IN THE SUPREME COURT OF FLORIDA

JEROME M. ALLEN,

Appellant,

v. CASE NO. 79,003

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

POINT 1: Florida's statutory scheme is distinguishable from Oklahoma's juvenile transfer statute. The legislative history behind Florida's juvenile transfer statute and the plain language of the statute demonstrate that the legislature clearly contemplated that those under the age of sixteen would be death eligible upon conviction for an offense punishable by death.

POINT 2: Allen did not attack the constitutionality of the death penalty under the Florida Constitution in the trial court so the claim is not cognizable on direct appeal. Even if the claim is cognizable, Allen has failed to demonstrate that the punishment is "unusual" so as to warrant relief.

POINT 3: Allen was tried by a fair and impartial jury, and his claim that his jury was conviction prone has consistently been rejected.

POINT 4: The trial court correctly denied Allen's motion to dismiss indictment on the basis of jury composition. Allen was entitled to a jury drawn from a fair cross section of the community, and he has cited no authority for the proposition that he is entitled to a jury composed of fifteen year olds.

POINT 5: Allen's statements were properly admitted. There was no coercive police activity and Allen voluntarily and knowingly waived his rights. Error, if any was harmless. The trial court properly admitted the conversation between Allen and Roberson in the holding cell as there was no reasonable expectation of privacy.

POINT 6: The trial court did not abuse its discretion in excusing two jurors for cause. The record supports the trial court's conclusion that the jurors were equivocal in their responses and that the jurors may have been unable to follow the law.

POINT 7: The trial court properly admitted the evidence in question as it was relevant to demonstrate Allen's connection with all of the crimes charged. Error, if any, was harmless.

POINT 8: The trial court did not abuse its discretion in denying a mistrial when a state witness testified on cross examination that he had dealt with Allen before. Defense counsel could have anticipated the response in light of the previous proceedings. In any event, a curative instruction was given so any error was either cured or harmless.

POINT 9: The jury was properly instructed. The evidence supported an instruction on possession of recently stolen property, an instruction on circumstantial evidence would have been confusing and the standard instructions were sufficient, there was no evidence to support an instruction on independent act of another and such an instruction would have been erroneous, and there was no error in not instructing the jury on third degree felony murder where Allen was never charged with grand theft.

POINT 10: The trial court did not abuse its discretion in denying Allen's motion for new trial or motion for continuance of the penalty phase. The evidence at issue would not have affected the outcome. Allen had the evidence and utilized it at the penalty phase.

POINT 11: The trial court did not abuse its discretion in denying Allen's motion to disqualify the public defender and motion to continue sentencing. No conflict has been demonstrated.

POINT 12: The trial court did not abuse its discretion in admitting Roberson's statement at the penalty phase where Roberson was unavailable and the statement contained sufficient indicia of reliability to meet Confrontation Clause standards. Error, if any, was harmless.

POINT 13: The trial court did not abuse its discretion in denying a mistrial on the basis of a comment by a state witness on cross examination at the penalty phase. Error, if any, was harmless.

POINT 14: Allen's claims regarding prosecutorial comment were not adequately preserved. Even if preserved relief is not warranted since the first comment related to a necessary aspect of the factual situation, the second comment was quickly corrected, the third was a permissible comment, and the fourth could in no way be construed as Allen alleges. Error, if any, is harmless.

POINT 15: The trial court did not abuse its discretion in not instructing the jury on the statutory mitigating factor of minor participation. There was no evidence to support the instruction.

POINT 16: The trial court correctly found that the murder was committed in a cold, calculated and premeditated manner. This was not simply a robbery gone bad, but was a robbery with an intent to leave no witnesses.

POINT 17: The trial court correctly weighed the aggravating and mitigating factors. It is up to the trial court to determine the weight to be accorded to particular factors, and reversal is not warranted simply because the appellant disagrees. The jury recommended death, and death is appropriate when compared to similar cases.

POINT 18: This court has consistently rejected the constitutionality arguments set forth in Allen's brief.

ARGUMENT

POINT 1

THE UNITED STATES SUPREME COURT OPINION RELIED UPON BY ALLEN IS NOT APPLICABLE TO FLORIDA WHERE FLORIDA'S STATUTORY SCHEME IS DISTINGUISHABLE FROM OKLAHOMA'S AND THE LEGISLATIVE HISTORY OF FLORIDA'S STATUTES DEMONSTRATES THAT THE LEGISLATURE CONTEMPLATED THAT JUVENILES COULD RECEIVE THE DEATH PENALTY.

Allen claims that *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), requires this court to declare that the execution of a person who was fifteen years old at the time of his crime violates the Eighth and Fourteenth Amendments to the United States Constitution. Appellee would first point out that *Thompson* is a plurality opinion, and plurality opinions have frequently been criticized because they fail to give any guidance to lower courts. *See*, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756 (1980); Note, *Plurality Decisions and Judicial Decisionmaking*, 94 Harv. L. Rev. 1127 (1981). The *Thompson* opinion demonstrates that such criticisms are indeed valid, and an analysis of that opinion demonstrates that there is no majority reasoning to guide lower courts, so it cannot constitute binding precedent on Florida courts.

In *Thompson*, a four Justice[1] plurality concluded that it would offend civilized standards of decency to execute a person less that sixteen years old at the time of his or her offense;

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[1] Stevens, Brennan, Marshall, and Blackmun, JJ.

the concurring Justice[2] declined to establish a national consensus as a matter of law; and three dissenting Justices[3] determined that no such consensus existed. Thus, there is no majority reasoning for the result in *Thompson*, and this court has held that an aggregation of separate judicial opinions does not produce law changing precedent. *See, Witt v. State*, 387 So. 2d 922 (Fla. 1980), where this court stated that *Lockett v. Ohio*, 438 U.S. 587, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) is not a precedent since an aggregation of judicial opinions in a case does not produce law changing precedent.

Likewise, utilization of the "narrowest grounds"[4] approach does not support a finding that *Thompson* is valid precedent, because the "narrowest grounds" are in one Justice's concurring opinion. Further, those "narrow grounds" which Justice O'Connor based her opinion on demonstrate that the issue is still open for determination in Florida. Justice O'Connor determined that while the Oklahoma legislature provided that fifteen year old murder defendants may be tried as adults in some circumstances, there was a considerable risk that it did not realize its actions would have the effect of rendering fifteen year olds death eligible, or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age

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[2] O'Connor, J.

[3] Scalia, J., Rehnquist, C.J., and White, J.

[4] *See, Gregg v. Georgia*, 428 U.S. 153, 169, n. 15, 96 S.Ct. 2909, 2923 n. 15, 49 L.Ed.2d 859 (1976), where the Court stated that the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds.

for death eligibility. *Thompson, supra,* at 2711 (O'Connor, J., concurring in the judgment).

The Florida legislature has not simply provided that juveniles can be processed through the adult system and treated as adults in "some circumstances". It has specifically mandated that when an indictment is returned against a child of any age for a violation of Florida law *punishable by death* or life imprisonment, the child *shall* be tried and handled in *every respect* as if he were an adult on the offense *punishable by death* or by life imprisonment. §39.022(5)(c), Fla. Stat. (1991) (emphasis supplied). The Florida legislature has further mandated that

> If the child is found to have committed the offense *punishable by death* or life imprisonment, the child *shall* be sentenced as an adult.

Id. (emphasis supplied). In analyzing this language, this court stated:

> The words 'every respect' could not be clearer and can only be read as a declaration of legislative intent that persons under eighteen years may be subject to the same penalty as an adult. This has been the long-standing law in Florida.

LeCroy v. State, 533 So. 2d 750, 756 (Fla. 1988). The *LeCroy* court reached this conclusion on the basis of an examination of the legislative history of Florida's juvenile statutes.

This court first recognized that after the constitution was amended in 1950 to authorize the legislature to confer criminal jurisdiction on cases involving juveniles to juvenile courts, the legislature responded by enacting chapter 26880, section 1, Laws

of Florida (1951), which was codified as chapter 39, Florida Statutes (1951). Under chapter 39, a child was defined as a person under seventeen years of age, and jurisdiction over violations of law committed by children was removed from criminal courts and placed in juvenile courts or county courts in counties where there were no juvenile courts. §§39.01, .02 Fla. Stat. (1951). Section 39.02(6) granted discretion to the juvenile court to transfer felony charges against children fourteen or older to criminal courts, except that "a child sixteen years of age or older who, if an adult, would be charged with a capital offense, *shall* be transferred (emphasis supplied). As the *LeCroy* court recognized, since 1951 "the legislature has steadily expanded the transfer of criminal charges from juvenile to criminal courts and has, similarly, expanded and reiterated its decision that juveniles charged with capital offenses be tried and handled as adults." *Id.* at 756.

The legislature amended section 39.02(6) in 1955 by deleting "sixteen years or older" and providing that *any child*, irrespective of age, indicted by a grand jury for an offense *punishable by death* or life imprisonment shall be tried in criminal court. Section 39.02(6) was further revised, and as this court noted, the legislative intent made even clearer, in 1967 and 1969 by providing:

> (c) When an indictment is returned by the grand jury charging a child of any age with a violation of Florida law punishable by death, or punishable by

> life imprisonment,[5] the juvenile court shall be without jurisdiction, and the charge shall be made, and the child shall be handled, *in every respect as if he were an adult.*

§39.02(6), Fla. Stat. (1969) (emphasis supplied).

Chapter 39 was substantially rewritten in 1973, and exclusive jurisdiction over charges against juveniles was returned to the circuit court and provisions were made whereby the court could try any child fourteen or over as an adult on *any* criminal charge. The legislature rewrote and recast section 39.02 in 1978, and provided that a child once tried as an adult would thereafter be subject to prosecution, trial, and sentencing as an adult for any subsequent criminal violations. Ch. 78-414, §3 Laws of Fla. (1978). In 1981, the legislature further amended 39.02(5) by providing that trials of offenses punishable by death or life imprisonment would include trials of any other criminal violations connected with the primary offense. The 1981 amendment also specifically provided that

> 3. If the child is found to have committed the offense punishable by death or life imprisonment, the child shall be sentenced as an adult.

Ch. 81-269 §1, Laws of Fla. (1981) (codified at 39.02(5)(c), Fla. Stat. (1981)).

The *LeCroy* court concluded, on the basis of this analysis, that it was clear that legislative action through the past 35 years has consistently evolved toward treating juvenile offenders charged with serious offenses as if they were adult criminal

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[5] The words "punishable by life imprisonment" were added in 1969. Laws 1969, c. 69-146, §1.

defendants. The court further found that it was clear that since 1951, the legislature has repeatedly reiterated the historical rule that juveniles charged with capital crimes will be handled in every respect as adults. *Id.* at 757. The *LeCroy* court stopped short of determining whether the legislature had consciously considered whether persons under sixteen could be subject to the death penalty, as that issue was not present. However, this court did specifically distinguish *Thompson, supra,* on the basis that section 39.02(5)(c) specifically provides that a child of any age indicted for a crime punishable by death or life imprisonment "shall be tried and handled in all respects as if he were an adult", and further stated that this point was reinforced by the Florida legislature's decision that age should be a statutory mitigating factor. *LeCroy* at 758.

Appellee would point to two factors that were not included in the *LeCroy* court's analysis of the legislative history which further indicate that the legislature contemplated that those under sixteen could be death eligible. The first factor is the legislature's substitution of the term "offense punishable by death" for "capital offense". The second factor is the enacting legislation of 1981, which specifically states:

> An act relating to juveniles; amending s. 39.02(5)(c), (d), Florida Statutes, 1980 Supplement; providing that a child indicted for an offense punishable by death or by life imprisonment shall be tried and handled as an adult on certain offenses; *providing for disposition of such child;* clarifying language; providing an effective date.

Ch. 81-269, Laws of Fla. (1981) (emphasis supplied). As the *LeCroy* court had noted, this is the legislation that provided that a child convicted of an offense punishable by death *shall* be sentenced as an adult.[6] Finally, the chapter relating to treatment of juvenile offenders was again substantially revised in 1990, and none of this language was amended or deleted. Ch. 90-208, Laws of Fla. (1990).

This court has found that the enactment of §39.02(5)(c) was within the scope of legislative authority, and stated that "it should be clear that a young person charged with violation of criminal law does not have an absolute right to be treated as a 'delinquent child' solely because of age." *Johnson v. State*, 314 So. 2d 573 (Fla. 1975). There is no inherent or constitutional right to preferred treatment as a juvenile offender, and a child has the right to be treated as a juvenile delinquent only to the extent provided by our legislature. *State v. Cain*, 381 So. 2d 1361 (Fla. 1980). Similarly, the Fifth Circuit has recognized

> that treatment as a juvenile is not an inherent right but one granted by the state legislature, therefore the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved. Chapter 39, Florida Statutes, grants to certain

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[6]This court again recognized that the creation of subsection (5)(c)3 specifically enumerated sentencing criteria of indicted children upon conviction, and stated:

> Children of any age who are convicted of offenses punishable by death or life imprisonment *shall* be sentencd as adults.

Duke v. State, 541 So. 2d 1170 (Fla. 1989).

> persons age eighteen or younger the right to be charged and tried as juveniles. The section does not grant that right to persons indicted by the grand jury for crimes punishable by life imprisonment or death. This is a legislative classification "entitled to a strong presumption of validity [which] may be 'set aside only if no grounds can be conceived to justify [it].'" No showing has been made that the classification is arbitrary or discriminatory. Doubtless the Florida legislature considered carefully the rise in the number of crimes committed by juveniles as well as the growing recidivist rate among this group. The legislature was entitled to conclude that the *parens patriae* function of the juvenile system would not work for certain juveniles, or that society demanded greater protection from these offenders than that provided by the system.

Woodard v. Wainwright, 556 F.2d 781 (5th Cir. 1977).

Appellee contends that the legislature has specifically decided that some fifteen year olds *may* be sentenced to death, and the judge and jury in this case decided that this appellant *should* be sentenced to death. *See, LeCroy* at 758. Appellee would also point out that the entire process which results in a death sentence is a narrowing one, with built in checks and balances at every step of the proceeding, so that this final decision is not one which has been arrived at lightly. A decision must be made as to whether to seek an indictment, a grand jury must decide to indict on the offense, the State Attorney must decide whether to seek the death penalty, the jury must convict the defendant of the offense punishable by death, the jury must return a death recommendation, the trial court must impose the sentence of death

supported by factual findings, and this court must review those findings to insure that they are supported by competent, substantial evidence and that a death sentence is proportionate.

This court long ago recognized that youthful age presents a very serious question in the context of the death penalty, but felt that this question, under the laws of Florida, was addressed to the discretion of the board of pardons. *Clay v. State,* 196 So. 462 (Fla. 1940). The three defendants in that case, all under the age of sixteen, were the last juveniles executed in the State of Florida. This court has had the opportunity to review two other cases under Florida's post-*Furman* death penalty statute where the defendants were fifteen at the time of their crimes. In *Vasil v. State,* 374 So. 2d 464 (Fla. 1979), this court remanded for imposition of a life sentence on the basis that four members of the court had to agree that death was the appropriate sentence, but the four members who voted to uphold the conviction were deadlocked on that issue. Justices Overton and Adkins would have affirmed the death sentence, Chief Justice England would have remanded for resentencing under section 921.141, Florida Statutes, and Justice Boyd would have remanded for imposition of a life sentence. In *Ross v. State,* 386 So. 2d 1191 (Fla. 1980), this court remanded the proceeding to the trial court for further reconsideration after determining that the trial court had given undue weight to the jury recommendation and had not exercised independent judgment. Significantly, neither of these cases was reversed on the basis that the death sentence could not be imposed upon someone who was fifteen years old at the time of the crime.

As the Court stated in *Stanford v. Kentucky*, 109 S.Ct. 2969 (1989),

> It is, to begin with, absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards. But even if the requisite degrees of maturity were comparable, the age-status in question would still not be relevant. They do not represent a social judgment that all persons under the designated ages are not responsible enough to drive, to drink, or to vote, but at most a judgment that the vast majority are not. These laws set the appropriate ages for the operation of a system that makes its determinations in gross, and that does not conduct individual maturity tests for each driver, drinker and voter.

109 S.Ct. at 2977. Similarly, as Justice Scalia noted in his dissent in *Thompson*:

> It is surely constitutional for a state to believe that the degree of maturity that is necessary fully to appreciate the pros and cons of smoking cigarettes, or even of marrying, may be somewhat greater that the degree necessary to fully appreciate the pros and cons of brutally killing a human being.

487 U.S. at 871 n.5, 108 S.Ct. at 2718 n.5. Allen thought nothing of stealing a car and driving it, although, under state law he was not old enough to do so, and Allen though nothing of possessing weapons and purchasing ammunition, which under state law he was not old enough to do. Allen also thought nothing of brutally murdering a man for no other reason than that he had witnessed Allen's robbery; there is no age requirement for this, but one who does it must pay the consequences as an adult.

In her concurring opinion in *Thompson*, Justice O'Connor stated:

> The day may come when we must decide whether a legislature may deliberately and unequivocally resolve upon a policy authorizing capital punishment for crimes committed at the age of fifteen. In that event, we shall have to decide the Eighth Amendment issue that divides the plurality and the dissent in this case, and we shall have to evaluate the evidence of societal standards of decency that is available to us at that time.

487 U.S. at 855, 108 S.Ct. at 2710. The Florida legislature has unequivocally stated that children indicted for an offense punishable by death shall be trial, handled, and if convicted, sentenced as adults. The *LeCroy* court did not definitively resolve whether there is some irreducible minimum age below which the death penalty may never be imposed, and the United States Supreme Court has not yet decided the Eighth Amendment issue that divided it, nor provided any majority reasoning as to why the death penalty cannot be imposed on a defendant who was fifteen at the time of his offense. Consequently, appellee contends that this court can and should find that such is appropriate under Florida law. A year after *Thompson*, Justice O'Connor recognized that Florida clearly contemplates the imposition of capital punishment on sixteen year old offenders in its juvenile transfer statute. *Stanford, supra*, 109 S.Ct. at 2981 (O'Connor, J., concurring). Federal courts have studiously avoided interfering in a state's legislative process, which is the heart of its sovereignty, and appellee submits this same statute just as

clearly contemplates that some fifteen year olds may be death eligible, and that some may be sentenced to death. Reversal is not warranted on this basis.

POINT 2

THIS CLAIM WAS NEVER PRESENTED TO THE TRIAL COURT SO IT IS NOT COGNIZABLE ON APPEAL; REVERSAL IS NOT WARRANTED.

Allen claims that the death penalty for fifteen year old offenders in Florida is so unusual as to be in violation of Article I, section 17 of the Florida Constitution. This argument was never presented to the trial court, so appellee contends that it has been waived and is not cognizable on appeal. Even constitutional errors must be raised in the trial court unless they are fundamental. *Clark v. State*, 363 So. 2d 331 (Fla. 1978). The constitutional application of a statute to a particular set of facts is a matter which must be raised at the trial level before it can be raised on appeal. *Trushin v. State*, 425 So. 2d 1126 (Fla. 1982).

Even if the claim were cognizable, relief would not be warranted. Allen's argument is nothing more than stating in different terms what the *Thompson* plurality decided, i.e., that there is a national consensus against the death penalty for those who committed their crimes while under the age of sixteen. Appellee submits that Allen has not demonstrated that there is any such consensus in Florida. Appellee would first point out that the right to be treated as a juvenile when charged with a violation of law derives from statute. The Florida Constitution states:

> (b) When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases.

Article I, §15, Fla. Const. The legislature has absolute discretion to determine whether an individual charged with a particular crime is entitled to the benefit of the juvenile justice system. *State v. G. D. M.*, 394 So. 2d 1017 (Fla. 1981). Thus, there is no right under the Florida Constitution to special treatment simply because of one's age, and as was demonstrated in Point 1, *supra*, Florida law specifically provides that children convicted of an offense punishable by death shall be treated in all respects as an adult.

Appellee would also point out that Allen's reasoning, that the death penalty is "unusual" simply because nobody who committed a crime while under the age of sixteen has been executed since 1941, is faulty. Appellee would point out that nobody who committed a crime while they were sixteen or seventeen has been executed, but this has not precluded this court from affirming the death sentence in such a case. Likewise, no women have been executed in Florida, but there has never been a finding that a death sentence for a woman is "unusual" for this reason, and appellee submits that if such were ever contemplated it would raise serious equal protection concerns.

Further, even though nobody who was fifteen at the time of the offense has been executed, at least three people of this age have been sentenced to death in the State of Florida and at least five have been sentenced to death in other states between 1984 and 1986. *See, Thompson v. Oklahoma*, 487 U.S. at 869, 108 S.Ct. at 2717 (Scalia, J., dissenting). Given the fact that a far smaller percentage of capital crimes is committed by persons under

fifteen than over fifteen, the discrepancy in treatment is much less than might seem. *See, Stanford v. Kentucky,* 109 S.Ct. at 2977. While Allen states that "the trial judges and juries of the State of Florida simply evolved beyond the death penalty for crimes while committed under the age of sixteen" since none were imposed over the decade prior to *Thompson,* such "statistic" is meaningless without the additional fact as to how many defendants in this age group were actually indicted for and convicted of a crime punishable by death. Further, assuming that there were some people in this age group who obtained a life recommendation and/or life sentence does not indicate that the death penalty should *never* be imposed, but rather, that it should *rarely* be imposed. It further indicates that juries and trial judges are taking their duties very seriously, and that if a person under the age of fifteen ultimately receives the death penalty, the consensus[7] is that it is warranted. Appellee submits that Allen's sentence does not violate Florida's constitutional prohibition against cruel or unusual punishment.

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[7] The advisory jury in Florida is the voice of the community, and its recommendation is entitled to great weight. The jury consists of twelve members drawn from a fair cross section of the community, and is in essence representative of the community consensus. This "consensus" recommended death for Allen, yet recommended life for Roberson, and the trial judges followed the recommendations in both cases. It certainly could not be suggested that Roberson's jury in any way abdicated its responsibility because it returned a life recommendation whereas there is nothing to indicate that Allen's jury, from the same community, failed to follow the trial court's instructions, including the instruction that age could be considered as a mitigating factor, in returning its recommendation. In other words, a jury's recommendation cannot be disregarded simply because one does not like it.

POINT 3

ALLEN WAS TRIED BY A FAIR AND IMPARTIAL JURY.

Allen claims that the trial court erred in permitting the state to death qualify the jury. Allen argues that the state's pursuit of the death penalty in this case was an unlawful quest, and that he was subjected to a more harsh, conviction prone jury. Allen relies on *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), but that case specifically rejected the contention that "death qualification" violates the right to a fair and impartial jury. 476 U.S. at 177, 106 S.Ct. at 1767. Allen, like McCree, does not claim that his conviction was tainted by any kinds of jury bias or partiality previously recognized as violative of the constitution, but simply argues that his jury was slanted in favor of conviction. The Court stated that it had consistently rejected this view of jury impartiality, and had squarely held that a fair and impartial jury consists of nothing more than "*jurors* who will conscientiously apply the law and find the facts". 476 U.S. at 178, 106 S.Ct. at 1767, *quoting Wainwright v. Witt*, 469 U.S. 412, 423, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). The Court further found this view (Allen's) of jury impartiality to be both illogical and hopelessly impractical.

Likewise, relief is not warranted under the Florida cases cited by Allen. Significantly, in *Smith v. State*, 568 So. 2d 965 (Fla. 1st DCA 1990), the court determined that it could not even address the issue since the defense never asked for an inquiry

into whether the state's pursuit of the death penalty had been in bad faith after all of the evidence was before the court. That court determined that this court had held that a circuit judge lacks authority to determine pretrial whether the death penalty could be imposed, so the appropriate time to present the issue to the trial court was after the trial. Allen never requested an inquiry into the state's motivation in seeking the death penalty, and there is nothing in the record to support a showing that it was in bad faith, particularly where the jury recommended death and the trial court imposed it. As demonstrated in Points 1 and 2, the state's pursuit of the death penalty was not a *per se* unlawful quest, since this court had previously declined to address the issue, had specifically noted that the case of *Thompson v. Oklahoma,* had been limited to the facts before that court, and never reached this issue despite the fact that it reviewed two cases where the defendants were fifteen years old at the time of their offenses.

Allen would like this court to ignore its prior pronouncements that a trial judge lacks authority pretrial to determine whether death is an appropriate penalty, but enforce an issue that has never been squarely addressed in this state. In this respect, appellee would also point out that Allen never sought to prohibit the trial court from proceeding with this matter, and should not now be heard to complain. Allen has neither alleged nor demonstrated that his jury was in any way not fair and impartial, and relief is not warranted.

POINT 4

THE TRIAL COURT WAS CORRECT IN DENYING THE MOTION TO DISMISS INDICTMENT ON THE BASIS OF GRAND JURY COMPOSITION.

Allen contends that the indictment should have been dismissed because it was not returned by a grand jury of his "peers", specifically, persons under the age of eighteen. A challenge to a grand jury panel may be made only on the ground that the grand jurors were not selected according to law, and a challenge may not be made after the grand jury has been impaneled and sworn. §§905.03, 905.05, Fla. Stat. (1991). Allen never challenged the composition of the grand jury prior to the time it was sworn, and he certainly would have been on notice that there would be no fifteen year olds on it, so appellee contends that the instant claim is not cognizable on appeal. *See, Dykman v. State,* 294 So. 2d 633 (Fla. 1974); *Seay v. State,* 286 So. 2d 532 (Fla. 1974).

Even if the claim is cognizable, it is without merit. While much lip service is paid to the phrase "jury of one's peers", the Sixth Amendment contemplates a jury drawn from a fair cross-section of the community. The United States Supreme Court has held that a defendant is not entitled to a jury of any particular composition. *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). Further, this "cross-section" requirement must have much leeway in application, and states are free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be said that the jury panels are representative of the community. *Id.*

In *United States v. Sneed*, 729 F.2d 133, 1337 (11th Cir. 1984), the court concluded that age was a race neutral and objective criteria relevant to determining those best qualified to serve as foreman of a grand jury. In *Willis v. Kemp*, 838 F.2d 1510, 1516-17 (11th Cir. 1988), the court found that young adults ages eighteen to 29 were not a cognizable group for purposes of Sixth Amendment cross-section claims because there was no internal cohesiveness to that age group as opposed to any other arbitrarily selected age groups. In *Wysinger v. Davis*, 886 F.2d 295, 296 (11th Cir. 1989), the court stated: "Whether viewed as a matter of law or a matter of fact, age alone does not identify an identifiable group for Sixth Amendment purposes."

Florida courts have taken basically the same position. In *Kibler v. State*, 546 So. 2d 710, 712-13 (Fla. 1989), this court quoted from *Taylor, supra*, 419 U.S. at 538, 95 S.Ct. at 702, for the proposition that a jury need not "...mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition." Allen has presented no authority, state or federal, which supports his contention that the grand jury should have been comprised of juveniles. Finally, the state certainly has a legitimate interest in excluding juveniles from grand jury service, as they are required to attend school, are not permitted to drive, and consequently have overriding concerns other than grand jury service. Relief is not warranted.

POINT 5

ALLEN'S STATEMENTS WERE PROPERLY ADMITTED.

Allen claims that statements he made before he invoked his right to counsel were involuntary and should have been excluded. The statements at issue include Allen's denial of any knowledge of a robbery or a shooting and claim that he was home by 10:00 p.m. the night of the murder. In other words, Allen claims that he involuntarily lied.

The trial court found "[t]hat miranda (sic) rights were initially waived by the defendant, and subsequently invoked during the course of the interrogation" (R 3755). A trial court's ruling comes to a reviewing court clothed with a presumption of correctness, and a reviewing court should not substitute its judgment for that of a trial court. *DeConingh v. State*, 433 So. 2d 501 (Fla. 1983). Coercive police activity is a necessary predicate to a finding that a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment. *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). The sole concern of the Fifth Amendment is governmental coercion; the voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on "free choice" in any broader sense of the word. 479 U.S. at 170, 107 S.Ct. at 523. *See also, Shere v. State*, 579 So. 2d 86 (Fla. 1991).

The record demonstrates that there was no coercive police activity and that Allen voluntarily and knowingly waived his

rights. Allen appears to claim that he was somehow "deluded" since the police checked the box marked "interview" as opposed to "arrest", and failed to inform him that the victim had died and simply referred to the matter as a "robbery and shooting". The delusion or confusion must be visited upon the suspect by his interrogators; if it originates from the suspect's own apprehension, mental state or lack of factual knowledge, it will not require suppression. *Thomas v. State,* 456 So. 2d 454 (Fla. 1984). Allen was being interviewed about a robbery and shooting, and he had left the victim for dead at the scene of that robbery and shooting. The fact that the police may not have immediately informed him that his efforts were successful, a fact which Allen probably was well aware of since the victim was blasted with a shotgun at close range, does not mean that the police in any way attempted to delude Allen as to his true position.

Allen also claims that the police action in refusing to allow his mother to see him also contributes to the involuntariness of the statement. The waiver form indicates that the interview commenced at 1:50 p.m. (R 4251), and Allen's mother did not even arrive at the police station until 3:00 p.m. (R 2450), which Detective Warren testified was right near the end of the interview. Allen was never precluded from calling his mother, and the fact that his efforts were not successful certainly cannot be attributed to police conduct. Further, Allen was permitted to contact and speak with his HRS counselor.

Allen also contends that his "tender age" is an important consideration. Youthful age, although a factor to be considered

in determining the voluntariness of a statement, will not render inadmissable a confession which is shown to be voluntary. *Ross v. State*, 386 So.2d 1191 (Fla. 1980). As Allen admits, he "obviously" has some prior juvenile offenses. The most telling information regarding Allen's experience in dealing with the police is found in statements he made to Eugene Roberson when the two were in adjacent holding cells. After Roberson told Allen that he had given a taped statement, Allen recommended that he "[t]ell 'em they force you to do that", specifically, "[t]ell the judge that they made you, they forced you" (R 4246). After Roberson asked Allen if he had made a statement, Allen replied, "[n]o! I wouldn't make no statement. You, you ain't had to make a statement. Hell no" (R 4248). It must also be remembered that Allen signed a waiver sheet, and he has failed to demonstrate that this waiver was in any way involuntary. Allen's "tender age" certainly is not a factor to be considered in this case. *See, Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979) (defendant was a 16 1/2 year old juvenile with considerable experience with the police-no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be). The record demonstrates that Allen was not intimidated or threatened in any way, nor was he subjected to extended interrogation. He simply voluntarily waived his rights and gave an exculpatory statement. The trial court correctly admitted that statement into evidence.

Even if the trial court erred, any error is harmless at worst, as the verdict would not have been affected. *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986). Evidence of Allen's conversation with Roberson, which was properly admitted, is far more incriminating than the statement at issue. *See, e.g., Kight v. State,* 512 So. 2d 922 (Fla. 1987) (admission of statement harmless error where unwarned statement was cumulative to properly admitted statements). Further, the state presented evidence that the victim said he was robbed and shot by two blacks and a white in a silver car (R 292); Maggie Sanders, who lives six houses from the Allens, had her silver car stolen around 11:10 and the shooting occurred around 11:25 (R 95, 259); Allen's palm print was found on the rear view mirror of the car (R 647); Allen had been shooting a shotgun earlier in the day and compatible ammunition to that used in the weapon that killed Dumont was found in Allen's house (R 152, 532, 664-704); a sawed off .16 gauge shotgun was found in the attic of Allen's house (R 534); Allen discussed with Roberson the fact that his "gauge" had been seized by the police (R 906-07); a canine tracked from the recovered car to Roberson's house, which is about 150 yards from Allen's house (R 501, 865). In light of this overwhelming evidence, the admission of Allen's exculpatory statement, if error, was harmless.

Allen next claims that his statements to Roberson in the holding cell should have been suppressed. As Allen recognizes, he had no expectation of privacy once he was incarcerated. *See, State v. McAdams,* 559 So. 2d 601 (Fla. 5th DCA 1990); *DiGuilio v.*

State, 451 So. 2d 487 (Fla. 1984), *approved and remanded, State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Allen's reliance on *State v. Calhoun*, 479 So. 2d 241 (Fla. 4th DCA 1985) is misplaced, as that case is distinguishable on its facts. In *Calhoun*, the defendant had asked to speak to his brother *in privacy* after having been given his Miranda warnings. He and his brother were taken to an interview room and left unattended, but there was a video camera in the ceiling. The court held that the officers had fostered a reasonable expectation of privacy so the videotape should have been suppressed.

No such reasonable expectation of privacy was present in the instant case, and as the trial court stated in its order, the defendants saw and discussed the presence of a video camera and microphone hanging over their heads in the cell and chose to ignore it (R 3756, 4244). Allen conversed only with Roberson, not with a state agent. *See, e.g., Stewart v. State*, 549 So. 2d 171 (Fla. 1989). "[T]he government has no duty to catch criminals sportingly or according to any game book rule, so long as a suspect's constitutional rights are observed." *DiGuilio*, 451 So. 2d at 490. The statements were properly admitted. *McAdams, supra; DiGuilio, supra. See also, Brown v. State*, 349 So.2d 1196 (Fla. 4th DCA 1977); *United States v. Moody*, 6 Fla. L. Weekly Fed. C1353 (11th Cir. November 6, 1992) (electronic interception of defendant talking to himself did not violate the Fifth Amendment and due process rights since there was no interrogation, compulsion or coercion).

Allen also asserts that his placement in a holding cell "arguably" violated §39.038(4), but such claim is not cognizable

as it was not asserted below. Further, Allen has failed to demonstrate that such section actually was violated, or that this would in any way require suppression of his statements even if it had been. Allen also seems to infer that the police ignored wiretapping laws, but such laws are only applicable where an individual has a justified expectation that his communications will not be intercepted, and as demonstrated, no such expectation was present in the instant case.

POINT 6

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCUSING TWO JURORS FOR CAUSE.

Allen claims that the trial court violated his rights by excusing for cause two "qualified" jurors over defense objection. Allen states that Juror Mintern never expressed an irrevocable commitment for life, and concluded that he could follow the judge's instructions. Allen further states that Juror Marshall "never came close to expressing the unyielding conviction and rigidity of opinion regarding the death penalty" (IB 80). The record refutes Allen's assertions, and demonstrates that the trial court did not abuse its discretion in excusing these two jurors.

Mr. Mintern's feelings regarding the death penalty are summarized in his following statements:

> Going the next step and asking for the death penalty, I guess I would have to say I'm very uncertain about how I would make that decision. But I would be inclined to say that I would have a difficult time doing that.
>
> * * *
>
> I would have to honestly say I'm not certain. I'm not certain. Like I have never had to think about it before today is the best way to explain it. I'm just not certain.
>
> * * *
>
> I would have to say just what I said before, is that I have never really thought about it seriously until today. I would have to say that I'm not certain, but my instincts tell me -- my instinct would be to perhaps not be able to render that or --

I'm not sure that's the right word. But to decide the death penalty...In other words, I could find somebody guilty if I felt that he was, but taking it to the next step in terms of the punishment.

* * *

See, that's the part. I'm not sure if I can go the distance on that. I'm just not certain. I wouldn't say it's irrevocably. I couldn't --

Sitting here at this moment, I'm not sure I could go that far.

* * *

In other words, I feel an ambiguity about it. That's the best I can describe for you.

* * *

Again, I know that I don't have a real clarity about it at the moment. That's the best I can offer you, counsel.

* * *

I would have to say -- At this point, I would have to say it's possible just to be consistent with -- just to be consistent with my lack of clarity. Just trying to work all this through today, trying to think all this through, I could see where I would have --
I'm still wrestling with it is the best way to put it.

* * *

Well, I'm trying to think about it. I have to say maybe I might have a problem with that.

* * *

Well, following up on what I've been saying is that -- because I'm not certain if I could come to the decision

> to recommend that somebody be put to death. That's the point which I'm not certain. I can go up to that point.
>
> If the judges instructions were maybe beyond the -- exactly what the judge's instructions mean in other words. Does it--
>
> There is a deliberation of some kind?...I guess I'm not familiar enough with how a judge instructs a jury based upon these circumstances.
>
> Is it implied you should arrive at this kind of decision? In other words, I'm not sure --
>
> * * *
>
> Right, I could. I think I could follow a judge's instructions to function under the law.
>
> But I have to tell you, as I've been trying to state, I'm not sure if I could go the distance of recommending that somebody be put to death.

(R 3132, 3135, 3138, 3140-41, 3142, 3144, 3148-49, 3150, 3151). Defense counsel opposed the state's motion, stating that "although Mr. Mintern obviously has a dilemma, and he's indicating he's giving it a lot of thought, he never said he was irrevocably committed to vote against the death penalty. That's the question from the case law" (R 3153).

Contrary to defense counsel's assertion, the standard is not whether the juror is "irrevocably committed to vote against the death penalty", but whether that person's "views would 'prevent or substantially impair the performance of his duties as juror in accordance with his instructions and his oath'". *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980). This standard does not

require that a juror's bias be proved with "unmistakable clarity". *Id.* If a juror's belief prevents him from applying the law and discharging his sworn duty, the trial court is obliged to excuse him for cause. *Randolph v. State,* 562 So. 2d 331 (Fla. 1990). Deference must be paid to the trial judge's determination of a prospective juror's qualifications. *Johnson v. State,* 608 So. 2d 4 (Fla. 1992).

Based on Mr. Mintern's statements, the trial court did not abuse its discretion in excusing him for cause. Mr. Mintern stated at least fifteen times that he was "not certain", "not sure", or "not clear" if he could recommend a death sentence. "The trial court had the opportunity to evaluate the demeanor of the prospective juror, and given [Mintern's] equivocal answers, we cannot say that the record evinces juror [Mintern's] clear ability to set aside [his] own beliefs 'in deference to the rule of law'". *Randolph, supra* at 337 (citations omitted). *See also, Trotter v. State,* 576 So. 2d 691 (Fla. 1990) (trial court did not abuse its discretion in removing for cause juror who equivocated ten times in response to questions on views on the death penalty, even though the juror ultimately responded affirmatively to questions regarding ability to follow the law).

Likewise, the trial court did not abuse its discretion in excusing Mrs. Marshall. Mrs. Marshall first responded that her views on the death penalty would substantially impair her ability to try the issues of the case, but then stated that she had not understood and responded no (R 3032). She then stated that it made "a little difference" that it was a death penalty case, and

agreed that she would worry about the death penalty in determining guilt or innocence (R 3033). She then stated that her son having killed himself would affect her ability to sit on the jury "a little bit" (R 3034). Regarding the death penalty, Mrs. Marshall stated "I just don't believe in it at all" (R 3034). Mrs. Marshall then stated that she could recommend a death sentence (R 3035), but shortly thereafter stated that she would be thinking about the death penalty in determining guilt, but she would "do her best" (R 3037). She also agreed that her beliefs "might would" preclude her from voting for the death penalty (R 3038). Mrs. Marshall also felt sorry for Allen because he is so young, that she "probably would" vote against the death penalty under any circumstances, and that she could not conceive of any circumstances under which she would recommend a death sentence (R 3039-40). In the end, Mrs. Marshall stated that she could recommend the death penalty (R 3043).

In excusing Mrs. Marshall, the trial court specifically stated:

> All right. Considering all things, not only what she said but the way she said those things and the conflict in her answers, my concern is real as to her ability to sit fairly and impartially.

(R 3047). Allen has failed to demonstrate that the trial court abused its discretion in excusing Juror Marshall. *Randolph, supra; Trotter, supra. See also, Foster v. State*, 17 Fla. L. Weekly S658 (Fla. October 22, 1992) (it was proper to excuse for cause juror who indicated she could not set aside her opposition to the death penalty in deference to the law).

POINT 7

THE TRIAL COURT PROPERLY ADMITTED CIGARETTES, MONEY, AND A SHORT BARRELED .16 GAUGE SHOTGUN INTO EVIDENCE.

Allen contends that the trial court erred in admitting into evidence several packages of cigarettes that were recovered from Ms. Stokes stolen vehicle; the fact that Allen, Roberson and Kennedy all had money on them when arrested; and a shotgun and box containing three unspent cartridges that were recovered from the Allen home. Allen claims that the evidence was irrelevant and prejudicial and deprived him of his right to a fair trial. A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. *Blanco v. State*, 452 So.2d 520 (Fla. 1984). The test for admissibility is not the necessity of the evidence, but rather its relevancy. *Craig v. State*, 510 So. 2d 857 (Fla. 1987). Allen has failed to demonstrate that the trial court abused its discretion.

Regarding the cigarettes, appellee would first point out that a picture of the floorboard of the car, including the cigarettes laying on it, was admitted into evidence without objection and published to the jury long before the state attempted to introduce the actual cigarette packs (R 47, Exhibit 38). Since this evidence was already before the jury without objection, appellee submits that Allen waived any further claim regarding the admissibility of the evidence and prejudice cannot be demonstrated.

In any event, the cigarettes were relevant since the state clearly demonstrated a connection between them, Allen, and the

crime scene. The cigarettes were recovered in a stolen car which had Allen's palm print on the rear view mirror (R 647). This was a silver car, and before dying, the victim stated that he had been robbed by two blacks and a white in a silver car. Scott Styles, who worked at the Exxon station where the victim was murdered, testified that when he left the station the cigarette rack had just been restocked, but when he returned approximately five minutes later the rack containing the Marlboro Reds was half empty. Consequently, the cigarettes were relevant as this evidence supports the inference that Allen was in that car at the Exxon station. Even if the admission of the cigarettes was error, appellee contends it was harmless at worst in light of the overwhelming evidence, *See* Point 5, *supra*, particularly since the jury had already seen a picture of the cigarettes in the car and heard testimony that cigarettes were missing from the gas station without objection.

Allen next contends that the trial court erred in admitting evidence that Allen had sixty dollars when he was arrested and that Roberson and Kennedy each had a fifty dollar bill when they were arrested. Allen was charged with robbery, the victim's wife had testified that the victim had approximately $270-300 after cashing his paycheck, and three young people connected to the crime by other evidence have approximately the same amounts of cash on them when they are arrested the next day. Appellee submits that such evidence is clearly relevant to the charged crimes. Allen claims that the jury undoubtedly assumed that Allen acquired the money through some nefarious scheme, probably

felony murder, but that is precisely the point. As this court has recognized, all evidence presented against a defendant is prejudicial, but it is only when the evidence is *unfairly* prejudicial that it should be excluded. *See, e.g., Swafford v. State*, 533 So. 2d 270 (Fla. 1988). Even if there were timing problems as well as a lack of connection, these were matters to be considered by the jury in evaluating the weight to give this testimony and did not render the evidence inadmissible. *Gore v. State*, 599 So. 2d 978, 983 (Fla. 1992) (evidence that defendant told witness that woman's purse in back seat of his car belonged to a girl he had killed last night was admissible in murder prosecution, despite fact that murder had allegedly taken place two weeks before defendant made statement and despite lack of connection between victim's purse and purse witness saw in car). As with the cigarettes, appellee submits that even if it was error to admit this evidence, it was harmless at worst in light of the other evidence.

Allen also states that the state attempted to prove its case against him by introducing a shotgun seized from his home and shotgun shells found at the house. Allen presents no argument as to why the admission of these items was erroneous, so appellee submits the claim has bee waived. Even if the claim is cognizable, it is without merit. Allen was charged with possession of a short barreled shotgun, so the fact that one was seized from his attic was clearly relevant. Further, Allen and Roberson discussed the fact that the police had seized Allen's "gauge" (R 906-07), a .16 gauge shotgun is what was seized, the

shells that were seized were .16 gauge, and there was expert testimony that a .16 gauge shotgun was probably used in the instant murder (R 704). This evidence was clearly relevant and the trial court did not abuse its discretion in admitting it. *See, Craig v. State,* 585 So. 2d 278 (Fla. 1991) (admission of shell casings found in third party's residence on day following murder was not error where casings were fired by victim's gun and placed gun in residence when defendant was there).

POINT 8

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A MISTRIAL WHEN A STATE WITNESS TESTIFIED ON CROSS EXAMINATION THAT HE HAD DEALT WITH ALLEN BEFORE.

Allen claims that the trial court's denial of his motion for mistrial after a law enforcement officer testified that he had dealt with Allen before resulted in an unfair trial. A ruling on a motion for mistrial is within the sound discretion of the trial court and should be granted only when necessary to insure the defendant a fair trial. *Power v. State,* 605 So. 2d 856 (Fla. 1992). The power to declare a mistrial and to discharge the jury "should be exercised with great care and caution and should be done only in cases of great necessity." *Salvatore v. State.* 366 So. 2d 745 (Fla. 1978). Appellee contends that the trial court did not abuse its discretion in denying the motion for mistrial.

While the trial court stated that the answer was not solicited by defense counsel, appellee submits that it was indeed an answer that could be anticipated, particularly when viewed in context with Detective Carter's previous proffer. Detective Carter's testimony was proffered by the state to identify the voices of Allen and Roberson on the tape of their conversation in the holding cell (R 733-38). During defense counsel's *voir dire*, the following exchange occurred:

> Q. How long had you talked with Allen that afternoon?
>
> A. Not very long. That afternoon not very long.

Q. Base based (sic) upon the hedging, I take it that you'd met Mr. Allen before?

A. Yes.

Q. When was the last time before December 11th you had talked with him?

A. I don't remember.

Q. Do you know how old he is now?

A. Should be seventeen now -- or sixteen now.

Q. Do you know when the last time was you talked with him? Are we talking days? Hours? Weeks? Months?

A. On occasion --We've dealt with Mr. Allen for five years.

Q. Okay. Do you know about when the last time was you talked with him so that you could listen to his voice?

A. No -- Well, that day.

Q. Before that. I'm sorry. Before that?

A. No.

Q. Before December 11?

A. No.

Q. You don't remember whether his voice was the same? Teenagers' voices change, don't they?

(R 741-42). During the testimony at issue, defense counsel was cross examining Detective Carter about the conversation in the holding cell, and Detective Carter was relating his interpretation of the conversation, specifically Allen's participation in it, with very little prompting and no objection

from counsel (R 912-13). Defense counsel then asked: "Well, that's an interpretation that you're making; is that correct?" (R 913). Detective Carter replied: "I've dealt with him before. Yes, okay. That's an interpretation, yes" (R 913).

Appellee contends that Detective Carter was justified in explaining the reasons for his interpretation, particularly where he had previously been extensively questioned by defense counsel about his prior contacts with Allen. A defendant may not take advantage on appeal of an error which he himself induced at trial. *Sullivan v. State,* 303 So. 2d 632 (Fla. 1974); *Stanley v. State,* 357 So. 2d 1031 (Fla. 3d DCA 1976). Further, the trial court instructed the jury to disregard the response Detective Carter had given, and there is nothing to indicate that the jury was unable to do this. Consequently, Allen has failed to demonstrate that the trial court abused its discretion in denying the motion for mistrial. *See, Sireci v. State,* 587 So. 2d 450 (Fla. 1991) (prosecutor's limited reference to defendant's prior death sentence in violation of pretrial order did not prejudice defendant or play significant role in resentencing proceeding so as to warrant a mistrial); *Buenoano v. State,* 527 So.2d 194 (Fla. 1988) (no abuse of discretion in denying motion for mistrial based on witness' gratuitous comment that defendant set fire to her home in order to collect insurance; curative instruction given); *Irizarry v. State,* 496 So. 2d 822 (Fla. 1986) (no abuse of discretion in denying motion for mistrial after witness mentioned defendant's polygraph test; curative instruction given); *Buckles v. State.* 567 So. 2d 40 (Fla. 3d DCA 1990) (trial judge acted within

bounds of discretion when he denied motion for mistrial and gave a curative instruction after a witness testified about a firearm where such testimony had been prohibited); *Marshall v. State*, 554 So. 2d 572 (Fla. 3d DCA 1989) (no error in denial of motion for mistrial where robbery victim testified about an alleged sexual attack which was neither charged in information nor relevant to any issue at trial; curative instruction given).

Appellee also asserts that any error was harmless due to the curative instruction given by the trial judge and the overwhelming evidence of guilt as set forth in Point 5. There is no reasonable probability that the outcome could have been affected. *DiGuilio, supra. See also, Louis v. State*, 567 So. 2d 38 (Fla. 3d DCA 1990) (any error harmless due to curative instruction and overwhelming evidence presented against defendant); *Riley v. State*, 367 So. 2d 1091 (Fla. 3d DCA 1979) (reference in testimony to charges for which defendant arrested was harmless error due to curative instruction by the trial court); *Howard v. State*, 471 So. 2d 208 (Fla. 5th DCA 1985) (witness' violation of order limiting evidence regarding irrelevant crimes by blurting out comment that defendant was a dealer in stolen property was harmless because the evidence of guilt was so overwhelming). Appellee would also point out that the jury would have been well aware of Allen's extensive knowledge of the criminal justice system from his conversation with Roberson in the holding cell. Reversible error has not been demonstrated.

POINT 9

THE JURY WAS PROPERLY INSTRUCTED.

Allen claims that the trial court erred in refusing to instruct the jury upon the law of the case. Allen first contends that the trial court erred in instructing the jury that proof of possession of recently stolen property gives rise to an inference that the person in possession knew or should have known that the property had been stolen. Allen claims that the evidence did not support this instruction and that it constitutes an impermissible comment on the evidence. While counsel did object on the basis that there was no proof of possession of recently stolen property, there was no objection that the instruction constituted an impermissible comment on the evidence (R 1079), so appellee contends that portion of the argument is not cognizable on appeal.

The instruction at issue was given as to the grand theft of the automobile charge, and the state presented evidence that Allen was in possession of the automobile after it had been stolen, so the instruction was proper. The owner of the car testified that it had been stolen at approximately 11:00 p.m., and the robbery and shooting at the gas station occurred at approximately 11:25 p.m. (R 92, 259). The victim stated that he had been shot by two blacks and a white in a silver car, and the stolen car was silver (R 292). Kennedy was in the car when it was found, Allen's palm print was on the rear view mirror of the car, and a tracking dog followed two sets of footprints to Roberson's house (R 642, 501, 865). During Allen's conversation

with Roberson in the holding cell, Roberson said that he had told the police that Allen had stolen the car, and Allen told Roberson that he should not have told them that, and that he had "messed it all up" (R 4247).

Appellee contends that this evidence was sufficient to demonstrate that Allen was in possession of the stolen vehicle, so the instruction is supported by the evidence. The joint possession of two or more persons acting in concert is exclusive as to any one of them. *Scobee v. State,* 488 So. 2d 595 (Fla. 1st DCA 1988) (evidence that defendant, his wife, and another woman were present at the scene of theft, that defendant left in vehicle with stolen goods in company of his wife and other woman who were implicated in theft, and that stolen property was found in kitchen of defendant's residence and in cargo area of station wagon which defendant was driving warranted instruction that proof of possession of recently stolen property gives rise to inference that person in possession of property knew or should have known that property had been stolen). It is the fact of possession that gives rise to the inference of guilt, and this inference is founded on the reasoning that when goods are taken from one person and are quickly thereafter found in the possession of another, there is a strong probability that they were taken by the latter. *State v. Young,* 217 So. 2d 567 (Fla. 1968). Since there was evidence that Allen was in possession of the stolen car, the correctness of the inference was for the jury. *Scobee, supra.*

Even if this court determines that the trial court erred in giving this instruction, appellee contends that the error is harmless at worst. As the foregoing demonstrates, the evidence that Allen stole the car, particularly his adoption of Roberson's statement that he did indeed steal the car, was overwhelming, and there is no probability that the giving of this instruction could have affected the verdict. As the United States Supreme Court recently stated, a jury is likely to disregard an instruction that is not supported in fact. *See, Sochor v. Florida*, 112 S.Ct. 2114 (1992). Thus, if the jury did not find the facts sufficient to support this inference, it would have been disregarded.

Allen next claims that the trial court erred in not giving his requested instruction on circumstantial evidence. Jury instructions must relate to the evidence at trial, and confusing, contradictory, or misleading instructions should not be give. *Butler v. State*, 493 So. 2d 451 (Fla. 1986). Allen states that the evidence as to one offense was "totally" circumstantial, while evidence as to the others was "almost entirely circumstantial" (IB 96). Appellee submits that none of the counts are supported totally by circumstantial evidence in light of Allen's conversation with Roberson in the holding cell, so such instruction would have been improper. However, even accepting Allen's characterization of the evidence, the giving of the circumstantial evidence instruction would have been confusing since it did not apply to all counts, and it could not have been given without commenting on which counts it applied to, so the trial court would have had to comment on the evidence. The trial

court did not abuse its discretion in not giving the requested instruction. Appellee would also point out that whether a conviction is supported by circumstantial evidence is a legal, rather than a factual determination, and consequently not a determination for the jury to make.

Allen next claims that the trial court erred in failing to give his requested instruction on the independent act of another. Appellee would first point out that there was absolutely no evidence to support the giving of this instruction. It would appear that the theory underlying this instruction is that the jury could find that Allen participated in the robbery, but another person who did not know Allen then arrived and committed the murder. This instruction certainly would not apply to the scenario set forth in the brief, i.e., that Allen knew a robbery was going to occur, but did not know Roberson was going to shoot the victim. This latter scenario is definitional felony murder, and the instructions as given are the ones applicable to the charge.

This court has long held that a challenged instruction should be considered in connection with all other instructions bearing on the same subject and if, when thus considered, the law appears to have been fairly presented to the jury, alleged error predicated on the challenged instruction, standing alone, must fail. *Driver v. State,* 46 So. 2d 718 (Fla. 1950). The standard instructions on felony murder were correct, and the trial court did not abuse its discretion in failing to give Allen's requested instruction which would have amounted to an incorrect statement of the law under the evidence presented.

Allen next claims that the trial court erred in giving his requested instruction on third degree felony murder with an underlying felony of grand theft. The state did not charge Allen with grand theft and grand theft is not a lesser included offense of robbery, so Allen was not entitled to this instruction. *See, Anderson v. State*, 574 So. 2d 87 (Fla. 1991) (state did not charge Anderson with the crime of accessory after the fact, nor is accessory after the fact a lesser included offense of premeditated murder, so Anderson was not entitled to a jury instruction on that issue). Even if for some reason this court finds that it was error not to give this instruction, any error is harmless at worst as Allen was convicted of an offense two steps removed from the crime of third degree murder. *See, Jackson v. State*, 575 So. 2d 181 (Fla. 1991).

POINT 10

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ALLEN'S MOTION FOR NEW TRIAL OR MOTION FOR CONTINUANCE OF THE PENALTY PHASE.

Allen contends that the trial court erred in denying his motion for new trial and motion for continuance of the penalty phase after "exculpatory" evidence withheld by the state was discovered. Allen's motion for new trial listed the following grounds:

> 1. Newly discovered evidence involving the co-defendant, Brian Patrick Kennedy being in possession of shotguns three days before the incident.
>
> 2. The State of Florida's violation of *Brady v. Maryland*, 373 U.S. 83 (1963) in its failure to supply Defendant with the above-stae (sic) information.

(R 3887). In his initial brief, Allen simply argues: "Finally, the trial court should have granted a new trial on this basis" (IB 105). Appellee submits that Allen's motion for new trial, which contains no facts or argument, is insufficient to present a claim that could be reviewed on appeal, and his one sentence argument on appeal is clearly insufficient to present a cognizable claim to this court.

In order to establish a *Brady* violation, a defendant must establish four factors, the final one being a demonstration that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Hegwood v. State*, 575 So. 2d 170 (Fla. 1991). In making this determination, the evidence must be considered in the

context of the entire record. *Cruse v. State,* 588 So. 2d 983 (Fla. 1991). Allen did not even allege, much less demonstrate this below, so there is nothing for this court to review. Further, 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 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). Since Allen has presented no argument in support of his claim, appellee contends that it is not cognizable.

Even if the claim were cognizable, reversible error has not been demonstrated, nor can it be demonstrated. As stated, Allen has neither alleged not demonstrated that there is a reasonable probability that the outcome of his *trial* would have been different if the defense had had this information about Kennedy; nor has he alleged or demonstrated how this evidence would even have been admissible. Kennedy did not testify during the guilt phase, so it certainly could not have been used as impeachment evidence. Further, Allen was indicted for and convicted of felony murder, and the evidence that he was at the murder, including his own statements to Eugene Roberson, is overwhelming.

As to the penalty phase, it is difficult to ascertain precisely what Allen is arguing. On the one hand he appears to claim that the trial court erred in denying his motion for continuance, but on the other he appears to be arguing that the trial court erred in excluding the evidence. These claims cannot

coexist, for if Allen had the evidence he did not need a continuance. In any event, Allen has failed to demonstrate that any error occurred during the penalty phase. Allen had this information in time for the penalty phase, and has failed to allege or demonstrate any prejudice resulting from the denial of his motion for continuance. Further, while Allen states that "some" of this evidence made its way to the jury, the record demonstrates that Kennedy admitted to the entire scenario now alleged to be *Brady* material. Kennedy testified that he had stolen two .12 gauge shotguns and a .22 rifle,[8] and the following exchange occurred during recross examination:

> Q. Mr. Craig mentioned the shotguns. When did you steal these shotguns?
>
> A. About a week and-a-half prior to December 10th.
>
> Q. Prior to December 7th?
>
> A. The 10th.
>
> Q. So about maybe a week prior to December 7th; is that correct?
>
> A. Yes.
>
> Q. Where did you have them hidden? At your home or hidden somewhere else?
>
> A. Hidden in an orange grove.
>
> Q. On December 7th you went and stole that vehicle from Eagle Way in Merritt Island?
>
> A. Yes.

---

[8] The murder weapon in the instant case was a .16 guage shotgun.

Q. You put those shotguns in that vehicle, didn't you?

A. Yes, I did.

Q. And you took and drove that vehicle to an all night gas station at the corner of Clearlake Road and University in Cocoa, didn't you?

A. Yes, I did.

Q. And you had shotguns with you as you drove in, didn't you?

A. Yes, I did.

Q. You were looking and thinking maybe there was just one attendant there, didn't you?

MR. CRAIG; Objection. Irrelevant.

THE COURT: Sustained.

BY MR. MCCARTHY:

Q. Did you have those guns with you?

A. Yes, I did.

Q. What did you do when you got there?

A. Got out of the car, filled up the tank, and left. Drove off without paying for the gas.

Q. You didn't intend to rob that place did you?

A. No, I didn't.

Q. But for the fact that in addition to the attendant, by the grace of God, there was another witness there --

MR. CRAIG: Objection. Argumentative.

BY MCCARTHY:

Q. There was another person there in addition to the attendant, wasn't there?

A. I believe there was more than one.

Q. It was different from the night of December 10th with Mr. Dumont up Mr. Titusville; right?.

MR. CRAIG: Objection. Argumentative.

THE COURT: Sustained.

BY MR. MCCARTHY:

Q. There was more than just the attendant there; is that right?

A. Yes, there was.

Q. On December 7th -- You got a hold of some keys to a car sometime prior to that; right?

A. Yes.

Q. You stole a motor vehicle; right?

A. Yes.

Q. You planned that, didn't you?

A. No, it kind of fell together.

Q. And then you had shotguns with you; right?

A. Yes.

Q. And went to a gas station; right?

A. Yes.

Q. And there were people there; right?

A. Yes.

Q. All you did that night was steal gas and drive away?

A. Yes.

Q. And you want us to believe that three days later you're some innocent dupe that showed up in Mims and Jerome Allen is running all this? Mr. Kennedy, is that what you want us to believe?

MR. CRAIG: Objection.

THE COURT: Objection sustained.

MR. MCCARTHY: Is that what you're telling us?

THE WITNESS: I think the key difference was I was driving then. I was in charge.

BU [sic] MR. MCCARTHY:

Q. You weren't in charge on December 10th, were you?

A. No, I wasn't.

Q. You had done this pretty close before, hadn't you? Three days earlier, hadn't you?

(R 1639-42). Testimony from the witnesses who were at the gas station would have been cumulative to Kennedy's testimony, and a trial court does not abuse its discretion in excluding cumulative testimony. *See, Hitchcock v. State,* 578 So. 2d 685 (Fla. 1991). The evidence was there, and counsel was free to argue the varying culpabilities of the defendants on the basis of it. Further, such evidence in no way demonstrates Allen's innocence, so on the basis of the entire record error has not been demonstrated.

POINT 11

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ALLEN'S MOTION TO DISQUALIFY THE PUBLIC DEFENDER AND MOTION TO CONTINUE SENTENCING.

Allen claims that the trial court erred by not disqualifying the public defender prior to the penalty phase and in denying his motion to continue sentencing once private counsel was finally allowed to appear. Allen has presented no argument on the continuance issue, so appellee submits the issue is not cognizable on appeal. Further, Allen has set forth no facts in support of this claim, nor has he alleged prejudice, so relief would not be warranted in any event.

The record demonstrates that the trial court was correct in denying the motion to disqualify the public defender as Allen failed to demonstrate that any conflict of interest existed. Appellee would first point out that Allen never challenged the public defender's representation at the guilt phase on the basis that one of his attorney's husband worked with the victim's father, and he does not explain how such alleged conflict, which apparently existed all along, impacted only on the penalty phase. In any event, as Allen recognizes, he was informed of this matter and signed a waiver (R 3885). Appellee submits that he should not be heard to complain on appeal about a matter in which he concurred at trial.

Appellee further submits that Allen has failed to demonstrate any conflict with regard to the public defender's prior representation of Brian Kennedy. A defendant must

demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). A possible conflict is not sufficient, and until a defendant shows that counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. 446 U.S. at 3550, 100 S.Ct. at 1719. *See also, Buenoano v. Dugger*, 559 So. 2d 1116 (Fla. 1990). As the *Cuyler* Court noted, absent special circumstances, trial courts may assume that the lawyer and his clients knowingly accept such risk that conflicts may exist, and may rely in large measure upon the good faith and judgment of defense counsel.

Defense counsel in the instant case opposed the basis for the motion for disqualification filed by Mr. Wesley, which certainly indicates that counsel felt there was no conflict that would adversely affect their representation (R 1414-15). Significantly, the public defender's representation of Kennedy was on an unrelated matter and had ended. Finally, the record demonstrates that counsel vigorously cross examined Kennedy (R 1582-1606, 1634-43), and brought out his deal with the state, as well as his prior crimes of stealing a car and guns, and his having contemplated a previous robbery at a gas station. On the basis of this record, Allen cannot demonstrate that there was a conflict of interest that adversely affected counsel's representation. *See, Mills v. State*, 496 So. 2d 172, 175 (Fla. 1985) (public defender's office represented codefendant on an unrelated charge and as soon as his involvement in the crimes for which

Mills was charged became evident, public defender's office withdrew from representation of codefendant-no conflict); *Bouie v. State*, 559 So. 2d 1113, 1115 (Fla. 1990) (public defender's representation of witness ended by time he testified, Bouie's counsel extensively cross examined him, and interests were neither hostile nor adverse to one another); *Lightbourne v. Dugger*, 829 F.2d 1012, 1023-24 (11th Cir. 1987) (any conflict of interest which may have existed by virtue of fact that public defender cross examined a client formerly represented by the same public defender's office had at best *de minimus* effect upon representation-witness was fully and fairly cross examined with regard to deal and credibility impeached through a variety of methods).

POINT 12

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE AT THE PENALTY PHASE.

Allen claims that the introduction of Roberson's statement during his penalty phase violated his right to confront witnesses. The state and the defendant can present evidence at the penalty phase that might have been barred at trial because a "narrow interpretation of the rules of evidence is not enforced". *Hodges v. State*, 595 So. 2d 929, 933 (Fla. 1992), quoting *Chandler v. State*, 534 So. 2d 701, 703 (Fla. 1988). The admission of evidence is within the trial court's discretion, *Id.*, and appellee submits that Allen has failed to demonstrate that the trial court abused its discretion.

In finding Roberson's statement admissible during the penalty phase, the trial court stated:

> THE COURT: Let me put an end to our misery. The Court will rule at this time that the witness Roberson is not available.
>
> That there is not substantial inconsistency with the statement of Mr. Roberson with Mr. Kennedy's prior testimony, nor with the statements made earlier by the witness and the defendant while incarcerated at the time of the arrest.
>
> That the statement subjects the witness to criminal liability and is therefore against his penal interest. He's confessed to participating in a robbery/murder.
>
> That there is a presumption based upon that corroborating evidence and the other standards set by case law that the defendant would not make the statement

> if it were not true; therefore, it meets the test of reliability and it is admissible.

(R 1698-99). In *Ohio v. Roberts,* 488 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Court recognized that evidence that is presumptively unreliable and inadmissible for Confrontation Clause purposes may nonetheless meet Confrontation Clause reliability standards if it is supported by a showing of particularized guarantees of trustworthiness. In *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), the Court recognized that the presumption of unreliability that attaches to codefendant's confessions may be rebutted. Appellee submits, as the trial court found, that Roberson's statement bears sufficient indicia of reliability to rebut the presumption of unreliability that attaches to codefendant's confessions, so there was no abuse of discretion in its admission.

The similarities between Roberson's statement and Kennedy's testimony are as follows: Both said Allen started the stolen car and drove (Exhibit 2, R 1490); both said the gun was Allen's, Roberson said a .16 gauge shotgun was used, and during the conversation between Allen and Roberson in the holding cell the fact that the police found Allen's "gauge" was discussed (Exhibit 2, R 906-07, R 1461); both said that Allen told Roberson to get out of the car with the gun, or to "go, go, go" (Exhibit 2, R 1501); both said Roberson pointed the gun at the victim and told him to give them the money (Exhibit 2, R 1501); both said Allen told Kennedy to go get the money from the office (Exhibit 2, R 1502); both said Kennedy took five packs of cigarettes (Exhibit

2, R 1512); Roberson said that Allen told Kennedy to get the money out of the victim's pocket and Kennedy said he took the money out of the victim's pocket (Exhibit 2, R 1505); both said that Allen told Roberson to shoot the victim because the victim could identify them (Exhibit 2, R 1507-09); Kennedy said that Roberson was trying to run back to the car and Allen was pushing him telling him to shoot the victim, and Roberson said that he did not want to shoot the victim (Exhibit 2, R 1509); and both said that they were each given $50 and Allen kept $60 (Exhibit 2, R 1522). In addition, during the conversation in the holding cell, Roberson told Allen that he had told the police that Kennedy took cigarettes and money, that he, Roberson had been the shooter, and that Allen had stolen the car (R 903-04). Allen instructed Roberson as follows:

> JEROME ALLEN: They ask you who made you pull the trigger, you say it went off by itself.
>
> Hey, yo. Say the white boy tried to force you to pull the trigger and you say no. He kept trying to grab the gun from you; right?

(R 906). It certainly would seem that Allen would have had no reason to bring up somebody making Roberson pull the trigger unless it had been Allen who did this.

In a similar situation, the Fifth Circuit determined that the trustworthiness of a codefendant's statements was clearly established by corroborating circumstances, and that there were sufficient indicia of reliability to satisfy the requirements of the Confrontation Clause. *United States v. Vernor*, 902 F.2d 1182 (5th

Cir. 1990). In that case, the codefendant took full responsibility for his part in the bank robbery, and made no attempt to minimize his role or to shift the blame from himself. There was nothing in the record to indicate that the codefendant made statements to avenge himself, or that the statements were made to curry favor with his interrogators, nor was there any evidence that the interrogators made any promises. The record demonstrated that the statements were voluntarily made after a waiver of rights, and there was no evidence of any plea bargaining nor was any plea agreement entered into.

Likewise, Roberson took full responsibility for his part in the robbery/murder, and made no attempt to minimize his own role or shift blame from himself; there was no nothing to indicate that he made the statements to avenge himself or curry favor with his interrogators; no evidence of any promises made to him; the statements were voluntarily made after a waiver of rights; and there was no plea bargain. The *Vernon* court also found that portions of the statement implicating the defendant were sufficiently corroborated by other circumstantial evidence of guilt, and as demonstrated above, portions of Roberson's statement implicating Allen are likewise corroborated by other evidence. It is undisputed that Roberson was unavailable, and his statement bore sufficient indicia of reliability to meet Confrontation Clause reliability standards. *Roberts, supra. See also, United States v. Carporale,* 806 F.2d 1487 (11th Cir. 1986); *United States v. Chapman,* 866 F.2d 1326 (11th Cir. 1989).

Even if this court determines that the statement was erroneously admitted, appellee submits that any error was harmless at worst, as there is no reasonable probability that the evidence complained of affected the outcome.. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). As demonstrated above, Roberson's statement was cumulative to Kennedy's testimony and statements made during the discussion between Roberson and Allen in the holding cell.

POINT 13

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A MISTRIAL ON THE BASIS OF A COMMENT OF A STATE WITNESS ON CROSS EXAMINATION DURING THE PENALTY PHASE.

Allen claims that the trial court erred in denying his motion for mistrial after a state witness commented on his right to remain silent. Appellee first contends that this issue has not been properly preserved for appellate review. After the comment was made, defense counsel immediately moved for a mistrial (R 1743). While the state suggested a curative instruction, one was never requested by the defense until after all penalty phase testimony had been completed, and even at that point counsel stated that he really did not want a curative instruction, but he had to in order to avoid waiver (R 1859). Appellee contends that the issue had already been waived at that point, since there was no immediate request for a curative instruction. *Castor v. State*, 365 So. 2d 701 (Fla. 1978).

Even if the claim has been preserved, relief is not warranted. Appellee would first point out that the comment was not elicited by the state, and was in fact given in response to a defense question which was well beyond the scope of direct examination. Defense counsel was arguing with the witness as to his motivations in obtaining the statements, and the witness responded in kind. A defendant should not be heard to complain on appeal about a situation that he has caused. *Sullivan, supra.*

Appellee further contends that the statement is not even a comment on Allen's right to remain silent, since Allen did not

exercise that right. Allen had initially given an exculpatory statement, and the jury heard this. As such, it was clear to the jury that Allen did not want to talk about the situation as the other two participants had done. Since Allen did not exercise his right to remain silent, error cannot be demonstrated. *Dolinsky v. State,* 576 So. 2d 271 (Fla. 1991).

Even if error has been demonstrated, it was harmless at worst. *State v. Thornton,* 491 So. 2d 1143 (Fla. 1986) (comments by witnesses on a defendant's right to remain silent may constitute harmless error). In the first place, the comment was made during the penalty phase, after the jury had already found Allen guilty of first degree murder. The comment in no way would have affected the jury's findings as to aggravating and mitigating factors. Further, as noted, Allen had given a statement, and by the time the penalty phase commenced the jury would have been well aware of the fact that Allen made no further statements, as all of the evidence had been presented. As such, appellee submits that a law enforcement agent's single comment on Allen's right to remain silent, if he exercised it, did not affect the penalty phase recommendation. *See, Brannin v. State,* 496 So. 2d 124 (Fla. 1986); *Ferry v. State,* 507 So. 2d 1373 (Fla. 1987).

POINT 14

ALLEN'S CLAIMS REGARDING PROSECUTORIAL COMMENT WERE NOT ADEQUATELY PRESERVED BELOW; REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED.

Allen claims that the prosecutor engaged in improper argument on four occasions. Allen first claims that the prosecutor's statement that "they left him there paralyzed, bleeding to death; and they didn't even know or care whether he was dead" was, "in essence", an argument that Allen had no remorse. While defense counsel objected, the objection was simply that the evidence was irrelevant, not that it was improper argument on lack of remorse (R 1877). In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court. *Bertolotti v. Dugger*, 514 So. 2d 1095 (Fla. 1987). Appellee contends that the relevance objection was insufficient to preserve the argument now raised on appeal, and that the claim is procedurally barred.

Allen next claims that the prosecutor misstated the law regarding mitigating evidence. After defense counsel objected, the trial court sustained the objection and told the prosecutor to change the wording (R 1880). The prosecutor then stated that "a mitigating circumstance is a mitigating circumstance if you find it is a mitigating circumstance" (R 1880), and there was no further objection. A defendant cannot complain on appeal of prosecutorial misconduct, even though the defendant objected at trial, where the defendant did not indicate at trial, by bringing

appropriate motions to strike, for special instructions or for mistrial, that sustaining objections was insufficient to cure the error. *Reichmann v. State*, 581 So. 2d 133 (Fla. 1991). Since Allen took no further action after the objection was sustained and the prosecutor changed the wording, the claim is not preserved for appellate review.

Allen next claims that the prosecutor improperly argued victim impact evidence. After objecting, defense counsel requested a curative instruction, which the trial court stated would be given (R 1889, 1891). The trial court instructed the jury that the aggravating circumstances it could consider were limited to during the commission of a felony, avoid arrest, and cold, calculated and premeditated (R 1907). There was no further objection from defense counsel or motion for mistrial, so appellee contends that this claim is waived as well.

Allen's final claim is that when the prosecutor was commenting on statements Allen had made in the holding cell that he was "obviously planning (sic) a seed in the jury's mind that, if they did not sentence Allen to death, he would undoubtedly be free one day" (IB 126). Again, the objection was simply that the argument was irrelevant (R 1892), and as with the first comment, in the absence of a more specific argument and objection the claim has not been preserved for appellate review. *Bertolotti, supra.*

Even if the claims have been preserved, error has not been demonstrated and reversal is not warranted. The control of prosecutorial comments is within the trial court's discretion, and that court's ruling will not be overturned unless an abuse of

discretion is shown. *Durocher v. State*, 596 So. 2d 997 (Fla. 1992). Prosecutorial error alone does not warrant automatic reversal, unless the errors involved are so basic to a fair trial that they can never be treated as harmless. *State v. Murray*, 443 So. 2d 955 (Fla. 1984). In the penalty phase, which results in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant vacating the sentence and remanding for a new penalty phase trial. *Bertolotti v. State*, 476 So. 2d 130 (Fla. 1985). Appellee contends that Allen has not demonstrated that the comments were even erroneous, but even if they were, any error was harmless at worst.

The prosecutor's first statement was simply a necessary aspect of the factual situation. *See, e.g., Patten v. State*, 598 So. 2d 60 (Fla. 1992). The prosecutor never mentioned the word remorse, certainly never argued that the lack of it could be considered an aggravating circumstance, and in closing had specifically argued that there were only two, and possibly three applicable aggravating factors (R 1878). There is simply no record support for Allen's claim that the prosecutor was "in essence" arguing that Allen had no remorse.

As to the second statement, while the prosecutor may have originally made a misstatement, he quickly corrected it. Further, the jury had been instructed that what the lawyers argued was not evidence, and was well aware that the applicable law was contained in the judge's instructions. The jury was specifically instructed that it could consider any aspect of Allen's character in mitigation, and that if they were reasonably

convinced that a mitigating circumstance existed they could consider it established (R 1909).

As to the third comment, the prosecutor was telling the jury it could *not* consider victim impact evidence in any way during its deliberations. Further, §921.141, Florida Statutes (Supp. 1992), now specifically provides for the introduction of victim impact evidence, and this court has determined that it is proper to introduce evidence of the impact of the crime on the victim's family, so long as the family members do not give an opinion on about the crime, the defendant, or the appropriate sentence. *Hodges v. State*, 595 So. 2d 929 (Fla. 1992). *See also, Burns v. State*, 609 So. 2d 600 (Fla. 1992); *Jones v. State*, 18 Fla. L. Weekly S11 (Fla. December 17, 1992).

Allen claims that the fourth comment was meant to plant a seed in the jurors' minds that if they did not return a death recommendation Allen would be free one day. Appellee submits that under no circumstances could the prosecutor's statement be construed as such; the prosecutor was specifically referring to statements Allen had made in the holding which demonstrated his familiarity with the criminal justice system. Arguing a conclusion that can be drawn from the evidence is permissible fair comment in closing. *Mann v. State*, 603 So. 2d 1141 (Fla. 1992). The prosecutor was simply concluding that Allen was not the poor, innocent child his mother had portrayed him to be, and such comment was permissible.

Even if the claims have been preserved and Allen has demonstrated that any of the comments were improper, any error is

harmless at worst since the outcome would not have been affected. As stated, the prosecutor never urged the jury to rely on nonstatutory aggravating factors, and in fact only argued that two were clearly proven, and the third (CCP) was up to them to decide. Reversible error has not been demonstrated.

POINT 15

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ALLEN'S REQUESTED JURY INSTRUCTION WHERE THERE WAS NO EVIDENCE TO SUPPORT THE INSTRUCTION.

Allen claims that the trial court committed reversible error by not instructing the jury on the statutory mitigating factor that the defendant was an accomplice in the capital felony and his participation was relatively minor. Appellee submits that the record fails to reflect that Allen was merely an accomplice whose participation was relatively minor, so the trial court did not abuse its discretion in not instructing the jury on this mitigating factor. *See, Jones v. State*, 18 Fla. L. Weekly S11 (Fla. December 17, 1992); *Reed v. State*, 560 So. 2d 203 (1990). The record reflects that the gun used in the murder was Allen's, that Allen stole and drove the car that was used to get to and from the scene of the murder, and that Allen urged Roberson to kill the victim because he could identify them, and that Allen was going to "put it on the white boy". There is simply nothing to demonstrate that Allen's participation was minor.

Even assuming, as Allen argues, that the jury could totally discount the testimony of Brian Kennedy and Roberson's statement, there is still no evidence to support the giving of this instruction. Allen's reliance on *Robinson v. State*, 487 So. 2d 1040 (Fla. 1986) is misplaced, as that case is factually distinguishable. In that case, this court determined that Robinson's statements could be interpreted to mean that he was merely an accomplice and his participation was relatively minor.

Id. at 1042-43. There are no such statements from Allen in the instant case, and in fact the only statement from him regarding his participation was that he was at home at the time of the murder, which was refuted by his later statements to Roberson in the holding cell. Likewise, those statements certainly do not support the instruction at issue, as they only demonstrate Allen's attempt to minimize his actual participation by "putting it on the white boy". As stated, the other evidence clearly demonstrates that Allen stole and drove the car, that it was his gun, and in no way was his participation "minor". As such, unlike the situation in *Robinson, supra,* the degree of Allen's participation was not subject to debate. Allen has failed to demonstrate that the trial court abused its discretion.

Further, the jury was instructed that it could consider any circumstance of the offense in mitigation (R 1908). Appellee would also point out that defense counsel never argued the varying degrees of participation or urged that this was a circumstance of the offense that could be considered in mitigation. The jury was well aware of the facts that Kennedy took the cigarettes and Roberson pulled the trigger, was well aware of the fact that it could consider anything in mitigation, and the majority still recommended the death penalty. Appellee submits that in light of these factors, there is no reasonable probability that even if the jury had received this instruction that the outcome would have been any different, so error, if any, was harmless.

POINT 16

THE TRIAL COURT CORRECTLY FOUND THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Allen claims that the trial court erred in finding that the murder was committed in a cold, calculated and premeditated manner. Allen contends that there is absolutely no evidence that a killing was contemplated by any of the codefendants prior to the actual robbery. When there is a legal basis to support an aggravating factor, a reviewing court will not substitute its judgment for that of the trial court. *Occhicone v. State*, 570 So. 2d 902 (Fla. 1990). 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 v. State*, 574 So. 2d 1085 (Fla. 1991). In arriving at a determination of whether an aggravating circumstance has been proved, the trial judge may apply a "common-sense inference from the circumstances". *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988); *Gilliam v. State*, 582 So. 2d 610, 612 (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. The facts of this murder and precedent demonstrate that there is a legal basis for the trial court's finding that this murder was cold, calculated and premeditated, and this finding is supported by competent, substantial evidence.

Contrary to Allen's assertion, the record demonstrates beyond a reasonable doubt that Allen clearly "contemplated" a killing prior to the actual robbery. This was not simply a "robbery gone bad"; rather, it was a robbery with the intent to leave no witnesses behind. As the trial court found, Allen had the gun and had fired it earlier that day (R 150-53). While the trio was sitting in Allen's living room discussing ways to obtain money, Allen pulled the gun from under the couch (R 1461). Allen suggested that they rob a store, and that the gun would be used to scare whoever they were robbing, and that the butt of the gun could be used to hit the victim on the head (R 1476-77). Allen then pulled out a box of shells and loaded the gun (R 1478). The trio left the house and returned about an hour later, and decided to steal a car (R 1481). Allen got the car started and drove (R 1491). Allen directed Kennedy to take the money and directed Roberson to shoot the victim because the victim could identify them (R 1500-07). The trio had made no attempt to disguise themselves to otherwise preclude an identification.

The facts of the instant case are similar to others where this court has upheld the finding of the cold, calculated and premeditated aggravating factor. In *Remeta v. State*, 522 So. 2d 825 (Fla. 1988), the evidence showed that Remeta and his friends robbed a convenience store because they needed money. After his arrest, Remeta made a statement to the effect that he never left any witnesses to his crimes. This court determined that the cold, calculated and premeditated aggravator was supported by evidence establishing that Remeta planned the robbery in advance

and planned to leave no witnesses. While Allen claims that the discussion prior to the murder shows only that the defendants planned to scare the victim with the gun and to hit the victim on the head with the gun, the evidence establishes that Allen loaded the gun before they left the house, which certainly would not be necessary to simply scare a potential victim or to hit a potential victim on the head with the gun. The "common sense inference" to be drawn from these facts is that Allen intended to kill a robbery victim.

In *Durocher v. State*, 596 So. 2d 997 (Fla. 1992), the defendant said he wanted to rob someone and steal a car so he would have money and transportation for a trip to Louisiana. When the defendant walked by the store where the victim worked, he decided to rob it. He walked to his mother's, packed his clothes, got a gun and walked back to the store. The clerk said there was no money because the store operated on credit, and the defendant stood there for a few minutes then shot him, and took some money and car keys. Durocher told the police that he was simply going to rob the store, but after thinking about it decided it would probably be better to go ahead and kill the clerk because that way the police would not be able to pin it on him. This court determined that this sequence of events demonstrated the calculation and planning necessary to the heightened premeditation required to find the cold, calculated and premeditated aggravator. *Id.* at 1001.

In *Wickham v. State*, 593 So. 2d 191 (Fla. 1991), the defendant devised a plan to trick a motorist into stopping so that he could

be robbed. After the victim examined an apparently disabled vehicle and determined there was nothing wrong with it, the defendant came out of a nearby hiding place and pointed a gun at the victim. The victim turned and attempted to walk back to his car, but the defendant shot him once in the back and once in the chest, and as the victim pled for his life the defendant shot him twice in the head. This court found that even though the murder may have begun as a caprice, it escalated into a highly planned, calculated and prearranged effort to commit the crime, and therefore met the standard for cold, calculated premeditation set forth in *Rogers v. State*, 511 So. 2d 526 (Fla. 1987). Likewise, the facts of the instant case meet this standard; significantly, the evidence even demonstrates that Allen specifically planned to avoid being the robber and the triggerman, no doubt figuring that his culpability would be considered lesser.

In *Valle v. State*, 581 So. 2d 41 (Fla. 1991), the defendant murdered a police officer who had stopped him and his companion. The evidence demonstrated that from two to five minutes elapsed from the time the defendant left the police officer's car to get the gun and slowly walk back to shot and kill the officer. Valle had told his companion that he would have to "waste" the officer. This court found these facts sufficient to sustain a finding that the murder was cold, calculated and premeditated. *See also, Asay v. State*, 580 So. 2d (Fla. 1991) (defendant's statements indicated planning of murder for twenty minutes; fact that murder did not proceed as planned did not preclude finding that it was accomplished in a calculated manner); *Hall v. State*, 18 Fla. L.

Weekly S63 (Fla. January 14, 1993) (defendant's intended to steal car-they could have simply taken the car and left the victim in the parking lot, but instead abducted, raped, beat and killed her); *Jones v. State*, 18 Fla. L. Weekly S11 (Fla. December 17, 1992) (defendant "coldly and dispassionately" decided to kill victims so he could steal their truck).

Even if this court determines that this factor is not applicable, appellee submits that striking it would not affect the sentence imposed. Appellee would first point out that it was not error to instruct the jury on this aggravator. As this court has recognized, although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by the evidence. *Johnson v. State*, 608 So. 2d 4 (Fla. 1992). *See also, Sochor v. Florida*, 112 S.Ct. 2114 (1992). The prosecutor did not heavily rely upon this aggravator in arguing to the jury, and in fact told the jury to "make the call" (R 1879). If this factor is stricken, two remain and there is nothing substantial in mitigation. The trial court specifically found that Allen was mature, understood the distinction between right and wrong, and the nature and consequences of his actions. Allen was the master mind of the events leading up to this murder, and the remaining aggravating factors outweigh the proffered mitigation.

POINT 17

THE TRIAL COURT CORRECTLY WEIGHED THE AGGRAVATING AND MITIGATING FACTORS; THE DEATH SENTENCE IS PROPORTIONATE

Allen first claims that the trial court erred in weighing the mitigating evidence, and "dismissed" nonstatutory mitigating evidence clearly established by the evidence. It is up to the trial court to decide if any particular mitigating circumstance has been established and the weight to be given it. *Hudson v. State*, 538 So. 2d 829 (Fla. 1989). Reversal is not warranted simply because an appellant draws a different conclusion. *Sireci v. State*, 587 So. 2d 450 (Fla. 1991). It is the trial court's duty to resolve conflicts in the evidence and this court, as the appellate court, has no authority to reweigh that evidence. *Gunsby v. State*, 574 So. 2d 1085 (Fla. 1991). "Mitigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt." *Lucas v. State*, 568 So. 2d 18, 23 (Fla. 1990).

This court, as a reviewing and not fact finding court, cannot make hard-and-fast rules about what must be found in mitigation in a particular case, and because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion. *Id.* The trial court must consider whether the facts alleged in mitigation are supported by the evidence, and if so whether the facts are of a kind capable of mitigating the defendant's punishment, then determine whether or not they outweigh the aggravating factors. *Rogers v. State*, 511 So. 2d 526 (Fla. 1987). Sentencing is an individualized process, and what

may constitute a mitigating factor in one case may not be a mitigating circumstance in another. *Jones v. State*, 580 So. 2d 143 (Fla. 1991).

While Allen claims that the trial court "dismissed the nonstatutory mitigating circumstances that were clearly established by the evidence" (IB 137), the only factor he specifically takes issue with is the trial court's finding that Allen's grandmother being murdered by his grandfather who then committed suicide was not a substantial mitigating circumstance. As stated, the weight to be given a particular mitigating factor is within the trial court's discretion, and there certainly was no abuse of discretion in the trial court's finding. Allen was one-year-old when this incident occurred, and there was no evidence that he was even aware of this when he was that age, much less evidence of any psychological effect on him. Contrary to Allen's assertions, this is not a case like *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990), which involved evidence of abuse during the defendant's formative years. The trial court did not abuse its discretion in finding that this evidence carried little weight in mitigation.

Allen next contends that the death sentence is not proportionate, as this crime can best be described as a "simple robbery 'gone bad'" (IB 139). As demonstrated in the previous point, that is not the case here; rather, Allen intended to commit a robbery and leave no witnesses. The jury in this case recommended a death sentence, and that recommendation is entitled to great weight. The evidence in mitigation is simply not that overwhelming as Allen contends.

Allen contends that his age should be given overwhelming weight, and that the disparate treatment given his codefendants is an important consideration. While Allen was fifteen years old at the time of the murder, the record demonstrates that he had extensive experience with the criminal justice system and was extremely street wise. Allen had a shotgun which he himself sawed off, and had ammunition to go with it. Allen also had other guns which were found at his home. Allen was quite adept at stealing cars. Allen knew the juvenile system, knew about varying culpabilities, knew about giving or not giving statements, and even knew about claiming that a statement was coerced and involuntary. Allen got out the gun that night and loaded it. Allen got the stolen vehicle started and did the driving that night. Allen points out that Roberson was seventeen, but the record demonstrates that he was much less experienced, had never been in trouble before (R 899), and no doubt looked up to his younger cousin's abilities and experience in crime. While Roberson pulled the trigger, it was at Allen's urging and insistence, which indicates it was Allen who had a great deal of influence over Roberson. Indeed, Allen was quite clever about arranging it so that he himself would not be the triggerman.

Appellee also submits that the treatment afforded the codefendants could hardly be deemed "desparate" (sic) (IB 141). The state treated Roberson no differently than it treated Allen. The state went to trial and sought the death penalty, and

Roberson's advisory jury recommended a life sentence.[9] *See, Hall v. State,* 18 Fla. L. Weekly S63 (Fla. January 14, 1993) (codefendant had no such criminal history and received a life recommendation). While the state agreed not to seek the death penalty against Kennedy, it was in exchange for testimony, and his culpability was certainly less than Allen's, as the trial court found. *See, Garcia v. State,* 492 So. 2d 360 (Fla. 1986) (prosecutorial discretion in plea bargaining does not violate principle of proportionality); *Hayes v. State,* 581 So. 2d 121 (Fla. 1991) (death sentence not disproportionate to codefendant's sentences where trial court found defendant more culpable); *Downs v. State,* 572 So. 2d 895 (Fla. 1990).

This was an extremely cold blooded murder for pecuniary gain, and the jury recommended death. This court has upheld death sentences under similar factual situations where the proffered mitigation was more substantial than in the instant case. *See, Hayes, supra* (murder was cold, calculated and premeditated and committed for pecuniary gain; defendant more culpable than codefendants, age of eighteen was "minor" mitigating factor, additional mitigating evidence included low intelligence, developmentally learning disabled, and product of a deprived environment); *Carter v. State,* 576 So. 2d 1291 (Fla. 1989) (borderline retarded defendant-three aggravating factors are supported by competent, substantial evidence and far outweigh the mitigating circumstance of deprived childhood); *Remeta v. State,*

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[9] Appellee submits that this is further proof that while Allen may have been the younger of the two, he certainly was the more dominant force.

522 So. 2d 825 (Fla. 1988) (four aggravators against mitigating evidence of mental age of thirteen, deprived and abused childhood, low intelligence, subject of discrimination, long term substance abuser). *See also, Eutzy v. State,* 458 So. 2d 755 (Fla. 1984); *Herring v. State,* 446 So. 2d 1046 (Fla. 1985) (convenience store clerk shot during robbery by nineteen-year-old defendant who had difficult childhood and learning disabilities). After analyzing the totality of the circumstances and comparing them to other capital cases, the only possible conclusion os that Allen's sentence is proportionate.

POINT 18

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL.

Allen claims that Florida's death penalty statute is unconstitutional for a variety of reasons. He first asks this court to reconsider its stand on "automatic aggravating factors" on the basis of a case recently accepted by the United States Supreme Court. Appellee point out that the Court accepted review based on the *state's* petition in that case, and that it has recently ruled adversely to Allen's position on this issue. *Blystone v. Pennsylvania,* 110 S.Ct. 1078 (1990).

Allen next claims that the trial court erred in denying his motion to strike adjectives from certain mitigating circumstances. This court has held that the standard instruction on mitigating factors is sufficient. *See, Dougan v. State,* 595 So. 2d 1 (Fla. 1992). *See also, Blystone, supra.*

Allen next contends that the jury's responsibility was diminished. The record demonstrates that there was no objection to the instructions as given, so the claim is not cognizable. Further, the jury was instructed that its recommendation would be given great weight, so Allen has failed to demonstrate error. Allen's claim that death qualification of the jury results in a prosecution prone jury has likewise been rejected, *see,* Point 3, *supra,* as has his claim regarding disclosure of aggravating factors. *Johnson v. State,* 438 So. 2d 774 (Fla. 1983).

Allen's remaining "list" is insufficient to present any cognizable claim to this court. Further, this court has

consistently rejected these constitutional attacks. *See, Carter v. State*, 576 So. 2d 1291 (Fla. 1989).

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable 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 has been furnished by hand delivery to Christopher S. Quarles, Public Defender's box at the Fifth District Court of Appeal and mailed to Professor Victor L. Streib, Cleveland-Marshall College of Law, Cleveland State University, Cleveland, Ohio 44115, this 22ND day of March, 1993.

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