to complain about the admission of the evidence. Regardless, there is no evidence in the record to suggest that the trial court placed any weight on this evidence, which was presented just prior to the trial court's imposition of sentence. Even if it were error to admit such testimony, it was harmless beyond a reasonable doubt in light of the fact that their were four aggravating factors and no mitigating factors. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). See also Payne v. Tennessee, 501 U.S. ___, 115 L.Ed.2d 720 (1991) (finding no per se violation).

B. Victim-impact Statement in PSI

Appellant also claims that the trial court improperly "considered evidence from a pre-sentence investigation, including a victim-impact statement." **Brief of Appellant** at 81.

Initially, the State would note that Appellant "made no objections to consideration of the statements." Scull v. State, 533 So.2d 1137, 1142-43 (Fla. 1988), rev'd on other grounds, 569 So.2d 1251 (Fla. (1990). Thus, he has failed to preserve this issue for review.

Even if he had preserved the issue, however, it is meritless. As this Court stated in Scull, "when a judge merely sees a victim impact statement contained in a presentence investigation report, but does not consider the statements for purposes of sentencing, no error has been committed." Id. at 1143. In its order, the trial court expressly stated that it had considered the testimony and evidence at the trial, the testimony and evidence at Phase II, "relevant portions of the pre-sentence investigation," and all matters at the sentencing hearing. (R 2527) (emphasis added). This evidence, which includes weighty aggravation, no mitigation, and the recommendation of death by the jury which heard no victim impact evidence, shows beyond a reasonable doubt that a sentence of death would have been imposed without the victim impact evidence. Parker v. Dugger, 537 So.2d 969 (Fla. 1988). Thus, this Court should affirm Appellant's sentence of death.

ISSUE XXIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO INTRODUCE THE TESTIMONY OF THE FORMER PROSECUTOR REGARDING HIS MOTIVATION FOR OFFERING A PLEA TO APPELLANT'S CODEFENDANT, TONY ESCALERA (Restated).

After Appellant rested his case during the penalty phase and asked the trial court to reinstruct the jury regarding the nature of Tony Escalera's plea, the State indicated that it was going to call Mike Celeste, the initial prosecutor on Appellant's case, and the prosecutor who negotiated the plea agreement with Escalera. (T 2016). Appellant objected and stated, "What happened in another case is irrelevant and he will be giving opinion testimony." (T 2016). The trial court made no express ruling, but implicitly overruled the objection. (T 2016-17).

Thereafter, Mr. Celeste testified that plea negotiation is a common practice and that a majority of cases result in a plea. (T 2018-19). When the State asked Mr. Celeste why he had made a plea offer of 40 years for second-degree murder to Escalera, Appellant objected to "opinion testimony," but the trial court made no ruling. As a result, Mr. Celeste explained that, as a result of an extensive investigation and his personal contact with Escalera, he believed that Escalera was a follower, not a leader, that he idolized Appellant, and that he did not have a history of violence as did Appellant. As a result, Mr. Celeste believed that Escalera was not capable of being the gunman in this case. (2019-20). At that point, Appellant objected to that opinion, moved to strike, and requested a curative instruction.

The trial court sustained the objection, struck the testimony, and instructed the jury to disregard it. Defense counsel then stated, "We also have another motion[;] we ask to approach the bench later for that." (T 2021). It was not until after the State's entire rebuttal, three witnesses later, that Appellant moved for mistrial. (T 2054). Regardless, during cross-examination, defense counsel asked Mr. Celeste whether he knew who the triggerman was, and Mr. Celeste responded that he did not. He disagreed with defense counsel that the evidence suggested that Escalera was the triggerman, and maintained that forty years was an appropriate sentence for Escalera, even with his juvenile record. (T 2021-27).

In this appeal, Appellant concedes that the law "permits an explanation by the prosecution for the disparate treatment of a co-defendant once the evidence of that treatment is introduced by the defendant," but contends that such evidence is not properly presented through lay witness opinion like that of Mr. Celeste. **Brief of Appellant** at 82. Initially, the State submits that Appellant has failed to preserve this issue for appeal because he failed to present sufficiently specific objections or to secure rulings on his objections. Such rulings are imperative, for they constitute the basis for review. See Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983) ("[A]ppellant did not pursue his motion to strike even though the judge did not rule on the motion. Under these circumstances, appellant has not preserved the issue for appeal."); State v. Barber, 301 So.2d 7, 9 (Fla. 1974); McPhee v. State, 254 So.2d 406, 410 (Fla. 1st DCA 1971).

Moreover, with respect to Appellant's motion for mistrial, the State submits that Appellant failed to make the motion sufficiently contemporaneous with the alleged error. When Mr. Celeste opined that he did not believe Escalera was the triggerman, Appellant objected, moved to strike, and requested a curative instruction. The trial court sustained the objection, struck the testimony, and instructed the jury. Before moving for a mistrial, however, at the end of the State's rebuttal, Appellant questioned Mr. Celeste further regarding this testimony and again elicited Mr. Celeste's opinion that Escalera was not the gunman. Thus, Appellant failed to move for a mistrial contemporaneously and then invited further error by raising the issue again on cross-examination. Under these circumstances, Appellant has waived his objections to this testimony.

Even if Appellant had preserved his initial objections based on allegedly improper opinion testimony, his argument that Mike Celeste could not relate the circumstances and rationale behind the plea is enigmatic, especially in light of Appellant's concession that such evidence is relevant and admissible. As the principal prosecutor on Escalera's case, and the prosecutor responsible for negotiating a plea agreement with Escalera, Mike Celeste was the only person capable of explaining the circumstances under which the plea was offered and the rationale behind such an offer. Thus, since his testimony fell within the rule of evidence allowing for lay witness opinion testimony, the trial court did not abuse its discretion in implicitly denying Appellant's objections.

ISSUE XXIV

WHETHER FLORIDA STATUTE § 921.141 IS CONSTITUTIONAL (Restated).

In this appeal, Appellant claims that Florida's death penalty statute is unconstitutional for the following reasons: 1) the penalty phase jury instructions relating to the aggravating factors "assure arbitrariness" because they merely mirror the language of the statute, (2) the jury had "unbounded discretion" in deciding the penalty because "it was not told the definition of the felony aggravators," (3) the jury's vote of 8 to 4, a bare majority, "is so unreliable as to violate due process," (4) this Court does not provide meaningful appellate review because (a) it refuses "to reweigh the aggravating and mitigating evidence," (b) it refuses "to examine first degree murder cases in which life is imposed and distinguish[es] cases based on the jury recommendation alone," (c) it inconsistently judges the appropriateness of a jury override, and (d) it "declares error harmless without independent review of the record and has not enforced a requirement of complete trial court findings of mitigating circumstances until Campbell, 571 So.2d 415," and (5) the burden of proof for finding mitigating circumstances ("reasonably convincing") is higher than that required by the United States Supreme Court ("reasonable likelihood"), thereby unconstitutionally restricting consideration of mitigating evidence. **Brief of Appellant** at 83-86. Even though Appellant filed numerous motions in the trial court challenging the constitutionality of section 921.141, none of the motions below encompass the arguments made in this appeal.

(R 2256-60, 2262-64. 2268-73, 2274-77, 2278-94, 2321-48). Nor did Appellant present these arguments at the hearing on the motions. (T 27-35, 53-54, 154-56). Thus, Appellant has abandoned the arguments made below and has failed to preserve the arguments made here. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Even if he had preserved these arguments for review, they are wholly without merit. Challenges for vagueness cannot be sustained against the four aggravating circumstances instructed upon in this case (prior conviction, commission during a burglary, avoid arrest, pecuniary gain) because they contain no terms which require more than common understanding for their definition. Thus, they do not engender the unfettered discretion envisioned by Appellant. See Lewis v. State, 398 So.2d 432, 437 (Fla. 1981).

As for Appellant's second point, the elements of the burglary offense which underlies the commission during a burglary aggravating factor have already been given and found to exist during the guilt phase. Thus, reinstruction during the penalty phase is not necessary. See Issue XXXI, infra.

Regarding Appellant's third point, this Court has already decided that a recommendation of death by a simple majority is constitutionally permissible. Fleming v. State, 374 So.2d 954, 957 (Fla. 1979). See also Schad v. Arizona, 501 U.S. ___, 115 L.Ed.2d 555, 564 (1991). Thus, the jury's 8 to 4 vote in this case is constitutionally permissible.

As for Appellant's fourth point, this Court's appellate review of capital cases does not render the statute unconstitutional. This Court has already decided that it will not reweigh the aggravating and mitigating evidence, Hudson v. State, 538 So.2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1990), and that it need not review all first-degree murder cases, Copeland v. State, 457 So.2d 1012, 1015-16 (Fla. 1984), cert. denied, 471 U.S. 1030 (1985). Since this case does not involve a jury override, Appellant's complaint is inapposite. Regarding harmless error analysis, this Court adopted in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), the harmless error test articulated in Chapman v. California, 386 U.S. 18 (1967), and required in Ciccarelli v. State, 531 So.2d 129, 132 (Fla. 1988) that appellate courts evaluate "the impact of the erroneously admitted evidence in light of the overall strength of the case and the defenses asserted." Thus, contrary to Appellant's assertion, an independent review of the record is performed before error is found to be harmless. See Martin v. Dugger, 599 So.2d 119 (Fla. 1992). See also Martin v. Mississippi, 494 U.S. 738 (1990). Finally, regarding the standard of proof for mitigating evidence, this Court has long since held that the statute does not unconstitutionally limit the consideration of mitigating factors. Sireci v. State, 399 So.2d 964, 972 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). See also Campbell v. State, 571 So.2d 415 (Fla. 1990). Thus, Appellant's arguments must fail.

ISSUE XXV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING APPELLANT'S REQUESTED PENALTY PHASE JURY INSTRUCTIONS (Restated).

A. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUESTED INSTRUCTION ON DOUBLING AGGRAVATING FACTORS (Restated).

During discussions on Appellant's special requested penalty phase instruction number six, which was a limiting instruction on doubling aggravating factors, the trial court stated, "Okay, the doubling up, Province v. State, that applies when I impose sentence; it doesn't apply to the jury. The jury just makes a finding of fact." (T 2060). Although not tendered to the court, the State indicated that it had "a Supreme Court case" that supported the trial court's statement. (T 2061). Presumably, the State was referring to this Court's opinion in Suarez v. State, 481 So.2d 1201 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986), which held that the jury could be instructed on both aggravators as long as the trial court did not give them double weight.

Recently, however, this Court "clarif[ied] the holding" of Suarez in Castro v. State, 597 So.2d 259 (Fla. 1992), and held that the trial court should have given a requested limiting instruction such as the one proposed in the instant case.[15]

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[15] This Court somewhat distinguished Suarez because it "did not involve a limiting instruction, but only the question of whether in that case it was reversible error when the jury was instructed on both aggravating factors." Castro, 597 So.2d at 261. However, in Robinson v. State, 574 So.2d 108, 113 & n.7 (Fla. 1991) (citing Suarez), decided a year before Castro, this Court found no error in the trial court's rejection of Robinson's

Naturally, Appellant relies on Castro to support his claim of error. The State submits, however, that Castro is not a fundamental change of law requiring retroactive application. See Gilliam v. State, 582 So.2d 610 (Fla. 1991). As this Court stated in Gilliam, "only 'fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding'--in effect, 'jurisprudential upheavals'--require retroactive application; 'evolutionary refinements' do not." Id. at 612 (quoting Witt v. State, 387 So.2d 922, 929 (Fla. 1980)). As this Court noted in Castro, it was merely clarifying its holding in Suarez. Thus, this evolutionary refinement should not be applied retroactively to the instant case.

B. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUESTED INSTRUCTIONS TWO, THREE, FOUR, FIVE, SEVEN, EIGHT, SEVENTEEN, NINETEEN, AND TWENTY (Restated).

Citing to Dixon v. State, 283 So.2d 1 (1973), cert. denied, 416 U.S. 943 (1974), Appellant claims that the standard penalty phase jury instructions "do not adequately explain Florida law regarding the standard of proof for establishing aggravating circumstances and the process the jury should use in weighing aggravating and mitigating circumstances." **Brief of Appellant** at 89-90. Dixon, however, does not support his assertion. In fact,

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requested special jury instructions, which included a limiting instruction on doubling aggravating factors.

it supports the State's position that the standard instructions are a correct statement of the law.

The substance of the special instructions requested by Appellant was adequately addressed by the standard instructions. See Vaught v. State, 410 So.2d 147, 150 (Fla. 1982); Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982), cert. denied, 463 U.S. 1229 (1983). The instructions given were not misleading; they were exactly what is provided in the standard jury instructions. Appellant's requested instructions related nothing more than a slanted version of the burden of proof and weighing instructions given in this and every other capital case. Since Appellant has failed to show a palpable abuse of discretion by the trial court in denying his instructions, his argument must fail. See Parker v. State, 456 So.2d 436, 444 (Fla. 1984).

C. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUESTED INSTRUCTIONS ELEVEN, TWELVE, FIFTEEN, SIXTEEN, EIGHTEEN, TWENTY-ONE, AND THIRTY (Restated).

Again, Appellant's requested instructions relating to mitigation were adequately addressed by the standard jury instructions. Thus, the trial court did not abuse its discretion in rejecting them. See Parker v. State, 456 So.2d 436, 444 (Fla. 1984).

D. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUESTED INSTRUCTION FOURTEEN (Restated).

In addition to instructions on the applicable statutory mitigating factors, Appellant wanted the trial court to instruct the jury that it could consider the disparate treatment of his co-defendant as a mitigating factor. While the State does not dispute that the disparate treatment of a co-defendant is a valid mitigating circumstance, it is a nonstatutory mitigating factor that falls within the catchall instruction. Thus, no separate instruction on this or any other nonstatutory fact need be given. Consequently, the trial court did not abuse its discretion in failing to give this instruction.

E. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUESTED INSTRUCTION THIRTEEN (Restated).

Appellant requested that the trial court give the following special instruction: "Your advisory sentence recommendation is extremely important. The judge is required to give great weight to your verdict." (R 2500). The trial court denied the request and gave the preliminary and final standard instructions. (T 1565-66, 2174-79). Appellant claims that the standard instructions violate the principles of Caldwell v. Mississippi, 472 U.S. 320 (1985), and Tedder v. State, 322 So.2d 908 (Fla. 1975). Rejecting an identical claim, this Court stated that it was "satisfied that these instructions fully advise the jury of the importance of its role and correctly state the law." Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989). Thus, Appellant's claim must fail.

F. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUESTED INSTRUCTION TWENTY-TWO (Restated).

The trial court gave the standard instruction regarding the avoid arrest aggravating factor and denied Appellant's requested addition: "This purpose cannot be found by you unless strong proof clearly shows that the dominant or only motive for the murder was the elimination of the eyewitness." (R 2509; T 2078). As this Court stated in Vaught v. State, 410 So.2d 147, 150 (Fla. 1982), the standard instructions are legally sufficient even though they do not "reflect the refinements provided by the decisions of this Court." Consequently, Appellant's argument must fail.

G. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUESTED INSTRUCTION THIRTY-ONE (Restated).

Appellant sought an instruction which cautioned the jury not to consider evidence of prior violent convictions "for any other aggravating circumstances." (R 2518). Other than claiming that the trial court erred in rejecting this instruction, Appellant offers no other aggravating factors to which this evidence would apply. It would hardly relate to the aggravating factors of pecuniary gain, avoid arrest, or during commission of a burglary. Thus, since no other aggravating circumstances were argued or instructed upon, Appellant's requested instruction was unnecessary. Consequently, the trial court did not abuse its discretion in denying Appellant's request.

H. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUESTED INSTRUCTION THIRTY-TWO (Restated).

Appellant's final complaint is to the trial court's denial of his thirty-second requested instruction. This instruction, however, relates solely to Appellant's culpability for the murder itself. Since the jury had already determined in the guilt phase that Appellant killed, or attempted to kill, or intended that a killing take place or that lethal force be employed, this instruction was also unnecessary. Thus, the trial court did not abuse its discretion in rejecting it.

ISSUE XXVI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO PRESENT EVIDENCE OF ONE OF APPELLANT'S PRIOR VIOLENT FELONIES (Restated).

During the penalty phase, the State sought to present the testimony of Deputy Vincent Picciolo, who investigated an aggravated battery on Lori Arce in 1987. Appellant objected on hearsay grounds and asked that the State proffer the witness' testimony. The trial court rejected the request to proffer and implicitly overruled Appellant's objection. (T 1571-72). Thereafter, Deputy Picciolo stated that he previously testified at Appellant's trial on this charge. When the State sought to elicit the details of his investigation, Appellant objected on the ground that it went beyond the fact of the conviction. The trial court overruled the objection. (T 1574-75). As a result, Deputy Picciolo testified that Ms. Arce told him, while she was being treated in the hospital, that Appellant had beaten her up.

Although Appellant and several persons who were with Appellant at the hospital initially told Deputy Picciolo that Ms. Arce had fallen down some stairs, Appellant's companions eventually told him that Appellant chased her down, and hit and kicked her as she lay on the ground until she became unconscious. Without objection, the State introduced a photograph depicting her injuries. (T 1575-82). The State had earlier introduced a certified copy of conviction for this offense (T 1567-70), and later introduced the information charging the aggravated battery (T 1599-1600).

In this appeal, Appellant claims that Deputy Picciolo's testimony amounted to "overkill" and should not have been admitted. **Brief of Appellant** at 96-97. As this Court has previously stated:

> [I]t is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the conviction. See Tompkins v. State, 502 So.2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987); Stano v. State, 473 So.2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986). Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence.

Rhodes v. State, 547 So.2d 1201, 1204 (Fla. 1989). See also Stewart v. State, 558 So.2d 416 (Fla. 1990); Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977).

Appellant cites to Buenoano v. State, 527 So.2d 194, 198 (Fla. 1988), to support his position that Deputy Picciolo's testimony was "overkill," but this case does not provide such support. In Buenoano, this Court reiterated the substance of the above excerpt, but commented that the State's evidence in that case "may have amounted to the type of 'overkill' which this Court has repeatedly met with disapproval," yet nevertheless found it to be harmless. The State suspects that the evidence in that case was far more extensive than the evidence presented here. In any event, if it were error to admit this testimony, such error was harmless beyond a reasonable doubt and did not prejudice Appellant's case such that a new sentencing proceeding is warranted. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE XXVII

WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE AGGRAVATING FACTOR THAT APPELLANT HAD PREVIOUSLY BEEN CONVICTED OF VIOLENT FELONIES (Restated).

During the penalty phase, the State introduced without objection a certified copy of conviction belonging to Appellant which indicated that Appellant had pled guilty to Attempted Sexual Battery with Slight Force, which was a lesser-included offense of the charged offense of Sexual Battery with a Deadly Weapon or Great Force. (T 1567-70; State's Ex. 2). Appellant now claims for the first time on appeal that "[a] crime involving slight force is not a 'life-threatening crime'" as required by this Court's opinion in Lewis v. State, 398 So.2d 432 (Fla. 1981). **Brief of Appellant** at 97. Since Appellant failed to

object in the trial court, however, he has failed to preserve this issue for review. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Even had he done so, his argument must fail. The statute specifically provides for prior convictions involving the use or threat of violence. Attempted sexual battery is such an offense. The State would also note that, although Appellant was convicted of attempted sexual battery with slight force, he was charged with sexual battery with great force. Regardless, since the ultimate offense involved the use or threat of violence, this prior conviction was properly used and considered as an underlying offense to support this aggravating factor.

ISSUE XXVIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO ELICIT TESTIMONY REGARDING AN EXHIBIT THAT WAS NOT ADMITTED INTO EVIDENCE (Restated).

On June 1, 1989, defense counsel moved the trial court for funds to obtain a CAT scan, an EEG, and an MRI on Appellant, based on Susan LaFehr-Hession's opinion that Appellant may have organic brain damage. The trial court granted the motion. (T 1476-91, 1510-12). On September 18, 1989, the State moved to compel production of the results of those tests. (R 2475). At a hearing on the motion, defense counsel indicated to the trial court that it did not yet have possession of those results. The trial court conditioned their admission in Phase II, however, on defense counsel's provision to the State of the results within a reasonable time. (T 1539-40).

On cross-examination by the State, Dr. Perry admitted that he had ordered an MRI and a CAT scan, but had not bothered to get the test results. (T 1832-33). On redirect, Dr. Perry testified that his opinions were not based on the results of the CAT scan, EEG, or MRI, since he had not seen them. (T 1843-44). Prior to the State's recross-examination of the witness, defense counsel objected to the State's use of the MRI test result in questioning the witness on recross because (1) no one had established its authenticity, (2) it was beyond the scope of redirect and irrelevant, since Dr. Perry did not base his opinion on it, and (3) it was work product, since Dr. Perry was appointed to assist the defense in preparation for Phase II. Because the State had obtained the test result by subpoena without defense counsel's knowledge, defense counsel claimed a discovery violation and requested a Richardson hearing. (T 1845-50).

At the hearing, the State argued that this was fair cross-examination because the defense witnesses were claiming that Appellant has organic brain damage, but the MRI was "normal." Moreover, the State indicated that Dr. Perry agreed during his deposition to obtain the test results for the State, so the State obtained them on its own. The State did not believe that defense counsel could conceal relevant information from the State under the guise of "work product," especially in light of its motion to compel. (T 1848-54). In the end, the trial court made no ruling. Defense counsel merely noted a continuing objection to the entire line of questioning. (T 1854).

Thereafter, the State tendered the MRI test results, which were marked for identification only, to Dr. Perry and asked if Appellant's name, age, and doctor's name were on the exhibit. Dr. Perry indicated that they were. Dr. Perry then admitted that the test results were "normal." (T 1854-55). On redirect, Dr. Perry explained that such a test cannot detect the type of brain dysfunction exhibited by Appellant, so a "normal" result does not necessarily negate his findings. (T 1856-60).

In this appeal, Appellant claims that Dr. Perry's testimony on recross was improperly admitted because (1) no predicate was laid regarding the reliability of the results, (2) it was hearsay, (3) the test results constituted work product and were confidential, and (4) the testimony was based on an exhibit which was not admitted into evidence. **Brief of Appellant** at 97-98. Initially, the State submits that, since Appellant failed to secure an express ruling on his objections, he has failed to preserve this issue for review. See Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983) ("[A]ppellant did not pursue his motion to strike even though the judge did not rule on the motion. Under these circumstances, appellant has not preserved the issue for appeal."); State v. Barber, 301 So.2d 7, 9 (Fla. 1974); McPhee v. State, 254 So.2d 406, 410 (Fla. 1st DCA 1971). Even if he had, he made no hearsay objection below; thus, he cannot make it now for the first time on appeal. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Even assuming arguendo that Appellant preserved these arguments for review, with respect to the authenticity argument, the State submits that there was nothing to authenticate. The exhibit was not introduced into evidence.[16] It was merely shown to Dr. Perry for his reference. He identified the exhibit by Appellant's name, age, and doctor's name, which were on the exhibit, and in no way disputed that it was Appellant's results or that the results were reliable.

As for Appellant's "work-product" objection, this too has no merit. In fact, it smacks of bad faith. When Appellant requested funds from the county in order to obtain a CAT scan, EEG, and MRI, it claimed no work-product privilege. Similarly, when the State sought to compel production of the test results, Appellant claimed no privilege and made no objection when the trial court required disclosure to the State as a prerequisite to its admission in the penalty phase. Yet, when the State obtained this relevant piece of evidence on its own--a piece of evidence beneficial to the State and harmful to the defense--Appellant suddenly claimed a work-product privilege.

This privilege, however, does not, and should not, protect this type of evidence. Florida Rule of Criminal Procedure 3.220(d)(2)(ii) requires a defendant to disclose to the prosecution "[r]eports or statements of experts made in connection with the particular case, including results of

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[16] Appellant claims this was error as well; yet, his expert witnesses testified at length about Appellant's psychological test results without ever admitting them into evidence.

physical or mental examinations and of scientific tests, experiments or comparisons" that is in the defendant's possession or control. Perhaps, by neglecting to obtain the test results, Appellant did not have them within his possession or control, but then he should not be able to claim them as work-product if he has no control over them. In truth, Appellant should not be able to subvert the truth-finding process by ordering tests, learning that the results are not favorable without obtaining possession of or control over them, and then claiming that they are nondiscoverable by the State. Such is a blatant attempt at subverting the process and should not be condoned by this Court.

ISSUE XXIX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE ADMISSION OF DEPOSITION TESTIMONY DURING THE PENALTY PHASE (Restated).

During the penalty phase, the State indicated that it wanted to introduce select portions of testimony from pre-trial depositions taken by defense counsel. Specifically, the State wanted to read in portions of testimony given by Gigi Homanick, the wife of Appellant's brother, William, who stated that Appellant came to their house the afternoon before the robbery/murder and asked William for money. When William refused, Appellant threatened to kill him and to "get him" for not loaning him money. The second witness was Freddie Baez, who testified that Appellant and Escalera came to his house sometime after the robbery/murder and offered to sell him some jewelry. In addition, the witness testified that, when he asked Escalera

what had happened to his leg, Appellant quickly responded that Escalera had hurt it climbing over a fence. (T 1583-84, 1588-89).

Appellant objected on hearsay and relevancy grounds, and claimed that Appellant's threat to kill his brother was evidence of a collateral crime that was not relevant to any of the aggravating factors. (T 1588-92). The State responded that the testimony was relevant to prove that, at the very least, Appellant was a major participant in the crime, and that it was committed for pecuniary gain. As for Appellant's threat to his brother, the State argued that Appellant could rebut the evidence with testimony from William that it was an idle threat between brothers and the Appellant did not mean it the way it sounded. (T 1589-90). The trial court found all of it admissible. (T 1591-92).

Appellant now complains that the trial court abused its discretion in admitting the testimony for two reasons. First, Appellant claims that the testimony was hearsay: "Appellant was unable to cross-examine the witnesses and did not have an opportunity to rebut the testimony from these depositions. He was therefore deprived of his constitutional right to confront the witnesses against him as guaranteed under the Sixth Amendment to the United States Constitution." **Brief of Appellant** at 99. Second, Appellant claims that "the testimony as to the alleged threat by Appellant to kill his brother was evidence of another crime for which Appellant had not been convicted or even charged." Even if it were not evidence of another crime, its

probative value was far outweighed by its prejudicial effect. Id.

As for Appellant's hearsay/confrontation argument, section 90.804(2)(a) of the Florida Evidence Code expressly supports the admission of the witnesses' deposition testimony. Assuming that the witnesses were unavailable within the meaning of the rule, which we must since Appellant has not raised this as an issue, this rule exempts from the definition of hearsay "[t]estimony given as a witness . . . in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Here, Appellant's counsel was admittedly at the deposition of these witnesses and had the opportunity and motive to develop the testimony. Thus, the testimony of these witnesses is not hearsay. Similarly, since the witnesses' testimony was given under oath in the same proceeding, and defense counsel had an opportunity to question them, the admission at trial of their deposition testimony did not violate Appellant's constitutional right to confront and cross-examine the witnesses against him. Ohio v. Roberts, 448 U.S. 56 (1980).

As for Appellant's threat to kill his brother, the State submits that this was not impermissible evidence of a collateral crime, but was relevant evidence of Appellant's state of mind. Since the State's case was based on felony murder, it was imperative that the State prove that Appellant was a major

participant in the crime. This evidence circumstantially shows that Appellant had a hostile, threatening, even murderous, state of mind just prior to the robbery/murder. Moreover, this threat to his own brother's life tended to rebut Appellant's allegation that he was a timid follower caught up in Escalera's murderous crime spree. The fact that it constituted a prima facie case of assault did not render it inadmissible, since the State was not using it as Williams rule evidence. It was highly relevant state of mind evidence, and its relevancy was not substantially outweighed by any undue prejudice it may have engendered. Thus, the trial court did not abuse its discretion in admitting it. Even if it were error, there is no reasonable possibility that it affected the jury's recommendation or the trial court's ultimate decision in light of the quantity and quality of permissible evidence upon which they could have relied to reach their respective decisions.

ISSUE XXX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S OBJECTIONS TO COMMENTS MADE BY THE STATE DURING PENALTY PHASE CLOSING ARGUMENT (Restated).

At the beginning of her closing argument, the prosecutor indicated to the jury that her intent was to discuss the statutory framework regarding aggravating and mitigating factors. (T 2104). At that point, the following comments were made:

> And on the second phase the first thing that you have are circumstances. These are the statutory circumstances that our Legislature has provided for, that if you find proof of these aggravating circumstances

> beyond a reasonable doubt, you weigh them, and you weigh them against -- first of all, if you find no mitigating circumstances, you weigh them and you decide: Are these weighty? And if they are, then your result is you recommend the death penalty.
>
> [DEFENSE COUNSEL]: Objection, Your Honor, misstatement of the law.
>
> THE COURT: Overruled. Go ahead.
>
> [THE STATE]: The next step you do is you look to mitigating circumstances. If you find that mitigating circumstances exist, you weigh those, as well, and you weigh them against the aggravating circumstances, and if the aggravating circumstances are more weighty, then your recommendation is that of the death penalty.
>
> If you find that the mitigating circumstances are more weighty, then your recommendation to this Court is life sentence.
>
> [DEFENSE COUNSEL]: Again, for the record, objection, a misstatement of the law.
>
> THE COURT: Overruled.

(T 2104-05).

Without any citation to authority, Appellant claims that the State's comments were "improper and could have led the jurors to believe that they could recommend death by applying a standard less than that called for by Florida law." **Brief of Appellant** at 100. When read in context, however, it is apparent that the State's comments were not a misstatement of the law. Though perhaps inartfully worded, the comments conveyed the essence of the weighing process. Even if some confusion resulted, such confusion was dispelled when the jury received its instructions from the court.

Next, Appellant claims error in the following comment made later by the State:

> It is pretty obvious why you would kill a security guard, but to avoid being arrested. And, ladies and gentlemen, this is another aggravating factor which is proven beyond a reasonable doubt that the State of Florida says if you consider this and you find it, and you find it weighty, the proper sentence is the death penalty.
>
> If you do not find, as they get to the mitigating factors, that they outweigh these --
>
> [DEFENSE COUNSEL]: Objection, misstatement of the law.
>
> THE COURT: Overruled.

(T 2110). This comment was directly relevant to the State's argument regarding the aggravating factor of commission of the offense to avoid arrest. Moreover, at the time of Appellant's objection, the State was attempting to elaborate upon or clarify its comments regarding the weighing process; Appellant merely interrupted before the State had a chance. Again, when read in context, the State's comments were not a misstatement, and, even if they were somewhat confusing, they were cured by the trial court's instructions.

Third, Appellant claims that the State argued nonstatutory aggravating factors, namely, "that Appellant allegedly likes to dominate people (R-2113) and that he had a history of violence (R-2131-2)." **Brief of Appellant** at 100. During its discussion of mitigating factors, the State attempted to rebut Appellant's claim that he committed the offense under extreme mental or

emotional disturbance. In attempting to do so, the State commented:

> Ladies and gentlemen, the evidence you have been presented is misleading and totally in conflict as to what you heard in the first part of this trial.
>
> Let's think about who is the mastermind behind this, who is not in any way, shape or form, under the influence of extreme emotional -- I think it says disturbance; that was not that case at all.
>
> Who is the older individual here, but the Defendant, Miguel Hernandez. He is 27 years old. At the time of the offense he is probably 26 years old, and the other individual involved in this case was 16 years old. There is a decade of experience in that man sitting in this courtroom that his cohort did not have. His cohort was a kid led by this man, and let's think about it. Can this man be dominated by anyone? Let's look at his history.
>
> He is a violent person. He has committed attempted sexual battery and battery. Do you think a 16-year-old is going to have one bit of influence over this man?
>
> Let's further look at this. This man doesn't take anything from anybody. When you look at the incident with his girlfriend, when she was at that hospital, she wouldn't tell the police what happened because she was afraid of him. He is the dominant person here. He likes to dominate other people and --
>
> [DEFENSE COUNSEL]: Objection, Your Honor, improper, beyond the scope of the statute.
>
> THE COURT: Overruled.

(T 2112-13). This too was a proper comment on the evidence as it related to Appellant's claimed mitigating factors. Perhaps it related more closely to the domination mitigating factor also raised by Appellant, but it was nevertheless fair comment on the

mitigating factors and in no way constituted an argument on a nonstatutory aggravating factor.

Similarly, the State's later comments regarding Appellant's history of violence which culminated in the death of John Giblan did not constitute an argument on a nonstatutory aggravating factor. (T 2131-35). When read in context, it is obvious that the State was discussing the aggravating factor relating to prior violent felonies and how their progression during a short period of time demanded considerable consideration, i.e., great weight by the jury. Thus, contrary to Appellant's assertion, it was not an improper argument.

Finally, without any record citation or legal authority, Appellant complains about the State's reference to the victim being in a lot of pain. Apparently, Appellant is referring to a comment made when the State was discussing Appellant's progression of violence from sexual battery to aggravated battery to murder. At one point, the State said before being interrupted by an objection, "Now, we next continue with this violence and we are at the Farmer's Market now. Our trial of violence begins with the three shots to John Gibbling [sic]. He is in horrible pain from the shot to his hip, which Dr. Benz told you --" Appellant's objection was overruled, and the State continued to discuss Appellant's inherently violent nature. (T 2131-35).

While Appellant's assertion may be true that the victim's pain was irrelevant because the heinous, atrocious, and cruel aggravating factor was not being presented to the jury for its

consideration, the State's comment was not improper when taken in context. As noted previously, it was wholly appropriate for the State to discuss Appellant's prior acts of violence which constituted the aggravating factor. The point the State was trying to make was that Appellant's prior violent behavior finally culminated in someone's death. Thus, based on these facts, a recommendation of death was warranted. Such an argument was not improper.

In making these claims of error, Appellant notes that his "motions for mistrial based upon all the above misstatements and arguments were denied by the trial court." **Brief of Appellant** at 100-01. Appellant's single motion for mistrial, however, was not made even remotely contemporaneously with the allegedly improper comments. Rather, Appellant waited until after his own closing argument to make a generalized motion for mistrial. Since the trial court had already overruled Appellant's objections, it quite properly denied Appellant's motion for mistrial. (T 2179-80). The State's closing argument was a fair comment on the evidence and did not have the effect alleged by Appellant. Even if it did include improper argument, such error was cured by the trial court's instructions to the jury. Thus, since the jury was properly instructed as to the appropriate aggravating and mitigating circumstances, the appropriate standards of proof for each, and the weighing process, there is no reasonable possibility that the State's comments contributed to the jury's recommendation. This Court should affirm Appellant's sentence of death.

ISSUE XXXI

WHETHER THE TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY DURING THE PENALTY PHASE AS TO THE DEFINITION OF THE FELONIES BY WHICH IT WAS ALLEGED THAT AGGRAVATING CIRCUMSTANCES SET FORTH IN FLORIDA STATUTE § 921.141(5)(d) WERE PRESENT (Restated).

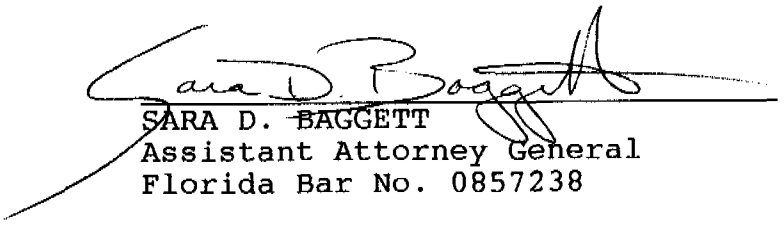
One of the aggravating factors applicable in this case was 921.141(5)(d), which relates to commission of the murder during a burglary. Appellant claims that the trial court failed to give an instruction on the elements of the burglary during penalty phase instructions. **Brief of Appellant** at 101-02. Since Appellant failed to raise this issue below, thereby preserving for appellate review, he is claiming fundamental error. The State disagrees. The jury was instructed on the elements of burglary in the guilt phase and found Appellant guilty of two counts of burglary. Since they had already found the underlying felony to exist, it would have been wholly unnecessary to give instructions on the elements again. The cases to which Appellant analogizes do not support a different conclusion. Thus, the trial court did not commit fundamental error by failing to instruct the jury on the elements of burglary, which was the underlying felony to the "during commission of a burglary" aggravating factor. Hitchcock v. State, 578 So.2d 685, 692 (Fla. 1990), cert. granted and rev'd on other grounds, 120 L.Ed.2d 892 (1992).

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm Appellant's convictions and sentences.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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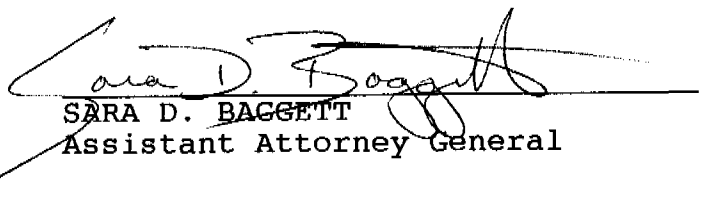
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Bert Winkler, Esquire, 250 Australian Avenue South, Suite 300, West Palm Beach, Florida 33401, this 16th day of November, 1992.



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