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IN THE SUPREME COURT OF FLORIDA

DWAYNE IRWIN PARKER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 76,172

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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IN THE SUPREME COURT OF FLORIDA

DWAYNE IRWIN PARKER, Appellant, vs. STATE OF FLORIDA, Appellee.	)))))))))))	CASE NO. 76,172

PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE AND FACTS

The State cannot accept Appellant's incomplete and argumentative statement of the case and facts, and cannot merely note the areas of disagreement.[1] Therefore, the State offers its own statement of the case and facts as follows:

On May 11, 1989, Appellant was indicted for the first degree murder with a firearm of William Nicholson, the attempted first degree murders with a firearm of Robert Killen and Keith Mallow, and the armed robberies of Thomas Kincade, Frances Dubroka, Deborah Kaminski, Marie Kaminski, Peter O'Rourke, Norman Wall, Bernard Ogbourne, Dwayne Holloway, and Eddie Alexis, allegedly committed with Ladson Marvin Preston, Jr., on April 22, 1989. (R 2400-02). A Special Assistant Public Defender was appointed to represent Appellant on September 7, 1989, after the Public Defender's Office withdrew due to conflict of interest. (R 2448).

Prior to trial, defense counsel filed several motions seeking the trial court to declare various provisions of Florida's death penalty statute unconstitutional. (R 2476-2544). Those motions were denied at a later hearing. (T 365-66).

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[1] See Thompson v. State, 588 So.2d 687, 689 (Fla. 1st DCA 1991) ("The basic requirements of professionalism mandate that an appellant's statment of the case and facts not only be objective, but be cast in a form appropriate to the standard of review applicable to the matters presented."); Overfelt v. State, 434 So.2d 945, 949 (Fla. 4th DCA 1983) ("The facts should be stated clearly, concisely and objectively. A slanted or argumentative factual statement is of little or no assistance and does not truly advance any appellant's prospects of reversal."), modified on other grounds, 457 So.2d 1385 (Fla. 1984).

On the first day of trial, defense counsel sought to dismiss the case or, in the alternative, suppress the testimony of the medical examiner based on the medical examiner's change in testimony regarding the color of the bullet removed from the victim's body. (R 2667-69). In addition, defense counsel sought to recuse the prosecutor for allegedly suborning the medical examiner's perjurious testimony. (R 2670-71). Both motions were denied after a hearing. (T 375-78).

The State's first witness was Kelly Danielson, who was a waitress at the Pizza Hut in Pompano Beach on April 22, 1989. (T 956). She was taking an order at the cash register from two black males around 11:00 p.m. when a black male walked in and asked to speak to the manager. He had short hair, was well built, and was wearing a tan windbreaker and a hat. When she asked him why he wanted to speak to the manager, Appellant pulled out a gun. He had another gun stuck in his waistband which he showed to her. She pointed to the manager, who was sitting at a table in the dining area doing paperwork. (T 957-63). When the man walked away, she ran to the back to call 911, but a second black male grabbed the phone from her and threw it to the floor. When he walked away, she grabbed the phone again, but he returned an ripped it out of the wall. When he walked away again, she ran out the back door and called the police from the Tenneco Gas Station next door. (T 963-65). Ms. Danielson later identified Appellant from a video lineup as the man with the guns. (T 987-88). She also identified Appellant's codefendant from a photo lineup. (T 986-87).

The State's next witness was Thomas Kincade, the assistant manager of the Pizza Hut. Mr. Kincade testified that he was doing paperwork at one of the tables when a man wearing a tan jacket and a mask stuck a gun in his face and ordered him to open the cash register. When he opened the cash register and safe, a second man grabbed the money. Mr. Kincade then heard shots fired in the dining area and fell to the floor. The second suspect made him stand up, and he heard more shots from the dining area. Shortly thereafter, he and two other employees were ordered into the bathroom. While inside, Mr. Kincade heard more shots, which sounded like they were coming from outside the restaurant. (T 996-1008).

Peter O'Rourke, who was eating at the restaurant, testified that he saw a man wielding a gun, and wearing a tan jacket, mask, and cotton work gloves, approach several ladies sitting at another table and demand money and jewelry. The man then came to his table and demanded money. The man returned to the ladies' table and was upset that they had not complied with his demands, at which point he fired his gun into the floor. He then ripped necklaces and bracelets from the ladies' necks and wrists. (T 1014-25).

Norman Wall, who was with Mr. O'Rourke gave essentially the same testimony. He testified further, however, that when the man with the gun came back to their table, he fired a single round into the floor, shooting Mr. Wall in the foot. (T 1091-98).

Bernard Ogbourne, another patron at the restaurant, testified that he saw a man come in the Pizza Hut and hold up the manager. The black male then robbed people at two other tables

before he robbed Mr. Ogbourne and his friends. After the black male left his table, he heard several gunshots. (T 1030-39).

Dwayne Holloway, who was with Mr. Ogbourne and two girls, gave essentially the same testimony. He noted, however, that a second black male kept saying, "Let's go. Let's go." but the man with the gun kept talking to them. "[H]e was like enjoying seeing everybody in the restaurant afraid. He was like enjoying seeing us, you know, suffer or whatever, so to speak, because he didn't want to leave." (T 1077-86).

Eddie Alexis was at the cash register ordering a pizza with his friend when a black male came in, asked to see the manager, then pulled out a gun. A second black male told them to go sit down. Mr. Alexis heard the man with the gun argue with other customers and then heard several shots fired. The man with the gun then came over and robbed him and his friend. (T 1057-66).

Marie Kaminski, her sister Frances Dubroka, and her daughter Deborah Kaminski were eating at a table when a black male of medium build, wearing a tan jacket and black mask and wielding a gun, approached their table and demanded money and jewelry. He then went to another table, but returned and stuck a gun to the temple of Frances Dubroka, saying, "You motherfucker, I ought to kill you. You're half dead anyhow." He then ripped a necklace off of Ms. Dubroka's neck and a bracelet off of Deborah Kaminski's wrist. Because they were not fast enough in meeting his demands, the black male fired several shots into the floor, one of which ricochetted and struck Ms. Dubroka in the leg. The black male then returned to the other table and fired a single shot over there. (T 1107-16, 1122-34, 1136-44).

Deputy Killen of the Broward Sheriff's Office responded to the Pizza Hut on North Federal Highway and saw a thin black male in a blue jogging suit exit the north door of the Pizza Hut and run in a northwesterly direction. (T 1481). After securing a customer who had escaped from the restaurant, Deputy Killen moved to the north side of the building, where he encountered a black male, whom he identified as Appellant, partially concealed around the edge of the building. Appellant pointed a gun at Deputy Killen and said, "Drop your gun, or I'll shoot you." (T 1182-86, 1491). From approximately fifteen feet away, Appellant fired four to six shots at him. Deputy Killen returned a single shot and then jumped behind a nearby car. (T 1488-90). Appellant fled in a southwesterly direction, and Deputy Killen followed him on foot, but lost sight of him when Appellant turned onto Northeast 29th Street. (T 1492-93). During this time, Deputy Killen heard gunshots. (T 1495).

Keith Mallow was driving east on 29th Street with his wife, two children, and a friend of his children when a man came running up to the driver's side of his car with a gun in his hand and ordered them out of the car. When Mr. Mallow accelerated, the man shot at them, barely missing Mr. Mallow's head, and causing him to careen into a parked car. He saw the man run behind the car in a southwesterly direction. (T 1149-59).

When Deputy Killen turned onto 29th Street, he saw Appellant run in front of a 7-Eleven, but then lost sight of him again when Appellant turned south onto Northeast 17th Avenue. He then heard another shot. (T 1495, 1498-99).

Tammy Duncan, who lived on 29th Street a block and a half from Pizza Hut, was watching television in her living room when she heard a gunshot. She walked to the corner of 29th Street and 17th Avenue and saw a black male, whom she identified as Appellant, run from behind the 7-Eleven down Northeast 28th Court carrying a gun. She also saw a man whom she later learned was William Nicholson running behind Appellant. She momentarily lost sight of Appellant, but then heard a shot and saw Mr. Nicholson grab his stomach and eventually fall to the ground in the middle of the street. (T 1181-1206).

Tina McKnight testified that she was in Rosie's Bar, which is next door to the 7-Eleven, just before the shooting. The victim, William Nicholson, was also in the bar. When someone came in and said that the 7-Eleven had been robbed, everyone went outside. She later saw Mr. Nicholson lying in the street on the other side of 7-Eleven. (T 1467-74).

Sergeant Baker, who had just turned onto 17th Avenue, saw Appellant running in a southwesterly direction, but facing northeast. He was ten to fifteen feet from a person lying in the street, and he had his arm extended, but Sergeant Baker could not see anything in his hand. (T 1527-30). Sergeant Baker followed Appellant down 28th Court. (T 1532).

When Deputy Killen spotted Appellant again, Appellant had turned onto 28th Court. At that point, two sheriff's department cruisers passed him. Deputy Killen followed Deputy Baker, who was in the first car, down 28th Court after Appellant. He saw Mr. Nicholson sitting in the road with a gunshot wound to his abdomen. (T 1495-99).

Deputy McNesby, who was in the second car, saw the victim doubled over in the middle of the street and stopped to help him. (T 1246-47). When he heard yelling several houses down, Deputy McNesby ran with his canine to 1670 Northeast 28th Court, where he found Deputy Killen and Deputy Baker with guns drawn ordering Appellant to show his hands. Appellant was lying on his stomach next to some bushes. When Appellant refused to show his hands, Deputy McNesby sent in his canine to apprehend Appellant. (T 1249-53). Appellant was arrested at 11:31 p.m. (T 1508). In response to defense counsel's repeated accusations, Deputy McNesby vehemently denied shooting Mr. Nicholson. (T 1260, 1275).

Appellant was taken back to the scene of the shooting, where Tammy Duncan identified him as the man she saw running down the street with William Nicholson in pursuit. (T 1204-05). At the police station, Deputy McCormes and Deputy Shafer patted Appellant down and found $117.00 secreted in Appellant's underwear. (T 1297-98, 1301-02). Sergeant Fantigrassi found $152.40, six rings, a watch, and some Lotto tickets in Appellant's pants pockets. (T 1358-61).

After returning from the hospital where he learned that Mr. Nicholson had died at 2:35 a.m., Detective Wiley interviewed Appellant, who, after waiving his Miranda rights, admitted to robbing the Pizza Hut, but claimed that his gun "just went off" inside the restaurant. Appellant also admitted to shooting at Deputy Killen outside the Pizza Hut, but claimed that he was just trying to buy time and was not trying to shoot anyone. Further, Appellant admitted shooting at the Mallows, but denied shooting Mr. Nicholson. (T 1312, 1321-41).

The next day, Kelly Danielson, the cashier/waitress at the Pizza Hut, picked Appellant's picture out of a photo lineup. Sometime later, she picked Appellant and Marvin Preston out of separate video lineups. (T 1313-18).

Detective Kammerer, a crime scene technician, testified that he found a black SWD M-11 9 millimeter semi-automatic pistol with twenty live rounds, several pieces of jewelry, some money, a pair of brown cotton gloves, and a stocking mask a few feet from where Appellant was apprehended on 28th Court. (T 1403). He also found six spent 9 millimeter shell casings and numerous bullet fragments inside the Pizza Hut, and five spent 9 millimeter shell casings outside the Pizza Hut. (T 1390-92). He found one spent 9 millimeter shell casing in the road at 28th Court where Appellant shot the victim, but he did not find a shell casing on 29th Street where Appellant shot at the Mallows. (T 1402, 1440). He also recovered a .22 caliber six-shot revolver with six live rounds from the front passenger seat of a white Pontiac parked on the south side of the Tenneco Gas Station behind the Pizza Hut. (T 1418-19). Appellant's identification was also found in a bag in the trunk of the Pontiac. (T 1699).

Dr. Bell, the medical examiner, testified that William Nicholson suffered a single gunshot wound to the abdomen. (T 1623-24). Based on stippling around the wound, Dr. Bell opined that the shot was fired from 2 to 24 inches away. (T 1631-32). Although Dr. Bell admitted that he described the bullet removed from the victim's body in his autopsy report and in an initial deposition as silver in color with very little deformation, upon reviewing his slide of the bullet upon request of the prosecutor,

he concluded that the bullet was copper in color with a cut in it from when he removed it from the body. (T 1635-46). Detective Cerat, who was present at the autopsy and who photographed the bullet once it was removed from the victim's body, also testified that the bullet was copper in color. (T 1560-64).

Following Dr. Bell's testimony, the State sought to present the testimony of Dr. Besant-Matthews, a forensic photographer, to testify that Detective Cerat's photo of the bullet was, indeed, an authentic photograph of the actual bullet recovered from the victim's body, but the trial court excluded the testimony from the State's case-in-chief because of the witness' late disclosure and the cumulative nature of his testimony. (T 1704-54). Thereafter, Patrick Garland, a firearms examiner, testified that the gun lying next to Appellant when he was apprehended holds a total of 33 cartridges, and was recovered with 20 copper-jacketed rounds. (T 1764-70). In addition, Mr. Garland testified that the bullet recovered from the victim's body and the shell casings recovered from inside and outside the Pizza Hut and at Northeast 28th Court where the victim was shot were all fired from Appellant's gun. (T 1776-86). Moreover, Mr. Garland testified over defense counsel's objection that, in his expert opinion, Detective Cerat's photo of the bullet removed from the victim accurately depicted the actual bullet removed. (T 1799-1807).

Thereafter, the State rested, and defense counsel moved for a judgment of acquittal, which was denied. (T 1829-35). Appellant personally waived his right to testify, and the defense rested. (T 1839-40, 1862). Defense counsel requested several special instructions, all of which were denied. (T 1842-48).

During the State's closing argument, defense counsel "reserved a motion" and moved for a mistrial at the close of the State's argument based on a comment made therein. The motion was denied. (T 1897, 1915). After requesting how to indicate a verdict of guilty to first degree felony murder on the verdict form, the jury returned verdicts of guilty to first degree murder as charged in Count I, a lesser-included offense of aggravated assault with a firearm in Count II, a lesser included offense of attempted second degree murder with a firearm in Count III, and robbery with a firearm as charged in Counts IV-XII. (T 2018-21, 2026-29).

On May 24, 1990, prior to the penalty-phase testimony, Appellant moved for a new trial based on newly discovered evidence. Brent Kissenger, a twice convicted felon, testified that, on the night in question, he lived at 1645 Northeast 30th Street, which is 75 to 100 yards from the Pizza Hut. (T 2046-47). While Mr. Kissenger was at the Tenneco buying cigarettes, he saw a black male, whom he identified as Appellant, run from the Pizza Hut with an officer in pursuit. (T 2050-51). The officer was about 6'2" tall, weighed between 220 and 230 pounds, had black curly hair, and wore wire-rimmed glasses. (T 2051). Mr. Kissenger followed the two men and saw them run through the parking lot of the 7-Eleven store. As they approached 17th Avenue and 29th Street, the police officer reached from behind, pulled out a shiny object, and said, "'Holt or I'll shoot.'" (T 2052-53). Mr. Kissenger lost sight of them momentarily, but when he turned the corner onto 17th Avenue, he saw the police officer in a firing position and saw a man lying in the street. (T

2053). He had heard one shot after the police officer ordered Appellant to stop, but he did not see the direction from which it was fired. (T 2054).

On cross-examination, Mr. Kissenger testified that Appellant was wearing jeans, a green Army jacket, and a green ski hat. Appellant did not have anything in his hands and was not wearing gloves. (T 2055). At the time of the shooting, the police officer was between 10 and 15 yards behind Appellant. (T 2055). He saw no muzzle flash and did not see where the shot went. (T 2063). As he came around the corner, he saw someone with dirty, dishwater blonde hair, wearing a green jacket, hat, dark pants, Army boots, and a green and white flannel shirt lying on the ground. (T 2063-64). He then saw a female sheriff deputy drive up. She and another deputy told Mr. Kissenger to leave, so he went to the 7-Eleven to buy cigarettes, then went home. After he told his wife what he saw, they both went back to the scene. There were about fifty law enforcement officers from several different agencies there. Mr. Kissenger heard about the shooting on the radio, but did not call the police because he did not want to get involved. (T 2065-69).

Following argument by counsel, the trial court found Mr. Kissenger's testimony "so inconsistent, incredible, uncredible, and unworthy of belief, that it is in effect discarded in its entirety by the Court. The evidence I don't think was material to the issue in question, and, certainly, cumulative to something or impeaching to something and would definitely not have been such as to produce a different result. Therefore, the motion for new trial is denied." (T 2083-84).

Thereafter, the State introduced certified copies of conviction relating to Appellant for two counts of robbery entered on October 15, 1988, and one count each of aggravated battery and aggravated assault entered in 1979. (T 2110). Over Appellant's objection, the State then presented the testimony of Deputy Cerat, Special Agent Richards of the FBI, and Dr. Besant-Matthews, all of whom confirmed that the original photo of the bullet removed from the victim's body was in fact an authentic photo of the actual bullet. (T 2111-15, 2115-30, 2133-41).

The State's next witness was Rodney Johnson, who testified that, in 1979 when he was 15 or 16 years old, he was at Pop's Pool Room in Jacksonville shooting pool with Appellant when he and Appellant got into a fight over 50 cents. Tyrone Jennings stepped in and took a brick away from Appellant. After the fight broke up, Mr. Johnson left. While ordering a sandwich at a nearby barbecue stand shortly thereafter, Appellant ran up and fired at him twice. Mr. Johnson, who was unhurt, fled. Nearby, he saw Tyrone Jennings lying in the street. (T 2145-51).

Tyrone Jennings testified that Appellant went after Rodney Johnson with a brick during a fight at a pool hall in Jacksonville. Tyrone stepped in and took the brick away from Appellant. As a result, Appellant hit Tyrone and knocked him down. The owner of the pool hall broke up the fight and Tyrone went home. When Tyrone came out of a bar after buying beer for his mother later that day, Appellant shot him three times: in the eye, neck, and side. Tyrone lost his sight in that eye. At the time of the shooting, Tyrone had just been released from prison after serving eight years for shooting two people. (T 2155-62).

Thereafter, the State rested, and defense counsel presented the testimony of his private investigator, Carey Kultau, who introduced, over the State's objection, certified copies of conviction relating to the victim in this case, William Nicholson, for one count of burglary entered in 1975, one count of aggravated battery entered in 1983, and one count each of burglary of a dwelling and aggravating battery entered in 1988. (T 2174-76).

Appellant's mother then testified on his behalf. Marion Sanders related that Appellant's father left when Appellant was three months old. When Appellant was six, she was committed to a mental hospital. Over the years, she was committed several times, and each time Appellant was placed through HRS into different foster homes where, she later learned, Appellant was physically and sexually abused. As a result, Appellant often ran away from the foster homes. Appellant's sister was always placed in the same foster home. Recently, Ms. Sanders had moved in with Appellant, his wife, and two children in Ft. Lauderdale because Appellant could no longer afford to pay her rent. (T 2184-89).

Appellant's next witness was Howard Finkelstein, who compiled a social history on Appellant as an investigator for the Public Defender's Office. After speaking with Appellant, his mother, father, sister, and brother, Mr. Finkelstein opined that Appellant's early life was "dysfunctional." Appellant was sexually abused by another male at the age of seven and was repeatedly sexually and physically abused while in the care of foster parents, from whom he would often run away. In exchange for shelter, Appellant would engage in sexual intercourse.

Because of his homosexual experiences, Appellant was ridiculed by his classmates. Appellant attended seventeen different schools by the time he graduated. (T 2202-16).

Next, Appellant presented the testimony of his codefendant in the robbery/murder, Marvin Preston. Marvin testified that he pled guilty to second degree murder in this case in exchange for a fifteen year prison sentence. He believed he would serve only four years. Regarding the robbery, Marvin testified that it was not planned. Appellant had drunk most of a liter of Seagram's gin that night and was intoxicated. Marvin believed that, had Appellant been sober, he would not have committed the robbery. (T 2217-21).

On cross-examination, Marvin testified that he and Appellant went to the Tenneco Gas Station next door to the Pizza Hut to buy ice and orange juice, and then decided to go to the Pizza Hut to eat. Before going in, however, they decided to rob it. Marvin, who had no gun or weapon, was supposed to be the lookout. He waited in the car for a little while, then went inside. He saw Appellant with a small gun. When he heard a shot, he left. Marvin admitted that, in a previous deposition, he had stated that Appellant knew what he was doing. (T 2217-30).

Appellant's next witness was Dr. Glen Cady, a licensed clinical psychologist, who was appointed as a confidential mental health expert before trial. (R 2631). Dr. Cady testified that he interviewed Appellant, talked to Appellant's mother by telephone, and reviewed Appellant's statement to the police, the probable cause affidavit, and Marvin Preston's pretrial deposition. (T 2238). From this information, he learned that

Appellant was 28 years old and was born in Ft. Pierce. He had one sister through his mother, and two half-sisters and three half-brothers through his father. (T 2239). Throughout Appellant's childhood, Appellant's mother was periodically committed to mental institutions as a paranoid schizophrenic, and Appellant was placed through HRS into foster care, where he was physically and sexually abused. Appellant had his first heterosexual experience when he was 14 years old and thereby resolved his sexual identity. He began shoplifting when he was 12 years old and associated with a "bad crowd." His life was chaotic because it was not structured, and Appellant began drinking and smoking marijuana at a young age. Currently, Appellant has a major alcohol abuse problem and very little self-worth. He believed Appellant committed the crime under the influence of alcohol. In Dr. Cady's opinion, Appellant is potentially recoverable in an emotional sense with professional help. (T 2233-50).

On cross-examination, Dr. Cady admitted that the conversation with Appellant's mother lasted only 25 minutes and that he did not talk to any witnesses, police officers, or other family members, or read any reports from the case; thus, his "collateral perspective" of Appellant was "limited." He did not perform any tests on Appellant, other than a screening test of intellectual process. (T 2251-60). He based his opinion that Appellant committed the crimes while under the influence of alcohol solely on Marvin Preston's deposition. (T 2263). He did not believe, however, that Appellant was under the influence of extreme mental or emotional disturbance at the time of the

murder, or that his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (T 2262, 2270-71).

Appellant's final witness was Carlton Moore, a private investigator for the Public Defender's Office. Mr. Moore testified that he spoke to Appellant's sister, his minister, a couple of teachers, his sister's foster parent, his mother's previous boyfriend, and his mother. From these people, he learned that Appellant was sexually molested by three of his foster parents and a male teenager at the age of nine. When Appellant was six, his mother held him out a four-story window by his belt and threatened to drop him. (T 2276-81).

Thereafter, the defense rested, and the State and defense presented closing arguments. (T 2286-2317). The jury returned a recommendation of death by a vote of 8 to 4. (T 2325; R 2862).

At the sentencing hearing on June 14, 1990, defense counsel introduced a copy of a newspaper article which indicated through an anonymous source that the jury's initial vote amongst themselves was 7 to 5 for life. (T 2348-49). Carlton Moore also testified that he spoke with one of the jurors after the recommendation, who told him that the vote was originally 7 to 5 for life, but that his vote changed because he was in a hurry to leave. (T 2350).

Appellant also presented the testimony of Howard Finklestein again. The substance of his testimony was the same as that presented to the jury during the penalty phase. On cross-examination, however, he admitted that he was opposed to the death penalty. (T 2356-61).

Dr. Dwayne Bontrager, a therapist at the county jail where Appellant was staying pretrial, testified that Appellant had had five individual sessions with him and had been in group therapy at the jail. In his opinion, Appellant was a "very helpful gentleman," genuinely sensitive to others in the group. He would be a model prison if given a life sentence. On cross-examination, Dr. Bontrager testified that he did not know about Appellant's past or the facts of the robbery/murder, except what he read in the newspaper. His focus was on Appellant's present and future, not his past. (T 2362-67).

After Dr. Bontrager's testimony, Appellant's mother made a statement to the court, pleading for his life. Appellant also made a brief statement on his own behalf seeking leniency. Thereafter, the trial court imposed a sentence of death. It found that the State had proven four aggravating factors beyond a reasonable doubt: "prior violent felony," "felony murder," "great risk," and "avoid arrest." Although it considered all of Appellant's evidence in mitigation, it found it insufficient to outweigh the evidence in aggravation. As a result, it sentenced Appellant to death for count I, to five years in prison for count II, to a concurrent 30 years in prison for count III, and to concurrent life terms for counts IV-XII. (T 2383-92; R 2887-95). This appeal follows.

SUMMARY OF ARGUMENT

Issue I - The trial court did not abuse its discretion in denying Appellant's cause challenges to four jurors who ultimately sat on the jury where they all agreed that they would render their verdict based solely on the evidence and the law presented. Although the peremptory challenge procedure used by the court was erroneous, Appellant has failed to show that he was prejudiced by it, i.e., that any of the jurors who sat on the jury were biased or partial.

Issue II - The trial court did not abuse its discretion in denying a motion to continue made the day of trial. Regarding evidence disclosed by the State shortly before or during trial, either Appellant failed to request a Richardson hearing, one was not required, Appellant failed to object to the evidence once the State sought to admit it, or the trial court determined that the discovery violation was inadvertent and not prejudicial.

Issue III - Appellant never made a "seemingly substantial complaint about counsel;" thus, a Nelson inquiry was never warranted. Even if it was, the failure to conduct one was harmless error.

Issue IV - Appellant failed to raise the same objection below that he makes here to the excusable homicide instruction; thus, he has failed to preserve it for review. Regardless, the instruction given was harmless error where there were no facts to support the defense. Special verdicts are not required. The reasonable doubt instruction was not fundamentally erroneous. Appellant failed to preserve his objections to the State's

closing argument. But even if he had, they were either fair comments on the evidence or harmless beyond a reasonable doubt.

Issue V - The hearing on the State's petition for an order to show cause regarding a witness who refused to comply with the State's subpoena was not a critical stage of the proceedings which required Appellant's presence.

Issue VI - It is well-established that the crime of first degree felony murder encompasses a murder committed during flight from the underlying felony.

Issue VII - The trial court did not abuse its discretion in denying Appellant's second motion for new trial based on newly discovered evidence where the trial court found that the witness was not credible and that his testimony was cumulative and merely impeaching of other testimony, and would probably not have produced an acquittal on retrial.

Issue VIII - Appellant's special requested instructions for the penalty phase were either incorrect statements of the law or subsumed within the standard instructions. Thus, the trial court did not abuse its discretion in rejecting them. Appellant failed to object below to the instructions regarding the "avoid arrest" and "great risk" aggravating factors. Similarly, Appellant failed to object to any of the comments made by the State during its penalty-phase closing argument. Even if he had, however, they were either fair comments or harmless beyond a reasonable doubt.

Issue IX - The trial court did not rely on any nonstatutory aggravating factors, and the record supports the trial court's findings of the "avoid arrest" and "great risk" aggravating

factors. Even if it does not, Appellant's sentence should nevertheless be affirmed in light of the two other aggravating factors and no mitigation. Appellant's challenge to the "felony murder" circumstance has long since been rejected.

X - The trial court properly considered and weighed Appellant's nonstatutory mitigating evidence.

XI - Appellant's sentence is proportional to sentences in other cases under similar facts.

XII - Florida's death penalty statute is constitutional.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT'S DENIAL OF SEVERAL CAUSE CHALLENGES BY APPELLANT AND ITS METHOD OF EXERCISING PEREMPTORY CHALLENGES DEPRIVED APPELLANT OF A FAIR TRIAL (Restated).

During jury selection, defense counsel sought to excuse for cause the following veniremen: Donna Geair, Ann Nehiley, Kenneth Silverman, Estelle Weisberg, Ronald Linares, Irene Herzog, Paul Scheril, Rosemary Bonvicin, Thelma Diggs, Frank Koeffler, Jay Miller, Joyce Anderson, Betty Bogle, Nancy Gorman, Richard Reno, and Barbara Mindich. (T 505-06, 527, 608-09, 637-38, 735-36, 738-40, 753-54, 824-25). Ultimately, Geair, Nehiley, Weisberg, Herzog, Scheril, Bonvicin, Diggs, Koeffler, Reno, and Mindich were all struck peremptorily by either the State or defense counsel. (T 612, 639, 742, 826). Linares and Silverberg were both struck for cause on the State's motion--Linares because of his acquaintance with one of the victims of the robbery, and Silverberg because of hardship. (T 610, 627). Thus, of the original sixteen challenged jurors, only four ultimately served on the jury: Nancy Gorman, Jay Miller, Joyce Anderson, and Betty Bogle.[2]

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[2] After Appellant's cause challenges to these jurors were denied, Appellant subsequently exhausted all of his peremptory challenges, requested more, exhausted the two additional peremptory challenges granted, and then renewed his cause challenges to these four jurors. Thus, Appellant has sufficiently preserved for review his challenges to these four jurors.

Counsel seeks, however, a whole new trial based on the trial court's denial of his cause challenges. As this Court recently held, such an error would only affect the sentencing phase. Hernandez v. State, 18 Fla. Law Weekly S306, 306-07 & n.7 (Fla. May 5, 1993).

It is well-established that "[t]he test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Lusk v. State, 446 So.2d 1038, 1041 (Fla.), cert. denied, 469 U.S. 873 (1984). It is solely within the trial court's discretion to determine whether the juror meets this test. Hitchcock v. State, 578 So.2d 685, 688 (Fla. 1990), cert. denied, 116 L.Ed.2d 254 (1991).

Regarding Nancy Gorman and Jay Miller, Appellant sought to excuse them for cause when they, and others, affirmatively responded to the following question by defense counsel: "I asked the question of, I think, Mrs. Nehiley, whether someone convicted of - just because they were convicted of a first degree murder that they should automatically get the death penalty. Anybody by raise of hand - let's try it this way first - agree with that position, that if you're convicted of first degree murder, you should get the death penalty?" (T 605-06, 608). The State objected to the cause challenges and argued that defense counsel had failed to lay a proper predicate in that the concept of aggravation and mitigation and the weighing process had not been explained to them. (T 609). The trial court denied the cause challenges "without prejudice." (T 609).

Shortly thereafter, the trial court instructed the venire as follows:

> Now, earlier there was a question asked on voir dire as to whether or not you would automatically give somebody the death penalty, whether it was premeditated murder and whether or not it was felony murder.

Some of you raised your hands about that and some of you didn't.

You remember how the trial will be conducted? First of all, it will be on the merits. That's where you determine whether or not the defendant is guilty or not guilty of the charges pending against him. After that, if you find the defendant guilty of murder in the first degree, there will be another phase of the trial, where you will perhaps receive evidence and be instructed on the law relating to mitigating and/or aggravating circumstances. And then, based on the evidence and the law, on those factors, you will return to the jury room, and then come back with a recommendation as to whether or not he should get the death penalty or life in prison without parole for 25 years.

Now, is there anybody on the jury panel who will not follow the law and base their recommendation on the evidence and the law in the penalty phase of the trial, if we get that far?

All right. Let the record reflect that nobody said they would not follow the law.

(T 622-23). The State also questioned the panel about their duty to follow the law:

I think some of you raised your hands and said you would automatically vote for the death penalty if it was first degree murder. But before you do that, is everybody in agreement, as you agreed with Judge Moe, that you will wait to hear the evidence, and you will follow the law and all circumstances and facts before you make up your mind no matter what your verdict is? Does everybody agree with that? Everybody's shaking their head.

(T 631-32). Thereafter, defense counsel followed up with several questions to Mr. Miller and Ms. Gorman:

MR. HITCHCOCK: Briefly, Your Honor. Mr. Miller, obviously you can follow the law. I mean, I think that you've indicated that to Mr. Satz and to His Honor, Judge Moe. But my question is a little different. My question to you is how do you feel about the death penalty with regard to felony murder?

> MR. MILLER: The death penalty, I stipulated before on premeditated, okay? On a felony murder, there's situations that would - the situations that took place causing the insanity of what went on during those situations would be my reasoning behind whether I felt that way or not. And whatever Judge Moe comes out with as far as the laws for that situation --
>
> MR. HITCHCOCK: Okay. Let me switch to Miss Gorman. Again, my question is a little bit different. You indicated earlier that you thought that the death penalty was appropriate in a first degree murder situation. And I'm really asking you that: Is that your feeling, that you feel that it's appropriate in every first degree murder case?
>
> MS. GORMAN: I would say for a felony crime, possibly, it would vary on the evidence and the circumstances.
>
> MR. HITCHCOCK: Okay.
>
> MS. GORMAN: Premeditated, I feel they should if the evidence is there for it.[3]
>
> MR. HITCHCOCK: Okay.

(T 632-33). After several jurors again responded that they would automatically vote for the death penalty upon a conviction for premeditated murder, the trial court instructed them:

> All right. Again, despite your feelings, as I told you before, you know, when you're a juror you hold a very special office. It requires you to rise above, overcome some feelings and base your decisions on the law and the evidence in this case. There's no

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[3] When asked previously by defense counsel regarding her feelings about the death penalty, Ms. Gorman indicated that "[b]asically it depends on the circumstances. It would depend on evidence, whether there was solid evidence that the person acutally did commit the crime. I think if there were witnesses and a lot of hard facts to back it up, like I said, I'm for it. . . . If there wasn't good sufficient evidence, then I wouldn't --" (T 567).

question about that. When you take your oath as a juror, that's what you promise to do.

* * * *

Is there any question of any of you jurors as to whether or not you will follow the law and base your verdict and/or any recommendation as to the penalty on the law and the evidence in this case?

Will anybody not do that? All right. Let the record reflect they all said they would.

(T 635-36). Nevertheless, defense counsel moved to excuse Mr. Miller and Ms. Gorman for cause, based on their responses to his questions. (T 637). The trial court denied the motions. (T 637-38).

From its superior vantage point, the trial court did not abuse its discretion in denying Appellant's cause challenges to Mr. Miller and Ms. Gorman. Both indicated that they would render a recommendation based on the evidence presented and the law. Thus, having met the Lusk standard, they were properly left on the panel. See Brown v. State, 565 So.2d 304, 307 (Fla. 1990); Waterhouse v. State, 596 So.2d 1008, 1016 (Fla. 1992).

Defense counsel also challenged Joyce Anderson for cause because she had indicated that death would be an appropriate penalty for one convicted of first degree murder. (T 735). As the record reveals, however, Ms. Anderson had previously indicated that she would follow the law:

MR. SATZ: Okay. How do you feel about the death penalty?

MS. ANDERSON: I am for the death penalty.

MR. SATZ: Okay. Now again, as judge Moe instructed the other jurors - and one of the questions was would you automatically vote

for the death penalty if it was a first degree murder conviction --

MS. ANDERSON: Provided the evidence was there, yes.

MR. SATZ: All right. And see if your answer would coincide with what I said and what Judge Moe had indicated. If there is a jury to deliberate on the death penalty, they have to follow the law as the Judge instructs at the end. In other words, as Judge Moe indicated, there are certain aggravating and mitigating circumstances that - and certain law with reference to them - and you hear that, a jury hears that and they listen to the law with reference to that, and then they make up their decision, okay? In other words, you don't have a preconceived idea of what you're going to do, you're going to listen to the facts and the law?

MS. ANDERSON: Correct.

MR. SATZ: Correct?

MS. ANDERSON: Yes.

MR. SATZ: Different people have different feelings about the death penalty, that's why we are asking these questions, right?

MS. ANDERSON: Uh-huh.

MR. SATZ: Okay. So, would you agree that every murder someone shouldn't receive the death penalty?

MS. ANDERSON: I agree.

MR. SATZ: And you as a juror would listen to the facts and the circumstances, and most importantly the law, before you render a decision if you're selected and you get to that point, is that right?

MS. ANDERSON: Absolutely, yes.

(T 673-74). Thereafter, defense counsel merely asked her: "[W]ith regard to if there were a conviction for first degree murder, would you then think that a death penalty would be the appropriate sentence?" Ms. Anderson responded, "Yes." (T 708-

09). Based on this response, defense counsel challenged her for cause. (T 735). In denying the challenge, the trial court noted: "She had positively indicated that no matter what her feelings were she would follow the law and base her verdict on the law and the evidence. Based on that, the motion to strike her for cause is denied." (T 736).[4] As with Mr. Miller, the trial court did not abuse its discretion in denying Appellant's cause challenge where Ms. Anderson maintained that she would listen to the evidence and apply the law as instructed. Brown; Waterhouse.

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[4] The State later clarified her response:

> MR. SATZ: Miss Anderson, let me just clear one thing up. When I originally got up and asked you this question about following the law as His Honor, Judge Moe told you at the end of the trial, you said that you wouldn't have any preconceived ideas, and you would follow the law?
>
> MS. ANDERSON: Correct.
>
> MR. SATZ: And then Mr. Hitchcock asked you would you automatically vote for the death penalty, I think you responsed yes. Did you mean by that that you would --
>
> MS. ANDERSON: As I interpreted the law.
>
> MR. SATZ: As you interpret the law?
>
> MS. ANDERSON: Right.
>
> MR. SATZ: So not every murder would you vote for the death penalty, it would depend on the facts and circumstances and the law as you heard from Judge Moe?
>
> MS. ANDERSON: Yes, sir.

(T 748-49).

Defense counsel also moved to excuse Betty Bogle for cause because "she has an expectation that the Defendant should do something, or testify, or present something in the case either through himself or his attorney." (T 753-54). The record reveals, however, that she would not infer any guilt from Appellant's failure to present a defense:

> MR. HITCHCOCK: You understand the Defendant has to do absolutely nothing in this case except be here and behave himself?
>
> MS. BOGLE: Correct.
>
> MR. HITCHCOCK: And you think that's fair to make the State fill their burden without us having to do anything?
>
> MS. BOGLE: Not completely fair, but the facts that would be presented in this case would be the --
>
> MR. HITCHCOCK: But it's been our law for oh, geez, over 200 years that the State must prove their case beyond and to the exclusion of every reasonable doubt. And it never says anything about the Defendant. He doesn't have to do anything. That's okay with you?
>
> MS. BOGLE: I think that he will --
>
> MR. HITCHCOCK: Okay.
>
> MS. BOGLE: -- take the stand to defend himself.
>
> MR. HITCHCOCK: Well that's a good -- You bring up a good question. What if he does not? Can you judge the case, or do you have a feeling that somehow you want the Defendant to do something?
>
> MS. BOGLE: Either you or the Defendant.
>
> MR. HITCHCOCK: Okay. But you understand that even if I did nothing, if we just sat here silent and did absolutely nothing - I mean nothing - not even talked to you in voir dire, that if we just sat there and did nothing, that that would be no presumption -- You could take from that, and His Honor,

> Judge Moe will tell you, that you're not allowed to infer any guilt from that. Could you do that?
>
> MS. BOGLE: I think I could.
>
> MR. HITCHCOCK: That would be tough. I mean here you got nine children, and if two of them are squabbling, you want to hear from both sides, correct?
>
> MS. BOGLE: Yes.
>
> MR. HITCHCOCK: But in here we're saying you don't get to hear from both sides, you only get to hear from one side and you have to make your decision on that, could you do that?
>
> MS. BOGLE: Weigh the facts that the prosecuting attorney gives. You have to weigh the facts.
>
> MR. HITCHCOCK: Okay. Thank you.

(T 752-53). The trial court properly denied the cause challenge. (T 754, 825). See Valle v. State, 566 So.2d 1386 (Fla. 3d DCA 1990) (no abuse of discretion in refusing to excuse for cause jurors who initially indicated negative feelings about the failure of the defendant to take the stand but who ultimately assured the judge that they could and would follow the law).

As a subissue, Appellant also complains that "[t]he trial court erred by refusing to allow the parties to exercise peremptory challenges in turn." **Brief of Appellant** at 25. To support his single-sentence argument, Appellant cites to Ter Keurst v. Miami Elevator Co., 486 So.2d 547 (Fla. 1986). Although the trial court in the present case used the peremptory challenge procedure disapproved in Ter Keurst, Appellant has failed to show that any of the jurors who ultimately sat on the jury were biased or partial. As noted previously in this issue,

although Appellant challenged four jurors for cause who actually sat on the jury, none of them warranted removal for cause. Thus, while the procedure for selecting the jury might have been suspect, the ultimate panel selected was fair and impartial. Consequently, the procedural error was harmless at worst.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A PRETRIAL CONTINUANCE SOUGHT BY APPELLANT, WHETHER THE TRIAL COURT FAILED TO CONDUCT RICHARDSON HEARINGS, AND WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING PHOTOGRAPHS DISCLOSED BY THE STATE DURING THE TRIAL (Restated).

On April 23, 1990, one week before trial, defense counsel's law partner sought a continuance on behalf of Appellant because defense counsel's father had died the previous week and defense counsel was attending the funeral in Minnesota. Counsel also based his motion for continuance on the State's recent disclosure of two additional witnesses.[5] (SR3 13-14). Regarding the disclosure of witnesses, the State assured the trial court that these witnesses would be made available for deposition. (SR3 14-15). Believing that "there is nothing for [him] to rule on until they are called as a witness," the trial court declined to rule on the discovery issue. (SR3 15). Ultimately, the trial was continued until the following Monday. (SR3 15-16).

On Monday, April 30th, defense counsel again requested a continuance based on the State's recent disclosure of the same two witnesses. (T 360-61). The State responded that it had disclosed the names of these witnesses two weeks previously and had told defense counsel the substance of their potential testimony. Moreover, the State indicated that one of the witnesses--Robert Nicholson--was immediately available for deposition, and the other witness--Tina McKnight--would be made

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[5] The State provided defense counsel with the names of Robert Nicholson and Tina McKnight on April 11, 1990. (R 2649).

available as soon as she got into town. (T 362-63). The trial court responded, "With that provision, the motion to delay the trial is denied." (T 363).

On May 3rd, defense counsel indicated to the trial court that he had deposed Robert Nicholson, but had not been able to depose Tina McKnight and requested a telephonic deposition. The State responded, however, that she would be available for an in-person deposition that afternoon, so defense counsel withdrew his request. (T 1106). The following day, the State and defense counsel made arrangements to take Tina McKnight's deposition. (T 1306-07). The State presented the testimony of Tina McKnight on May 7th, without objection from counsel. (T 1467).

In this appeal, Appellant first claims that the trial court abused its discretion "in denying a continuance when apprised of the state's discovery violation shortly before trial." In addition, Appellant complains that the trial court failed to conduct a Richardson hearing as required; thus, a new trial is warranted. **Brief of Appellant** at 26. In Taylor v. State, 589 So.2d 918 (Fla. 4th DCA 1991), the exact issue arose and was decided adversely to Appellant. In that case, the prosecutor disclosed the name of a new witness just prior to jury selection. The defendant objected, but the trial court stated that it would consider the objection if and when the state offered the witness' testimony. The trial court then denied a defense continuance sought for the purpose of deposing the witness, but the State indicated that it would make the witness available as soon as possible. The next day, when the witness was offered by the state, the defendant made no objection and requested no

Richardson hearing. Relying on this Court's decision in Lucas v. State, 376 So.2d 1149, 1151-52 (Fla. 1979), the Fourth District affirmed, finding that the defendant had waived a Richardson hearing because he never requested one when the matter was raised, nor did he object later or request a hearing when the witness was offered. Id. at 919. As in Taylor, Appellant failed to object to the admission of the witnesses' testimony and waived a Richardson hearing when he failed to request one either at the time the witnesses were disclosed or when their testimony was presented. Similarly, the denial of the motion for continuance was well within the trial court's discretion.

Next, Appellant complains that the trial court failed to conduct a Richardson hearing when the State sought to introduce a previously undisclosed grand jury report during Deputy McNesby's redirect examination. **Brief of Appellant** at 26. During cross-examination, defense counsel asked Deputy McNesby whether he had ever been the subject of an internal affairs investigation. (T 1269). When the witness answered negatively, defense counsel confronted him with an investigation regarding the shooting of a suspect in 1984. (T 1272-73). The witness explained that an internal affairs investigation was standard procedure whenever an officer's weapon is fired and that the grand jury report exonerating him was available as a public record. (T 1273). Then, on redirect, the State offered the grand jury report to the witness for identification, at which point, defense counsel asked for a moment to review the report since he had never seen it before. (T 1276-77). Pursuant to the trial court's order, the State continued with redirect while defense counsel reviewed the

report. (T 1277-78). When the State concluded its examination, the following colloquy occurred:

> THE COURT: Any further recross?
>
> MR. HITCHCOCK: Yes, Your Honor. We would request an opportunity to review this document. Judge, I haven't seen this at all. I don't know why I wasn't provided a copy with this.
>
> MR. SATZ: I wasn't provided with a copy of what he was using, either, Your Honor.
>
> MR. HITCHCOCK: Judge, it's in the custody of the State. This was not in my custody, nor was my - the internal affairs file. It's in the -- It's presumed in their custody. This is their custody. He has to provide it to me.
>
> MR. SATZ: Your Honor --
>
> THE COURT: Mark that into evidence as the next consecutive State's Exhibit.
>
> (Whereupon, said document was marked as State's Exhibit 56 in evidence.)
>
> THE COURT: Do you have any more questions of this witness?
>
> MR. HITCHCOCK: Yes, I do, Judge. I would like an opportunity to review this document.
>
> THE COURT: Go ahead and read it, then.
>
> MR. HITCHCOCK: Thank you.

(T 1278-79). Thereafter, defense counsel questioned Deputy McNesby about the shooting incident in 1984. (T 1279-83).

Once again, Appellant waived any Richardson hearing when he failed to object to the admission of the grand jury report and failed to request a hearing. All defense counsel wanted was time to look at the report. Once appeased, defense counsel made no other objection to the report or to the testimony of Deputy McNesby. Thus, no Richardson hearing was required.

Lastly, Appellant complains that the trial court abused its discretion in admitting during the testimony of Detective Cerat and Patrick Garland photographs of the bullet removed from the victim's body, because they were untimely disclosed and prejudiced Appellant's defense. **Brief of Appellant** at 26. During opening statements, Appellant's theory of defense was that Deputy McNesby shot William Nicholson and then conspired with his fellow officers and the medical examiner to cover it up, including planting a different shell casing at the scene and switching the bullet removed from the victim with another one. (T 935-52). In direct response to this argument, the State began to focus its attention on the bullet, to show that it had not been switched or tampered with in any way. To prove this point, the State called as a witness Detective Cerat, who attended the autopsy of the victim and took photographs of the bullet that the medical examiner removed from the victim's body. (T 1555-60). During direct examination, Detective Cerat identified the actual bullet removed from the victim (State's Exhibit SSSSSS for ID), a photograph that he took of the bullet still lodged in the victim's sacrum (State's Exhibit MMMMMM for ID), a photo that he took of the bullet once it was removed from the bone (State's Exhibit NNNNNN for ID), and an enlargement of Exhibit MMMMMM (State's Exhibit LLLLLL for ID). Defense counsel objected to the admission of Exhibits SSSSSS (bullet) and LLLLLL (enlargement of bullet in bone) without stating any grounds. (T 1560-71). The trial court reserved ruling until defense counsel had an

opportunity to voir dire the witness during cross-examination. (T 1569-71).[6]

During cross-examination, defense counsel questioned Detective Cerat extensively about his photographic techniques, lighting, and photo processing in an attempt to discredit his testimony that the bullet was copper in color, rather than silver, as the medical examiner initially indicated. (T 1575-1610). At the conclusion of cross-examination, the following coloquy was had at sidebar:

> THE COURT: Hearing nothing that would render the exhibits inadmissible, the objection to their admissibility is overruled.
>
> MR. HITCHCOCK: May I be heard, Your Honor, please, briefly on that? First place, and I want to back up before we get to the admission of those two things: Number one, I have to complain. It was a discovery violation. The photograph --
>
> THE COURT: We will take that up later.
>
> MR. HITCHCOCK: But it goes to the admission of these two exhibits, Your Honor, because the photograph that was given to me is clearly the same, from the same print, from the same negative, clearly - clearly a whole different color rendition, Judge, and the one that they seek to introduce in evidence has clearly got a yellow cast to it, and the enlargement is even worse, Judge.
>
> THE COURT: Okay. What did I just say? I said we would take that up later.
>
> MR. HITCHCOCK: Okay. Well, you're not going to admit these two things in between?
>
> THE COURT: Yes, I am going to admit them in. It goes to the weight and not the admissibility.

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6 State's Exhibits MMMMMM and NNNNNN for identification were admitted into evidence without objection as State's Exhibits 115 and 116, respectively. (T 1563-65).

MR. HITCHCOCK: Well, Judge, then with regard to the projectile itself, I don't think that he's established the chain of custody completely yet. He hasn't brought in the doctor. I mean, he says that he took it from the doctor, but you - I don't think he's established the chain properly.

THE COURT: What's the State's position?

MR. SATZ: Your Honor, the doctor's going to testify next. He said he saw the doctor remove it from the bone, and he took it, he photographed it, and --

THE COURT: There's enough of a chain. There's no evidence or indication of tampering. If the doctor gets on the stand and says no, it's not the bullet, I will remove it from evidence.

MR. SATZ: Fair enough.

(T 1610-12).[7]

The following day, May 8th, the State sought to proffer the testimony of a newly obtained expert, Dr. Besant-Matthews. The witness testified that he was contacted by the prosecutor on Friday, May 4th, and flew into town on Sunday, May 6th. (T 1724-26). The following day, he "was asked to examine some photographs and look at a bullet and attempt to determine if a bullet shown in a photograph embedded in some bone and tissue was one and the same bullet as that which was depicted in a photograph which was handed to me." (T 1726). He photographed the bullet itself and he photographed a photo of the bullet lodged in the victim's sacrum. (T 1726). In comparing the photographs, he determined that the bullet that was alleged to have been removed from the victim was the same bullet depicted in

[7] State's Exhibits SSSSSS and LLLLLL for indentification were admitted into evidence as State's Exhibits 121 and 122, respectively. (T 1612).

the photo of the bullet lodged in the victim's sacrum. (T 1727-30).

Ultimately, the trial court excluded Dr. Besant-Matthews from testifying during the State's case-in-chief because of his late disclosure as a witness. (T 1743-44). At that point, the State indicated that it intended to use the photographs taken by Dr. Besant-Matthews during the testimony of Patrick Garland, a firearms examiner with the Broward County Sheriff's Office, who was present when the photographs were taken. (T 1744). Defense counsel maintained his objection to the photographs based on their untimely disclosure. (T 1746). Although the trial court noted that the photographs were not being offered into evidence at that point, it made the following findings:

> While finding that there has been a violation of the rules of discovery, if the State attempts to introduce those two photographs, I find that the mistake - the error was not on purpose, was inadvertent, and that there's really no procedural or substantive surprise because those two pictures are pictures of things that have already been admitted into evidence, that the defense has known about and knows about, and has been prepared for for a long time. Based on that, the objection to the photographs being admitted into evidence is overruled.

(T 1749). Pursuant to this ruling, defense counsel's objections to the photographs when they were offered into evidence were similarly overruled. (T 1793-98).

Regarding the photograph admitted during Detective Cerat's testimony, the State submits that there was no discovery violation, and thus no Richardson hearing was warranted. See Bush v. State, 461 So.2d 936, 938 (Fla. 1984) ("A Richardson inquiry is necessary only when there is a discovery violation and

an objection based on the alleged violation."). State's Exhibit LLLLLL for identification was merely an enlargement of an exhibit admitted without objection by defense counsel (State's Exhibit MMMMMM for identification). Thus, the content of the photograph was already known by Appellant; he could not have been surprised by its subject matter. Rather, defense counsel objected to the photograph because of its coloring, which, as the trial court properly decided, went to the photograph's weight rather than its admissibility.

In Bush, this Court held that "[w]hen testimonial discrepancies appear, the witness' trial and deposition testimony can be laid side-by-side for the jury to consider. This would serve to discredit the witness and should be favorable to the defense. Therefore, unlike failure to name a witness, changed testimony does not rise to the level of a discovery violation and will not support a motion for a Richardson inquiry." See also Whitfield v. State, 479 So.2d 208 (Fla. 4th DCA 1985). Similarly, defense counsel here was able to put the enlargement showing the bullet to be copper next to the original photograph showing the bullet to be silver and alert the jury to the discrepancy, thereby discrediting the State's witness and evidence. As with testimonial discrepancies, coloring discrepancies in photographs do not rise to the level of a discovery violation; thus, no Richardson hearing was warranted.

As for the photographs introduced through Patrick Garland, the record clearly reveals that the trial court conducted a Richardson hearing. Although it found a discovery violation, it found that the State's untimely disclosure was inadvertent and

that there was no procedural surprise because the photos were of objects known by defense counsel that had already been admitted into evidence. In other words, Appellant was not prejudiced by the late disclosure. Consequently, the photos were properly admitted.

ISSUE III

WHETHER THE TRIAL COURT WAS REQUIRED TO CONDUCT AND NELSON INQUIRY AND, IF SO, FAILED TO DO SO (Restated).

Without any factual basis or citation to the record, Appellant complains that the trial court failed to conduct a Nelson inquiry when Appellant made complaints about trial counsel. **Brief of Appellant** at 27. The State presumes that Appellant is referring to his comments to the trial court on the first day of trial just prior to jury selection. After defense counsel moved unsuccessfully to dismiss the case due to the medical examiner's change in testimony regarding the color of the bullet removed from the victim's body (T 375-78), Appellant addressed the court and requested a special investigation into the case, particularly regarding the bullet and the sheriff department's and medical examiner's conspiracy to frame him for this murder. Appellant claimed that he had asked defense counsel to request an investigation, but he had not heard anything about it. (T 385-88). The trial court tried to explain that it could not order an independent investigation and that Appellant would have to contact someone else. (T 388).

At no time did Appellant allege that defense counsel was rendering ineffective representation. Nor did Appellant indicate that he wanted substitute counsel. Rather, Appellant wanted the trial court to do what neither he nor counsel was able to do: order an independent investigation into this case. Such a request, however, did not constitute "a *seemingly substantial complaint* about counsel" which would mandate a Nelson inquiry. See Wilder

v. State, 587 So.2d 543, 545 (Fla. 1st DCA 1991) (emphasis in original).

Even assuming for argument's sake, however, that the trial court did not conduct a sufficient Nelson inquiry, such error was harmless beyond a reasonable doubt. As the First District has held:

> [T]he trial court's failure to make a thorough inquiry and thereafter deny the motion for substitution of counsel is . . . not in and of itself a Sixth Amendment violation. In determining whether an abuse of discretion warranting reversal has occurred, an appellate court must consider several factors, in addition to the adequacy of the trial court's inquiry regarding the defendant's complaint, including as well whether the motion was timely made, and if the conflict was so great as to result in a total lack of communication preventing an adequate defense.
>
> In the present case, the record reflects that defendant's motion to dismiss counsel was timely filed before trial. Although the trial court's inquiry as to the grounds stated for discharge was not extensive, the court acknowledged receipt of the motion and gave defendant an opportunity to argue the motion further. When the appellant did not respond, the motion was denied. The most important circumstance militating in favor of affirmance, however, is the fact that the appellant proceeded to trial *with his court-appointed counsel*, and made no additional attempt to dismiss counsel or request self-representation. Similarly, there is no evidence in the record of any conflict or lack of communication during the *trial* between appellant and his attorney that would support a finding that the appellant did not receive an adequate defense. Thus, based on the record at bar, we conclude that the trial court's failure to conduct a more extensive inquiry regarding the merits of the motion to discharge did not violate the appellant's Sixth Amendment right to effective assistance of counsel, and was at most harmless only.

Kott v. State, 518 So.2d 957, 958 (Fla. 1st DCA 1988) (emphasis in original; citations omitted).

Here, even if Appellant's comments could be construed as a motion for substitution of counsel, not only was it untimely, being made on the morning of trial, but his allegations did not present a conflict "so great as to result in a total lack of communication preventing an adequate defense." Id. Appellant proceeded to trial with Mr. Hitchcock, and at no time voiced any objection to counsel's performance. Moreover, there is no evidence in the record whatsoever that Appellant and Mr. Hitchcock had such a conflict or lack of communication that Mr. Hitchcock could not present an adequate defense. In fact, the record reveals that Mr. Hitchcock zealously challenged the State's evidence regarding the color of the bullet and the medical examiner's change of testimony regarding same. Ultimately, however, he could not overcome the overwhelming evidence of guilt, which included a positive identification of Appellant as the gunman in the Pizza Hut (T 966-67), an eyewitness who saw Appellant running down the street with the victim in pursuit moments before the victim fell to the pavement with a gunshot wound to the abdomen (T 1185-1206), and Appellant's apprehension with the proceeds from the robbery and the murder weapon near the scene of the shooting (T 1356-61, 1501-09). Consequently, Appellant's conviction should be affirmed since there is no reasonable possibility that the verdict would have been different even if the trial court had conducted a Nelson inquiry. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). See also Sweet v. State, 18 F.L.W. S447 (Fla.

Aug. 5, 1993) (finding inadequate Faretta hearing harmless where defendant accepted counsel and later professed satisfaction with him); Boynton v. State, 577 So.2d 692 (Fla. 3d DCA 1991) (finding inadequate Nelson inquiry harmless where (1) defendant "proceeded through a several-day trial with his court-appointed counsel without once complaining about or seeking to discharge counsel," (2) counsel mounted a vigorous and partially successful defense, "and, more importantly, (3) the defendant's statement to the court at trial that his court-appointed counsel was doing a 'good job' for the defendant and that 'I trust you [counsel] now.'"); Parker v. State, 570 So.2d 1053, 1055 (Fla. 1st DCA 1990) ("In light of the overwhelming evidence of guilt, the legal insufficiency of the motion, the defendant's failure to pursue the motion although having the opportunity to do so, and a record which reveals no evidence of incompetence, we find that the failure to conduct an inquiry was harmless error."), rev. denied, 581 So.2d 1309 (Fla. 1991).

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY DURING THE GUILT PHASE AND WHETHER A COMMENT DURING THE STATE'S CLOSING ARGUMENT DEPRIVED APPELLANT OF A FAIR TRIAL (Restated).

A. Jury Instructions

Initially, Appellant complains that the trial court "should have sustained the defense objection to [the excusable homicide] instruction," because it "incorrectly communicated that a homicide committed with a firearm was never excusable." **Brief of Appellant** at 29. At the charge conference, the following discussion was had regarding this instruction:

> MR. HITCHCOCK: . . . On page five under excusable homicide, first place, we're not requesting the excusable or justifiable homicide anyway. I don't think it applies. But if you're going to read excusable homicide, the statement in here with regard to sudden combat, it just doesn't apply to the facts in this case.
>
> THE COURT: What's the State's position?
>
> MR. HITCHCOCK: Well, Your Honor, if you're going to instruct them on manslaughter, obviously part of the instructions on manslaughter is excusable and justifiable homicide.
>
> THE COURT: I decline to delete that.
>
> MR. HITCHCOCK: Okay. How about the or upon sudden combat?
>
> THE COURT: I decline to delete that also.
>
> MR. HITCHCOCK: You've noted our objection though, of course?
>
> THE COURT: I note your objection.

(T 1858-59). As is obvious from the foregoing, Appellant did not articulate the same objection below that he makes here. Thus, he

has failed to preserve this issue for review. See Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Regardless, any error in giving the instruction was harmless because there were no facts to support either excusable or justifiable homicide. Banda v. State, 536 So.2d 221, 223 (Fla. 1988).

Next, Appellant claims that the trial court abused its discretion in denying his proposed instruction relating to special verdicts for premeditated and felony murder. **Brief of Appellant** at 29-30. This Court has repeatedly held, however, that special verdicts are not required. See, e.g., Haliburton v. State, 561 So.2d 248, 250 (Fla. 1990).

Finally, Appellant claims that the instruction on reasonable doubt constituted fundamental error.[8] **Brief of Appellant** at 31-33. This Court, and others, have previously held that the standard instruction adequately defines "reasonable doubt." See, e.g., Brown v. State, 565 So.2d 304 (Fla.), cert. denied, 112 L.Ed.2d 547 (1990); Woods v. State, 596 So.2d 156, 158 (Fla. 4th DCA 1992). Thus, Appellant's argument must fail.

B. Closing Argument

Without any factual basis or citation to the record, Appellant complains in two conclusory sentences that the trial court abused its discretion "in finding proper the state's jury argument that the theory of defense was a 'fantasy.'" **Brief of Appellant** at 33. Appellant is apparently referring to the

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[8] Appellant did not object to the instruction below, and thus must rely on the principle of fundamental error in seeking relief.

following comment made by the State during its guilt-phase closing argument:

> Now, you know, Mr. Hitchcock says they. Who is they? Who's they? They want to do this and they want to do that. Now, in order to believe the theory or fantasy that Mr. Hitchcock told you about, about the Stans and this --
>
> MR. HITCHCOCK: I would like to reserve a motion, Your Honor, please.

(T 1897). At the end of the State's closing argument, defense counsel makes the following motion:

> I just would move for a mistrial, Your Honor, based on the comment by Mr. Satz during his closing argument characterizing the defense as fantasy. I think it's improper, it's precluded - those kind of comments are precluded in the case law, and the only remedy is a mistrial.
>
> THE COURT: What says the State?
>
> MR. SATZ: Your Honor, I didn't say the defense was a fantasy. I said that talking about fanciful doubt. I said Mr. Hitchcock's theory or fantasy -- In other words, what I was referring to was fanciful doubt, not the defense was fantasy.
>
> THE COURT: I consider it a fair comment, perhaps invited by the closing argument by the defense.
>
> At any rate, the motion for mistrial is denied.

(T 1915).

As is evident from the foregoing, Appellant failed to make a contemporaneous objection to the State's argument. Merely reserving an objection at the time the objectionable comment is made is not sufficient. See Duest v. State, 462 So.2d 446, 448 (Fla. 1985) ("The proper procedure to take when objectionable comments are made is to object and request an instruction from

the court that the jury disregard the remarks."); Randolph v. State, 556 So.2d 808, 809 (Fla. 5th DCA 1990) ("[A]t least an objection should be made to the remark at the time it occurs followed by a motion for mistrial no later than the end of the prosecutor's closing statement. Since no objection was made at the time of the offending comment, such silence is considered an implied waiver."). Moreover, "both a motion to strike the allegedly improper [comments] as well as a request for the trial court to instruct the jury to disregard the [comments] are thought to be necessary prerequisites to a motion for mistrial." Palmer v. State, 486 So.2d 22 (Fla. 1st DCA 1986). Here, Appellant failed to satisfy his burden. Not only did Appellant fail to alert the trial court to the allegedly improper statement at the time it was made, but he also failed to seek a curative instruction. Thus, Appellant has failed to preserve this issue for appeal.

Even if his belated motion was sufficient, "a motion for a declaration of a mistrial is addressed to the sound discretion of the trial judge," and "the power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity." Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert. denied, 444 U.S. 885 (1979). As the trial court noted, the State's remark was a fair comment on the evidence as it related to the concept of reasonable doubt. Even if it were improper, however, it was harmless beyond a reasonable doubt. See State v. Murray, 443 So.2d 955 (Fla. 1984). In light of the quality and quantity of permissible evidence upon which the jury could have relied to

reach its verdict, which included eyewitness accounts and strong physical evidence, there is no reasonable possibility that the State's comment, if improper, affected the jury's verdict. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Therefore, Appellant's conviction should be affirmed.

ISSUE V

WHETHER APPELLANT WAS PREJUDICED BY HIS ABSENCE FROM A HEARING ON THE STATE'S PETITION FOR AN ORDER TO SHOW CAUSE REGARDING A STATE WITNESS WHO REFUSED TO APPEAR FOR TRIAL (Restated).

On April 25, 1990, the State petitioned the trial court to issue an order to show cause against Bernard Ogbourne, one of the robbery victims, who failed to appear for trial on April 23rd and who told the prosecutor that he did not want to appear.[9] Based on the state attorney's office investigator's testimony that he personally served Mr. Ogbourne with a subpoena, the trial court issued an order to show cause and a pickup order. (SR3 21-24). Neither Appellant nor defense counsel was present at this hearing.

Without any factual basis or citation to the record, Appellant claims in two conclusory sentences that he was prejudiced by his absence from this hearing. **Brief of Appellant** at 34. He cites to State v. Smith, 547 So.2d 131 (Fla. 1989), to support his position, but Smith involves the defendant's absence from his own criminal contempt hearing. Clearly, this was a critical stage of the proceedings which mandated his presence. In the present case, however, Appellant's presence at this show cause hearing was unnecessary since it involved an administrative matter into which Appellant would have had no input. Thus, his absence was not prejudicial. See Junco v. State, 510 So.2d 909, 911 (Fla. 3d DCA), rev. denied, 518 So.2d 1276 (Fla. 1987).

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[9] The trial was ultimately continued to April 30th pursuant to a defense motion.

ISSUE VI

WHETHER FELONY MURDER ENCOMPASSES MURDER DURING FLIGHT FROM THE FELONY (Restated).

Citing to Florida Statutes § 784.02(1)(a), Appellant claims that the crime of first degree felony murder does not include a murder committed during flight from the underlying felony. **Brief of Appellant** at 35. The law is well-settled, however, to the contrary. See, e.g., Parker v. State, 570 So.2d 1048, 1051 (Fla. 1st DCA 1990) ("The term 'in the perpetration of' includes the period of time when a robber is attempting to escape from the scene of the crime."); McFarlane v. State, 593 So.2d 305, 306 (Fla. 3d DCA 1992) (conviction for second-degree felony murder affirmed where codefendant shot by officer while fleeing scene of robbery); Mills v. State, 407 So.2d 218, 221 (Fla. 3d DCA 1981) ("In the absence of some definitive break in the chain of circumstances beginning with the felony and ending with the killing, the felony, although technically complete, is said to continue to the time of the killing.").

ISSUE VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S PETITION FOR WRIT OF ERROR CORAM NOBIS AND/OR MOTION FOR NEW TRIAL II (Restated).

Within the requisite time period after rendition of the verdicts, Appellant filed a motion alternatively styled "Writ of Error Coram Nobis and/or Motion for New Trial II." (R 2754-57). The motion alleged that a newly discovered witness saw a police officer shoot towards the victim. At the hearing on the motion, Brent Kissenger, a twice convicted felon, testified that, on the night in question, he lived at 1645 Northeast 30th Street, which is 75 to 100 yards from the Pizza Hut. (T 2046-47). While Mr. Kissenger was at the Tenneco buying cigarettes, he saw a black male, whom he identified as Appellant, run from the Pizza Hut with an officer in pursuit. (T 2050-51). The officer was about 6'2" tall, weighed between 220 and 230 pounds, had black curly hair, and wore wire-rimmed glasses. (T 2051). Mr. Kissenger followed the two men and saw them run through the parking lot of the 7-Eleven store. As they approached 17th Avenue and 29th Street, the police officer reached from behind, pulled out a shiny object, and said, "'Holt or I'll shoot.'" (T 2052-53). Mr. Kissenger lost sight of them momentarily, but when he turned the corner onto 17th Avenue, he saw the police officer in a firing position and saw a man lying in the street. (T 2053). He had heard one shot after the police officer ordered Appellant to stop, but he did not see the direction from which it was fired. (T 2054).

On cross-examination, Mr. Kissenger testified that Appellant was wearing jeans, a green Army jacket, and a green ski hat. Appellant did not have anything in his hands and was not wearing gloves. (T 2055). At the time of the shooting, the police officer was between 10 and 15 yards behind Appellant. (T 2055). He saw no muzzle flash and did not see where the shot went. (T 2063). As he came around the corner, he saw someone with dirty, dishwater blonde hair, wearing a green jacket, hat, dark pants, Army boots, and a green and white flannel shirt lying on the ground. (T 2063-64). He then saw a female sheriff deputy drive up. She and another deputy told Mr. Kissenger to leave, so he went to the 7-Eleven to buy cigarettes, then went home. After he told his wife what he saw, they both went back to the scene. There were about fifty law enforcement officers from several different agencies there. Mr. Kissenger heard about the shooting on the radio, but did not call the police because he did not want to get involved. (T 2065-69).

Following argument by counsel, the trial court made the following findings:

> The Court having considered the allegations in the motion and having read the motion including the grounds, and the citation and authority supporting the grounds, having read the reply to the motion for new trial and the reply to the petition for writ of error coram nobis, having taken testimony from one witness, heard arguments of counsel, and, again, considered the applicable authority for the motion for new trial and the petition for writ of error coram nobis, finds that, basically, it's not unusual after the occurrence of a cataclysmic or notorious event, for certain emotionally unbalanced people to come forward, basically, people who for reasons klown [sic] to them or not known to them crave the attention of

> others and volunteer themselves in cases where they have no involvement at all.
>
> I have seen it happen over and over in cases where people come in and confess to being a mass murderer, confess to seeing things that they dream about, and confess to being places where there is objective visual and written proof that they were never there to begin with.
>
> That's the category I put Mr. Kissenger's testimony in. His testimony is so inconsistent, incredible, uncredible, and unworthy of belief, that it is in effect discarded in its entirety by the Court.
>
> Based on that, some of the criteria, pursuant to writ of coram novice [sic], the motion for new trial, based on newly discovered evidence could be granted, have been met, in that the evidence was discovered after the fact, and it was not previously discoverable in the exercise of due diligence because, quite frankly, I think Kissenger made it up.
>
> The evidence I don't think was material to the issue in question, and, certainly, cumulative to something or impeaching to something and would definitely not have been such as to produce a different result.
>
> Therefore, the motion for new trial is denied and the writ of error coram nobis is dismissed for lack of jurisdiction.

(T 2083-84).[10]

It is well-established that a motion for new trial falls within the sound discretion of the trial court and, absent a showing of an abuse of that discretion, its disposition will not be disturbed. Stone v. State, 616 So.2d 1041, 1043 (Fla. 4th DCA 1993). As this Court held in Clark v. State, 379 So.2d 97, 101 (Fla. 1979), in order to prevail on a motion for new trial, the

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[10] The trial court's written order contained essentially the same findings. (R 2883-84).

new evidence must be discovered after the trial, it must have been undiscoverable at the time of trial by the exercise of due diligence, it must go to the merits of the case, not merely to impeach a witness who testified, it must not be cumulative, and it must be such that it probably would have changed the verdict. See also Jones v. State, 591 So.2d 911 (Fla. 1991) ("[I]n order to provide relief, the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial."). In addition, as with newly discovered evidence predicated on the recantation of a witness, when a newly discovered witness comes forward, the trial court must determine whether the witness is testifying truthfully. See Stone v. State, 616 So.2d 1041, 1043-44 (Fla. 4th DCA 1993); Glendening v. State, 604 So.2d 839, 840-41 (Fla. 2d DCA), rev. denied, 613 So.2d 4 (Fla. 1992).

Here, the trial court heard the witness' testimony and found that the evidence was discovered after the trial and could not have been discovered sooner. However, the trial court believed that the witness had fabricated the testimony and found it to be wholly unbelievable. Moreover, the testimony was not material to the issues, was cumulative to other evidence, and was merely impeaching of other witnesses' testimony. Thus, the trial court properly disregarded it and denied Appellant's motion for new trial.

ISSUE VIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S SPECIAL REQUESTED PENALTY-PHASE JURY INSTRUCTIONS, WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY REGARDING ITS ADVISORY ROLE, AND WHETHER THE STATE MADE IMPROPER COMMENTS DURING ITS PENALTY-PHASE CLOSING ARGUMENT (Restated).

During the penalty phase, defense counsel requested thirty special jury instructions, all of which were denied. (R 2783-50; T 2274). In this appeal, Appellant claims that the trial court abused its discretion in denying those special instructions. **Brief of Appellant** at 37-44. Regarding Appellant's special instruction number 29, this Court has previously held that Florida law does not require an instruction that each juror should make an individual determination as to the existence of any mitigating circumstance. Waterhouse v. State, 596 So.2d 1008, 1017 (Fla. 1992). Regarding Appellant's special instructions 10 and 11 relating to doubling of aggravating factors, the trial court specifically stated, "I don't think any of [the aggravating factors] double up to the point that they're duplicitous in themselves. I think there's independent evidence supporting each and every one." (T 2273). Regardless, at the time of this trial in May of 1993, Suarez v, State, 481 So.2d 1201 (Fla. 1985), was the law at the time. Castro v. State, 597 So.2d 259 (Fla. 1992), had not yet issued and should not be applied retroactively. In addition, this Court specifically held that Appellant's special instruction number 10 was an incorrect statement of the law. Mendyk v. State, 545 So.2d 846, 849 & n.2 (Fla. 1989). Thus, failure to give these instructions was not an abuse of discretion.

As for Appellant's special instruction number 30 based on Jackson v. State, 502 So.2d 409 (Fla. 1986), there was simply no evidence to support this instruction. There can be no question that Appellant fired the fatal shot. Moreover, Appellant's codefendant had fled in the opposite direction well before the murder. Thus, this "shared culpability" instruction was not warranted.

As for Appellant's special instruction numbers 18-28, this Court has repeatedly held that trial courts need not instruct on each individual nonstatutory mitigating fact separately. E.g., Jones v. State, 612 So.2d 1370, 1375 (Fla. 1992). Similarly, this Court has also held that the jury need not be instructed on its pardon power. Mendyk v. State, 545 So.2d 846, 849-50 & n.3 (Fla. 1989). Thus, Appellant's special instruction number 1 was properly denied.

Regarding Appellant's special instructions numbers 12 and 15 relating to the jury's ability to recommend life imprisonment based on any single mitigating factor, these instructions are adequately covered in the standard instructions. See Dougan v. State, 595 So.2d 1, 5 (Fla. 1992) ("The standard jury instruction on nonstatutory mitigating evidence is not ambiguous and allows jurors to consider and weigh relevant mitigating evidence."). Similarly, Appellant's special instruction number 5 relating to his amenability to rehabilitation fall within the "catchall" instruction and does not warrant a separate instruction. See Jones, supra. Regarding Appellant's special instructions 6, 7, and 8, relating to the burden of proof for aggravating factors, these instructions are subsumed within the standard instructions

and have previously been rejected. See Robinson v. State, 574 So.2d 108, 113 & n.7 (Fla. 1991), cert. denied, 112 S.Ct. 131 (1992). Similarly, Appellant's special instructions 9 and 4, which inform the jury that other aggravating factors are inapplicable, and that the aggravating factors must outweigh the mitigating factors for death to be an appropriate recommendation, have also been rejected previously. Robinson. Appellant's special instruction number 3, which informs the jury that the weighing process does not involve a counting process, but rather the exercise of reasoned judgment, is adequately related in the standard instructions. Dougan. Finally, Appellant's special instruction number 16, relating to residual doubt, has been repeatedly rejected. Downs v. State, 572 So.2d 895 (Fla.), cert. denied, 112 S.Ct. 101 (1990).

Appellant also challenges the constitutionality of the "avoid arrest" and "great risk" instructions. **Brief of Appellant** at 44-45. He did not challenge them below, however; thus, he cannot now challenge them on appeal. Sochor v. State, 18 Fla. L. Weekly S273, 275 (Fla. May 6, 1993). Regardless, the standard instructions are legally sufficient even though they do not "reflect the refinements provided by the decisions of this Court." Vaught v. State, 410 So.2d 147, 150 (Fla. 1982). See also Valle v. State, 474 So.2d 796, 805 (Fla. 1985) ("This Court has consistently held that the standard jury instructions on aggravating and mitigating circumstances, which were given in this case, are sufficient and do not require further refinements."), rev'd on other grounds, 106 S.Ct. 1943 (1986).

Next, without any citation to the record, Appellant enigmatically complains because the trial court instructed the jury that its recommendation carried great weight. Since it is not error for a trial court to reject such an instruction when it is requested, see Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989), *a fortiori* it is not error to give such an instruction even when not requested. Thus, Appellant's argument must fail.

Finally, Appellant makes several claims of error regarding the State's penalty-phase closing argument. First, without any citation to the record, he claims that "the state argued to the jury that it should disregard the valid, undisputed mitigation before it," thereby depriving him of a fair trial. Second, he claims that "the state improperly urged the jury to disregard the decedent's status in society." Third, he claims that the State improperly argued that murder during flight from the robbery was sufficient to satisfy the "felony murder" circumstance. Finally, he complains that the State's argument regarding the "great risk" circumstance "incorrectly argued that speculation about danger to possible passers by." **Brief of Appellant** at 45-46. Since Appellant failed to object to any of these comments, however, he has failed to preserve this issue for review. Henry v. State, 586 So.2d 1033, 1036 (Fla. 1991).

Even if he had objected, the State's remarks were not improper. As this Court has previously held, "[t]he state may properly argue that the defense has failed to establish a mitigating factor." Valle v. State, 581 So.2d 40, 47 (Fla. 1991). Thus, its comments regarding Appellant's mitigating

evidence, which included the victim's status as a convicted felon, were fair. Similarly, its comments regarding the "felony murder" and "great risk" aggravating factors were proper. Florida Statutes § 921.141(5)(d) specifically includes murder committed while the defendant "was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery . . . ." As for the State's argument regarding the "great risk" circumstance, the actions of Appellant during the entire criminal episode--from the robbery of the Pizza Hut to Appellant's apprehension after the shooting--were relevant in proving this aggravating factor.

In sum, the State's comments, either singularly or in combination, were not improper. Even if they were, however, they were harmless beyond a reasonable doubt. See Bertolotti v. State, 476 So.2d 130 (Fla. 1985) ("In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial."); Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), cert. denied, 480 U.S. 951 (1987). Thus, Appellant's conviction should be affirmed.

ISSUE IX

WHETHER THE TRIAL COURT RELIED ON NONSTATUTORY AGGRAVATING FACTORS AND WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDINGS OF THE "AVOID ARREST" AND "GREAT RISK" AGGRAVATING FACTORS (Restated).

At the final sentencing hearing, the trial court made oral findings regarding the aggravating and mitigating factors proven in this case.[11] During its oral pronouncement, in discussing the existence of the "great risk" aggravating factor, the trial court lamented that, for some unknown reason, Appellant shot Mr. Nicholson in the stomach and left him lying in the street to bleed to death. (T 2388). Appellant contends that this comment constituted nonstatutory aggravation, but it did not. When it is read in context, it is obvious that the trial court was merely concluding that the risk of death to innocent bystanders caused by Appellant's actions was indeed great, as evidenced by the senseless and merciless death of William Nicholson. There is no indication, however, that the fact that the victim bled to death in the street was treated as a nonstatutory aggravating factor. Rather, it was merely a fact upon which the trial court found the existence of the "great risk" circumstance.

Next, Appellant complains that the trial court impermissibly relied upon the fact that there were children in the Mallow's car. Again, however, this was merely a fact upon which the trial court relied in finding that Appellant's actions caused a great

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[11] While the substance of these oral findings comport with the written findings of the trial court, they are not verbatim. The trial court extemporized to some degree at the sentencing hearing.

risk of death to many people. When Appellant shot into the car, which contained Mr. and Mrs. Mallow and three children, there was a likelihood or high probability that someone in that car would be hit and killed. The fact that they were not was sheer providence. Regardless, the children's presence was not a nonstatutory aggravator; it was an important fact in finding the "great risk" aggravator.

In a single conclusory sentence, Appellant also complains that "[t]he court also unconstitutionally placed too great emphasis on the penalty verdict rather than exercising its independent judgment." **Brief of Appellant** at 47. Of course, Appellant neglects to cite to the record which allegedly supports this proposition--because, in fact, there is nothing to support it. The trial court made an independent evaluation of the evidence and arrived at its own conclusion regarding the appropriate sentence in this case; its sentencing order speaks for itself.

Appellant's next claim is that the record does not support the trial court's finding of the "avoid arrest" aggravating factor. **Brief of Appellant** at 47-48. Regarding this factor, the trial court stated in its written order:

> This Court finds that the murder was committed for the purpose of avoiding or preventing a lawful arrest. [Florida Statute 921.141(5)(e)]. After committing nine (9) counts of robbery in the Pizza Hut Restaurant, the Defendant fled from the restaurant on foot with Deputy Killen in pursuit. During the chase, the Defendant fired five (5) shots at Deputy Killen. The Defendant then tried to commandeer the Mallow family car in order to effectuate his get away and fired one (1) shot into the vehicle, the bullet just missing Keith Mallow's head.

> The bullet passed Deborah Mallow's head before exiting the car through the roof of the car's passenger side. The Defendant then ran west on Northeast 17th Avenue, all the while being pursued by Deputy Killen. Near the intersection of Northeast 28th Court and Northeast 17th Avenue, the Defendant shot and killed an innocent bystander while fleeing from the police. The Defendant was finally apprehended after Deputy McNesby and Sergeant Baker joined Deputy Killen in pursuing the Defendant. Clearly, the sole purpose of the murder was to avoid or prevent a lawful arrest by police after the Defendant committed (9) counts of robbery in the Pizza Hut Restaurant and fled from the Pizza Hut Restaurant. The application of this aggravating circumstance to the Defendant's crime has been established beyond any reasonable doubt. Rivera.

(R 2891).

Based upon the facts as outlined in the trial court's order, this aggravating factor was proven beyond a reasonable doubt. For whatever reason, the victim was chasing Appellant down the street after Appellant had robbed the Pizza Hut. In order to effectuate his escape, Appellant shot and killed his pursuer. His only reason for doing so was to avoid his imminent arrest. The record supports the finding of this aggravating factor. See Rivera v. State, 545 So.2d 864 (Fla. 1989).

Similarly, the record supports the finding that Appellant knowingly created a great risk of death to many people, contrary to his assertion. Although this Court declined to consider the events leading up to the fatal shooting in Suarez v. State, 481 So.2d 1201, 1209 (Fla. 1985), wherein the defendant led officers on a high speed chase following a convenience store robbery and then shot and killed a pursuing officer, the events preceding the shooting in this case support this aggravating factor and should

be considered. Appellant armed himself with two firearms when he went in to rob the Pizza Hut--an SWD M-11 9 millimeter semi-automatic pistol loaded with 33 cartridges and a .22 caliber revolver loaded with 6 cartridges. While inside the Pizza Hut, which was occasioned by eleven customers and five employees, Appellant fired six shots, wounding two of the unarmed customers. Upon leaving the restaurant, Appellant fired five shots at Deputy Killen, none of which found there target. Appellant then attempted to commandeer a car containing two adults and three children. Appellant fired a single shot into the car, barely missing the two adults. Appellant's thirteenth shot found its target: the abdomen of William Nicholson, who was pursuing Appellant down a residential street.

As the trial court noted in its sentencing order,

> [a]t least twenty-three (23) persons, including the victim, the five (5) people in the Mallow's car, Deputy Killen and the sixteen (16) people inside of the Pizza Hut Restaurant, were in the presence and line of the Defendant's gun fire. . . . This total does not include any other potential victims who were proved to be in the heavily populated commercial areas of the Pizza Hut Restaurant and Tenneco Gas Station, both of which were open for business on the Saturday night when the crimes were committed. Nor does it include any potential victims on Northeast 29th Street, a well travelled street, or in the residential areas of Northeast 17th Avenue and Northeast 28th Court where the victim was shot and the Defendant was finally apprehended.

(R 2890). Based on these facts, there was a "likelihood" or "high probability" that someone would be shot and killed. The fact that only one person died was a mere fortuity which does not in any way diminish the great risk to many other people caused by

Appellant's intentional acts. The record amply supports the trial court's finding of this aggravating factor. See Suarez; Rivera.

Even if, however, the facts do not support either the "avoid arrest" or "great risk" aggravating factors, Appellant's sentence should nonetheless be affirmed. There remain two other valid aggravating factors--"prior violent felony" and "felony murder"--and nothing in mitigation. Thus, there is no reasonable possibility that the recommendation or sentence would have been different absent either or both of these aggravating factors. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Consequently, Appellant's sentence should be affirmed.

As a final point, Appellant challenges the constitutionality of the "felony murder" aggravating factor. **Brief of Appellant** at 49-50. His argument, however, has long-since been rejected. See Lowenfield v. Phelps, 484 U.S. 231 (1988); Parker v. Dugger, 537 So.2d 969, 973 (Fla. 1988); Bertolotti v. State, 534 So.2d 386, 387 n.3 (Fla. 1988). Thus, his sentence should be affirmed.

ISSUE X

WHETHER THE TRIAL COURT PROPERLY CONSIDERED AND WEIGHED NONSTATUTORY MITIGATING EVIDENCE (Restated).

Regarding Appellant's nonstatutory mitigating evidence, the trial court made the following findings in its written order:

> At the Sentencing Hearing held on May 25, 1990, the Defendant was allowed the unrestricted presentation of evidence in mitigation. To that end, the Defendant presented the testimony of Mr. Cary Kultau, Howard Finkelstein, Esquire, and Carton [sic] Moore, who all testified as to the Defendant's social and behavioral history. Mr. Kultau also testified as to the victim's criminal record. The Defendant's mother, Marian Sanders, testified as to the Defendant's childhood and her shortcomings as a parent. Ladson Marvin Preston, Jr., the Defendant's co-defendant, testified as to the Defendant's alcohol consumption, impairment, and the circumstances of the robbery. Dr. Glenn Caddy [sic] testified as to his psychological evaluation of the Defendant and the Defendant's childhood history and life experiences. <u>This Court has considered all of the evidence presented at the Sentencing Hearing, along with the circumstances of the offense</u> and finds nothing in the Defendant's character or record to be in mitigation. This Court does not consider the fact that the victim, who was an innocent bystander, had a criminal record, to be a mitigating circumstance.
>
> In summary, this Court finds that of the nine (9) aggravating circumstances, four (4) are applicable to the Defendant. Florida Statutes 921.141(5)(b)(c)(d)(e). No mitigating circumstances, statutory or otherwise, apply to the Defendant. Thus, there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

(R 2890-91) (emphasis added). The trial court also made the following comments during its oral pronouncement of sentence:

> I have considered all the testimony and evidence introduced, and as in any decision in a case like this, not only given it considerable thought, consideration, but, of course, pray that the answer would be grounds for appealment knowing full well the final responsibility is always mine at this level.
>
> I recognize any knowledge of the fact that Dwayne Parker had a lousy, rotten childhood, for which he is not responsible, and the chiche [sic] of the day in this country is it's never too late to overcome a lousy childhood is not applicable and I wouldn't demean it by saying that; I certainly have simpathy [sic] for him in that regard. But I find that's a [sic] not applicable as the mitigating circumstances in this case.
>
> So of the nine possible statutory aggravating circumstances, I find four are applicable and no mitigating circumstances are applicable based on the testimony and evidence in this case.

(T 2390-91) (emphasis added).

In this appeal, Appellant claims that "[t]he trial court accepted as true the mitigating evidence regarding Mr. Parker's family life both as a child . . . and as a father . . . but gave it no weight. It failed to consider other unrebutted defense factors, including cooperation with the police, child abuse in a series of foster homes, sexual abuse, homophobic discrimination, alcoholism and drug abuse, ostracism in school, limited intelligence, impaired capacity, and prospects for rehabilitation." **Brief of Appellant** at 51. The State submits, however, that, as the excerpts from the sentencing order and oral pronouncement reveal, the trial court considered all of this evidence, but found it insufficient to outweigh the aggravating factors.

As this Court recently stated in Lucas v. State, 568 So.2d 18, 23 (Fla. 1990)(citations and quoted sources omitted),

> a trial court need not expressly address each nonstatutory mitigating factor in rejecting them, and . . . [because] 'the court's findings of fact did not specifically address appellant's evidence and arguments does not mean they were not considered.' . . . We, as a reviewing court, not a fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in any particular case. Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion.

Here, the trial court considered all of Appellant's mitigating evidence, but gave it little or no weight. The trial court's decision should not be reversed because Appellant reaches the opposite conclusion. See Dougan v. State, 595 So.2d 1, 5 (Fla. 1992) (affirming the trial court's rejection of (1) positive character traits, (2) contribution of racial oppression to the homicide, (3) potential for rehabilitation, and (4) inequality between his sentence and those of codefendants as nonstatutory mitigation); Jones v. State, 580 So.2d 143, 146 (Fla. 1991) ("Although cultural deprivation and a poor home environment may be mitigating factors in some cases, sentencing is an individualized process. We cannot say the trial court erred in finding the evidence presented insufficient to constitute a relevant mitigating circumstance."); Francis v. State, 529 So.2d 670, 673 (Fla. 1988) (finding evidence of cultural deprivation and abuse as child too remote in time from murder by 31-year-old defendant to constitute mitigating evidence). Rather, Appellant's sentence should be affirmed.

ISSUE XI

WHETHER APPELLANT'S SENTENCE IS PROPORTIONAL TO SENTENCES IN OTHER CASES UNDER SIMILAR FACTS (Restated).

With respect to the murder of William Nicholson, the trial court found four aggravating factors and nothing in mitigation. As this Court has repeatedly held, however, the weighing process is not a numbers game. Rather, when determining whether a death sentence is proportionally warranted, the facts should control. Here, the evidence established that Appellant walked into a Pizza Hut Restaurant armed with a MAC-11 and a .22 caliber revolver and robbed the business and patrons of cash and jewelry. In the process, he fired six rounds from the MAC-11, injuring two of the patrons. Upon fleeing the restaurant, he engaged Deputy Killen in a gunfight, firing five more shots, then fled through a residential neighborhood. In an attempt to escape impending capture, he attempted to commandeer a car occupied by two adults and three children. He shot into the car, narrowly missing Mr. and Mrs. Mallow, which caused Mr. Mallow to careen out of control and strike a parked car. For reasons unknown, Appellant thereafter shot an innocent bystander in the stomach and tried to hide in the bushes of a nearby house. Based on these facts, which are easily distinguishable from the facts of the cases cited to by Appellant, Appellant's sentence of death is proportionally warranted. See Rivera v. State, 545 So.2d 846 (Fla. 1989); Carter v. State, 576 So.2d 1291 (Fla. 1989); Hill v. State, 515 So.2d 176 (Fla. 1987).

ISSUE XII

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL (Restated).

Prior to trial, Appellant filed seven motions claiming that various provisions of Florida's death penalty statute were unconstitutional. (R 2476-2544). All of these motions were denied by the trial court. (T 365-66). Appellant renews his challenges in this appeal, none of which have merit.

Appellant raises four challenges to the jury's role in sentencing. First, Appellant claims that "the jury instructions are so flawed as to assure arbitrariness and to maximize discretion in reaching the penalty verdict." **Brief of Appellant** at 53. This Court has previously held, however, that "the standard jury instructions on aggravating and mitigating circumstances, which were given in this case, are sufficient and do not require further refinements." Valle v. State, 474 So.2d 796, 805 (Fla. 1985), rev'd on other grounds, 106 S.Ct. 1943 (1986).

Second, Appellant claims that a verdict by a bare majority violates due process. **Brief of Appellant** at 53-54. This argument has long since been rejected. Schad v. Arizona, 501 U.S. ___, 115 L.Ed.2d 555, 564 (1991); Spaziano v. Florida, 468 U.S. 447 (1984); Fleming v. State, 374 So.2d 954, 957 (Fla. 1979). Thus, the jury's 8 to 4 vote in this case, which is hardly a bare majority, is constitutionally permissible.

Third, Appellant claims that "[t]he standard instructions do not inform the jury of the great importance of its penalty verdict." **Brief of Appellant** at 54. Rejecting an identical

claim, this Court stated that it was "satisfied that these instructions fully advise the jury of the importance of its role and correctly state the law." Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989). Thus, Appellant's claim must fail.

Fourth, Appellant claims that "anti-sympathy" instructions violate the Eighth Amendment. **Brief of Appellant** at 54. No such instruction was given in this case. Regardless, this Court has held that the jury need not be instructed regarding its pardon power. Mendyk v. State, 545 So.2d 846, 850 (Fla. 1989).

Appellant also challenges counsel's role in the sentencing process, claiming that "[i]gnorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through to the present." **Brief of Appellant** at 54-55. This claim, along with Appellant's attacks on the judge's role and on the judicial election system, are baseless exaggerations which should be rejected subito.

Likewise, Appellant's challenges to this Court's appellate review of capital cases should be summarily rejected as they have been so many times before. See, e.g., Hudson v. State, 538 So.2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1990); Copeland v. State, 457 So.2d 1012, 1015-16 (Fla. 1984), cert. denied, 471 U.S. 1030 (1985); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974); Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982); Campbell v. State, 571 So.2d 415 (Fla. 1990); Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990); Remeta v. State, 522 So.2d 825 (Fla.), cert. denied, 488 U.S. 871 (1988).

Finally, Appellant makes four miscellaneous challenges to the sentencing process. First, Appellant claims that the lack of special verdict forms listing the aggravating and mitigating factors that the jury found to exist, and the lack of unanimous verdicts, violate the state and federal constitutions. **Brief of Appellant** at 61. This Court has consistently rejected this claim. See, e.g., Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990); Patten v. State, 598 So.2d 60, 62 (Fla. 1992).

Second, Appellant claims that a condemned inmate's inability to seek mitigation of sentence under Florida Rule of Criminal Procedure 3.800(b) "violates the constitutional presumption against capital punishment and favors mitigation." **Brief of Appellant** at 62. This argument is patently absurd since the death penalty statute provides for a separate hearing in which a defendant can present anything that might conceivably mitigate his sentence. Were the statute to provide for such a hearing after being sentenced, as Appellant seems to want, there is no doubt that his claims of constitutional deprivation would be extremely more vociferous. Appellant seems to want it both ways, without wanting either.

Third, Appellant complains that "Florida law creates a presumption of death where but a single aggravating factor appears." **Brief of Appellant** at 62-63. Since this Court's opinion in Dixon, it has maintained that "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances." 283 So.2d at 9. See also Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied, 428

U.S. 912 (1976); Sims v. State, 444 So.2d 922 (Fla. 1983), cert. denied, 467 U.S. 1246 (1984); White v. State, 446 So.2d 1031 (Fla. 1984), cert. denied, 111 L.Ed.2d 818 (1985). The United States Supreme Court has also rejected this argument:

> The presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury. See Lowenfield v. Phelps, 484 U.S. 231, 244, 108 S.Ct. 546, 554, 98 L.Ed.2d 568 (1988) ("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion."). The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence.

Blystone v. Pennsylvania, 494 U.S. 299, 306-07 (1990). See also Johnson v. Dugger, 932 F.2d 1360, 1368-70 (11th Cir. 1991) (rejecting an identical claim under Florida's sentencing scheme).

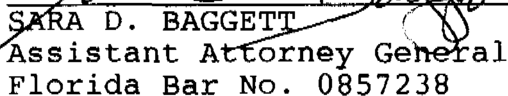
Fourth, Appellant claims that electrocution constitutes cruel and unusual punishment. **Brief of Appellant** at 63. This claim has been repeatedly rejected. See, e.g., Buenoano v. State, 565 So.2d 309 (Fla. 1990). Therefore, as Appellant's constitutional claims are wholly without merit, his sentence of death should be affirmed.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Gary Caldwell, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, this 27th day of September, 1993.

SARA D. BAGGETT
Assistant Attorney General