IN THE SUPREME COURT OF FLORIDA

KONSTANTINOS X. FOTOPOULOS,

Appellant,

v. CASE NO. 77,016

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Fotopoulos' Statement of the Case with tie exception of his characterization of his objection to the state's use of peremptory challenges. Appellee has set forth the exchange in the following statement of facts.

Appellee accepts Fotopoulos' Statement of the Facts as far as it goes,[1] and for purposes of its answer brief appellee sets forth these additional facts:

Fotopoulos is not black, nor were either of his two murder victims, nos is his attempted murder victim (R 229, **4093,** 4111, 4192, 4213). When *voir dire* commenced, the trial court called eighteen prospective jurors,[2] including four black jurors.[3] Following initial questioning, bath parties agreed to strike Moore, the defense struck Schanberger, Tindall was accepted, the defense struck Guthrie, Johnson, who is black, was accepted, Hanna was accepted, Grisham was accepted, the defense struck Eaton, Harris, who is black, was accepted, Daley was accepted, and the state indicated it wanted to strike Bostic. Defense counsel requested that the record reflect that Mrs. Bostic is black and stated he wanted to object (R 228-229).

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[1] Fotopoulos has attributed a number of statements to Hunt (IB 5), and while appellee does not dispute the fact that Hunt testified as such, the statements do not all appear at the cited pages.

Moore, Schanberger, Tindall, Guthrie, Johnson, Hanna, Grisham, Eaton, Harris, Daley, Bostic, **Earp,** Knowles, Roberts, Stark, Bennett, Knefely, and Smith **(R 33-34).**

Johnson, Harris, Bostic, and Smith (R 509).

The trial court noted that the defendant was white and there were four black jurors, and asked defense counsel if he wanted to give some reaction as to how it was prejudicial that the state exercised a peremptory challenge to a black juror (R 229). Defense counsel stated he did not believe that was necessary (R 229). The prosecutor stated that he had accepted two black jurors, and that Mrs. Bostic's son has been involved in the criminal justice system through his office since 1987 (R 230). Defense counsel replied that Grisham and several of the other jurors had children who had been arrested (R 230). The trial court found that there had been no initial showing of prejudice and that the state had given a neutral reason for the peremptory challenge (R 230-31). After that exchange, Earp was accepted, Knowles was accepted, the state struck Roberts, Stark was accepted, Bennet was accepted, Knefely was accepted, Smith, who is black, was accepted (R 232), and six more prospective jurors were seated (R 234-35).

Following several more excusals and challenges, defense counsel more extensively questioned Grisham about his contacts with the State Attorney and his assistants (R 431-33). Grisham had previously stated that his stepson, who was married and had never lived with him, was on parole for grand theft, stemming from charges in Putnam County (R 68). Grisham had been one of his stepson's victims (R 335-36). After further questioning, defense counsel exercised a peremptory challenge to remove Grisham (R 433). The prosecutor then excused Mrs. Gordon (R 434).

Defense counsel again requested that the record reflect that Mrs. Gordon is black and stated he would like to ascertain any reason other than race (R 434). The trial court asked defense counsel if he had anything more than complaining about the state challenging a black, and defense counsel replied that he did not (R 434). The court had the prosecutor respond out of an abundance of caution, and the prosecutor explained that Mrs. Gordon had stated that she was opposed to the death penalty, that her grandson had significant legal problems, and that Mrs. Gordon's car had been seized as a result of her grandson's actions (R 435). Defense counsel stated "Nothing further, Your Honor" (R 435). The trial court found there had not been an initial showing of discrimination and that the reasons given by the prosecutor were sufficient (R 436). After Mrs. Gordon was excused, Juror Meek was seated (R 436). Barbara Lockhart, who is black, was the final juror seated (R 452). On the final panel there were four blacks, one of whom served as an alternate (R 509).

Ramsey's fiancee testified that Ramsey was trying to blackmail Fotopoulos (R 689). Jeff Stanley, who worked at Ritz Camera, testified that Fotopoulos was in the store in October, 1989 with two other people and an eight millimeter video camera was purchased (R 1347-49). Stanley was asked how the camera worked in low light (R 1350). Stanley usually gives a business card to interested customers (R 1352), and a Ritz Camera business card with the name Jeff on it was found in Fotopoulos' car (R 1550, 4252), as was the trespass warning that had been issued to Ramsey (R 1549, 4299).

After Hunt shot Ramsey, Fotopoulos shot him with an AK-47 and Hunt caught the shell in her jacket (R 784-86). A shell casing was found in Fotopoulos' car and was matched to the AK-47 found at the Paspalakis home (R 11939). Bullets from Ramsey's body and the scene of his murder were matched to the .22 Ruger found at the Paspalakis home, and a magazine fitting the gun was found inside the home (R 1930, 1934-35). The day after the Ramsey shooting Fotopoulos told Hunt that she would have to kill his wife Lisa or he would turn the videotape of the murder over to the police (R 793).

On October 25, 1989, Lisa Fotopoulos told Fotopoulos that she was going to divorce him (R 1965). On October 26, 1989, Hunt offered Matthew Chumbley (aka Mike Cox) $10,000 to kill Lisa and he agreed to do it (R 795-97, 1707). Chumbley went to jail so Hunt approached Newman Taylor Jr. (aka J.R.) with the same proposition (R 801). Like Chumbley and Ramsey, Taylor was "expendable" (R 802). However, Taylor "didn't want to kill nobody", and Lori Henderson had told him, the night before Halloween, that the person who shot Lisa was going to die (R 2509). Taylor contacted the police after learning Lisa had been shot and informed them that he had been offered the job (R 2510-12, Exhibit 141).

Hunt had told James that she and Fotopoulos had shot Ramsey and videotaped it (R 1740). Hunt also told James that Ramsey was killed because he knew some things that James knew about Fotopoulos and Ramsey was trying to blackmail Fotopoulas (R 1741). Fotopoulos came in and told James the he, Fotopoulos,

knew that James knew some things about him that nobody was really supposed to know and Ramsey had known those things and "chosen the wrong road to go down" (R 1742). Fotopoulos gave James a choice; either work for him or go down the road Ramsey went down (R 1742). James was worried that he was going to end up like Ramsey (R 1756). Lisa identified James after he attacked her at Joyland (R 1990).

The afternoon of the Joyland attack, Hunt recruited Chase, who was to follow Lisa home that evening, hit her car and get out and kill her (R 827-29). Chase followed Lisa, but did not hit her (R 831). Lisa was following Fotopoulos home, and they took an unusual route and she felt like someone was following her (R 1985-86). Chase went to the house that evening to shoot Lisa but could not get in (R 846, 849). Chase returned to the house that evening with a knife to cut the window but still could not get in, and Hunt sent him back a second time and followed him but he still could not get in (R 869-70). Chase was then supposed to hide in the bushes and kill Lisa when she left for work, but a neighbor called the police when he was seen walking through their yard (R 872, 878). The next evening Chase got into the home, shot Lisa, and was murdered; Fotopoulos told Lisa that it was James' friend from Ohio (R 2000). Fotopoulos called Hunt and told her he had made "meatloaf" of Chase and laughed (R 895).

That morning, after Lisa was shot, Tony Calderone arrived home and found Fotopoulos there; Calderone said to Fotopoulos "you son of a bitch, you did it, didn't you?" (R 1868). Fotopoulos, with a big smile on his face, replied "I told you

that Greek men never divorce their wives" (R 1868). When Calderone asked Fotopoulos why he had killed Chase, Fotopoulos told him "dead men tell no tales" (R 1879). Shortly after Ramsey had last been seen, Calderone had asked Fotopoulos where Ramsey was and Fotopoulos told him that they wouldn't be seeing Kevin any more because he was no longer with us (R 1859).

Fotopoulos had discussed Lisa's life insurance policies with her, and he was mad because she had her brother on one of the policies so she told him she would change it (R 1962-63). Some time around Halloween Fotopoulos discussed opening an Arthur Treacher's restaurant with Arienthiran Prakash, and told Prakash that he would have the money in about a month (R 1473-74).

Fotopoulos' fingerprints were on the videotape case and on the bag in which it was contained (R 1616, 1910). Fotopoulos claimed that Hunt had given him the videotape as a surprise, that he had put it with the rest of his pictures in the garage, and did not look at it because after what happened to Lisa the last thing on his mind was looking at naked women (R 2356-57).

Fotopoulos testified that he provided Hunt with room, board, clothes and living expenses in exchange for sexual favors (R 2267). Fotopoulos told Hunt she could find a nice place to live as long as there would be no other people sleeping there; Hunt had a habit of sleeping around and Fotopoulos, being a married man, did not want to get any disease because that would be hard to explain (R 2278). Fotopoulos was intrigued with the fact that Hunt liked weapons (R 2271). He had taken her to where his weapons were buried and been shooting with her where his

weapons were buried about seven times (R 2273). The weapons were buried because they were illegal and dangerous (R 2274). Fotopoulos alsa testified about his business ventures (R 2286-98); his loans (R 2303-07); and gifts he purchased for his wife and mother (R 2460).

SUMMARY OF THE ARGUMENTS

POINT 1: The defense, by insufficient objection, never met its initial burden of demonstrating that the state was exercising peremptory challenges in a racially discriminatory manner. Even if the objection was sufficient, the trial court did not abuse its discretion in determining that there were reasons why the challenges did not appear to be racially motivated. In any event, the state gave valid, nonracial reasons why the jurors were challenged, and since the arguments now advanced on appeal were not presented to the trial court they are not cognizable.

POINT 2: The trial court did not abuse its discretion in denying Fotopoulos' motion for severance. This was not simply two murders occurring two weeks apart but a criminal episode where each crime, beginning with the Ramsey homicide, precipitated the next, culminating in the attempted murder of Lisa Fotopoulos and murder of Bryan Chase. Even if error occurred, it was harmless where there was no prejudice and the state's evidence would be the same even if the crimes were tried separately.

POINT 3: The state's cross examination of Fotopaulos was proper as Fotopoulos opened the door or the questions involved subjects that were appropriate for exploration on cross examination. If any error occurred, it was harmless.

POINT 4: Fotopoulos failed to preserve below his claim that the trial court erred in permitting the state to impeach him with prior testimony. Even if the claim is preserved relief is not warranted as Fotopoulos has neither alleged nor demonstrated how he was prejudiced by the impeachment.

POINT 5: The trial court was never apprised of an alleged discovery violation so cannot be faulted for failing to conduct an inquiry. Further, the record is sufficient to demonstrate that there was no discovery violation and so no need for further inquiry.

POINT 6: The presentation of numerous alleged errors in one point is improper. Further, the bulk of these claims are either not preserved or are insufficiently argued, and in sum are without merit either individually or in combination.

POINT 7: There was no objection to either the joint penalty phase or the instructions as given so the claim has been waived. In any event, relief is not warranted as there is nothing to indicate that the jury was mislead, particularly where the prosecutor argued that three factors were applicable to the Ramsey homicide and five were applicable to the Chase homicide.

POINT 8: There was no objection to statements admitted during the penalty phase so the claim has been waived. In any event, relief is not warranted as this factor was established independent of any alleged hearsay. Even if this factor is stricken death is still appropriate as the trial court specifically stated that the two remaining aggravating factors warranted the death penalty.

POINT 9: There was no objection to the instructions as given and no request for a special instruction so the claim is not cognizable on appeal. The jury verdict of premeditated first degree murder clearly reflects a finding that Fotopoulos actually killed or contemplated that a life would be taken.

POINT 10: The evidence in this case proves beyond any reasonable doubt that Fotopoulos planned and arranged the Ramsey murder before the crime began so the trial court correctly found that the murder was cold, calculated and premeditated. Fotopoulos packed up his guns, camera and light and took Ramsey to an isolated location where he was tied to a tree and shot five times.

POINT 11: There was no objection to either the joint penalty phase or the instructions as given so the claim is barred. Prejudice cannot be demonstrated as all of the factors the jury was instructed on are applicable to the Chase murder.

POINT 12: The trial court properly found that the Chase murder was committed during the course of a burglary where Fotopoulos was convicted of burglary and has not challenged this conviction. Even if this finding is erroneous it does not affect the sentence as the trial court stated that death was appropriate on the basis of two other aggravating factors.

POINT 13: The trial court properly found that the Chase murder was committed for pecuniary gain and committed in a cold, calculated and premeditated manner as these factors are separate and distinct and not merely restatements of each other. Even if the factors were merged the sentence would not be affected.

POINT 14: The trial court properly found that the Chase murder was committed for pecuniary gain and to avoid arrest as these factors are separate and distinct. While Fotopoulos claims that there cannot be two primary motives and one must cancel the other to hold such would permit a defendant such as Fotopoulos to benefit from his own deviousness. Even if the factors were merged the sentence would not be affected.

POINT 15: This court has consistently rejected claims that the aggravating factor cold, calculated and premeditated is unconstitutional.

POINT 16: None of the grounds set forth in support of the claim that Florida's death penalty is unconstitutional were presented to the trial court so they are not cognizable on appeal. In any event, they have been consistently rejected.

POINT 1

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO USE PEREMPTORY CHALLENGES TO EXCUSE TWO BLACK JURORS.

Fotopoulos claims that the trial court erred in permitting the state to use peremptory challenges to exclude two black jurors. As to Juror Bostic, Fotopoulos contends that the trial court erred in concluding that he had not met the initial burden of demonstrating that the challenge was exercised in a racially discriminatory manner, and further erred in finding that the state established race neutral reasons supported by the record. As to Juror Gordon, Fotopoulos likewise claims that the trial court erred in finding that he had not met his initial burden and further erred in finding that the state established race neutral reasons.

The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. *State v. Neil,* 457 So.2d **481,** 486 (Fla. **1984).** The procedure to be followed under these circumstances is:

> There must be an objection that the challenges are being exercised in a racially discriminatory manner. At this point, the judge should determine if there has been a prima facie showing that there is a strong likelihood that the jurors have been challenged because of their race. *Neil.* If legitimate reasons for the challenge are not apparent from the jurors' statements but there are other reasons why the challenges do not appear to be racially motivated, the judge should note these reasons on the record. If the judge rules that a prima facie showing has been made, the burden shifts to the challenging party to demonstrate valid, nonracial reasons why each minority juror has been stricken. *Thompson v. State,* 548 So.2d **198** (Fla. **1989).** The judge **must** then evaluate the proffered reasons in deciding whether the objection is well taken.

Valle v. State, **581** So.2d **40, 44** (Fla. **1991).** **A** trial court is vested with broad discretion in determining whether peremptory challenges are racially intended. ***Reed v. State,*** **560 So.2d 203 (Fla. 1990).**

The state first contends that by simply pointing out that the challenged jurors were black, with nothing more, the **defense** did not meets its initial burden of demonstrating that the challenges were **being** exercised in a racially discriminatory manner. Even if this bare assertion was sufficient for the trial court to proceed with an initial determination as to whether the challenges were being exercised because of the jurors' race, the

trial court did not abuse its discretion in determining that there were reasons why the challenges did not appear to be racially motivated. Even if this court determines that as to either juror the challenge was sufficient and the burden shifted to the state, the reasons given by the state, out of an abundance of caution, demonstrate valid, nonracial reasons why the jurors were challenged, and since counsel did not present the arguments now raised on appeal the issues have not been preserved.

Juror Bostic

At the time the state challenged Mrs. Bostic, the trial court noted that the defendant is white and there were four black jurors, and defense counsel declined to elaborate as to how it was prejudicial that the state had challenged a black juror (R 229). Two of those black jurors had already been initially accepted by the state (R 228-29). The state would also point out that the final juror seated is black, so the net effect of the state's peremptory strikes was the excusal of one black juror (R 452). While the striking of even a single black juror for racial reasons is impermissible, this court has found that the mere fact that the state has challenged one of four black venire members does not show a substantial likelihood that the state was exercising peremptory challenges in a racially discriminatory manner, particularly where the effect is to place another black on the jury. *Taylor v. State,* 583 So.2d 323 (Fla. 1991). *See also, Reed, supra,* at 206 ("Given the circumstances that both the defendant and the victim were white and that two black jurors were already seated, we cannot say that the trial judge abused

his discretion in concluding that the defense had failed to make a prima facie showing that there was a strong likelihood that the jurors were challenged because of their race"); *Valle, supra,* at 44, n. 4 (defendant, who is not black, did not show it was likely that the challenges were used in a racially discriminatory manner-two blacks served as jurors and a third served as an alternate).

Even if the burden shifted to the state, which the state strongly disputes, the record demonstrates racially neutral reasons far the challenge. Mrs. Bostic's juvenile son had been continuously prosecuted by the State Attorney's Office over the past several years and at the time of trial was currently in a home in Jacksonville (R 67, 230). Fotopoulos now claims that this reason is not supported by the record and that it was a pretext because several of the jurors who were accepted by the state had family members equally involved with the law, but after the state gave this reason, defense counsel only stated:

> Mr. Grisham and several of the others have children who have been involved with the law and who have been arrested.

(R 230). Thus, any claim that the state's reason is not supported by the record is not preserved for appellate review. *State v. Fox,* 16 F.L.W. 664 (Fla. October 10, 1991); *Bowden v. State,* 16 F.L.W. 614 (Fla. September 12, 1991); *Floyd v. State,* 569 So.2d 1225 (Fla. 1990). In any event, the record demonstrates that the reason is not a pretext.

The fact that a juror who has a relative who has been charged with a crime is a race neutral reason for excusing that

juror. *Bowden, supra; Valle, supra.* While defense counsel stated that Mr. Grisham and "several of the others" have children who have been involved with the law, the record demonstrates that their situations are readily distinguishable. *Cf.* ***Green*** *v.* ***State,*** 583 So.2d **647** (Fla. 1991) (argument that jurors gave same responses on views on death penalty but remained seated has no merit). It was not Mr. Grisham's son, but rather his stepson, who was married and had never lived with Mr. Grisham, who had been involved with the law (R 68). Mr. Grisham also has a stepdaughter who was in jail, but again, he did not consider either of these two to be his children, **since** when he was asked about his children, he replied that he had two sons adopted in his first marriage (R 91). Later questioning revealed that Mr. Grisham had been one of his stepson's victim, and significantly, after further questioning Mr. Grisham about his contacts with the State Attorney's Office, the ***defense*** peremptorily excused him, which certainly indicates that an attorney's feelings as to how a juror might feel based on such contacts is a valid reason for a peremptory challenge.

While defense counsel did not specifically name any of the other jurors, and the state contends that this lack of specificity has waived further development of the issue on appeal, the record likewise demonstrates that their situations were distinguishable from Mrs. Bostic's. Mrs. Daley has a son who once pled guilty to grand theft, but who is now working (R *66*, 98), so there is no indication that she had any extensive dealings with the State Attorney's Office. Fotopoulos also

points out that Mr. Knowles had a cousin in jail for murder, but defense counsel only pointed out jurors with children who had been arrested, and in any event Mr. Knowles' cousin was in jail in Fernandina and Mr. Knowles was not close to him (R 63). Thus, the state's reasons for excusing Mrs. Bostic were racially neutral and not a pretext.

Juror Gordon

When the state challenged Mrs. Gordon and the defense objected, the trial court again asked defense counsel if he had anything more than just complaining about the state challenging a black (R 434). Defense counsel replied he did not, but out of an abundance of caution the trial court had the state give reasons (R 434). The prosecutor noted that Mrs. Gordon was categorically opposed to the death penalty, her grandson was facing significant legal problems, and Mrs. Gordon's car had been seized as a result of her grandson's criminal activity (R 435). Defense counsel replied "Nothing further, your honor" (R 435).

As with Mrs. Bostic, the defense failed to show that the state was exercising peremptory challenges discriminatorily. Another black juror, Mr. Smith, had been accepted at the time the state challenged Mrs. Gordon (R 232, 434), and as previously noted, the final juror seated was black so the net effect was the loss of one black juror. The trial court did not abuse its discretion in finding that Fotopoulos had failed to meet his initial burden of demonstrating that the state was exercising peremptory challenges in a racially discriminatory manner. *Taylor, **supra; Valle,** supra; **Reed,** supra.*

If this court determines that Fotopoulos did meet his initial burden, the state contends that any further argument regarding the state's reasons has not been preserved for failure to object below. ***Fox, supra; Bowden, supra;*** *Floyd,* ***supra.*** Even if the issue had been preserved, the claim is without merit. A juror's reservations about the death penalty is a valid reason for a peremptory challenge, ***Green,*** *supra;* ***Valle, supra,*** as is a juror's relative's arrest. Id.; *Bowden,* ***supra.*** Mrs, Gordon twice stated that she is not for the death penalty, and that a person who takes another's life should be reminded each and every day of what he did (R 365-66). Fotopoulos compares Mrs. Gordon's response with that of Mr. Meek, claiming that the states's reason was a pretext, but it is significant to note that Mr. Meek was called ***after*** Mrs. Gordon was excused, and further, his answer clearly differs as he stated that he is neither for nor against the death penalty (R **438**). The record also demonstrates that Mrs. Gordan was directly affected by her grandson's arrest, as her car **had** been seized and there would no doubt be further proceedings on those matters. Since the trial court did not abuse its discretion in determining that Fotopoulos failed to meet his initial burden as to the challenge of either juror or in determining that the reasons given by the state were racially neutral, relief is not warranted.

POINT 2

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING FOTOPOULOS' MOTION TO SEVER THE RAMSEY HOMICIDE FROM THE REMAINING COUNTS.

Fotopoulos contends that the trial court erred in denying his motions to sever count one from the remaining counts. Appellee first submits that the instant issue has not been properly preserved for appellate review. At the close of the state's case Fotopoulos did not move for a mistrial on the basis that the state's evidence had not supported the joinder, and Fotopoulos' motion for new trial simply stated "[t]hat the Court erred in not granting a severance of the counts of the two capital murder charges listed in counts I and II of the indictment" (R 3961). The grounds of a motion must be presented in the trial court and they must be specific so the trial judge can appreciate the problem being presented. *Steinhorst v. State,* 412 So.2d 332 (Fla. 1982). The trial court denied Fotopoulos' motion on the basis of the state's proffer, and appellee submits that the claim raised now, that the state failed to present evidence that it proffered, differs from the claim presented to the trial court, and that the motion for new trial was not sufficient to apprise the trial court of this variation in claims.

Even if the issue is cognizable, relief is not warranted. Fotopoulos claims that the testimony at trial demonstrates that there was no connection between the murder of Kevin Ramsey and the later plot to kill Lisa Fotopoulos or the resulting murder of Bryan Chase. Fotopoulos states that the Ramsey murder occurred in a rural area on October 20 and that Ramsey was killed because he was blackmailing Fotopoulos, while the attempted murder of Lisa Fotopoulos and the Chase murder occurred two weeks later and that the motive for shooting Lisa was to obtain insurance

proceeds while the motive to kill Chase was to insure he would be unable to testify against Fotopoulos. This oversimplification of the facts overlooks all of the intervening events which demonstrate that this was not simply two unconnected murders occurring two weeks apart, but that each crime committed in the course of events, beginning with the Ramsey murder, precipitated the next, thus connecting all crimes in an episodic sense. Indeed, the only reason that the two murders occurred two weeks apart was due to the failure of intervening attempts.

Pursuant to Florida Rule of Criminal Procedure 3.151(b), related offenses can be consolidated upon timely motion by either side. Offenses are related "if they are triable in the same court and are based on the same act or transaction or on two or more connected acts or transactions." Fla.R.Crim.P. 3.151(a); *Livingston v. State*, 565 So.2d 1288, 1290 (Fla. 1988). This court recently summarized the law as it relates to consolidation of offenses as follows:

> ...the "connected acts or transactions" requirement of rule 3.150 means that the acts joined for trial must be considered "in an episodic sense[.] [T]he rules do not warrant joinder or consolidation of criminal charges based on similar but separate episodes, separated in time, which are "connected" only by similar circumstances and the accused's alleged guilt in both or all instances." *Paul*, 365 So.2d at 1065-66. Courts may consider "the temporal and geographical association, the nature of the crimes, and the manner in which they were committed." *Bundy*, 455 So.2d at 345. However, interests in practicality, efficiency, expense, convenience, and judicial economy, do not outweigh the defendant's right to a fair

determination of guilt or innocence. *Williams,* 453 So.2d at 025.

Garcia *v.* ***State,*** 568 So.2d 896, 899 (Fla. 1990). Granting a severance is largely a matter of discretion with the trial court and the burden is on the movant to demonstrate an abuse of discretion. Johnson *v.* ***State,*** 438 So.2d 774 (Fla. 1983). The record demonstrates that Fotopoulos has failed to meet that burden.

In denying Fotopoulos' amended motion for severance, the trial court stated that he was convinced that the offenses "are definitely connected in an episodic sense" and further found that they are "certainly connected in a temporal sense" (R 502). The court further noted that shortly after the Ramsey killing several plots to kill Mrs. Fotopoulos were set in motion, and the offenses were "well connected" (R 502). The evidence presented by the state supports this conclusion.

Mark Kevin Ramsey was last seen in the company of Hunt and Fotopoulos on the evening of October 20, 1989, and the description of the clothes he was wearing matched the clothes he was wearing in the videotape of his murder and that were found on his decomposed body (R 683-84, 4204, Exhibits 50 and 55). The next morning Fotopoulos told Hunt that she would have to kill his wife Lisa, and if she did not he would turn the videotape of the murder over to the police (R 793). On October 25, 1989, Lisa Fotopoulos told Fotopoulos that she was going to divorce him (R 1965). On October 26, Hunt offered Matthew Chumbley (aka Mike Cox) $10,000 to kill Lisa and he agreed to do it (R 795-97,

1707). Chumbley went to jail so Hunt approached Newman Taylor Jr. (aka J.R.) with the same proposition (R 801). Like Chumbley and Ramsey, Taylor was "expendable" (R 802). However, Taylor "didn't want to kill nobody", and Lori Henderson had told him, the night before Halloween, that the person who shot Lisa was going to die (R 2509).

Hunt had told James that she and Fotopoulos had shot Ramsey and videotaped it (R 1740). Hunt also told James that Ramsey was killed because he knew some things that James knew about Fotopoulos and Ramsey was trying to blackmail Fotopoulos (R 1741). Fotopoulos came in and told James that he, Fotopoulos, knew that James knew some things about him that nobody was really was supposed to know and Ramsey had known those things and "chose the wrong road to *go* down" (R 1742). Fotopoulos gave James a choice; either work for him or go down the road that Ramsey went down (R 1742).

James was first supposed to kill Lisa at Joyland, her place of business, but he was unable to procure a gun and it got too late so the plan was called off (R 1742-43). The next attempt on Lisa's life was to be at a bar on Halloween night, but James got scared and could not do it (R 1749-50). That night James and Hunt drove to Edgewater and got a gun (R 1751). James was worried that he was going to end up like Ramsey (R 1756). James was then supposed to kill Lisa at Joyland on November 1, but Lisa was able to escape and subsequently identified James as her attacker (R 1753, 1759, 1990). Hunt next recruited Bryan Chase, and after several more failed attempts over the next several days

Chase finally broke into the house on November 4th and shot Lisa Fotopoulos and was immediately murdered by Fotopoulos (R 828, 831, 851, 867, 870-72, 892).

An episode is defined as "an occurrence or connected series of occurrences and developments which may be viewed as distinctive and apart although part of a larger and more comprehensive series".[4] The evidence demonstrates that Fotopoulos' overall plan was to kill Lisa; it began with planning and videotaping the Ramsey murder and ended when he murdered Chase after Chase shot Lisa. Each occurrence precipitated the next in the series; Fotopoulos used the videotape and murder of Ramsey as leverage against Hunt and James, and as each subsequent plan for Lisa's murder went awry a new one was immediately developed. While Fotopoulos claims that since Hunt testified she did not know Ramsey was to be murdered this separates the episodes, it was Fotopoulos state of mind, knowledge and motives that were at issue in this trial. The evidence clearly demonstrates that at the time the Ramsey murder occurred it was his intent to use this to further his plans for Lisa's demise.

All of the crimes for which Fotopoulos stood trial are inextricably intertwined and occurred as one continuous sequence of events. *See, e.g., Brown v. State,* 502 So.2d 981 (Fla. 2d DCA 1987); *Pugh v. State,* 518 So.2d 424 (Fla. 2d DCA 1988). Crimes occurring on the average of one per day in furtherance of a plot to murder are certainly connected in a temporal sense. Likewise, two cold and calculated murders of "expendable" people, committed

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[4] Webster's Third New International Dictionary (1986).

by ruse in order to obtain financial gain and avoid detection are similar in nature and manner of commission. The trial court was correct in not severing for trial the first and last crimes committed in this episode.

Even if far some reason this court determines that the Ramsey murder was improperly joined with the rest of the charged offenses, any error can be deemed harmless, as reversal is required only if there is actual prejudice causing a damaging effect or influence on the jury's verdict. Livingston, *supra* at 1290; *Beltran v. State*, **566** So.2d 792 (Fla. 1990). Appellee would first point out that Fotopoulos' only allegation of prejudice is that "the State was permitted repeatedly to go into the intimate details of the two murders" (IB 35). Fotopoulos has included no record cites in support of this allegation, and a review of the record demonstrates that it is simply not true, as the state presented its case in essentially a chronological fashion. The "details" of the Ramsey homicide were presented early in the trial, and the remainder of the state's case focused on the rest of the charges. Fotopoulos has not demonstrated how consolidation has caused him prejudice and the evidence against him was overwhelming,[5] so even if the court committed error on

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[5] The testimony of Hunt and James directly implicates Fotopoulos in all of the charged crimes (R 691-1081, 1737-1827), and it is overwhelmingly supported by the circumstantial evidence. Ramsey was last seen with Hunt and Fotopoulos and the description of his shirt matched the one found on his decomposed body (R 683-84, 4204). The police first began to search for Ramsey's body on the basis of information from James, and found it based on information from Hunt (R 575, 584). Fotopoulos had bought a video camera to work in low light (R 1347-52). A videotape, with his fingerprints on the case, was found at the house where he lived, as were the Ramsey murder weapons, and four people

this point it was harmless beyond any reasonable doubt. *Livingston, supra.*

Further, even if there had been separate trials, evidence of either murder would have been admissible at the trial for the other, so Fotopoulos cannot demonstrate that a severance was necessary for a fair determination of his guilt or innocence. *Bundy v. State,* 455 So.2d 330, 345 (Fla. 1984). ***See also, King v. State,*** 390 So.2d 315 (Fla. 1980). Evidence of a collateral crime may be admitted to establish the entire context out of which the criminal action occurred. ***Heiney v. State,*** 447 So.2d 210 (Fla. 1984) (evidence was relevant to show motive for the subsequent crimes and to establish the entire context of the crimes charged); *Ruffin v.* ***State,*** 397 So.2d 277 (Fla. 1981) (evidence was relevant to material issue of identity and because it established the entire context out of which the criminal action occurred); *Tumulty v.* ***State,*** 489 So.2d 150 (Fla. 4th DCA 1986) (inseparable crimes evidence that explains or throws light upon the crime

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identified the voice on the tape as his (R 1397-1400, 1616, 1910, **1930, 1934-35, 1939).** An expended AK-47 shell, that had been fired from Fotopoulos' gun, was found in his car along with Ramsey's trespass warning (R 1549, 1939). Autopsy results matched Hunt's version of events. The day after the Ramsey murder Fotopoulos told Hunt she would have to kill his wife (R 793). Fotapoulos had discussed Lisa's life insurance with both Lisa and Hunt (R 794-95, 1962-62), and the day after Lisa told Fotopoulos she was going to divorce him Hunt offered Chumbley $10,000 to kill Lisa, and the plans and attempts continued until Lisa was shot and Chase murdered (R 801, 818-895, 795-97, 1707, 1743-59, 1965, 2510-12). Fotopoulos admitted he shot Chase, or as he told Hunt, made "meatloaf" out of him (R 895). Fotopoulos said he would have money to open a restaurant about a month after Halloween (R 1473-74). When accused of killing Chase and having Lisa shot Fotopoulos said that Greek men never divorce their wives and dead men tell no tales (R 1868, 1879). After Lisa was shot, the police received a call from another person who had been offered the jab (R 2508).

being prosecuted). Such evidence is also admissible to show motivation and intent, *Phillips v. State,* 476 So.2d 194 (Fla. 1985); ***Craig v. State,* 510 So.2d 857** (Fla. 1987), as well as common scheme and identity. ***Bundy, supra.***

Evidence of the Chase murder and the crimes leading up to it would be admissible in a trial on the Ramsey murder to show Fotopoulos' entire scheme as well as his motive, which was not only to get rid of Ramsey but to also have leverage against Hunt and James to assure their further participation in the scheme, as both testified to at trial. When evidence of motive is available and would help the jury to understand the other evidence presented, it should not be kept from them simply because it reveals the commission of other crimes, even those not charged. ***Craig,*** *supra,* at **863.** The test for admissibility is nat necessity, but relevancy. *Id.;* ***Ruffin, supra*** at **279.** Likewise, evidence of the Ramsey murder would be admissible at a trial on the rest of the charges as it also shows a common scheme, motive, and connection between and motivation of all of the participants and victims. Reversal is not warranted.

POINT 3

THE TRIAL COURT WAS CORRECT IN PERMITTING THE STATE TO IMPEACH FOTOPOULOS WITH EVIDENCE OF PRIOR MISCONDUCT.

Fotopoulos claims that the trial court erred in permitting the state to introduce evidence of and cross examine him regarding his federal convictions for counterfeiting. Fotopoulos contends that the "purported opening of the door" was the result

of improper questioning; that case authority permitting further inquiry into the nature of prior convictions involves only situations where the defense, and not the prosecutor has elicited testimony in an effort to lessen the impact of prior convictions; the time frame of the conduct underlying the convictions has little or no relevance; and, even if the door was opened, the issue was the time frame and no door was ever opened with respect to the nature of the offenses. Appellee submits that the cross examination was proper, but even if error occurred it was harmless. Fotopoulos has also set forth several additional allegations which are not preserved, without merit or both, and again, even if error occurred it was harmless as the verdict would not have been affected.

As to Fotopoulos' first contention, appellee submits that there was no improper questioning; Fotopoulos simply failed to heed counsel's advice and gave the "wrong" answers. Fotopoulos has cited no authority for the proposition that defense counsel can interrupt and direct his client's answering of cross examination questions, and the trial judge, who has control over the trial, was correct in pointing this out to counsel and permitting Fotopoulos to finish his answer. When the prosecutor asked Fotopoulos if that was all he had to say, he could have just said yes, as his attorney was obviously urging him to do, rather than stating that he just wanted to mention it (the six prior convictions) was nonviolent. Likewise, when the prosecutor attempted to clarify the aforementioned "it" by asking "[s]ix prior felonies?", Fotopoulos could have just said "*yes*" instead

of elaborating that it was "one incident that was compounded" (R 2359).

It is well established that when a defendant attempts to mislead or delude the jury about his prior convictions, the state is entitled to further question the defendant in order to negate the delusive innuendos. *See, McCrae v. State,* 395 So.2d 1145 (Fla. 1980); *Ashcraft v. State,* 465 So.2d 1374 (Fla. 2d DCA 1985). Fotopoulos' claim that this only applies when the defense, and not the prosecutor has elicited the responses, is a distinction without a substantive difference and is contrary to logic and reason. The fact remains that it is the defendant, through his voluntary answers, and not the person asking the questions who opens the door. Simply because defense counsel elects not to attempt to soften the blow of anticipated impeachment during direct does not give the defendant free reign to mislead the jury on cross. *See, Hernandez v. State,* 569 So.2d 857 (Fla. 2d DCA 1990) (defendant who volunteered statements on *cross examination* that he had never done any drug related deals in his life opened the door to questioning about a heroin deal he had arranged two days prior to the instant offenses).

Fotopoulos' further contention that the underlying time frame was not relevant, and even if it was no door was opened with respect to the nature of the offense, is likewise without merit. Appellee would first point out that the time frame was clearly relevant as this is exactly what Fotopoulos was attempting to minimize when he stated that it was one incident that was compounded, when it actuality it involved a number of

incidents over a two year period (R **4450-51).** Further, this is not "Let's Make A Deal" where one can select which door one wants opened, and appellee contends that by referring to "one incident" the state was entitled to inquire as to what that incident was.

Appellee would further point out that Fotopoulos utilized the same method of impeachment on Hunt when she testified about her prior convictions. Defense counsel specifically stated, "When she misstates the number of convictions that she has I have a right to *go* through them" (R **1073).** Thus, there was no error in allowing the prosecutor to ask specific impeachment questions which were similar to the questions Fotopoulos asked Hunt on cross examination. *Mills v.* ***State,*** 462 So.2d **1075,** 1079 (Fla. **1985).** **As this** court recently stated, "Justice was best served by allowing the jurors to hear that the man whose critical testimony they were scrutinizing was convicted of these crimes." ***Riechmann v. State,*** **581** So.2d **133, 140** (Fla. **1991).**

Appellee further contends, as was argued below, that evidence of Fotopoulos counterfeiting activities **was** an appropriate subject for cross examination where Fotopoulos had testified on direct about all of his business ventures **to** support the inference that he was a successful businessman with no need for money and thus had no motive **to** kill his wife (R 2365). As this court has recognized:

> One of theses **objects** [of cross examination] is **to** elicit the whole truth of transactions which are only partly explained in the direct examination. Hence, questions which are intended to fill up designed ok accidental omissions of the witness, or

> to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony, are legitimate cross-examination.

McCrae, supra at 1152, quoting, 4 *Jones* on *Evidence,* Cross Examination of Witnesses § 25:3 (6th Ed. 1972). Further, the test for determining whether a defendant's prior crimes is admissible is relevancy, and as long as it is relevant for any purpose the fact that it is prejudicial does not make it inadmissible. *Sireci v. State,* 399 So.2d 964 (Fla. 1981). Thus, the fact that Fotopoulos made his money from counterfeiting and not from his allegedly successful business ventures was clearly relevant to fill in the gap created on direct and also to rebut his claim that he had no need for money. *See also, Craig v. State,* 510 So.2d *857* (Fla. 1987); *Heiney v. State,* 447 So.2d 210 (Fla. 1984); *Austin v. State,* 500 So.2d 262 (Fla. 1st DCA 1986).

Even if for some reason this court determines that the impeachment was improper, any error was harmless at worst. *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986). In the first place, since Fotopoulos did misrepresent his prior convictions as one incident the state was entitled to introduce at the very least a certified copy of the judgment, which it did, so the jury would have discovered the nature and time frame of the offenses from that. Further, the evidence against Fotopoulos was overwhelming so the fact that he was impeached with his counterfeiting convictions could not have affected the outcome. *See,* note 5, *supra.*

Fotopoulos also claims that over objection, the state was permitted to describe the contents of certain photographs and

cross examine Fotopoulos about them. The record demonstrates that while there was initially an objection, defense counsel subsequently acknowledged that certain questions may be proper, so any claim regarding the photographs has been waived. *Riechmann, supra.* Further, it was Fotopoulos who first brought up the subject of the pictures when he testified that he put the videotape from Hunt, which he thought depicted her in affairs with other women, in the garage with the rest of his "pictures" (R 2357).

Fotopoulos next claims that cross examination on the basis of his conversations with his attorney was improper and in direct violation of the attorney-client privilege. While counsel objected, it was not on this basis and since this argument was never presented to the trial court so it is not cognizable on appeal. *Gunsby v. State,* 574 So.2d 1085 (Fla. 1991); *Bertolotti v. Dugger,* 514 So.2d 1095 (Fla. 1987). Further, questions do not violate any privilege; the privilege simply provides a legal basis for not answering those questions. Finally, Fotopoulos has failed to demonstrate why this was erroneous or how he was prejudiced so relief is not warranted.

Fotopoulos also claims that the state's effort to impeach him on the basis of a false loan application was also improper, but again, in the absence of an objection the claim is not cognizable. Further, when viewed in context the question was not improper. The prosecutor posed the question "You have no regard for honesty?", and Fotopoulos responded "How do you know, you never met me before" (R 2448). Fotopoulos put this trait in

issue with his response, and the prosecutor can hardly be faulted for accepting Fotopoulos' invitation to demonstrate how it was known that Fotopoulos **has** no regard for honesty. ***See, Squires*** *v.* ***State,*** 450 So.2d 208 (Fla. 1984). Further, Fotopoulos had testified on direct that he was able to obtain credit and loans on his own, so this evidence was **relevant** to fill in the gaps **as** to how Fotopoulos was able to do this. *McCrae,* ***supra.***

Likewise, there was no objection as to whether Fotopoulos had used counterfeit or real money to purchase a ring for his mother, and this was also a fair question as Fotopoulos had testified, in an effort to demonstrate that he had **no** need for money, that he bought gifts for his wife and the ring for his mother (R 2460). **Having** raised the issue on redirect, Fotopoulos cannot complain that the state expounded on this subject. ***Cruse*** *v.* ***State,*** 16 F.L.W. 701 (Fla. October 24, 1991).

Fotopoulos also claims that the state was permitted to introduce, over objection, that he possessed automatic weapons, machine guns, illegal silencers, and hand grenades. Fotopoulos provides a list of record citations, but a review of those references demonstrates that with the exception **of** one, (R 1721), there were no objections so the claim is not cognizable. Further, several of these cites contain testimony about the Ramsey murder weapon, which was clearly relevant (R 1121, 2414), and the ane reference where there was an objection was not to testimony that Fotopoulos possessed a machine gun, but to the fact that he could obtain them for the witness (R 1721). Further, it was Fotopoulos, on direct examination, who introduced

the fact that he possessed illegal weapons, when he stated that the reason he buried his weapons was because they were illegal and because they were dangerous (R 2273-74). Also, Fotopoulos testified that one of the reasons he was so intrigued with Hunt was because she was so interested in weapons and that she could operate almost all of his guns and they had dug up these weapons and used them (R 2271, 2273). In light of Fotopoulos testimony, these questions were not improper. *McCrae, supra; Cruse, supra.*

Fotopoulos next argues that the state combined evidence of illegal weapons and counterfeiting and set out to assassinate his character. The record demonstrates that there were no objections to the referenced comments, so the claim has been waived.[6] Further, the state did not, as Fotopoulos alleges, "stoop to a campaign of character assassination to obtain a conviction". The state introduced evidence which bore on the credibility of the defendant, and the fact that the defendant elected to voluntarily embellish this evidence with statements like passing counterfeit money is fun, certainly cannot be held against the state. The jury was entitled to hear all evidence bearing on the credibility of this witness.

POINT 4

FOTOPOULOS FAILED TO PRESERVE BELOW HIS CLAIM THAT THE TRIAL COURT ERRED IN PERMITTING THE STATE TO IMPEACH HIM WITH PRIOR TESTIMONY; NEITHER ERROR NOR

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[6] Fotopoulos alleges in a faotnote that one line of inquiry bordered on, if not exceeded, improper comment on his right to remain silent, but unfortunately there was no objection. There was no basis for an abjection as Fotopoulos had voluntarily signed a right's waiver (R 2402).

PREJUDICE HAS BEEN ALLEGED OR DEMONSTRATED.

Fotopoulos claims that the trial court erred in permitting the state to impeach him with testimony given at a prior hearing where the state failed to provide a copy of the "statement" to counsel and where counsel was not afforded the opportunity to challenge the voluntariness of the statement. He contends that the trial court should have permitted him and counsel to read and review the transcript so that he could refresh his recollection and counsel could challenge the voluntariness of the statement. The record demonstrates that there was no request for an opportunity to review or challenge the former testimony, so the instant claim is not cognizable on appeal. *Bertolloti v. Dugger*, 514 So.2d 1095 (Fla. 1987).

In any event, Fotopoulos has failed ta state a cognizable claim for relief as there is no allegation or demonstration of prejudice. 9924.33, Fla. Stat. (1989). Fotopoulos simply claims that the trial courts alleged error deprived his counsel of the opportunity to present the argument now presented. In the first place, this court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law. *Lucas v. State*, 376 So.2d 1151 (Fla. 1979). Further, the lack of an opportunity to present an argument, particularly in the absence of a demonstration that counsel would have prevailed, does not amount to the deprivation of any substantial right. Finally, Fotopoulos has failed to allege or demonstrate how he

was prejudiced by the limited impeachment with testimony from the prior proceeding. Even if error occurred, it was harmless as there is no possibility that the verdict was affected.

POINT 5

THE TRIAL COURT WAS NEVER APPRISED OF AN ALLEGED DISCOVERY VIOLATION AND THERE WAS NO DISCOVERY VIOLATION.

Fotopoulos claims that the trial court had an absolute duty to conduct a *Richardson*[7] hearing when advised by defense counsel of a possible violation of Florida Rule of Criminal Procedure 3.220 (b)(1)(iii). The trial court in the instant case was never apprised of a possible discovery violation; counsel simply stated that he was not provided with a copy of the transcript, and after the prosecutor stated that it was an official court record available to the defense and counsel was aware that his client had been in court that day, counsel simply stated for the record that he was not Fotopoulos' counsel that day (R 2373-74). Counsel acknowledged that he had a copy of the transcript in his hand, the trial court told the prosecutor to proceed, and no further objection was interposed (R 3274).

A *Richardson* inquiry is necessary only when there is a discovery violation and an objection based on the alleged violation. *Bush, v. State,* 461 So.2d 936 (Fla. 1984). Before it can be said that reversible error has automatically occurred because no inquiries were made, there must be a clear showing of the need for a *Richardson* hearing, *Braze11 v. State,* 570 So.2d 919 (Fla. 1990). The burden is on the defense to raise a timely objection and

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[7] Richardson v. State, 246 So.2d 771 (Fla. 1971).

thereby allow the trial court to make inquiry into all of the surrounding circumstances and then specifically rule on the issue. *Carillo v. State,* 382 So.2d 429 (Fla. 3d DCA 1981), citing *Lucas v. State, 376* So.2d **1149** (Fla. **1979).** Appellee contends that counsel's acquiescence in the prosecutor's statement that this was not discovery material, and further failure to object when the prosecutor was instructed to proceed was not sufficient to apprise the trial court of a need for any further inquiry. ***See,*** ***Lucas, supra*** (defense counsel deferred to trial court's statement of applicable law and reviewing court would not indulge in presumption that trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law); ***Delmarco v. State,*** 406 So.2d 1169 (Fla. 1st DCA 1981) (trial argument was not sufficient to apprise trial court of discovery violation and reviewing court would not be persuaded to extend ***Richardson*** reasoning to require that the trial judge act as defendant's advocate).

Further, the record is sufficient to demonstrate that there was no discovery violation and thus no need for further inquiry. ***See, Freeman v. State,*** **494** So.2d *270* **(Fla.** 1986) ***(Richardson*** hearing is not required in the absence of a discovery violation). "Labels are convenient, but they sometimes mislead by their simplicity." ***Carter v. State,*** **485** So.2d **1295 (Fla.** 4th DCA 1986). Fotopoulos has cited no authority for the proposition that the discovery rule requires the prosecutor to furnish the defense with copies of transcripts of all pretrial proceedings, and to find such would extend the requirements rule 3.220 far beyond their intended

purpose. The discovery rule was never intended to furnish a defendant with a procedural device to escape justice. *Richardson, supra* at 774. Contrary to Fotopoulos assertion, the rule does not require the prosecuting attorney to disclose all information within his possession and control. The state is not required to prepare the defense's case, *Medina v. State,* 466 So.2d 1046 (Fla. 1985), and a defendant should not be permitted to employ pretrial procedures so as to require the state attorney to prepare his case for him or disclose documents which are readily available to him. *State v. Coney,* 272 So.2d 550 (Fla. 1st DCA 1973).

The same trial court judge presided over the hearing at issue, appointed defense counsel, and presided over trial. The order appointing counsel specifically states that a hearing was held (R 3467). Thus, counsel was aware (as was Fotopoulos), and the trial court knew he was aware that such hearing had been conducted, and could have obtained a transcript of it. Fotopoulos is attempting to pervert the requirements and intent of the discovery rule to escape justice and such attempt should be summarily rejected.

POINT 6

FOTOPOULOS HAS FAILED TO ALLEGE OR DEMONSTRATE REVERSIBLE ERROR.

Fotopoulos claims that the cumulative errors committed require that he be awarded a new trial, and sets forth a potpourri of alleged errors. The purpose of briefs and arguments is to present to the court in concise form the points and questions in controversy, and by fair argument on the facts and

law of the case to assist the court in arriving at a just and proper conclusion, and to notify apposing counsel of the questions presented and the authorities relied on. *State v.* ***A.D.H.,*** ***429*** So.2d ***1316*** (Fla. 5th DCA ***1983).*** ***See also, Duest v. Dugger,*** 555 So.2d ***849*** (Fla. 1990). Alleged errors relied upon for reversal must be clearly, concisely, and as separate points on appeal. ***Rodriguez v. State,*** *502* So.2d 18 (Fla. ***3d*** DCA 1987); ***Singer v. Borbua,*** ***497 So.2d 279 (Fla. 3d*** DCA ***1986).*** When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy. *Polyglycoat* ***Corporation v. Hirsch Distributors,*** ***Inc.,*** ***442*** So.2d 958 (Fla. 4th ***DCA*** 1984). The duty rests upon the appealing party to make error clearly appear, and an appellant does not discharge this duty by merely posing a question with an accompanying assertion that it was improperly answered in the court below and then dumping the matter in the lap of the appellate court for decision. Lynn *v.* City *of* ***Fort Lauderdale,*** ***81 So.2d 511*** (Fla. ***1955).*** Appellee submits that the presentation of numerous alleged errors in one point is improper. In any event, as will be demonstrated, ***the*** bulk of these claims were either not preserved, ***see, Sochor v. State,*** *580* So.2d 595 (Fla. 1991), are insufficiently argued, and in sum are without merit either individually or in combination, so relief is not warranted. ***See,*** ***Burns v. State,*** 16 F.L.W. 389 (Fla. May 16, ***1991).***

Fotopoulos first claims that ***the*** ability (which appellee assumes should read inability) to prepare properly for the cross-examination and follow-up investigation of the deposition answers

of Hunt deprived him of a fair trial. Counsel never requested a continuance and specifically stated that he was ready for trial (R 27, 511), so this claim has not been preserved. Further, Fotopoulos has failed to allege anything additional that could have been done so prejudice has not been demonstrated.

Fotopoulos next claims that the trial court erred in permitting the state to elicit irrelevant background information from Hunt. The record demonstrates that after the prosecutor asked Hunt about her father, defense counsel objected and the trial court stated that it considered a couple of questions on background okay but if it went much further the objection would be sustained (R 693). There was no further objection to the testimony now referenced by Fotopoulos, so the claim is not preserved. *Bertolloti, supra.* Further, the case cited by Fotopoulos is inapplicable. Simply because the trial court properly precluded certain questions of the defendant in that case does not mean that asking Hunt background questions in this case was error, particularly in the absence of an objection.

Fotopoulos next claims that the trial court erred in permitting "repeated references" to weapons. As Fotopoulos has set forth no record cites to support this claim, appellee submits it is not cognizable and must be considered waived. Likewise, Fotopoulos' bald assertion that this evidence became the "feature of the trial" is insufficient to demonstrate prejudice. *A.D.H., supra;* Lynn, *supra.*

Fotopoulos next claims that the state improperly injected the issue of homosexuality into the trial by suggesting through

witnesses that he and Kouracos had a homosexual relati nship. This argument was never presented to the trial court so it is not cognizable on appeal. *Bertolotti, supra.* Further, while there was an objection during the testimony of Mrs. Kouracos that was sustained, there was no motion to strike or request for a curative instruction or mistrial, so the issue has not been preserved. *Riechmann v. State,* 581 So.2d 133 (Fla. 1991). Kouracos was asked on cross-examination whether he found his way into the Fotopoulos bedroom within 24 hours of Lisa Fotopoulos being shot, and defense counsel objected on the basis of relevancy. The trial court indicated the objection would be sustained unless relevancy could be shown, and after the prosecutor stated he was offering it to show the bias of the witness there was no further objection. Before proceeding, the prosecutor even specifically asked if he was being allowed to ask the question, and there was no further comment by the defense. Appellee submits that this constitutes waiver of the objection. *Id.* In any event, prejudice has not been demonstrated, because unlike the case cited by Fotopoulos, the prosecutor did not repeatedly ask, over defense objection, pointed questions about the defendant's sleeping arrangements, and in fact on direct Kouracos had explained all of the circumstances surrounding this single incident.[8] The

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[8] Kouracos has testified that the preceeding day he had worked at the Greek Festival all day, then went and "partied" at a friend's house until close to 3:00 a.m. Several people **became** concerned about Fotopoulos being alone so Kouracos and Lisa's cousin went over and sat **up** all night at the Paspalakis home. Kouracos took the cousin home about 5:30 or 6:00 a.m., returned to the Paspalakis home because he was worried about Fotopoulos, and fell asleep on the couch. Mrs. Paspalakis came in and woke him up, and he went upstairs to talk to Fotopoulos. Fotopoulos was getting up so he laid down in **the** bed to take a nap (R 2180-84).

testimony showed nothing more than that Kouracos and Fotopoulos, as well as Lisa Fotopoulos, were very close friends.

Fotopoulos next claims that the state made a feature of his sexual life, but again this argument was never presented to the trial court, and defense counsel acknowledged that certain questions were proper in response to Fotopoulos' assertions that he was a good husband (R 2391), so the claim is not cognizable. In any event, as defense counsel acknowledged, this subject was a proper area for exploration where the defense theory was that Fotopoulos had a good marriage and no reason for killing his wife. *McCrae, supra.* One of the purposes of cross-examination is to weaken, test, or demonstrate the impossibility of the testimony of the witness on direct examination. *Steinhorst v. State,* 412 So.2d 332, 337 (Fla. 1982). Further, it was Fotopoulos who first brought up the collection of pictures he "had in the garage", to which he added the videotape which he claimed he thought was a "surprise" from Hunt, depicting her affairs with women. Fotopoulos stated that the last thing on his mind the morning after Lisa was shot was looking at naked women (R 2357).

Fotopoulos' remaining claims pertain to his cross-examination and are addressed in Point 3, *supra.*

POINT 7

THERE WAS NO OBJECTION TO EITHER THE JOINT PENALTY PHASE OR THE INSTRUCTIONS AS GIVEN AND NO REQUEST FOR SPECIAL INSTRUCTIONS SO THE CLAIM IS BARRED; ERROR HAS NOT BEEN DEMONSTRATED.

Fotopoulos claims that the error in denying his motions for severance was compounded during the penalty phase since the jury was instructed on five aggravating factors due to the Chase murder but only three applied to the Ramsey murder. While Fotopoulos states that he renewed his severance motion argument at sentencing, the record demonstrates that this "renewal" was nothing more than a comment that was made during argument at the trial court sentencing proceeding in regard to the application of the prior violent felony aggravating factor (R 3360). Since there was no motion for separate penalty phases and no objection to the instructions as given and no request for special jury instructions as to each murder, the instant claim is not cognizable on appeal. *Sochor v. State*, 580 So.2d 595 (Fla. 1991); *Bertolotti v. Dugger*, 514 So.2d 1095 (Fla. 1987).

Even if the claim is cognizable, relief is not warranted. As demonstrated in Point 2, the trial court did not abuse its discretion in denying Fotopoulos' motions to sever. At the penalty phase, the jury was instructed that the aggravating circumstances it could find were limited to those "established by the evidence" (R 3324-25), and was given a separate verdict form for each murder (R 3328-29). There is nothing to indicate that the jury was led or left to believe, as Fotopoulos contends, that all five aggravatoss applied to both murders. *See, e.g., Espinosa v.*

State, 16 F.L.W. 489 (Fla. July 11, 1991) (nothing in jury instructions or elsewhere indicates that the jury's deliberations with respect to whether defendant should be executed for victim's murder was improperly influenced by evidence concerning attack on attempted murder victim). This is particularly true in light of the fact that the prosecutor argued that three factors were applicable to the Chase murder and five were applicable to the Ramsey murder (R 3307-8).

The cases relied upon by Fotopoulos are readily distinguishable. In *Floyd v. State,* 569 So.2d 1225 (Fla. 1990) and *Stewart v. State,* 549 So.2d 171 (Fla. 1989), this court held that it is not error to refuse to instruct the jury on all statutory aggravating factors so that the absence of many of those factors can be argued as a reason for imposing a life sentence. In *Omelus v. State,* 584 So.2d 563 (Fla. 1991), this court held that error in instructing the jury on an inapplicable aggravating factor could not be found harmless where the prosecutor had forcefully argued the finding of such factor to the jury. As stated, the prosecutor never argued that all five factors were applicable to both homicides and specifically argued only three in support of the Ramsey murder, so even if the claim is preserved and error occurred, it is harmless at worst where there is nothing to indicate that the jury was confused or affected.

POINT 8

THERE WAS NO OBJECTION TO STATEMENTS ADMITTED DURING THE PENALTY PHASE SO THE CLAIM HAS BEEN WAIVED; THE TRIAL COURT PROPERLY FOUND THAT THE RAMSEY MURDER WAS COMMITTED TO PREVENT LAWFUL ARREST.

Fotopoulos claims that the trial court erred in permitting the state to introduce hearsay statements during the penalty phase which he did not have the opportunity to rebut, and that this testimony was used by the trial court in support of an aggravating factor. The record demonstrates that there was no objection to this testimony, so the claim has been waived. ***Sochor,*** *supra; Bertolotti, supra.* In addition, testimony that Ramsey was blackmailing Fotopoulos was admitted during the guilt **phase** without objection (R 689, **1741-42, 1821-25),** was brought **out** by the defense curing the guilt phase (**R** 1802-03), and was argued by the defense during penalty phase closing (R 3315), ***so*** Fotopoulos should not now be **heard** to complain that the admission of such testimony was error. ***See,*** *Farinas v. State,* 569 So.2d 425 (Fla. 1990); ***Armstrong v. State,*** **579** So.2d **734** (Fla. **1991).**

In any event, this factor was established independent of **any** possible hearsay evidence and was properly found by the trial court. **A** motive to eliminate a potential witness to an antecedent crime can provide the basis for this aggravating factor, and it is not necessary that an arrest be imminent at the time of the murder. *Swafford v. State, 533* So.2d **276 (Fla. 1988).** ***See also, Johnson*** *v. State,* **465** So.2d **499 (Fla. 1985);** *LeCroy v. State,* **533** So.2d *750* (Fla. 1988). The arrest avoidance factor can be supported by circumstantial evidence through inference from facts shown. *Id.* at **276,** n.6. In determining whether an aggravating factor has been proved the trial judge may apply a "common-sense inference from the circumstances." ***Id.*** at 277; *Gilliam v.* ***State,*** 582 So.2d 610 (Fla. 1991). The resolution of factual conflicts is

solely the responsibility and duty of the trial judge and an appellate court has no authority to reweigh that evidence. *Gunsby u. State,* **574** So.2d **1085 (Fla.** 1991). **When** a trial judge, mindful of the applicable standard of proof, finds that an aggravating circumstance has been established, this finding should not be overturned unless there is a lack of competent substantial evidence to support it. *Bryan u. State*, **533** So.2d **744** (Fla. 1988).

The operative facts that support this factor do not come from the fact that Ramsey told James and Henderson that he was blackmailing Fotopoulos, but rather come from what Fotopoulos knew and the way he reacted. James testified that Hunt had told him that Ramsey was killed because he knew "some stuff" about Fotopoulos and was trying to blackmail him (R 1741). Fotopoulos then told James that he knew that James knew some things that nobody was supposed to know about him, and that Ramsey had known those things and "chose the wrong road to go down" (R 1742). Fotopoulos' philosophy was that dead men do not tell tales (R 1879). The common sense inference from these facts, **as** found by the trial court, is that:

> Ramsey knew of the Defendant's illegal activities and planned to blackmail the Defendant, One of the dominate (sic) motives behind killing Ramsey was elimination of a witness hostile to the Defendant.

(R 3937).

Fotopoulos also claims that this aggravating factor was incorrectly found because there was more than one possible

explanation/motive for the murder. Fotopoulos refers to two possible motives Hunt may have had, but appellee submits that Hunt's possible motives are irrelevant to the findings in the instant case. Fotopoulos also refers to three "theories" behind the Ramsey murder (to have leverage over Hunt, to see if Hunt could kill, and blackmail), but none of these theories exclude, and all certainly include the fact that the reason Ramsey was selected as the victim was to eliminate him as a potential witness. This factor was properly found.

Even if for some reason this court determines that the trial court erred in finding this factor, any error is harmless at worst. The trial court specifically found that the other two aggravating factors are entitled to great weight and by themselves call for the death penalty as they overwhelm any mitigating evidence (R 3939). Death is the appropriate penalty. *See,* Jones *v. State,* 580 So.2d 143 (Fla. 1991) (trial court specifically stated that stricken circumstance was not determinative and death would have been imposed on its absence); Young *v. State,* 579 So.2d 721 (Fla. 1991) (trial court stated that mitigating evidence was outweighed by any one aggravating factor).

POINT 9

THE CLAIM IS NOT PRESERVED AND ALTERNATIVELY IS WITHOUT MERIT.

Fotopoulos claims that the trial court erred in not instructing the jury pursuant to *Jackson v. State,* 502 So.2d 409 (Fla. 1986), as to the Ramsey murder. There was no objection to

the instructions as given and no request for a special instruction so the claim is not cognizable on appeal. *Sochor, supra.* In any event, the claim is without merit as the instant case is distinguishable. Jackson involved a felony murder, and this court set forth an instruction to ensure a defendant's right to an *Enmund*[9] factual finding, which is whether a defendant convicted of felony murder actually killed or attempted to kill or contemplated that life would be taken. *Jackson* at 412-13. Appellee submits that the jury verdict of premeditated first degree murder for the Ramsey killing vitiated the need for any such instruction as it clearly reflects a finding that Fotopoulos actually killed or contemplated that life would be taken.

POINT 10

THE RAMSEY MURDER WAS COMMITTED IN A COLD, CALCULATED AND, PREMEDITATED MANNER **WITHOUT ANY PRETENSE OF** MORAL OR LEGAL JUSTIFICATION.

Fotopoulos quotes one phrase from the trial court's findings in support of the aggravating factor cold, calculated and premeditated,[10] and claims that the trial court applied the wrong standard, in that "apparently" is not the equivalent of proof beyond a reasonable doubt. Fotopoulos further contends that since the evidence does not establish beyond a reasonable doubt that Ramsey was alive when he shot him, this factor was

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9 Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

10 "While Ramsey was *apparently* still alive the defendant administered a coup de grace with an AK-47."

improperly found. The trial court's finding, in its entirety, is:

> This factor is established. The victim was lured to the woods under a ruse. The killing was staged like a production. The Defendant held a light and a camera. When the equipment was thought to be in focus, Ramsey was hot three times in the chest by co-defendant Deidre Hunt. After a pause Hunt shot Ramsey in the head. While Ramsey was apparently still alive the Defendant administered a coup-de-grace with an AK-47. This killing was an execution done with greatly heightened premeditation.

(R 3937). The fact that Ramsey may not have still been alive when Fotopoulos administered the "coup de grace" does nothing to minimize or vitiate his heightened premeditation before the murder occurred. As this court recently stated:

> This circumstance requires proof of heightened premeditation, that is, "the evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit murder before the crime began." *Porter v. State*, 564 So.2d 1060, 1064 (Fla. 1990); *see also, e.g., Rogers*, **511** So.2d at **533.** There is **no** evidence to reasonably suggest that Shere and Demo had any motive other than to kill Snyder. They discussed killing Snyder before the murder, they obtained a shovel to bury the body, then they took Snyder to an isolated location where Snyder was shot ten times. *See, e.g., Francis*, **473** So.2d at 677; *Lara*, 464 So.2d at 1173.

***Shere v. State*, 579 So.2d 86, 95** (Fla. 1991). Likewise, there is no evidence to reasonably suggest that Fotopoulos had any motive other than to kill Ramsey. He packed up his guns, video camera and light, then took Ramsey to an isolated location where he was tied to a tree and shot five times. The evidence in this case

clearly proves beyond any reasonable doubt that Fotopoulos planned and arranged to commit murder before the crime began. *See also, Cruse v. State,* 16 F.L.W. 701 (Fla. October 24, 1991); *Ponticelli v. State,* 16 F.L.W. 669 (Fla. October 10, 1991); *Zeigler v. State, 580* So.2d 127 (Fla. 1991); *Asay v. State,* 580 So.2d 610 (Fla. 1991); *Valle v. State,* 581 So.2d *40* (Fla. 1991).

POINT 11

THERE WAS NO OBJECTION TO EITHER THE JOINT PENALTY PHASE OR THE INSTRUCTIONS AS GIVEN AND NO REQUEST FOR SPECIAL INSTRUCTIONS SO THE CLAIM IS BARRED; ERROR HAS NOT BEEN DEMONSTRATED.

Fotapoulos contends, as in Point 7, that error in denying his motions to sever was compounded in the penalty phase, and claims that for the same reasons as set forth in that point he must also be awarded a resentencing for the Chase murder. As demonstrated in Point 7, *supra,* the claim is not cognizable and even if it is error has not been demonstrated. Appellee would simply add that all five aggravating factors that the jury was instructed on are applicable to the Chase murder, so there is no way that prejudice can be demonstrated so relief is not warranted in any event.

POINT 12

THE TRIAL COURT CORRECTLY FOUND THAT THE CHASE MURDER WAS COMMITTED DURING THE COURSE OF A BURGLARY.

Fotopoulos claims that the aggravating factor of during the course of burglary was improperly found since Chase was "invited" into the premises so the essential element of non-consent is lacking. Fotopoulos recognizes the contrary authority of *K.P.M.*

v. State, 446 So.2d **723** (Fla. 2d **DCA** 1984), where the court held that unauthorized consent (from the son of the owners and an occupant of the burglarized home) will not operate to support dismissal of a burglary charge. Likewise, appellee submits that Fotopoulos, the son-in-law of the owner and an occupant of the burglarized home, and no authority to consent to entry into the home for the purpose of the killing of another occupant. Appellee would also point out that Fotopoulos has not attacked his conviction for burglary, which clearly supports this aggravating factor, as the trial court found. ***Perry v. State, 522*** So.2d 817 (Fla. 1988). Even if this factor was improperly found, any error is harmless at worst since the trial court found that two factors by themselves (prior violent felony and cold, calculated and premeditated) overwhelm the proffered mitigation. ***Jones, supra;*** Young, ***supra.***

POINT 13

THE TRIAL COURT PROPERLY FOUND THAT THE CHASE MURDER **WAS COMMITTED** FOR **PECUNIARY GAIN** AND **THAT IT WAS COMMITTED IN A COLD, CALCULATED** AND **PREMEDITATED MANNER.**

Fotopoulos claims that the finding of both pecuniary gain and cold, calculated and premeditated constitutes improper doubling of the same aggravating aspect of the offense. Fotopoulos recognizes the contrary authority in *Echols v. State,* **484** So.2d 568 (Fla. 1985), and has set forth no compelling reason **why** it is not applicable to his case. Fotopoulos, like Echols, was motivated by a desire for pecuniary gain and the murder was likewise planned and carried out in a cold, calculated and

premeditated manner, and there is no reason why the facts in this case cannot support multiple aggravating factors which are separate and distinct and not merely restatements of each other. *Id.* at 575. ***See** also, Buenoano v. **State**,* **527** So.2d **194** (Fla. **1988**).[11]

While Fotopoulos claims that virtually every defendant who kills for pecuniary gain starts with two aggravating factors, this is not true as robbery and pecuniary gain cannot be doubled as they are based on the same conduct. The legislature has set forth the factors which set certain murders apart from others, and in doing so has clearly recognized that a cold-blooded, calculated execution for pecuniary gain is a more aggravated crime than a robbery-gone-bad, Even if for some reason this court determines that these factors were improperly doubled, a new sentencing is not required where the trial court found that the two factors of prior violent felony and cold, calculated and premeditated outweighed all proffered mitigation. ***Jones, supra; Young, supra.***

POINT 14

THE **TRIAL** COURT **PROPERLY FOUND THAT** THE **CHASE** MURDER **WAS COMMITTED** FOR **PECUNIARY GAIN** AND **TO AVOID ARREST.**

Fotopoulos claims that the trial court improperly used the same aspects of the crime to conclude that the Chase murder occurred for the purpose of eliminating a witness and for pecuniary gain, but fails to demonstrate how so this conclusory

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[11] While this specific argument was not presented in that case, this court found that two aggravating factors were applicable where the defendant systematically poisoned her husband for insurance proceeds.

allegation is legally insufficient. The trial court found that the pecuniary gain aggravator is supported by evidence that Fotopoulos hoped to receive life insurance proceeds upon his wife's death, and the avoid arrest aggravator is supported by evidence that Fotopoulos shot Chase to eliminate him as a witness to his wife's murder (R 3941). As in *Echols, supra*, there is no reason why the facts in this case cannot support multiple aggravating factors which are separate and distinct and not merely restatements of each other. Fotopoulos concocted a plan where his wife would be murdered, the only witness besides himself would be killed, he would collect insurance proceeds, and appear **as** the sad, hero/widower. While Fotopoulos claims that there cannot be two primary motives and one must cancel the other, to hold such would permit Fotopoulos to benefit from his own deviousness.

Even if error occurred, it is harmless where the trial court found that two aggravating factors outweigh the mitigating evidence, **so** the merging of these two factors would not affect the outcome. ***Jones,*** *supra;* Young, ***supra.*** Fotopoulos also states in a footnote that the jury was not properly instructed, but there was no objection below so the claim is not cognizable and even if it were this conclusory allegation is legally insufficient. In any event, where evidence of an aggravating factor has been presented an instruction on that factor is required. *Bowden v.* ***State,*** **16** F.L.W. 614 (Fla. September 12, 1991).

POINT 15

THE AGGRAVATING CIRCUMSTANCE COLD, CALCULATED AND PREMEDITATED IS NOT UNCONSTITUTIONAL,

Fotopoulos claims that the aggravating factor cold, calculated and premeditated is unconstitutionally vague, overbroad, arbitrary and capricious on its face and as applied in violation of the United States and Florida Constitutions. This claim was not presented to the trial court so any claims as to the constitutional application to a particular set of facts has been waived. *Trushin v. State*, 425 So.2d 1126 (Fla. 1982). In any event, as Fotopoulos acknowledges, this court has consistently rejected this claim. *Brown v. State*, 565 So.2d 304 (Fla. 1990); *Klokoc v. State*, 16 F.L.W. 603 (Fla. September 5, 1991).

POINT 16

FLORIDA'S DEATH PENALTY IS CONSTITUTIONAL.

Fotapoulos claims, for a variety of reasons, that Florida's death penalty is unconstitutional. None of these grounds were ever presented to the trial court so they are not cognizable on appeal, and appellee respectfully requests this court apply its procedural bar rather than finding that the claims are without merit. Further, as stated in Point 6, *supra*, the presentation of numerous alleged errors in one point is improper. Out of an abundance of caution, the claims will be briefly addressed.

Fotopoulos takes issue with the jury instruction on heinous, atrocious or cruel, but has no standing to raise this issue as his jury was not instructed on it nor was it found by the trial court. Fotopoulos' challenges to the jury instructions

on cold, calculated and premeditated; avoid arrest; and pecuniary gain have been waived by failure to object below.

Likewise, Fotopoulos never claimed in the trial court that a verdict (i.e., life recommendation) by a bare majority violates the due process and cruel and unusual punishment clauses so the claim is not cognizable. In any event, a jury recommendation is not a verdict, and in Florida it is the judge and not the jury who is the ultimate sentencer. ***See,*** *Spaziano* ***v.*** *Florida,* **468 U.S. 447 (1984);** *Hildwin* ***v.*** *Florida,* 109 S.Ct. *2055* **(1989).**

Likewise, Fotopoulos never objected to the jury instruction on the role of the jury, *so* the claim is waived. In any event, *Caldwell v.* Mississippi, **472 U.S. 320** (1985), is not applicable in Florida. *Combs v.* ***State,*** 525 So.2d 853 (Fla. **1988).**

Likewise, Fotopoulos never complained about counsel below, and sets forth no specific omissions in the instant claim **so** it is not cognizable. In any event, review of counsel's performance is readily available to all death sentenced inmates pursuant to Florida Rule of Criminal Procedure 3.850.

Likewise, Fotopoulos never presented any claim regarding the role of the trial judge to the trial court so the claim has been waived. In any event the claim is without merit. *See, Hildwin,* ***supra.***

Likewise, Fotopoulos never presented to the trial court any claim that the selection of sentencers in Florida is racially discriminatory so it is waived. In any event, Fotopoulos is **a** white defendant who was sentenced to death by a white judge and certainly cannot claim that he was sentenced on the basis of racial factors.

As Fotopoulos acknowledges, Florida's system of appellate review has been approved. *Proffitt v. Florida,* **428 U.S. 242 (1976);** *Spaziano, supra. See also, Clemons v. Mississippi,* **110 S.Ct. 1441 (1990).** While Fotopoulos claims that Florida has institutionalized disparate application of the law in capital sentencing through the use of the contemporaneous objection rule, all of the cases he cites apply the contemporaneous objection rule so no disparity has been shown. *See, Dugger v. Adams,* **109** S.Ct. **1211 (1989).** Fotopoulos has no standing to challenge Florida's override procedure where he did not receive a life recommendation and his **vague** references to "other legal doctrines" does not constitute a cognizable claim.

There was no request for a special verdict on aggravating and mitigating circumstances so the *claim* is waived, and is without merit as well. *See, Hildwin, supra.* The remainder of Fotopoulos' claims were never presented to the trial court and are not cognizable, and as Fotopoulos recognizes, they have been rejected.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully requests this court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail to Douglas N. Duncan, Wagner, Nugent, Johnson, Roth, Kupfer and Rossin, P.A., 505 South Flagler Drive, P.O. Box 3466, West Palm Beach, Florida 33402; and to Philip G. Butler, Jr., The Commerce Center, 324 Datura Street, Suite 312, West Palm Beach, Florida 33401, this 6th day of December, 1991.

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