IN THE SUPREME COURT OF FLORIDA

RALPH KERMIT ELLIS,

Appellant,

v. CASE NO. 75,813

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

(A) Procedural History

The State accepts the chronology of the case as reported by the Appellant and would additionally note that Mr. Ellis has been allowed to file three appellate briefs. This is the third Answer Brief submitted on the State's behalf.

(B) Facts

The Appellant's latest brief raises fourteen distinct claims. The facts relevant to each claim will be set forth in order:

Facts: Argument I

Following the Appellant's indictment for two counts of first degree murder and one count of attempted murder (R 40-44), the State filed a motion for consolidation of the three cases for trial (R 85). A hearing was conducted on the State's motion (TR 236).

The State argued that it had previously filed Williams Rule notices in all three cases (TR 237, see R 68). However, since the same evidence was to be used in all three trials it was apparent that consolidation would be appropriate (TR 237-238).

The State argued that the proximity of the crimes, the temporal proximity of the crimes and the use of the same "modus operandi" all militated in favor of consolidation (TR 238). Given the presence of the Williams Rule, the State noted the lack of prejudice to the defendant (TR 241-242).

All three victims were picked up along the same stretch of US-1 in Jacksonville, Florida (TR 242-245). All three victims were "abducted by trick" into Ellis' truck on the pretense of buying some marijuana (TR 242-245). All three victims sat between Ellis and Boehm. (TR 242-245). All three victims were attacked with a knife (TR 242-245). Two died from similar wounds while the third escaped (TR 242-245). The two dead victims were dumped on the side of the road in the north part of Jacksonville (TR 242-245). All of the victims were selected on the basis of race (TR 245).

The Appellant argued that the three crimes were not all part of a single transaction and could not be consolidated (TR 246). The trial court agreed to review the caselaw (TR 254). The State's motion was granted (TR 254).

After trial, the consolidation issue was renewed as an argument in support of Ellis' motion for new trial. The trial court denied relief, holding as follows:

> With regard to the grounds in the motion for new trial as to the consolidation. Ms. [sic] Vickers and Ms. Corey, I think one factor that is an issue, and I think unless I -- and I could stand corrected, because the matter of the consolidation in the large matter depends on the discretion of the court. Having heard all of the evidence at trial, I'm more convincied than ever that the matter should have been consolidated as they were, if for no other reason but that the State would have had to put on three separate and distinct trials, all of which are identical. I could see no way that the State could have prosecuted the death of Willie Evans or Howard Mincey without also at the same time having prosecuted or presented the evidence related to the death, or the attempted death, of Allen Reddick. Clearly the Williams Rule would provide that. And we're to go before a

> jury by way of admission under the Williams Rule or by consolidation, I think ultimately makes little difference.

(TR 1810-1811).

Facts: Argument II

Richard Feagle was the stepson of "co-defendant" Johnny Boehm. On June 22, 1989, Feagle gave a sworn statement to the prosecutor (R 119). Feagle reported that Ellis had confessed to two separate murders of black people (R 119-122). Ellis also told Feagle about a third victim who escaped (R 123). Feagle was able to provide details on the modus operandi of the killers and where the vcitims were abandoned (R 119-125). Ellis also told Feagle he had lied (to the hospital staff) about the cut on his arm (R 127).

On December 1, 1989, Feagle appeared for a deposition (R 131, et seq.). Feagle denied remembering any confessions by Ellis (R 134). Feagle did not know why he answered "yes" to the prosecutor's question (R 134). Feagle did not recall Ellis' second confession (though he did recall saying that Ellis should not "dump" his victims in Feagle's neighborhood) (R 135). Feagle also alleged that Ellis had a "regular" haircut (in 1978) and was clean shaven (R 136).

Feagle then denied hearing a third confession regarding a victim who escaped (R 137). Feagle denied knowing how Ellis cut his arm (R 138). Feagle accused the prosecutor of threatening him and his mother (R 142-143).

Feagle's relationship with Boehm, his false accusations against the prosecutor and his recantation of his sworn statement

led the State to the conslusion it could not vouch for Feagle's credibility and that he was a hostile witness (R 117-118).

The defense alleged that Feagle was not an "eyewitness" and that, as a result, he was merely "not helpful" as opposed to "hostile" (TR 989-990).

After careful review of the proffered caselaw, the trial court said it could see little or no difference between an eyewitness and one who hears a direct confession (TR 994). The court decided to call Feagle as its own witness and allow both parties to cross examine him (TR 995).

In the presence of the jury, Feagle tried to aid the Appellant by repudiating his sworn statement and accusing the State of threatening him (TR 1017-1023).

Facts: Argument III

The trial court properly denied Ellis' motion for judgment of acquittal because the defendant's motion called for an assessment of comparative credibility rather than the absence of evidence (TR 1216-1222).

The State's case is adequately set forth in Mr. Ellis' third brief. In sum, the State proved Mr. Evans was murdered. A witness (Phillips) saw Ellis washing blood off his truck (TR 908). Ellis described his victim as an "older black man" (TR 910). Ellis described where and how they kidnapped the victim (TR 910). Ellis described how the victim was killed (TR 912). The autopsy corroborated the story, as did other confessions to witnesses Mallaly and Feagle (TR 1043, 1163 et seq.).

Ellis, who even testified on his own behalf (TR 1382, et seq.), offered no alibi or other defense other than to challenge descriptions of his appearance and explain a cut on his arm (id).

Facts: Argument IV

The important facet of Randy Mallaly's testimony as it related to "other crimes" was the fact that this "other crime" took place on the day of one of the murders, just prior to the murder itself. Thus, defense arguments regarding relevance (TR 650-654), were properly denied.

On the day of the "collateral" crime, Mallaly, Ellis and Boehm went out in Ellis' truck (TR 1030). Mallaly asked Ellis what they were going to do and Ellis replied, "We're going to kill a nigger." (TR 1030). The trio pulled into a parking lot, and Ellis produced a sawed-off shotgun (TR 1031). Ellis passed the gun to Boehm and asked Mallaly if he wanted to help (TR 1031). Mallaly refused so they took Mallaly to Ellis' house and left him (TR 1031).

Mallaly went next door to visit Ray Phipps (TR 1031). Later that night, he returned to Ellis' home, where he saw Boehm driving away (TR 1032), and Ellis in his garage cleaning blood off of an "instrument" (TR 1032). There appeared to be blood on and inside Ellis' truck (TR 1032). Ellis then told Mallaly he had "killed a nigger" (TR 1041).

Facts: Argument V

The trial judge instructed the jury on first degree felony murder with kidnapping as an underlying felony (TR 1496-1502,

1612-1618). The court also instructed on "robbery" as to the Evans murder (TR 1496-1502, 1612-1613). The defense objected, but only because of the weight of the "robbery" evidence and because of a question over whether Mincey and/or Evans died inside or outside of Ellis' truck (TR 1497-1500).

Facts: Argument VI

The Appellant correctly reports Officer Robinsons' unresponsive answer to the prosecutor's question, "how he remembered" (whether Ellis had a beard) (TR 1455). Robinson stated that Ellis was popular for his hatred of blacks (TR 1453-1456).

This was a rebuttal witness. Ellis had already testified to having that sort of reputation and to liking it because it kept people "off his back" (TR 1387). Ellis also admitted he called black people "niggers" (TR 1426).

Facts: Argument VII

Although the trial judge did not list nonstatutory mitigating factors in his sentencing order, it is clear that these factors were considered. On page 254 of the written sentencing opinion, the court wrote:

> The defense called a number of witnesses all of whom were family and friends of the defendant. Each of the witnesses testified that the defendant was a good person, a loving and caring father and husband, a good worker and a good neighbor. Each reported shock upon learning that the defendant had been charged with the instant offenses. At least one of the witnesses explained that the defendant's only brush with the criminal justice system of which the witness was aware involved a minor altercation some years ago

which did not result in defendant's conviction for a felony.

The court made reference to this evidence at the sentencing hearing particularly as it related to the statutory mitigating factors (TR 1823-1833). The court properly instructed the jury on mitigation (TR 1784).

Facts: Argument VIII

The nature of the crimes at bar led the court to the conclusion that Ellis' age, while ordinarily a mitigating factor, was not a factor in this instance (TR 1834). That was a ruling on evidentiary weight.

Facts: Argument IX

The State was not able to prosecute Johnny Boehm because the only evidence it had against him was in the form of Ellis' confessions to third parties. (R 246). Thus, absent any evidence, Boehm was legally innocent and could not be prosecuted. Boehm did not receive "better" treatment, nor did he receive a lesser sentence.

Facts: Argument X

Mr. Ellis did not object to the jury instruction on the "heinous-atrocious-cruel" aggravating factor.

Facts: Argument XI

This issue is dependent upon the facts as stated in argument five.

Facts: Arguments XII, XIII, XIV

No factual development is required.

SUMMARY OF ARGUMENT

The Appellant offers fourteen (14) points on appeal, none of which warrant relief.

Mr. Ellis' crimes were properly consolidated for trial and, as noted by the court, if not consolidated would still have resulted in the same evidence going before the (juries).

Mr. Ellis' remaining issues are either unpreserved, or challenges to reasonable exercises of judicial discretion, or not supported by law. In addition, Ellis has failed to show that any alleged error was prejudicial to his case.

Mr. Ellis was properly convicted and sentenced to death.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION IN CONSOLIDATING THE THREE CRIMES AT BAR FOR TRIAL

Once again, Mr. Ellis opens his appeal with the claim that the trial court erred in consolidating the three crimes at bar for trial. We note that Mr. Ellis, despite having the benefit of the State's Answer Brief, still confines his arguments to the question of factual error by the lower court without any discussion of "abuse of discretion", or "harmless error" or the impact of the Williams Rule.[1] Indeed, conspicuously absent from Mr. Ellis' brief is the one case which appears to control this appeal; Crossley v. State, 596 So.2d 447 (Fla. 1992). The State will, again, address the full scope of the issue.

(A) Standard of Review

In reviewing a claim of improper consolidation two factors control the court's review function. First, the standard of review for assessing the trial judge's decision is not simply "error". Rather, it is "abuse of discretion". Second, if an abuse is found, the next step is to perform a harmless error analysis as required by §§59.041, and 924.33, Florida Statutes.

The concept of "abuse of discretion" is distinct from that of mere "error". As noted in Canakeris v. Canakeris, 382 So.2d 1197 (Fla. 1980), an "abuse of discretion" is an arbitrary, unreasonable or fanciful judgment with which no reasonable person

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[1] Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).

could agree. This definition was refined in Walter v. Walter, 464 So.2d 538, 539 (Fla. 1985), as follows:

> The correction of an erroneous application of law and the determination that the trial court abused its discretion are two separate functions. An erroneous application of a rule of law is illustrated by a trial court order requiring payment of support for a child who has reached majority and is not dependent by reason of unusual circumstances. (citation). An example of an appellate court's proper determination, upon known facts, that the trial court abused its discretion is found in the oft-cited decision of Brown v. Brown, 300 So.2d 719 (Fla. 1st DCA 1974). . . .
>
> This Court has repeatedly stated that appellate courts, in examining the discretionary acts of trial courts, must not reweigh the facts.[2]

It is undisputed that the standard of review is the "abuse of discretion standard." Bundy v. State, 455 So.2d 330 (Fla. 1984); Garcia v. State, 568 So.2d 896 (Fla. 1990); Crossley v. State, 596 So.2d 447 (Fla. 1992). It is also true that many of the district court decisions relied upon by Mr. Ellis failed to utilize that standard.

Simple "legal error" was used in Wallis v. State, 548 So.2d 808 (Fla. 5th DCA 1989); Cannady v. State, 557 So.2d 225 (Fla. 3rd DCA 1990); Hoxter v. State, 553 So.2d 785 (Fla. 1st DCA 1989); McMullen v. State, 405 So.2d 479 (Fla. 3rd DCA 1981); Williams v. State, 439 So.2d 1014 (Fla. 1st DCA 1983); Paul v. State, 385 So.2d 1371 (Fla. 1st DCA 1979). Indeed, in some of

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[2] Brown involved a lower court order which provided for only temporary, rehabilitative, alimony for a wife who had not worked for 18 years because she had once been a registered nurse and real estate agent.

these cases, subsequent review did not include the appropriate standard but rather just a "legal error" discussion. Paul v. State, 385 So.2d 1371 (Fla. 1980); State v. Williams, 453 So.2d 824 (Fla. 1984).

The caselaw was further confused by the use of a "per se error" standard by some panels of the lower courts. Macklin v. State, 395 So.2d 1219 (Fla. 1st DCA 1981), and refusal to consider the correct standard in Hoxter, supra.

"Abuse of discretion", of course, does not end the inquiry. Judicial error of this kind is still subject to "harmless error" review. Bundy, supra; Crossley, supra. Harmless error can be shown either by showing a lack of actual prejudice to the defendant, see McDonald v. State, 537 So.2d 185 (Fla. 1st DCA 1989) (jury not influenced by improperly consolidated arson charge since the defendant was acquitted), or where the same evidence would still have come in under the "Williams Rule". Bundy, supra; Crossley, supra; Spivey v. State, 533 So.2d 306 (Fla. 1st DCA 1988).

Again, in many of the cases cited by Mr. Ellis the courts ignored harmless error, ignored the Williams Rule, and employed incorrect standards (including "per se" reversible error), without regard to precedents of this Court. Brown v. State, 502 So.2d 979 (Fla. 1st DCA 1987) ("presumed prejudice"); Macklin, supra (per se error).

This case provides this Court with a clear opportunity to place all of the courts "on the same page" in their review of these cases. The correct standard of review is "abuse of

discretion". The appellant must establish an entitlement to relief by showing arbitrary and capricious misconduct by the trial court. Mere "legal" error or a difference of opinion regarding the weight or interpretation of evidence will not suffice.

If an abuse of discretion is shown, then the State must be allowed to establish harmless error as mandated by statute. To the extent that any prior caselaw deviates from the standard of review established by law, it is wrong.

(B) Abuse of Discretion

Mr. Ellis, despite having the State's previous brief on "abuse", continues to ignore the legal standard of review in favor of a "legal error" argument. The reason for this tactical choice is clear. Mr. Ellis cannot establish fanciful or arbitrary conduct.

Naturally, it is undisputed that the record shows careful consideration of the consolidation issue before trial (when the court took time to study the caselaw and records before entering its decision) and in the trial court's post-trial discussion of the issue. Whether one agrees with the trial court is irrelevant. The issue on appeal is the qualify of the court's conduct and whether its decision - right or wrong - could reasonably have been obtained. We reject the notion that an error by the trial court is per se "unreasonable", for such a standard would abolish the "abuse of discretion" test.

The trial court was confronted with two issues:

(1) Admit evidence of all three crimes under the Williams Rule, or

(2) consolidated the three cases for trial.

The only practical difference between the two approaches was the way in which the jury (or juries) would receive the same evidence. In fact, using the "Williams Rule" approach, Mr. Ellis would arguably have had the additional disadvantage of "prior convictions" going to the jury (after the first trial) as opposed to "prior accusations".

When the trial court arrived at its decision it noted the prospect of the Williams Rule letting the same evidence enter the case(s) anyway. The court's decision was not based on Williams alone, but rather was based upon the factors recognized in this Court's decisions from Paul, supra to Crossley, supra.

(i) Geographic Proximity

Mr. Ellis may debate precise distances in blocks or feet, but the geographic proximity of these crimes is patently obvious:

(a) All the victims were abducted along a small stretch of US-1.

(b) All victims were stabbed in the defendant's truck.

(c) The two murder victims were transported to the north side of town and dumped on the side of the road.

Ellis ignores the abduction and stabbing elements of the crimes and focuses on where the bodies were found. True, the bodies were not dumped in the exact same location, but such conduct on Ellis' part would have been foolish, especially after the first body was found and police began searching the area.

The finding of geographic proximity, whether agreed with or not, is at least a reasonable conclusion in light of the decision in Spivey v. State, 533 So.2d 306 (Fla. 1st DCA 1988). In Spivey, the court found "geographic proximity" in two cases which were no closer than "northern Gainesville".

(ii) Modus Operandi ("M.O.")

The defendant's "M.O." is relevant in consolidation cases and was starkly relevant here. Each of Ellis' victims were picked up in the same area. In each case they were tricked into going with Ellis on the pretext of buying "pot". In each case, the victim was seated between Ellis and Boehm. All of the victims were attacked in the same manner and the dead victims were left on the north side of town. These three crimes were not simply three random events involving the same defendant.

The similarities in "M.O." were relied upon by the courts in Bundy, supra, and in Shupe v. State, 517 So.2d 780 (Fla. 5th DCA 1988); Snyder v. State, 564 So.2d 193 (Fla. 5th DCA 1990); Meadows v. State, 534 So.2d 1233 (Fla. 4th DCA 1988).

If the court "erred" in ordering consolidation because the crimes were "merely similar", see State v. Williams, 453 So.2d 824 (Fla. 1984), such an error cannot be classified as an "abuse of discretion" when the fine shade of difference between "merely similar" and "modus operandi" is considered. This case clearly leans toward the "M.O." side of the scale.

(iii) Temporal Proximity

Two of the crimes at bar took place approximately four days apart in March of 1978. The third attack took place on July 7, 1978. We submit that in reviewing the temporal proximity issue the Court must look at the entire trilogy, in context, rather than mere ticks of a clock or dates on a calendar.[3]

Willie Evans was abducted by trick from a parking lot along US-1, and later killed, on March 20-21, 1978. The victim's body was found on March 21, 1978. Shortly thereafter, Mr. Mincey was abducted from the same area on US-1 and murdered. His body was found on March 24, 1978.

It would not be unreasonable for Ellis and Boehm to lay low for awhile to avoid being identified or having the truck identified. In July, when Mr. Reddick was attacked, Ellis used a new truck even though he abducted Reddick from the same area. Mr. Ellis was questioned by the police in November, 1978 (TR 152), and was aware of his status as a suspect. No other killings or attacks were attributed to Ellis. These three crimes did not occur all in one night, but it is clear that the temporal proximity (or lack thereof) is a factor dictated by the other record events.

(iv) Nature of Crimes

Bundy, supra, cites the nature of the crimes as the fourth factor to be considered. These crimes were not random attacks

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[3] Of course, on appeal, all facts and all inferences from the facts must be taken in favor of the lower court's decision. Shapiro v. State, 390 So.2d 344 (Fla. 1980).

upon three people for different motives. These crimes were an attack upon the African-American population of Duval County. Ellis himself expressed the motive in two words: "kill niggers". These crimes were pure and simple hate crimes whose commonality cannot be dispatched. This is in stark contrast to State v. Williams, 453 So.2d 824 (Fla. 1984) (random thefts and burglaries) or even the sexual assaults of Wallis v. State, 548 So.2d 808 (Fla. 5th DCA 1989). Those crimes were similar, or had similar victims, but were based upon the defendant's "needs" or "urges" of the moment. Ellis, on the other hand, was selectively exterminating African-Americans because of racial bias. In a sense there was one victim: race.

Mr. Ellis, for obvious reasons, may dispute these findings but he cannot dispute the fact that the court's findings were at least grounded upon some caselaw and "arguable" facts. Thus, the court's decision clearly was not "arbitrary" or made in callous disregard for the law.

(C) Harmless Error

Even if the trial judge erred, any error was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

The three crimes at bar would have been presented to all three putative juries, had Ellis received three trials, under Florida's Williams Rule. Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).

As often noted, Williams creates a rule of admission, not exclusion, and allows juries to hear evidence of other crimes

when said evidence establishes identity, motive, modus operandi, lack of mistake or a common scheme. The applicability of the Williams Rules to consolidation cases is an established fact. Bundy, supra; Crossley, supra.

The crimes at bar reflect a common modus operandi and a common plan or scheme. They also reflect "lack of mistake" should Ellis allege "self defense", or intoxication or some other intent-based defense as to any one attack.

The record in this case supports the consolidation decision by the trial court. Even if, however, the court erred in its interpretation of the (conflicting) caselaw, it is painfully obvious that no abuse of discretion was involved (a mere legal error is not "abuse"), and that any error was harmless.

POINT II

THE TRIAL COURT DID NOT ERR IN CALLING FEAGLE AS A COURT WITNESS

The Appellant, citing Jackson v. State, 498 So.2d 906 (Fla. 1986), and Brumbly v. State, 453 So.2d 381 (Fla. 1984), contends that the trial court erred in calling Mr. Feagle as a court witness because:

(1) Feagle was not an eyewitness to the crimes, and

(2) Feagle's testimony did not hurt the State.

Mr. Ellis argument neglects to mention the standard of review and is otherwise limited in scope. Prior to answering his

argument, the State would place this argument in its proper perspective.[4]

(A) Standard of Review

The decision to call a witness as a court witness is a discretionary decision whether made pursuant to §90.608 or §90.801, Florida Statutes. Austin v. State, 461 So.2d 1380 (Fla. 1st DCA 1984); Wasko v. State, 505 So.2d 1314 (Fla. 1987). Thus, appellate review should be conducted under the abuse of discertion standard (discussed above), rather than any reweighing of any evidence.

The decision of the trial court, of course, must also be affirmed even if the judge reached a correct result "for the wrong reason." Savage v. State, 156 So.2d 566 (Fla. 1st DCA 1963).

Finally, even if the court erred, any error must be examined under the "harmless error" standard of DiGuilio.[5]

(B) §90.608, Florida Statutes

Mr. Ellis' argument under §90.608, Fla.Stat., is his strongest and is thus provided without elaboration in his brief. As noted above, Mr. Ellis contends that under Jackson, Brumbly,

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[4] As noted above, Feagle (the co-defendant's stepson), was subpoenaed by the prosecutor and gave a sworn statement on June 22, 1989. (R 119-129). Just three days before trial, Feagle gave a deposition in which he could no longer remember Ellis' confessions. (R 134, et seq.). Feagle also claimed State coercion. (R 143, et seq.). At trial, Feagle was called as a court witness (over defense objections), after extensive argument. (TR 982-996). The jury was not told Feagle was a court witness.

[5] State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

et al., the court erred in calling Mr. Feagle as its witness since he was not an eyewitness and since his testimony was "not harmful".

The legal position taken by Mr. Ellis is only partially disputed. We agree that the court should not call a witness as its own under §90.608, Fla.Stat., if his testimony is not, in fact, damaging to the State.

We agree with the trial court, however, that the "eye witness" references in Jackson, et al., are references to the kind of witness who "should" (this Court's term) be called as a court witness but not to the only kind of witness who "can" or "shall" be called as a court witness. The trial judge astutely recognized that eyewitnesses and witnesses who receive confessions are more alike than they are different. Both witnesses offer direct, rather than circumstantial, proof of guilt. Since Jackson does not forbid the calling of witnesses other than "eyewitnesses" who can provide direct evidence of guilt, there is no logical reason to preclude the court from calling them. Again, under the appropriate standard of review for discretionary rulings, the court's finding is neither incorrect nor "arbitrary" nor "unreasonable".

This brings us to the issue of whether Feagle's testimony was damaging to the State.

Feagle's testimony can be viewed several ways. As Mr. Ellis notes, it could arguably be viewed as a mere statement of memory loss which, in turn, would not be considered "hostile" to the State. Pitts v. State, 333 So.2d 109 (Fla. 1st DCA 1976);

Jackson v. State, supra. On the other hand, the nature of the "memory loss" and Feagle's intimations that his earlier statement was the product of prosecutorial misconduct (a recurring defense theme during trial) could indeed be said to have been harmful to the State because it reflected on the credibility of other "coached" witnesses such as Mr. Reddick, Mr. Crawly and Mr. Phillips. (See State objection, TR 919, and curative instruction TR 1090, after Mallaly testified).

The weight to be afforded this evidence is no longer subject to review. On appeal, the issue of "how damaging" this evidence is must yield to a review of whether "no reasonable person" could possibly agree with the trial judge. Canakeris, supra. Even if this Court would have reached a different result, reversal would be inappropriate unless the trial court's conduct was arbitrary, unprincipled, fanciful or unreasonable. Canakeris, supra. Since this testimony was arguably damaging, Mr. Ellis cannot prevail.

We would also note one significant difference between this case and Jackson.

In Jackson, the defendant's mother never gave anyone a sworn statement alleging that the defendant confessed. In fact, she was consistent in her denials. The prosecutor wanted to put her on as a court witness in order to lay a predicate for the introduction of third party hearsay testimony (otherwise inadmissible) from a police officer (who would say that the mother told him what Jackson said).

In our case, the witness did give an inconsistent, sworn statement and his corroborative testimony would have been

admissible had he not changed his story. This significant factor distinguishes our case from Jackson. Also, under Brumbly, it shows that Feagle was unreliable or untrustworthy in addition to his familial relationship with the codefendant Boehm.

In reviewing judicial discretion, we again perceive no error.

Even if the court erred, however, we submit that any error was harmless under DiGuilio.

First, the jury was never told Feagle was a court witness and both sides cross examined him.

Second, Feagle (at worst for Mr. Ellis) merely acknowledged making his June 22 statement (which was otherwise admissible) while accusing the prosecutor of pressuring him.

Third, Feagle's testimony was merely cumulative to that of Phillips and Mallaly. Even though Phillips, after eleven years, inverted the order of the killings the fact remains that Ellis' confessions were clearly corroborated by the physical evidence. Mallaly's and Phillips' testimony could have stood alone with the physical evidence. Feagle's testimony was merely cumulative.

Fourth, even if this testimony should not have been allowed (in this form) under §90.608, Fla.Stat., the same procedure could have been allowed under §90.801, Fla.Stat. That brings us to Part (C) of the argument.

(C) §90.801, Florida Statutes

Mr. Feagle was subpoenaed to the State Attorney's Office, where he gave a sworn, transcribed and notarized statement.

Section 90.801 of the Florida Statutes provides that the court may call, as a court witness, any witness who has repudiated a prior, sworn statement given at a trial, deposition, hearing or "other proceeding". Furthermore, while prior statements under §§608 can only be used for impeachment purposes, prior statements under this section may qualify as substantive evidence of guilt.[6] State v. Delgado-Santos, 497 So.2d 1199 (Fla. 1986); Moore v. State, 452 So.2d 559 (Fla. 1984).

This Court recognizes, in defining "other proceedings," the existence of a "bright line" between statements made in a trial, hearing, deposition or "other proceeding" and statements (even if sworn) made to the police. State v. Delgado-Santos, supra. Our statute was intended to track the federal evidence code on this point, see Moore, supra, and the rationale for this "bright line" (as opposed to case by case review), has been intelligently, even if not successfully, challenged. See Robinson v. State, 455 So.2d 481 (Fla. 5th DCA 1984); Tinsdale v. State, 498 So.2d 1280 (Fla. 4th DCA 1986) (Glickstein, J., dissenting).

That issue does not concern us here, however, since we are not dealing with an unsworn statement, as in Dudley v. State, 545 So.2d 857 (Fla. 1989), or a statement taken by the police.

We have a statement that was given to an asistant state attorney, an officer of the court, pursuant to a subpoena. In her investigative capacity, the prosecutor at bar acted as the equivalent of a one-woman grand jury. Imperato v. Spicola, 238

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[6] At trial, without citing this section, the court and prosecutor noted that the statements could be substantive evidence. (TR 996).

So.2d 503 (Fla. 2nd DCA 1970). Pursuant to Moore, supra, a "Grand Jury" proceeding, while not a judicial proceeding (since there is no cross examination), nevertheless can produce a sworn statement admissible under §§801. In fact, in Moore, this Court held:

> The Law Revision Council notes indicate that §90.801(2)(a) was inspired in part by Federal Rule of Evidence 801(d)(1) which requires the statement to have been given under oath, subject to the penalty of perjury, at a trial, hearing or deposition. As is indicated below, Rule 801(d)(1) has been interpreted as including statements given under oath before a grand jury. Because section 90.801(2)(a) was patterned after Federal Rule of Evidence 801(d)(1), we should construe the former in accordance with federal court decisions interpreting the latter.

Moore, supra, at 561, 562.

If we recognize that an officer of the court is more than a police officer (and, indeed, the prosecutor's special role is even noted by the Code of Professional Responsibility), then, under Imperato and Moore, sworn statements given under penalty of perjury should qualify for admission under §§801 since they are of comparable reliability to grand jury testimony.[7]

We will not belabor the Court with a second "harmless error" summary but we would note that again, harmless error applies in §§801 cases. Dudley v. State, 545 So.2d 857 (Fla. 1989).

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[7] As an aside, in Davis v. State, 539 So.2d 555 (Fla. 4th DCA 1989), the court held that under 90.608 the State could not impeach a witness' sudden loss of memory with his prior, sworn statement. But, in doing so, the district court noted the State's failure to cite or argue §90.801 as an alternative basis for admission of the earlier statement.

Even if Mr. Ellis could show an "error" in the form of a misperception of the evidence, we submit he has not shown (1) an abuse of discretion; (2) error under §§801, or (3) prejudice.

POINT III

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

The Appellant contends that the trial court should have granted his motion for judgment of acquittal since the evidence failed to sufficiently "link" him to the murder of Mr. Evans. We submit that Mr. Ellis' argument misapprehends both the controlling law and the nature of the evidence.

We will begin by reviewing the evidence.

The State's case against Mr. Ellis consisted of the following evidence:

> (1) The "corpus delecti", which is not contested, of the death of the victim as a result of a beating and a stabbing. The multiple wounds included damage to the victim's skull wihch could have been inflicted by a "tire checker".
>
> (2) Mr. Ellis' incriminating statements to Cecil Phillips describing when, where and how he picked up and killed a black man.
>
> (3) Cecil Phillips' observation of blood spatters on the outside of Ellis' truck. Ellis was in the process of cleaning the exterior of the truck as he spoke.
>
> (4) Ellis made incriminating statements to a Mr. Feagle regarding the killing of a black man and the disposal of his body on Plummer Road.
>
> (5) Ellis invited Randy Mallaly to join him (and Johnny Boehm) in killing a black man. Mallaly refused and was taken to the Ellis' home and left there. Mallaly went to a neighbor's home until Ellis returned. Ellis

> reported killing a black and described how the victim was dragged from the truck, beaten and stabbed. Ellis was cleaning blood off of an instrument similar, though not identical, to the (State's) sample tire checker. Blood was also seen in Ellis' cab. Ellis told Mallaly the victim was left on the "north side of town".
>
> (6) Ellis provided Mr. Phillips and Mr. Mallaly with subsequent, detailed information which clearly described the murder of Mr. Mincey and the attempted murder (and escape) of Mr. Reddick.
>
> (7) Ellis suffered a stab wound in his arm during the "Reddick" attack. Ellis' description of his wound as a "snag" type injury caused by walking past a piece of glass was totally inconsistent with the physical evidence (as explained by the attending physician).

Mr. Ellis, in response, offered no evidence other than the testimony of some friends and relatives who heard Ellis describe "how" he cut his arm. Ellis offered no alibi. Ellis offered no reasonable (or any other) hypothesis of innocence regarding the Evans murder.

Mr. Ellis did, however, rely upon Mr. Phillips' confusion in giving details of the Evans and Mincey killings. Mr. Phillips, after eleven years, inverted the order of the dumping points (Plummer and Imeson roads), and the relative ages (young and old) of the victims. Still, of all the roads in Duval County, Phillips correctly named the two roads involved and Phillips also knew that one victim was older than the other. Mr. Phillips' "errors" did not include errors of fact totally unrelated to any of Ellis' crimes.

Mr. Ellis also relied upon Feagle's recantation. Feagle, however, had become the stepson of codefendant Boehm.

Mr. Ellis' request for a judgment of acquittal was, therefore, grounded upon challenges to the credibility of the witnesses rather than any hypothesis - reasonable or otherwise - of innocence.

The law governing motions for judgment of acquittal is well established.

In State v. Laws, 15 F.L.W. S241 (Fla. 1990), this Court discussed motions for acquittal in circumstantial evidence cases, stating:

> The law as it has been applied by this Court in reviewing circumstantial evidence cases is clear. A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. Jaramillo v. State, 417 So.2d 257 (Fla. 1984). Where the proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972 (Fla. 1977); Mayo v. State, 71 So.2d 899 (Fla. 1954). The question of whether the evidence fails to exclude all reasonable hypothesis of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse. Heiney v. State, 447 So.2d 210 (Fla.), cert. denied, 469 U.S. 910 (1984); Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983). . . .

This Honorable Court went on to recognize that its holding was consistent with, and did not weaken, the established rule that a defendant seeking a judgment of acquittal admits all facts and all conclusions from the facts in the State's favor. Lynch v. State, 293 So.2d 44 (Fla. 1974), see also Brown v. State, 294 So.2d 28 (Fla. 3rd DCA 1974); Weldon v. State, 287 So.2d 133

(Fla. 3rd DCA 1974). This Court described the trial judge's task as follows:

> It is the trial judge's proper task to review the evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the State. Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975), cert. denied, 428 U.S. 911 (1976). The State is not required to 'rebut every possible variation' of events which could be inferred from the evidence which is inconsistent with the defendant's theory of events. See Toole v. State, 471 So.2d 1174 (Fla. 1985). Once that threshhold is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

State v. Laws, supra, at 241.

The facts in Laws compare to some of those at bar. In Laws, the victim was found dead. The cause of death to the child was a subdural hematoma caused by a blow to the head. Laws offered four theories as to how the child "could have" died and the trial court granted an acquittal because the State's case did not rebut all four theories. This Court reversed because the State, in fact, offered evidence "from which the jury could have reasonably rejected each of Laws' theories." Laws, supra, at 243.

Returning to our case, Ellis denied his guilt but offered no theories of innocence at all. The State's evidence (if one considers the consolidated cases in this manner) and Ellis' various statements provided the jury with a factual basis for excluding any "reasonable" hypothesis of innocence.

In Hardwick v. State, 521 So.2d 1071 (Fla. 1988), the defendant confessed to killing the victim (by name) to one

witness while telling other witnesses he had taken care of the "thief" who stole his quaaludes. There were no witnesses to the killing and the victim's body was recovered from the river. This Court upheld the conviction, noting that Hardwick's confessions constituted direct rather than circumstantial evidence of guilt, and finding that the trial court could have concluded that no reasonable hypothesis of innocence existed.

In Spaziano v. State, 393 So.2d 1119 (Fla.1981), the skeletal remains of the victim were found in a dump. The State's case rested upon a "confession" given to a witness by Spaziano. The witness was able to take the police to the body. Although the witness (Dilisio) was a drug user (Spaziano's defense to Dilisio's credibility), the evidence was deemed sufficient to convict.

In Grant v. State, 474 So.2d 261 (Fla. 1st DCA 1985), the victim was found shot to death in a gas company truck. The defendant offered an alibi while the State offered evidence that the defendant sold a truckload of gas belonging to the same company (for which Grant no longer worked) the night before. Other witnesses saw "a black man" (the victim was white), driving a gas company truck the night before the body was found. Despite Grant's alibi, the evidence was deemed sufficient to link him to the body.

In Stano v. State, 473 So.2d 1282 (Fla. 1985), the defendant's conviction was upheld when corroborated by the physical evidence (surrounding a discovered body), even though the victim was so decomposed that the case of death could not be determined.

In the case at bar, Mr. Ellis offered no alibi. He simply denied making statements and denied his guilt. Mr. Ellis' statements were uncanny in their depictions of the cause of death, age and description of the discovery point of Evans and Mincey. The statements surrounding the attack upon Mr. Reddick were corroborated by Reddick and Mr. Crawley.

The weight of, or credibility of, the testimony of Messrs. Crawley, Feagle, Phillips and Mallaly was a jury question. Again, for the purposes of the motion, Ellis conceded their credibility and all reasonable inferences from their testimony.

Thus, in the absence of any hypothesis of innocence, the evidence in this case clearly supported the lower court's decision not to grant a motion for acquittal as well as the eventual verdict.

POINT IV

THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF MR. MALLALY REGARDING A COLLATERAL EVENT

Mr. Ellis' brief overlooks a very important fact in challenging the admission of Mr. Mallaly's statement. Mr. Mallaly did not merely testify to some random event. Rather, Mallaly testified to events transpiring between himself and Mr. Ellis just before one of the two murders at bar.

The Court is directed to Mallaly's entire story - not just the part where Ellis offered him a gun.

After Ellis told Mallaly he (and Boehm) were going to "kill a nigger" (TR 1030), Mallaly was invited to join in. Mallaly refused (TR 1031). Ellis then drove Mallaly back to the Ellis

house and left with Johnny Boehm (TR 1032). That same night, Ellis and Boehm returned to Ellis' home. Mallaly saw Boehm drive away and he saw Ellis wiping blood off of "an instrument" (TR 1032), and he saw blood on the seat of Ellis' truck (TR 1032).

Although Mallaly did not recall the date, it is clear that Mallaly was with Ellis on the date of the Evans murder. That, in turn, puts this testimony in a different posture.

The offer of a shotgun and the invitation to join in (a) murder qualifies as admissible hearsay under §90.803(3)(a)(2), Fla.Stat., as well as the "Williams Rule. Under the statute, the remarks demonstrate the defendant's intent and state of mind just as analogous comments did in Jones v. State, 440 So.2d 570 (Fla. 1983), see also Clark v. State, 145 So.2d 748 (Fla. 2nd DCA 1962).

Of course, under the Williams Rule this evidence tended to prove motive, intent or lack of mistake, so, again, it was admissible.

Mr. Ellis' argument regarding Kight v. State, 512 So.2d 922 (Fla. 1987), is misplaced. If we look at the invitation and the subsequent killing as two crimes, we find that the Appellant's reference to Kight favors the State. As in Kight, both victims were randomly selected black males. As in Kight, the victims were selected from the same area. As in Kight, the same motive applied to every victim.

It is clear that the incident reported by Mr. Mallaly was admissible even if allowed "for the wrong reason." Savage v. State, 156 So.2d 566 (Fla. 1st DCA 1963). There is no valid basis for reversal.

POINT V

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE UNDERLYING FELONIES OF ROBBERY AND KIDNAPPING

In his fifth point on appeal, Mr. Ellis alleges that the trial court erred in merely giving jury instructions on "robbery" and "kidnapping", but then launches into some wholly irrelevant argument regarding the sufficiency of the evidence for a conviction. Mr. Ellis apparently equates the standards for these two entirely distinct issues.

The issue, at least as titled by Ellis, is whether a jury instruction should have been given. Not one of the cases cited by Ellis even mentions, much less resolves, that question and therefore do not merit discussion. Before citing the relevant cases, we will remind the Court of the operative facts.

First, Ellis was charged with first degree murder without specification. Similarly, the jury found Ellis guilty of first degree murder as charged, without specifying "premeditated" or "felony" murder (R 208, 209). Second, there was evidence of theft as to the Evans murder given the theft of Evans' wallet. Also, both victims were lured into Ellis' truck by artifice or trick, thus bringing the abductions arguably within the definition of kidnapping (see below).

When a defendant is prosecuted for both "felony" and "premeditated" murder, the trial court must instruct the jury on the underlying felonies with "sufficient definiteness to assure the defendant a fair trial", but is not required to instruct the jury with the same "definiteness" required if the defendant was

actually on trial for the underlying felony. Brumbley v. State, 453 So.2d 381 (Fla. 1984); McCrae v. Wainwright, 422 So.2d 824 (Fla. 1982); Washington v. State, 432 So.2d 44 (Fla. 1983); Middleton v. State, 426 So.2d 548 (Fla. 1983).[8]

Although stated in the context of the penalty phase, this Court's holding in Straight v. State, 422 So.2d 827 (Fla. 1982), applies. There, this Court held that a trial judge should not invade the province of the jury by refusing to give a jury instruction on an aggravating factor simply because the judge does not feel it was proved "beyond a reasonable doubt." Indeed, just as a defense instructino should be given if supported by some evidence, Keys v. State, 17 F.L.W. D2197 (Fla. 1st DCA 1991), so should a state requested instruction. Evidentiary sufficiency is a jury question.

There was, of course, evidence on the record to support robbery and kidnapping whether rebutted or not. Cecil Phillips testified that Ellis was in possession of Mr. Evans' wallet, which contained pictures of Mr. Evans (TR 922-923). Lorraine Evans, the vcitim's mother, verified that Evans owned a wallet (billfold, not purse) (TR 1262), and that on the day he was killed he was carrying photos of himself to be distributed as gifts (TR 1261). She also said that Evans could have had more than one wallet (TR 1273), but the only wallet she knew about was at home (TR 1272).

The kidnapping evidence was much stronger.

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[8] These cases reflect a marginally lower standard of proof baed upon the absence of a need for specific instructions on every element of every underlying felony.

Ellis' brief neglects to concede that a kidnapping can also be accomplished by "trick". Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1984). In Sochor v. State, 580 So.2d 595 (Fla. 1991), the evidence was found to support a finding of kidnapping when the victim "voluntarily" got into the defendant's truck by virtue of a trick or ruse. Again, the sufficiency of this evidence was a jury question. Sochor, supra; see Preston v. State, 444 So.2d 939 (Fla. 1984).

Finally, we must return to the question of "harmless error".

In Washington v. State, 432 So.2d 44 (Fla. 1983), the defendant complained that the trial court erred in instructing the jury on "felony murder" when there was "no evidence presented that the murder was committed during any of the enumerated felonies" id at 47. This Court noted that it might have been better for the judge not to have instructed the jury, but that any error was harmless because:

> (1) The defendant was simply prosecuted for first degree murder;
>
> (2) The record supported "premeditation";
>
> (3) The "felony" aspect was not unduly emphasized;
>
> (4) It would be gross speculation to theorize as to "which theory" the jury settled on.

Similarly, in Middleton v. State, 426 So.2d 548 (Fla. 1982), this Court held that a felony murder instruction is proper when felony murder is offered as an "alternate theory" backed by "some evidence".

There is no logical argument for reversal from this jury instruction. The court did not tell the jury that any felony had been proven or that the jury "ought' to find robbery or kidnapping. In fact, if anyone would be prejudiced by a lack of proof in the face of instructions it would have been the State.

The trial court did not err and, in any event, the defendant was not prejudiced.

POINT VI

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN ALLOWING A POLICE OFFICER'S ANSWER TO A QUESTION ON IDENTITY TO STAND

Mr. Ellis' brief correctly recites Frederick Robinson's remark that Ellis was popular, in high school, for his bigotry. The brief does not mention that this alleged revelation was hardly surprising, since Ellis himself had previously testified to calling black people "niggers" (TR 1425-1426), and to having a reputation which kept people off his back (TR 1054). The brief also fails to note Mallaly's testimony that Ellis boasted about "killing a nigger". (TR 1030).

The trial court did not allow the state to probe, or even highlight, Ellis' racist past (TR 1426-1428), but, in light of Mr. Ellis' testimony and the totality of the record, denied a mistrial and overruled the motion to strike Robinson's remark.

It is submitted that Officer Robinson's remark about a reputation Ellis agreed that he had was not prejudicial to the defense even if the comment was improper. DiGuilio, supra. The witness did not elaborate, so the jury heard nothing more than what Ellis had already admitted. Furthermore, given the strong

testimony of Mr. Reddick (the surviving victim), and corroborating confessions, it cannot logically be assumed that this one comment had any impact on the jury.

Mr. Ellis cites several cases for the proposition that the witness' remark constituted reversible error.

Lewis v. State, 377 So.2d 640 (Fla. 1979), merely precludes the prosecutor from inquiring about specific prior bad acts by the defendant. That precise ruling was also made by the court sub judice. Lewis also, however, states that when defense witnesses testify regarding the defendant's reputation the "door is opened" to other testimony. (Here, Ellis testified to his reputation before Robinson did). Finally, Lewis recognizes that any error can be "harmless".

In Dixon v. State, 426 So.2d 1258 (Fla. 2nd DCA 1983), the court held that the State could not prove bad character by showing specific misconduct by the defendant. However, the court also held that the State could refute Dixon's assertions of total innocence with evidence of his reputation, citing §90.405, Fla.Stat. (1981). Dixon does not help Mr. Ellis.

Witt v. State, 410 So.2d 925 (Fla. 3rd DCA 1982), addresses a misinterpretation of the Williams Rule and, again, the use of "prior bad acts" as evidence. Witt is irrelevant.

Finally, Ellis' citation to Parker v. State, 458 So.2d 750 (Fla. 1984), and his allegation that police officers cannot testify to reputation is sheer nonsense. The Parker decision said that there is no such "community" as the "criminal justice community" so as to qualify a police officer as a witness on the

issue of an inmate's character, even if the officer had sufficient contact. Here, the witness, although a police officer, testified as a member of the high school community (at Paxon High) in 1978. There is no logical connection between Parker and this case. Parker, however, does note (once again) that "error" if this type can be harmless.

Given Ellis' denial of guilt and his acknowledgement of his reputation, there is simply no evidence in this record of either error or prejudice.

POINT VII

THE TRIAL COURT CONSIDERED NON-STATUTORY MITIGATING EVIDENCE

Mr. Ellis contends that the trial court erred in not considering "non-statutory mitigating evidence" as required by Lockett v. Ohio, 438 U.S. 586 (1978). The Appellant does not allege that the court was unaware of Lockett, while the record shows that the court allowed the defense to present Lockett evidence, gave a proper instruction to the jury, and discussed the defendant's "non-statutory evidence" in its sentencing order (R 236).

The problem with the court's order is that it did not find Ellis' evidence sufficient to weigh in as a "mitigating factor". As such, the court did not repeat its analysis of this evidence in the "mitigating factors" segment of its order.

In Spaziano v. Dugger, 557 So.2d 1372 (Fla. 1990), this Court held that it was "incredible to assume" that a trial court would give proper instructions, allow nonstatutory evidence to

come in, and then violate Lockett, supra, on its own. Again, in Card v. Dugger, 512 So.2d 829 (Fla. 1987), and in Harich v. State, 542 So.2d 90 (Fla. 1989), this Court agreed that the mere failure of a sentencing order to discuss non-statutory factors does not mean that they were not "considered". The federal courts agree. Johnson v. Wainwright, 806 F.2d 1479 (11th Cir. 1986); Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985).

Although he did not separately list "non-statutory mitigating factors", the trial judge did - as Ellis confesses - analyze such putative factors as Ellis' age, work habits, the co-defendant and racial tensions in the course of his order (R 228-236). Some of this "non-statutory" evidence was acknowledged as establishing "statutory" mitigation (R 257), while other evidence carried no weight at all.

The court found that Ellis had no substantial criminal record and, in addition, said:

> In fact, substantially all of the evidence presented by the Defense during the penalty phase indicated that since 1978 the Defendant has been a model citizen. While the Court finds the Defendant's commission of the three instant offenses in 1978 to be significant, the Court also believes that his actions in the past eleven years must also be seriously considered. The Court finds that this particular mitigating circumstance exists.

(R 257).

The court also considered Ellis' age, an issue mentioned in Ellis' brief, but found that it was not a significant mitigating factor in this case (R 258).

Mr. Ellis' real complaint is the weight afforded his mitigating evidence as opposed to whether it was "considered".

Lockett and Eddings v. Oklahoma, 455 U.S. 104 (1984), hold that mitigating evidence must be considered, but they do not remove judicial discretion by guaranteeing that such evidence will always receive some weight. Eddings, for example, merely says that the trial judge cannot refuse to assign "weight" to evidence by refusing to even consider the evidence.

The issue of evidentiary "weight" is not subject to appellate review as long as the evidence was "considered". Mann v. State, 17 F.L.W. S571 (Fla. 1992); Campbell v. State, 571 So.2d 415 (Fla. 1990). The sentencer simply, and logically, agreed that Ellis' "age" was not mitigating under the unique facts at bar. Similarly, the fact that Ellis was nice to his own family (after the crimes at bar), hardly had any bearing upon his hatred for people of a different color. The record did not, as alleged, show that Ellis was a good prisoner but in fact showed that he was a problem prisoner with overt, racist, misbehavior in jail. Finally, the "co-defendant" (Boehm) did not receive "disparate treatment". Boehm eluded prosecution due to a current lack of evidence. That deficiency cannot logically help Ellis.

The "evidence" at bar simply did not compel the "finding" of mitigating factors when considered by the trial judge. Since the weighing process is not subject to review, Ellis is not entitled to relief. See Tibbs v. State, 397 So.2d 1120 (Fla. 1981).

POINT VIII

THE TRIAL COURT CONSIDERED ELLIS' AGE WHEN PASSING SENTENCE

The decision of the sentencing court clearly shows that Ellis' age was considered. Ellis' complaint is that his age, once considered, was given no weight. The argument (that a mere disagreement over the weight to be assigned to a given piece of evidence means that the sentencer did not even "consider" the evidence) is illogical in that it assumes that the defendant's view is the only possible view that can be found from any consideration of the evidence. This theory has no legal or factual basis.

Eddings, supra, specifically states that mitigating evidence need only be considered. Eddings not only does not require state courts to guarantee weight to any particular piece of evidence, it cannot, for the United States Supreme Court has no jurisdiction to enter such a decree. See Gryger v. Burke, 334 U.S. 728 (1948) (federal courts have no jurisdiction to reweigh evidence or resentence state prisoners); Lewis v. Jeffers, 497 U.S. ___, 111 L.Ed.2d 606 (1990).

Ellis' age did not lessen his ability to comprehend that what he was doing was wrong. (Indeed, he cleaned the truck and dumped the bodies on deserted roads outside of town). Ellis planned his crimes and carried the two murders out well enough to avoid arrest for over a decade. Age was not a factor in this case.

POINT IX

THE TRIAL COURT DID NOT FAIL TO CONSIDER THE TREATMENT OF THE CO-DEFENDANT

This is not a case in which a co-defendant stood trial and received a lesser sentence, nor is this a case in which a co-defendant entered into a plea bargain, nor is this a case in which a co-defendant received immunity. Instead, an unfortunate circumstance of this case is that there is insufficient evidence at this time to bring Johnny Boehm to trial. Thus, Boehm is not the beneficiary of disparate treatment, but rather he is the beneficiary of disparate evidence.

The Appellant, yet again, has cited to cases having no logical or factual nexus with the case at bar. Should the State ever uncover sufficient evidence to bring Boehm to trial, it is a logical assumption that a capital sentence will be sought.

POINT X

THE "HEINOUS-ATROCIOUS-CRUEL" JURY INSTRUCTION ISSUE WAS NOT PRESERVED FOR APPELLATE REVIEW

Mr. Ellis' brief fails in its obligation to advise this Court that the issue argued in Point X was not preserved by objection in the trial court. Mr. Ellis is not entitled to review of Point X. Kennedy v. Singletary, 599 So.2d 991 (Fla. 1992); Sochor v. Florida, 504 U.S. ___, 119 L.Ed.2d 326 (1992); Kennedy v. Singletary, 967 F.2d 1482 (11th Cir. 1992); Clark v. State, 363 So.2d 331 (Fla. 1978); Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1984); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Mitchell v. State, 527 So.2d 179 (Fla. 1988).

The "short form" instruction on the "heinous-atrocious-cruel" (HAC) aggravating factor was given without objection and was the same as the instruction challenged in Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (1992), but even if the issue had been preserved any error would have been harmless beyond any reasonable doubt. DiGuilio, supra.

First, there is no question that the beating and stabbing deaths of Mr. Evans and Mr. Mincey qualified as heinous, atrocious and cruel when compared with Gilliam v. State, 582 So.2d 610 (Fla. 1991) (victim mutilated while still alive); Swafford v. State, 533 So.2d 270 (Fla. 1988) (multiple gunshots); Koon v. State, 513 So.2d 1253 (Fla. 1987) (victim beaten and killed); Cherry v. State, 544 So.2d 184 (Fla. 1989) (beaten to death); Morgan v. State, 415 So.2d 6 (Fla. 1982) (ten stab wounds); Haliburton v. State, 561 So.2d 248 (Fla. 1990) (multiple stab wounds); Duest v. State, 462 So.2d 446 (Fla. 1985) (same).

Second, the jury's advisory sentence of "death", even if based upon an allegedly defective instruction, did not bind the trial court. The judge, as actual sentencer, had to make his own independent finding. Spaziano v. Florida, 468 U.S. 447 (1984); Proffitt v. Florida, 428 U.S. 242 (1976); see Grossman v. State, 525 So.2d 833 (Fla. 1988); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). The court made an independent evaluation based upon his knowledge of the law and was "guided" in the exercise of that discretion accordingly. Walton v. Arizona, 497 U.S. 639 (1990).[9]

[9] Any reinterpretation of Florida law by the federal court is not binding on this Court since the United States Supreme Court lacks jurisdiction to overturn this Court's interpretation of state

Thus, the error complained of by Mr. Ellis is not properly before the Court, nevertheless, any automatic review of the "HAC" factor itself clearly reveals that this factor applies.

POINT XI

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE AGGRAVATING FACTOR RELATING TO MURDER DURING A KIDNAPPING

As noted in point five on appeal, a "kidnapping" can be accomplished by trick or artifice. Robinson, supra; Sochor, supra. The mere fact that Mr. Ellis does not think that the evidence of kidnapping carried sufficient weight does not preclude the giving of the jury instruction itself. Middleton v. State, supra.

The victims were lured into Ellis' vehicles by trick. They were forced to sit between Ellis and Boehm, they were trapped and unable to flee (with the exception of Mr. Reddick who fought his way to freedom), and they were carried to secluded spots where their bodies were left. Mr. Ellis' arguments regarding "sequence" or "timing" are a vain attempt to ignore the obvious. These victims were abducted and murdered.

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law. Wainwright v. Goode, 464 U.S. 78 (1984); Pennzoil v. Texaco, 481 U.S. 1 (1987).

POINT XII

THE TRIAL COURT DID NOT ERR IN RELYING UPON THE "COLD - CALCULATED - PREMEDITATED" AGGRAVATING FACTOR

This issue requires no extended argument since, as Mr. Ellis concedes, the "ex post facto" application of the "cold-calculated-premeditated" aggravating factor has already been upheld. Combs v. State, 403 So.2d 418 (Fla. 1981); Justus v. State, 438 So.2d 358 (Fla. 1983); Dobbert v. Florida, 432 U.S. 282 (1977).

POINT XIII

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE AGGRAVATING FACTOR RELATING TO PRIOR CONVICTIONS

It is undisputed that contemporaneous convictions for multiple murders can be used in aggravation of a capital sentence. Pardo v. State, 563 So.2d 77 (Fla. 1990); Porter v. State, 564 So.2d 1060 (Fla. 1990); Dolinsky v. State, 576 So.2d 271 (Fla. 1991). The murders at bar were committed against two people at two different times. The attempted murder was a third, separate, offense. Although the trial judge clarified the instruction to let the jury consider Ellis' contemporaneous convictions, the court did not misstate the law or mislead the jury.

In his first point on appeal Ellis complained that his cases were improperly joined for trial. This issue would be moot if three trials were held because the attempted murder of Mr. Reddick could be used to aggravate the Evans killing, and then the two convictions could aggravate the sentence in Mincey. The

only difference in the use of these crimes as cross-aggravators, therefore, is the sequence (a lack thereof) of these trials. Clearly Ellis should not escape these cross-aggravating factors just because his cases were consolidated.

POINT XIV

THE TRIAL COURT DID NOT REVERSIBLY ERR IN NOT REINSTRUCTING THE ADVISORY JURY ON "REASONABLE DOUBT"

The "reasonable doubt" instruction benefits the State by advising jurors that proof "beyond a reasonable doubt" does not require proof "beyond a shadow of a doubt" nor does it require the State to overcome fanciful or speculative doubt.

Mr. Ellis' purely speculative final point on appeal cites to no authority for its contention that the advisory jury had to have "reasonable doubt" redefined, nor does the argument allege or show prejudice to the defense. We submit that Ellis probably benefited from the absence of the instruction.

Of course, even if the court erred any error was harmless beyond a reasonable doubt. DiGuilio, supra. The jury was previously instructed on this point and has not been shown to have needed reinstruction. In addition, the jury was not the sentencer. In addition, the trial court had to independently analyze this evidence. Nothing in this record reflects error or prejudice at any stage of the sentencing process.

CONCLUSION

Mr. Ellis' convictions and sentences of death should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. W.C. McLain, Esq., Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 2nd day of October, 1992.

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