IN THE SUPREME COURT OF FLORIDA

CASE NO: 76,072

RICKY STEVE CORBETT

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

GISELLE D. LYLEN
Florida Bar #0508012
Assistant Attorney General
Department of Legal Affairs
Florida Regional Service Center
401 N.W. 2nd Avenue, Suite N-921
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

OTHER AUTHORITIES

INTRODUCTION

This is an appeal of a conviction and sentence of death entered in case number 89-158CF by the Honorable G. Robert Barron, Circuit Court Judge, of the First Judicial Circuit, In and For, Walton County, Florida.

Throughout this brief the Defendant/Appellant, **Ricky Steve Corbett**, will be referred to as "the defendant" and the Prosecution/Appellee, the **State of Florida**, will be termed "the State." Reference to the Record on Appeal and Transcripts included therein will be made by the use the symbol "R" followed by citation to the appropriate page. Similarly, reference to the Supplement to the Record on Appeal, filed herewith, will be made by the use of the symbol "S".

The State disputes the statement of the facts contained in the defendant's initial brief and thus includes its own hereinafter.

STATEMENT OF THE FACTS

The Guilt Phase

At 8:00 a.m. on May 5, 1989, Betty Hardy drove her eldest daughter, Sherry Lynn Daily, to her job at the King Bee Liquor Store in Freeport, Florida.(R.254,257). Sherry was wearing a turquoise blouse with pocket stitching, a faded blue jean skirt, and white tennis shoes; Sherry did not keep other clothing at the store.(R.255,257).

Later that morning, at about 10:30 a.m., Henry McCormick went to the liquor store where he found the store abandoned and the register drawer open.(R.274-5). Although Sherry was no where to be found, her pocketbook was still there.(R.274-5). Mr. McCormick and another patron, who arrived at the drive up window, proceeded to call the police and attempted to reach the store manager.(R.274-5).

Judy Nobles, an employee of the store, testified that she was contacted at around 11:00 a.m. that morning and asked to come to the store and determine what, if anything, was different or missing.(R.277). Ms. Nobles determined that exactly $112.00 was missing from the register which showed that the last sale was for $1.20 worth of merchandise.(R.277-8,281). The register tape, when the time was corrected, showed that that sale took place at 10:32 that morning.(R.278,282).

Glen Hardy, a security guard a the Sandestin Beach Resort, saw the defendant and Donnie Phillips, his codefendant, enter the resort premises shortly after 7:00 a.m. on the morning of the 5th.(R.259-60). The log maintained by Mr. Hardy established that

the defendant entered the premises at 7:13 a.m. driving a Ford Tiempo, license tag number BBW 52F, and left the premises at 8:45 a.m.(R.261-2). Sharee Campbell, an employee at the Elephant Walk Restaurant at the resort, saw both Phillips and the defendant in Joyce Anderson's Ford Tiempo at approximately 8:00 a.m. when she arrived at work.(R.265-6).

Baptist Minister, Robert Cupsted, passed the King Bee Liquor Store the morning of the 5th at approximately 10:30 a.m.(R.268,270). He looked at the cars in the parking lot because he wanted to make sure that parishioners he was attempting to help with drinking problems were not there and noticed a reddish brown car resembling Ms. Anderson's Ford Tiempo.(R.269).

Lillie Mae Miller also saw the car on her way to Freeport when it pulled out in front of her.(R.284-5). The occupants of the car were two black males, one of whom had lighter skin than the other, and a white female seated in the back seat who looked straight at Ms. Miller.(R.286,304-5). She was able to positively identify the woman as Sherry Daily when she saw her photo on t.v. later that night.(R.305).

Ernest Hogans, who lived with the defendant's sister, also saw the defendant and Donnie Phillips in Anderson's Ford Tiempo, in Redhead, a city just north of Ebro, sometime after 10:30 the morning of the 5th.

Walton County Sheriff's investigator Fred Mann was dispatched to the King Bee, arriving at 10:56 a.m.(R.312). Several people were outside, including Henry McCormick, who indicated that the clerk was not on the premises.(R.313). After

he ascertained that Ms. Daily was, indeed, missing, he had another employee of the store come to the premises to check the cash register.(R.313). She determined that all the bills were missing from the register.(R.315). They then determined, by correcting the time on the register tape, that the machine had last been opened at 10:22 a.m.(R.315-16).

On May 11, 1989, Sheriff Mann spoke with Terry Poston who led them to where Ms. Daily's body was found, in a wooded, swampy area off a graded road called Cow Ford Road in Bruce, about ten miles from the store.(R. 317). Approximately one week later, Donnie Phillips took Sheriff Mann to a community called Redhead, in Washington County, where he directed him to a plastic jug submerged below the water containing clothing identical to that Ms. Daily was wearing at the time of her disappearance.(R.323-4). Phillips also pointed out a dark colored pair of men's shoes thrown on either side of a nearby road.(R.323,328). Sheriff Mann testified that the shoes could not be worn by Phillips who, since he was a large man, wore a much larger size.(R.332).

Joyce Anderson, the defendant's fiancee testified she allowed the defendant to use her Ford Tiempo on the day of the murder.(R.338-9). The defendant, who was living with her, left that morning at 6:00 a.m. wearing a pair of tennis shoes; however, she conceded that the shoes Phillips directed Sheriff Mann to resembled a pair owned by the defendant.(R. 339-40).

Tony Phillips, the brother of codefendant Donnie Phillips, testified that on May 5, 1989, he and his brother lived together.(R.343). Tony saw a firearm in the house on May 4, 1989

along with five blunt nose short .38 caliber bullets.(R.343-44). He saw his brother and the defendant on the day of the murder.(R.343). On May 6, 1989, Tony searched the house for the firearm and the bullets he had seen two days before; he found the gun, but not the bullets.(R.343-4).

Jan Johnson, a crime lab analyst for FDLE's Pensacola lab, was dispatched to the King Bee Liquor Store on May 5, 1989 where she examined the scene, prepared sketches, collected latent fingerprints and other physical evidence and photographed the scene.(R.349-51). Ms. Johnson also examined the area in which the body was found where a thorough examination was also conducted.(R.351-2). A single hair, found on the victim's chest was also collected.(R.354). The following day, she attended the autopsy conducted by Fort Walton Beach Medical Examiner Dr. Kielman and obtained the victim's fingerprint standards and the bullet removed from her skull.(R.352). A second bullet recovered at the scene was turned over to Ms. Johnson who then released all of the evidence obtained from the various scene to the lab for delivery to the necessary sections for analysis.(R.352-5).

Laura Rosseau, FDLE crime lab analyst, was dispatched to the scene where Ms. Daily's body was found with Jan Johnson of her office.(R.357). A positive metal detector reading in murky water to the left of the victim's head was followed up the next day, leading to the retrieval of a second bullet.(R.358-9). Ms. Rousseau also processed the Ford Tiempo for evidence, vacuuming it for hair and fiber materials and photographing it.(R.359). Ms. Rousseau took carpet standards from the seats and carpets of the

vehicle and also processed the car for latent prints.(R.359,362). All of the evidence obtained by Ms. Rousseau was turned over to Ms. Johnson for release to the crime lab.(R.363).

Charles Richards, FDLE crime lab print analyst, compared the prints obtained by police personnel from the various scenes and compared them to standards of the victim and suspects. (R.347,352,364-70). The defendant's palm print was found on the store counter near the register; several of Phillips' prints were located on the rear view mirror of the Tiempo and the interior door frame of the liquor store.(R.367,370).

Dr. Edmund Kielman, Walton County Medical Examiner, was called to the area where the victim's body was found on May 11, 1989.(R.383). Dr. Kielman described the area as very swampy, stating it was difficult to get to the body without ending up in water over the tops of his shoes.(R.384). Dr. Kielman circled the body taking photos before deciding it was best to move the body to the morgue where it could be examined under better circumstances.(R.384). He subsequently performed the autopsy on May 12, 1989 at the Okaloosa County morgue.(R.384). The body was identified, through the use of dental records, as that of Sherry Daily.(R.347-8,435-7,448-50).

Examination revealed that the body, clad only in a pair of low-cut white tennis shoes, was in a rather severe state of decomposition.(R.385). The victim had sustained a bullet wound to the head with the point of entry directly above the left ear and a point of exit just above, and slightly forward of, the right ear, through and through the cranial cavity.(R.385). A second

bullet wound to the head had the entry wound inside the roof of the mouth; the bullet was recovered during the autopsy still inside the cranial cavity.(R.385). Additionally, two bullet wounds were found in the left hand, with two points of entry in the palm and one exit wound in the back of the hand.(R.386). Considerable hemorrhaging was present in the hand.(R.386).

Although Dr. Kielman attributed the cause of death to the two bullet wounds to the head, he also found that the ring finger of the right hand had been amputated.(R.390). The victim had also sustained a large injury to the lower abdomen ranging from the belly button, around the legs, to the anus.(R.390). Dr. Kielman likened this injury to that which occurs when an animal is skinned, leaving only the subcutaneous fat.(R.391). He testified that this injury could not have been caused by maggots or deterioration due to the precise edges of the wound.(R.396,398).

Tommy Watson testified that he and his nephew, Terry Poston, hired the defendant to take them to his house on Cow Ford Road.(R.409,422-3). During the drive, they stopped to purchase beer and marijuana which they all consumed.(R.413). On the way to Watson's house, the defendant stopped along Cow Ford Road; Poston got out of the car and accompanied the defendant while the other occupants remained by the car.(R.414). Poston told his uncle, after the defendant dropped them off, that the defendant had shown him a dead body down there; his uncle initially thought that Poston was kidding.(R.426). They did not go to the police to report the body until Thursday because they were scared and did not know what to do.(R.430). Both were afraid that the defendant

and whoever helped him commit the crime would come back and kill them if they thought they would go to the police.(R.433). When he learned that another nephew had been arrested, Mr. Watson used that as an excuse to go to the police[1]; they did not report what they had learned to benefit from the reward offered by Ms. Daily's family.(R.430-1,434).

FDLE firearms analyst, David Williams, examined the two bullets submitted for analysis and was able to determine that the .38 caliber bullets were, in fact, fired from the same gun.(R.441,443-4). The wad-cutter, or flat nosed bullets, which are designed for target shooting, could have been fired from either a .357 or a .38 caliber weapon.(R.444-7).

FDLE microanalyst, Larry Smith, testified that the single hair found on the victim's chest was characteristic of Negroid body hair; however comparison was impossible since the source of the hair could not be determined and only hair from either the head or pubic region is suitable for comparison purposes.(R.453-455). Mr. Smith's examination of debris removed from the victim's shoes revealed another Negroid body hair not suitable for comparison purposes.(R.455-6). Five hairs, also characteristic of Negroid body hair, were also found amongst the debris from Ms. Daily's clothing.(R.457).

Paula Sauer, an FDLE fiber analyst, compared standards of the victim's clothing and the Ford Tiempo's interior to debris removed from the car.(R.466-7). Ms. Sauer found two polyester

---

[1] Poston also beleived that if he went to the police he would be arrested on an outstanding warrant.(R.430).

fibers on the victim's clothing consistent with the carpet standard taken from the bottom of the seat.(R.469-70). Additionally, one nylon fiber consistent with the carpeting located on the rear dash of the Tiempo was found on the victim's clothing.(R.470). Ms. Sauer believed that these fibers came from the Ford Tiempo since it was highly unusual to have two different types of carpet in one vehicle, both with unusual fiber characteristics, both appear on the victim's clothing.(R.471-4).

Walton County Jail inmate, Jesse Wooden, testified that he met the defendant when they shared the same cell block.(R.480-1). During their discussions regarding the defendant's case, the defendant told Wooden that he and Phillips had planned to rob a bank or a Jr. Food Store but did not go through with it because it was too risky.(R.482). Instead, they decided to rob a liquor store, using a gun Phillips brought from his home.(R.482). The defendant told Wooden that they robed the liquor store and took the lady cashier, who they knew, down a dirt road where they shot her.(R. 482-3). The defendant told Wooden that he showed the body to or told Poston about the murder; the defendant seemed upset that Poston had in turn told his uncle who then contacted the police.(R.483-4).

Terry Poston testified that on May 8, 1989, he and his uncle, Tommy Watson, hired the defendant to take them to Bruce.(R.489-90). The defendant drove them in a Ford Tiempo,; they stopped along the way to purchase beer and marijuana.(R.491-2). On the way, the defendant turned down a road near his uncle's home, telling them he had something to show them.(R.493). Poston

accompanied the defendant, at his request, while the other occupants of the car were asked to remain with the car.(R.493).

The defendant showed Poston a body; he stood there drinking beer and laughed saying "that's what I think about life."(R.494,508). The defendant told him that he had shot the girl and needed someone to talk to because he was having bad dreams.(R.495).

After the defendant dropped them at his uncle's house, Poston told Watson what he had seen; he did not go to the police initially because he was scared that if the defendant thought they were going to turn him in he would kill them.(R.495). Poston stated that he was more afraid of what he had seen, than he was of going to jail on his pending DUI charge.(R.504). He knew his uncle was going to the police on Thursday when Watson accompanied another uncle, Ray, when he went to get Poston's brother out of jail.(R.504-5). Poston had no interest in the reward offered by the victim's family.(R.504,507).

The Penalty Phase

During the penalty phase, the State rested after introducing into evidence a certified copy of the defendant's prior convictions, relying upon the evidence it presented in its case in chief to support the aggravating factors it argued.(R.608-9).

The defense put on psychologist, Dr. Jim Larson, who examined the defendant and also interviewed the defendant's fiancee, natural father, and step-mother.(R.618-19). Psychological testing revealed that the defendant had an IQ of 81 which placed him in the dull normal range and a mental age of

fourteen and a half.(R.620,628). He exhibited a fifth grade reading level and a seventh grade level in mathematics, which made it impossible to administer the MMPI since it required a sixth grade reading level and in Dr. Larson's opinion, the defendant did not read well enough for the test to yield reliable results.(R.621). He conceded, however, that the defendant could be faking his difficulty with the tests he administered.(R.631).

Dr. Larson also obtained a history of the defendant which revealed he grew up in an impoverished family of whom he spoke highly.(R.622-3). The family, which had no established father figure, split up when the defendant's mother died when he was in the seventh grade.(R.623-4). The defendant lived with different relatives, each for only a few months before he began living on the streets.(R.624). He then went to live with his natural father, but failed to adjust.(R.624-5). The defendant told Dr. Larson that he had been convicted of armed robbery, but claimed the weapon had been unloaded, when he was sixteen or seventeen for which he served three years and four months.(R.627).

Dr. Larson concluded that the defendant came from an impoverished home, which was later broken up due to the traumatizing death of the defendant's mother.(R.628). He asserted that such a loss could set the stage for mental disturbance later in life, but found that the defendant in this case was neither suffering from any gross mental illness nor psychotic.(R.628-9). Dr. Larson's knowledge of the crime was limited to facts provided by the defense i.e.: that someone was murdered, that several bullet wounds were involved and that the defendant had been found

guilty of playing some role in the death.(R.636). He did not learn that the victim had been mutilated until the week prior to trial, after he had formulated his opinion.(R.635). The defendant refused to discuss the crime of which he stood accused with Dr. Larson.(R.635).

David Clark, the defendant's natural father testified that he had little contact with the defendant during his early years.(R.642). The defendant lived with him for a short time in the late 1970's while he was working at the School For Boys in Lake Okeechobee.(R.643). Mr. Clark testified that he cared about his son and wanted to be involved in his life since they had not had much time together since the defendant came into his life.(R.643). The defendant's stepmother, Ethel Clark, testified that she first met the defendant when he came to live with them when he was about fifteen; she did not know how long he lived with them.(R.645). Mrs. Clark testified that she has an adopted daughter who has never been in trouble with the law.(R.645-5).

The defendant also called Walton County Investigator Rick Sutton who had previously testified during the guilt portion of the trial.(R.646). Mr. Sutton stated that he first had contact with the defendant when he approached the department to do drug buys for them.(R.647). During a three to four month period, the defendant made five of six buys from which they arrested perhaps three people.(R.648). Although he had no specific knowledge of the defendant's drug use during the time he was employed by the department, he stated that they normally use individuals who are familiar with the drug trade and added the defendant obviously

knew people in the drug business because he was able to make buys.(R.651).

The final defense witness in mitigation was the defendant's fiancee, Joyce Anderson.(R.652). Ms. Anderson testified that she met the defendant at a bar approximately a year before.(R.657). The defendant had been out of jail only three or four weeks; she knew he was a convicted felon but believed people could change.(R.660,663-4). Ms. Anderson, and her nine year old daughter, began living with the defendant two or three weeks after they met.(R.653,665). She claimed that she and the defendant had a nice, loving relationship in which they had arguments but did not fight.(R.655,665). Ms. Anderson conceded, however, that she had cut the defendant on one occasion because he said something she did not appreciate, but insisted that was not a fight.(R.665-6).

ISSUES ON APPEAL

I.

DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR CONTINUANCE?

II.

DID THE TRIAL COURT IMPROPERLY RESTRICT CROSS-EXAMINATION OF A STATE WITNESS WHEN THE JURY WAS APPRISED OF HIS PENDING CRIMINAL CHARGES?

III.

DID THE SUCCESSOR JUDGE ERR IN IMPOSING A DEATH SENTENCE UPON THE DEFENDANT AFTER REVIEWING ALL PLEADINGS FILED IN THE CASE AND ALL TRANSCRIPTS RELATING THERETO WHEN THE JURY PREVIOUSLY RECOMMENDED DEATH?

IV.

DID THE TRIAL COURT ERR IN REFUSING TO DECLARE A MISTRIAL WHEN THE STATE, DURING CROSS-EXAMINATION OF A DEFENSE PSYCHIATRIC EXPERT, ELICITED THE FACT THAT THE DEFENDANT REFUSED TO DISCUSS THE DETAILS OF THE CRIME OF WHICH HE HAD PREVIOUSLY BEEN FOUND GUILTY?

V.

DID THE TRIAL COURT ERR IN FAILING TO ALLOW THE DEFENSE, DURING THE PENALTY PHASE OF THE TRIAL, TO USE THE CODEFENDANT AS AN EXHIBIT TO ALLOW THE JURY TO VIEW HIS PHYSICAL APPEARANCE?

VI.

DID THE TRIAL COURT ERR IN FINDING THAT THE MURDER WAS COMMITTED TO AVOID ARREST AND WAS COMMITTED IN A HEINOUS, ATROCIOUS AND CRUEL MANNER WHEN THE EVIDENCE REVEALED THAT THE DEFENDANT KNEW THE VICTIM WHO COULD IDENTIFY HIM AND WHEN THE VICTIM WAS NOT ONLY SHOT FOUR TIMES, BUT MUTILATED?

VII.

IS THE DEATH SENTENCE IMPOSED ON THE DEFENDANT DISPROPORTIONATE?

VIII.

DID THE TRIAL COURT ERR IN READING THE STANDARD JURY INSTRUCTIONS ON THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS, AND CRUEL WHEN THE DEFENDANT DID NOT OBJECT TO THE INSTRUCTION OR REQUEST DIFFERENT OR ADDITIONAL INSTRUCTION?

IX.

DID THE TRIAL COURT ERR IN REVIEWING THE DEFENDANT'S PSI WHEN IT WAS NOT PRESENTED TO THE JURY AND THE TRIAL COURT DID NOT RELY UPON VICTIM IMPACT EVIDENCE IN REACHING ITS SENTENCE?

X.

DID THE TRIAL COURT ERR IN GIVING THE STANDARD JURY INSTRUCTIONS DURING THE PENALTY PHASE OF THE TRIAL WHEN THE INSTRUCTIONS HAVE BEEN FOUND PROPER BY THIS COURT AND THE DEFENDANT INDICATED NO OBJECTION TO THEM?

SUMMARY OF THE ARGUMENT

The trial court did not err in refusing to grant the defendant's motion for continuance when it conducted a Richardson hearing and determined that the State's late production of Wooden's name was through no fault of its own and the defendant was unable to prove actual prejudice.

The trial court did not improperly restrict cross-examination of State witness Terry Poston when the jury was fully apprised of the fact he had an out-standing warrant for his arrest on a DUI charge.

Judge Barron, the successor to Judge Wells, did not err in imposing the death penalty upon the defendant when he fully reviewed all pleadings filed in the case and read transcripts of all the proceedings conducted by his predecessor. His actions are particularly appropriate in view of the fact that his sentence fully comports with the jury's recommendation.

The trial court did not err in refusing to declare a mistrial when the State, on cross-examination of a defense psychiatric expert, elicited the fact that the defendant refused to discuss the details of the crime of which he stood accused since the right against self-incrimination does not apply to noncustodial examination of a health professional.

The trial court did not err in refusing to allow the defense to use codefendant Phillips as an exhibit since the rules of evidence do not allow for the use of an individual in that manner. Furthermore, since the defense sought to question

Phillips, the trial court correctly determined that Phillips, who invoked his Fifth Amendment rights, would have been subject to cross-examination.

The trial court correctly found the murder was committed to avoid arrest and was heinous, atrocious, and cruel given the fact the victim, who knew the defendant, was robbed, kidnapped, and taken to an isolated rural area where she was mutilated and murdered.

The death sentence imposed upon the defendant is not disproportionate since the evidence produced at trial clearly established that the defendant was the primary actor in the murder having admitted that he shot the victim.

The trial court did not err in reading the standard jury instructions on heinous, atrocious, and cruel during the penalty phase of the trial when this Court has held that those instructions are Constitutional and the defendant failed to object to or request different of additional instruction.

The trial court did not err in reviewing the defendant's PSI when the record, which clearly supports the trial court's sentence, does not show the trial court was influenced by the victim impact information contained therein, and the defendant did not object.

The trial court did not err in giving the standard jury instructions during the penalty phase of the trial when this Court has upheld those instructions as Constitutional and the defendant failed to object to or request different or additional instruction.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR CONTINUANCE.

The defendant claims that the trial court erred in denying its motion for continuance, made immediately prior to trial since it was unable to investigate possible impeachment evidence relating to two witnesses whose identities were provided late to the defense, thus prejudicing its case. However, the record reveals that the trial court conducted an adequate and complete hearing with regard to whether or not the State should be allowed to call these individuals and what impact, if any, their testimony would have upon the defense. It thus acted within its discretion in denying the motion for continuance.

As the defendant concedes in his brief, a trial court has considerable discretion in deciding whether to grant or deny a motion for continuance. See: Jackson v. State, 464 So.2d 1181 (Fla. 1985); Cooper v. State, 336 So.2d 1133 (Fla. 1977). He asserts that in this case, that discretion was abused when the State allegedly provided the defense with the names of two additional witnesses on the eve of trial. The record reveals, however, that the defense had been provided with the name of one of the two individuals, codefendant Donnie Phillips, as early as December 13, 1989.(R.785). No violation or conceivable prejudice could result as to Phillips, particularly since he was a known codefendant and the State did not call him as a witness at either phase of the trial.

The defendant next claims that his inability to investigate Jesse Wooden prejudiced him in the preparation of his defense. The trial court made every effort to determine if such prejudice resulted by conducting a complete inquiry pursuant to the dictates of Richardson v. State, 246 So.2d 771 (Fla. 1971). The trial court found that although Wooden's name was provided to the defense only several days prior to the commencement of the trial, it was not due to a wilful act on the part of the State which had no prior knowledge of the witness. The defense, in fact, concurred in this finding.(R.12). The trial court also found no prejudice accrued to the defense since it was provided with an opportunity to depose Wooden prior to trial and because his testimony would be merely cumulative to that of Terry Poston.(R.19-21). See: Thompson v. State, 565 So.2d 1311, 1317 (Fla. 1990); Machin v. State, 213 So.2d 499 (Fla. 3d DCA 1968). The court went on to find that the defense had failed to establish actual prejudice, Norris v. State, 554 So.2d 1219 (Fla. 2d DCA 1990). The basis for the motion was the claim that the continuance was necessary to investigate whether other inmates were present in the cell during the time the defendant made incriminating statements to Wooden regarding his involvement in the murder. However, it is clear that the defendant himself was present while he made these statements and would, of necessity, be able to provide this information to his counsel. The defendant thus had its own independent authoritative source for this information, which it concedes was not only purely speculative, but probably nonexistent. (Initial

brief page 21; R.17). The instant case is comparable to that of Diaz v. State, 513 So.2d 1045,1047 (Fla. 1987), in which the defense claimed error due to the trial court's failure to grant a continuance to allow additional time to investigate testimony of a late-listed witness who had shared a neighboring cell with Diaz prior to trial. This Court declined to reverse, finding "no abuse of discretion in the trial court's denial of Diaz's requested continuance. Similarly, no error resulted in this case.

II.

THE TRIAL COURT DID NOT IMPROPERLY RESTRICT CROSS-EXAMINATION OF A STATE WITNESS WHEN THE JURY WAS APPRISED OF HIS PENDING CRIMINAL CHARGES.

The defendant asserts that the trial court improperly restricted his cross-examination of State witness Terry Poston with regard to the outstanding warrant for his arrest. The record below shows that the existence of the warrant was placed squarely before the jury for its consideration through the testimony of both Poston and his uncle, Tommy Watson. Thus, the jury had these facts before it in making its credibility determinations and no error resulted.

The defendant asserts that he was prevented from establishing Poston's bias or motive when the trial court sustained the State's objection to the question of whether Poston knew there were outstanding warrants for his arrest. Nevertheless, the record below establishes that Tommy Watson testified that his nephew did not go to the police immediately after being shown the body by the defendant because he had warrants outstanding for his arrest and because he was afraid of what the defendant would do to them if he believed they were going to turn him in.(R.421,430,433). Additionally, Terry Poston himself testified that he went to Freeport with is uncle because he thought he would be arrested and that the reason he hesitated in going to the police was because the situation scared him a lot more than going to jail on his pending DUI charge.(R.497,504). Thus, the issue of Poston's pending criminal action was fully before the jury for its consideration.

Livingston v. State, 565 So.2d 1288 (Fla. 1990); Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988). The trial court therefore did not improperly prevent the issue from coming before the jury and no reversible error resulted.

III.

THE SUCCESSOR JUDGE DID NOT ERR IN IMPOSING A DEATH SENTENCE UPON THE DEFENDANT AFTER REVIEWING ALL PLEADINGS FILED IN THE CASE AND ALL TRANSCRIPTS RELATING THERETO WHEN THE JURY PREVIOUSLY RECOMMENDED DEATH.

The defendant contends that Judge Barron erred in imposing the death sentence after replacing the original trial judge who was tragically killed in a plane crash the day after the jury returned its recommendation of death. The record below establishes that the successor judge did not err in imposing its sentence since it obtained and carefully reviewed all pleadings filed in the case and all transcripts relating to both pretrial matters and the trial prior to delivering its sentence. The correctness of the sentence is all the more apparent since it is in conformity with the jury's prior recommendation, as well as, the original trial court's thoughts regarding sentencing which were documented immediately following the penalty phase.(S.6-9). Judge Barron did not review these notes prior to rendering his sentence, instead reaching an independent determination.(R.1466).

It is clear that the Florida Legislature anticipated the possibility of tragic circumstances similar to those which arose in this case and it therefore enacted Fla.R.Crim.P. 3.231. That Rule specifically provides that

> If by reason of death or disability the judge before whom a trial has commenced is unable to proceed with the trial, or post-trial proceedings, another judge, certifying that he has familiarized himself with the case, may proceed with the disposition of the case.

Had the Legislature felt that death penalty cases should be exempted from this Rule, it could have provided for such exception in the rule. It did not see fit to do so and in fact obviously felt that so long as a successor judge has first familiarized himself with what occurred prior to his appointment, the fact that the successor was not personally present during the prior proceedings neither renders the successor judge's disposition of the case invalid nor necessitates a new trial.

In this case, Judge Barron, the successor to Judge Wells, indicated repeatedly that prior to the time he imposed sentence, he reviewed all the transcripts of the trial and hearings relating to the case, as well as, all the pleadings filed relating to it.(R.1452-5,1508). The record shows that the trial court did, indeed, carefully review these materials, as established by the detailed findings of fact set forth in the sentence it rendered.

> It is permissible to allow a judge who did not preside in the trial to pass sentence upon the accused. Anderson v. State, 115 Fla. 477, 155 So. 726 (1934); Ex Parte Williams, 26 Fla. 310, 8 So. 425 (1890); United States v. Bakewell, 430 F.2d 721 (5th Cir. 1970), cert. denied, 400 U.S. 964, 91 S.Ct. 366, 27 L.Ed.2d 384 (1970). However, a prerequisite exists which requires the substitute judge to protect the rights of a defendant by thoroughly familiarizing himself with the case before proceeding to the matter of sentencing. Bennett v. United States, 285 F.2d 567 (5th Cir. 1960). Caplinger v. State, 271 So.2d 780, 781 (Fla. 3d DCA 1973).

See also: United State v. McGuinness, 769 F.2d 695 (11th Cir. 1985); Johnson v. State, 409 So.2d 1158 (Fla. 1st DCA 1982), app. after remand, 426 So.2d 889, post conviction relief denied, 557 So.2d 223, rev. denied, 563 So.2d 632 (Fla. 1990); Moore v. State, 378 So.2d 792 (Fla. 2d DCA 1980); Castor v. State, 351 So.2d 375 (Fla. 1st DCA 1977); McCoy v. State, 344 So.2d 250 (Fla. 1st DCA 1977), cert. denied, 354 So.2d 982 (Fla. 1977).

Finally, the defendant is unable to establish prejudice as a result of his being sentenced by Judge Barron, since the sentence imposed is in conformity with both the jury's recommendation and the sentence contemplated by the original trial court who did preside throughout the guilt and penalty phases of the trial. See: McCoy v. State, supra.

IV.

THE TRIAL COURT DID NOT ERR IN REFUSING TO DECLARE A MISTRIAL WHEN THE STATE, DURING CROSS-EXAMINATION OF A DEFENSE PSYCHIATRIC EXPERT, ELICITED THE FACT THAT THE DEFENDANT REFUSED TO DISCUSS THE DETAILS OF THE CRIME OF WHICH HE HAD PREVIOUSLY BEEN FOUND GUILTY.

The defendant asserts that the trial court erred in refusing to declare a mistrial after the State, on cross-examination, elicited from a defense psychiatric expert the fact that the defendant had refused to discuss the details of the crime with him. He attempts to liken this to a comment on a defendant's right to remain silent following an arrest. As a result, the cases he relies upon are totally distinguishable from the facts of the instant case and he may not prevail.

While it is true that the State may not elicit testimony from law enforcement officers or other authorities as to a defendant's assertion of his right to silence following an arrest, the rule does not apply under the circumstances here. As this Court recognized in Spivey v. State, 529 So.2d 1088 (Fla. 1988),

> ...Miranda rights were established as a prophylactic rule to minimize the coercive atmosphere of custodial interrogation by law enforcement officers. The rule prohibits the use by the state of any statement, whether exculpatory or inculpatory, obtained in a custodial setting unless the procedural safeguards of Miranda are followed. Moreover, "[t]he prosecution may not...use at trial the fact that he stood mute or claimed his privilege in the face of accusation." (Citations omitted). Miranda, however, is addressed to the actions of the state and its agents.

529 So.2d 1091.

Thus, the comment elicited from the defendant's psychiatric expert that he refused to discuss the crime is not an improper comment upon the defendant's right to silence. The cases he relies upon are distinguishable since they involve the elicitation of comments by government agents, i.e. law enforcement officers, on the defendant's exercise of his constitutional rights following arrest. The defendant has failed to cite one case in support of his proposition that the same rule applies to defense experts on cross-examination.

The trial court's ruling is also appropriate in view of the State's line of questioning which sought to establish that the defense expert reached his opinion without full knowledge of the facts and circumstance of the crime of which the defendant was accused. The record below establishes that the defense did not provide its expert with any information other than the fact that a victim was dead, shots were involved, and the defendant stood accused of some involvement in the crime; the defendant also declined to discuss the case. Thus, the State sought to establish that Dr. Larson's opinion was not worthy of belief since it was not formulated with full knowledge of the underlying crime. Finally, even if the defendant was correct in his characterization of the comment, the matter is nonetheless subject to a harmless error analysis and it is clear, that in view of the overwhelming evidence of guilt, it had no impact upon the defendant's conviction. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

V.

THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW THE DEFENSE, DURING THE PENALTY PHASE OF THE TRIAL, TO USE THE CODEFENDANT AS AN EXHIBIT TO ALLOW THE JURY TO VIEW HIS PHYSICAL APPEARANCE.

The defendant contends that because the trial court improperly refused to allow him to put codefendant, Donnie Phillips, on the stand to allow the jury to view his physical appearance he was deprived of arguing the mitigating factor that the defendant acted under the substantial dominion of Phillips in the commission of the crime. It is clear, however, that no error occurred.

The defense sought to put Phillips on the stand as though he were merely an exhibit since Phillips refused to testify based upon his Fifth Amendment privilege.(R.594).[2] Despite counsel's characterization of Phillips as an exhibit, defense counsel sought to obtain certain information regarding his physical appearance to infer that Phillips was the primary actor in the murder while the defendant was a minor participant under Phillips' control. In the first instance, the rules of evidence simply do not provide for the use of a person as an exhibit; the defendant's argument fails for this reason alone. Next, he argues that Phillips' presence on the stand was nontestimonial

---

[2] MR. HARLEE: Also your Honor, I've subpoenaed Donnie Phillips here for basically --as an exhibit, not as a person testifying. My questions are going to be limited to State your name."(R.594).

MR. HARLEE: Well, I'm not going to ask him any questions about this or any other activity other than his name, his height and weight.(R.595).

in nature and would thus not open the door to cross-examination by the State thereby rendering the trial court's ruling incorrect. This argument belies trial counsel's in court statements to the effect that he would, in fact, be soliciting testimony from Phillips. Any testimony by Phillips would have opened the door to cross-examination by the State particularly where Phillips' height and weight were irrelevant without the foundation to such questions, i.e. the defendant's claimed mitigation, being supported by the record. The cases cited by the defendant are thus inapposite since in all of them the defendant did not testify and merely presented nontestimonial evidence.

The trial court's ruling can afford the defendant no relief for several other reasons. Primary among them is the fact that the record is devoid of any testimony whatsoever to the effect that the defendant had a subservient personality and was easily dominated by others. It is equally void of testimony that Phillips was a domineering personality. Any instruction on the mitigating factor claimed would have been unjustified even if Phillips had been allowed to take the stand. Secondly, as the defendant concedes, the jury did have testimony before it, by more than one witness, regarding Phillips' size and weight.(R.331-2,650). His appearance was thus unnecessary and would have proven to be merely cumulative. Lastly, even if the defendant were correct in his assertion of error, any error was, at best, harmless since the defendant told Terry Poston and others that he shot Ms. Daily.

VI.

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE MURDER WAS COMMITTED TO AVOID ARREST AND WAS COMMITTED IN A HEINOUS, ATROCIOUS AND CRUEL MANNER WHEN THE EVIDENCE REVEALED THAT THE DEFENDANT KNEW THE VICTIM WHO COULD IDENTIFY HIM AND WHEN THE VICTIM WAS NOT ONLY SHOT FOUR TIMES, BUT MUTILATED.

The defendant asserts that two aggravating factors, that the murder was committed to avoid arrest and was heinous, atrocious, and cruel, were improperly found by the trial court. The record, however, refutes this claim and clearly establishes that the trial court was eminently correct in its determination.

The defendant first contends that the trial court erroneously determined that the murder was committed to avoid arrest and relies upon Perry v. State, 522 So.2d 817 (Fla. 1988), Amazon v. State, 487 So.2d 8 (Fla. 1986), and similar cases in support of his claim. These cases, however are totally distinguishable from the instant case. In Perry and Amazon, for example, this Court found that the defendants had no prearranged plan to kill their victims to avoid arrest, but rather ended up killing their victims on the scene when the situation got out of their control and they panicked. Here, however, the situation is much different. Not only did the defendant and his co-perpetrator plan to commit a robbery with a loaded firearm thus exacerbating the possibility that someone would be killed, they carefully selected a site which did not have cameras or other devices to record their actions so that the sole source to lead to their identification would be their victim. They rejected a bank and convenience store for just this reason and instead

selected a remote liquor store which did not have security devices.(R.482). The defendant conceded the fact that they knew their victim, Sherry Daily.(R.482). Had the defendant not been motivated by a desire to avoid arrest, Ms. Daily, having been deprived of the contents of the store register, would have been left in the store alive.

Perhaps the most comprehensive analysis of this aggravating factor in recent years was set forth in this Court's opinion in Swafford v. State, 533 So.2d 270 (Fla. 1988) in which the Court held

> A motive to eliminate potential witnesses to "an antecedent crime" can provide the basis for this aggravating circumstance. Menendez v. State, 419 So.2d 312, 315 n. 2 (Fla. 1982). It is not necessary that an arrest be imminent at the time of the murder. See, e.g. Herring v. State, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984); Riley v. State, 366 So.2d 19 (Fla. 1978).
>
> Although some decisions have approved findings of motive to eliminate witnesses based on admissions of the defendant, Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986); Bottoson v. State, 443 So.2d 962, 963 (Fla. 1983), cert. denied, 469 U.S. 873, 105 S.Ct. 223, 83 L.Ed.2d 153 (1984); Johnson v. State, 442 So.2d 185, 188 (Fla. 1983), cert. denied, 466 U.S. 963, 104 S.Ct. 2183, 80 L.Ed.2d 563 (1984), in others the factor has been approved on the basis of circumstantial evidence without any such direct statement. Routly v. State, 440 So.2d 1257 (Fla. 1983) ("express statement" not required), cert. denied, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 888 (1984). While Swafford's statement to Johnson did not contain any clear reference to his motive for the murder specifically, the circumstances of the murder were similar to those in many cases where the arrest

> avoidance factor has been approved. E.G. Cave v. State, 476 So.2d 180, 188 (Fla. 1985) (evidence left "no reasonable inference but that the victim was kidnapped from the store and transported some thirteen miles to a rural area in order to kill and thereby silence the sole witness to the robbery"), cert. denied, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986); Routly v. State, 440 So.2d at 1264 ("no logical reason" for the victim's abduction and killing "except for the purpose of murdering him to prevent detection"). Other cases have applied the same reasoning to similar facts. E.G. Burr v. State, 466 So.2d 1951 (Fla.), cert. denied, 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985); Martin v. State, 420 So.2d 583 (Fla. 1982), cert. denied, 460 U.S. 1056, 103 S.Ct. 1508, 75 L.Ed.2d 937 (1983); Griffin v. State, 414 So.2d 1025 (Fla. 1982).
> 533 So.2d at 276.

The State respectfully submits that the same rationale applies to the facts of this case where: the defendant had been convicted on a previous strong arm robbery by a victim identification, the defendant specifically selected a less risky site for his robbery after rejecting those with surveillance equipment, the defendant entered the premises, armed with a gun, to commit a robbery, the store clerk knew the defendant, and the defendant, after successfully robbing the store, transported the victim to a rural area some ten miles away, mutilated her, and shot her four times.

The defendant also claims that the trial court erroneously determined that the murder of Sherry Daily was heinous, atrocious and cruel. This assertion is, however, totally refuted by the record below.

The record adduced at trial clearly establishes that the victim was forcibly abducted at gunpoint from the liquor store where she was employed and transported by the defendant to a rural location some ten miles away.(R.275,286,305,317,319). Upon their arrival at this isolated spot, the victim was forced to strip naked and was left with only her tennis shoes.(R.385). The record further establishes that a finger on Ms. Daily's right hand was amputated for no apparent reason.(R.390). Additionally, she was skinned, like an animal, from her abdomen, below her navel, around her legs, all the way to her anus.(R.390-2). Ms. Daily also sustained two bullet wounds to her left hand, resulting in a massive amount of hemmorhaging.(R.386) These wounds were inflicted through two entry wounds in the palmar surface and exited through one wound on the opposite side of the hand, thus establishing that these were defensive wounds in nature.(R.386). Finally, Dr. Kielman's testimony established that Ms. Daily's death was caused by two bullet wounds to the head, one of which entered directly above the left ear with an exit wound just above and slightly forward of the right ear, and the other through the roof of the mouth.(R.385).

This Court has repeatedly upheld the finding of this aggravating factor in cases, such as this where a victim undergoes torture at the hands of a defendant. See: Mendyk v. State, 545 So.2d 846 (Fla. 1989), cert. denied, 110 S.Ct. 520, 107 L.Ed.2d 521 (1989); Cook v. State, 542 So.2d 964 (Fla. 1989); Swafford v. State, 533 So.2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1988). On this basis alone, the trial court's finding is appropriate.

Even if one were to assume arguendo that the defendant was correct in his assertion that the victim was shot in the head prior to the time the other injuries were inflicted upon her, the trial court's finding is nonetheless proper. This Court has held that a finding of heinous, atrocious, and cruel is appropriate in cases in which a victim faces a helpless anticipation of her own impending death. See: Rivera v. State, 561 So.2d 223 (Fla. 1990); Cook v. State, 542 So.2d 964 (Fla. 1989); Jackson v. State, 522 So.2d 802 (Fla. 1988), cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988); Koon v. State, 513 So.2d 1253 (Fla. 1987), cert. denied, 485 U.S. 943, 108 S.Ct. 1124, 99 L.Ed.2d 284 (1987); Melendez v. State, 498 So.2d 1258 (Fla. 1986). Here, Ms. Daily, who was abducted, driven many miles, and forced to strip and march into an isolated swamp, surely was aware that she would not be allowed to survive to tell what had happened. Thus, the finding of heinous, atrocious, and cruel is supported by the mental anguish she must of necessity have experienced. Phillips v. State, 476 So.2d 194 (Fla. 1985); Cave v. State, 476 So.2d 180 (Fla. 1985), cert. denied, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1985). Finally, Ms. Daily's awareness of her impending doom is further established by the gunshot wounds to her left hand which were inflicted from the palm to the opposite side of the hand, showing she attempted, albeit futilely, to avoid the inevitable. Huff v. State, 495 So.2d 145 (Fla. 1986), denial of post-conviction relief rev'd, 569 So.2d 1247; Ross v. State, 474 So.2d 1170 (Fla. 1985); Cave v. State, supra.

VII.

THE DEATH SENTENCE IMPOSED ON THE DEFENDANT IS NOT DISPROPORTIONATE.

The defendant asserts that the trial court erroneously imposed the death sentence when his codefendant, Donnie Phillips, received a life sentence and his actions were no more culpable than those of Phillips. The record refutes this claim and establishes that the defendant was the primary actor in the murder of Sherry Daily and thus the imposition of the death penalty is appropriate.

Although the defendant seeks to mitigate the effect of his statements to Terry Poston, the evidence adduced at trial clearly establishes the fact that he admitted to being the person who shot Sherry Daily to death.(R.495,507). Additionally, the record unequivocally shows that when the defendant took Poston to view his handiwork, he laughed and said "that's what I think about life."(R.494,508). Absolutely nothing in the record substantiates the defendant's claim that he was merely a minor participant in this crime. To the contrary, it establishes that he was the major actor and both the jury and the trial court recognized this to be true.[3] Hargrave v. State, 336 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 414 (1979). Under these circumstances, it is clear that the imposition of the death penalty was correct. Van Poyck v. State, 564 So.2d 1066 (Fla. 1990); Diaz v. State, 513 So.2d 1045

[3] The defendant's argument also ignores the fact that Phillips' lessor sentence may have been attributable in part to the fact that Phillips assisted the police in obtaining physical evidence relating to the crime.

(Fla. 1987), cert. denied, 108 S.Ct. 1061, 98 L.Ed.2d 1022 (1987).

VIII.

THE TRIAL COURT DID NOT ERR IN READING THE STANDARD JURY INSTRUCTIONS ON THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS, AND CRUEL WHEN THE DEFENDANT DID NOT OBJECT TO THE INSTRUCTION OR REQUEST DIFFERENT OR ADDITIONAL INSTRUCTION.

The defendant, citing to Maynard v. Cartwright, 484 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), complains that the trial court erred in reading penalty phase instructions on the aggravating factor of heinous, atrocious, and cruel since he asserts the instructions did not provide the necessary limiting definitions to allow for the factor's proper application. Nevertheless, the instructions read, the standard jury instructions on this aggravating factor, have been upheld as Constitutional by this Court since Maynard has no applicability to Florida's sentencing scheme. The defendant's argument has been repeatedly rejected by this Court and he may not prevail. Smalley v. State, 546 So.2d 720 (Fla. 1989); Dixon v, State, 283 So.2d 1 (Fla. 1973); Hildwin v. Florida, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), reh. denied, 109 S.Ct. 3268, 106 L.Ed.2d 612 (1989). Additionally, as the defendant failed to object to the instructions as read at the time of trial, the matter is not preserved for the appellate review of this Court. See e.g.: Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Bottoson v. State, 433 So.2d 962 (Fla. 1983), cert. denied, 105 S.Ct. 233 (1984).

IX.

THE TRIAL COURT DID NOT ERR IN REVIEWING THE DEFENDANT'S PSI WHEN IT WAS NOT PRESENTED TO THE JURY AND THE TRIAL COURT DID NOT RELY UPON VICTIM IMPACT EVIDENCE IN REACHING ITS SENTENCE.

The defendant contends that the trial court reversibly erred in reviewing the PSI report which contained victim impact evidence. The record establishes that the trial court did not, however, make improper use of the victim impact evidence contained in the PSI in reaching the sentence it imposed.

Fla.R.Crim.P. 3.710 specifically provides that a trial court may, at its discretion, order the preparation of a PSI report prior to sentencing so long as it is provided to both the State and the defendant and the defendant is given the opportunity to object to and rebut any materials contained in the report with which he does not agree. In this case, the defendant failed to object to either any material contained in the PSI[4] or to the trial court's consideration of it.(R.1502-3). Any argument as to this issue is therefore waived.

The record below also fails to support the defendant's charge that the trial court's sentence was motivated by its having read the PSI. The sentence was, by the trial court's own admission, a result of its independent review of the transcripts and pleadings filed in the case.(R.1508). It is also apparent that its determination of an appropriate sentence is in conformity with the jury's recommendation and the material the

---

[4] The defense's sole complaint with regard to the PSI related to the incorrect guidelines scoresheet point total.(R.1503).

defendant complains of was at no time presented to the jury. Reed v. State, 560 So.2d 203 (Fla. 1990). See also: Payne v. Tennessee, 5 FLW Fed. S708 (June 27, 1991). The defendant may not prevail.

X.

THE TRIAL COURT DID NOT ERR IN GIVING THE STANDARD JURY INSTRUCTIONS DURING THE PENALTY PHASE OF THE TRIAL WHEN THE INSTRUCTIONS HAVE BEEN FOUND PROPER BY THIS COURT AND THE DEFENDANT INDICATED NO OBJECTION TO THEM.

The defendant contends that the trial court erred in giving the jury the standard penalty phase instructions since he claims that these instructions improperly diminish the responsibility of the jury's role in the sentencing process. This Court has, on numerous occasions, found that the standard instructions are constitutional and do not serve to diminish the importance of the jury's function in sentencing. Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1988); Ford v. State, 522 So.2d 345 (Fla. 1988), cert. denied, 109 S.Ct. 1355, 103 L.Ed.2d 8232 (1988); Lemon v. State, 456 So.2d 885 (Fla. 1984), cert. denied, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985); Vaught v. State, 410 So.2d 147 (Fla. 1982).

Furthermore, the defendant concedes that this Court has found against him on this identical issue but does not set forth any argument that has not been previously presented to the Court which would justify its receding from its holdings in Combs v. State, 525 So.2d 853 (Fla. 1988) and Aldridge v. State, 503 So.2d 1257 (Fla. 1987). His argument also ignores the fact that no objection on these grounds was made at the trial court level so as to preserve the issue for appellate review.(R.670). See e.g.: Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Bottoson v. State, 433 So.2d 962 (Fla. 1983), cert. denied, 105 S.Ct. 233 (1984).

CONCLUSION

Based upon the foregoing argument, the Appellee, the State of Florida, respectfully requests that this Court affirm the judgment and sentence entered below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

Giselle D. Lylen
GISELLE D. LYLEN
FLORIDA BAR NO. 0508012
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N-921
Miami, Florida 33128

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **MOTION TO SUPPLEMENT THE RECORD ON APPEAL** was furnished by mail to **W. C. McCLAIN, ASSISTANT PUBLIC DEFENDER, Counsel for Defendant/Appellant, 301 SOUTH MONROE STREET, FOURTH FLOOR NORTH, TALLAHASSEE, FLORIDA 32301** this 9th day of AUGUST 1991.

Giselle D. Lylen

GISELLE D. LYLEN
Assistant Attorney General