IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,383

RONNIE JOHNSON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

FARIBA N. KOMEILY
Assistant Attorney General
Florida Bar No. 0375934
Office of Attorney General
Department of Legal Affairs
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

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STATEMENT OF THE CASE AND FACTS

The defendant was charged with one count of first degree murder of Tequila Larkins, also know as "Sugar Mama," on March 11, 1989. (R. 1) . Ms. Larkins was the owner of Sparkle City Laundromat, in Perrine, Florida. (T. 660, R. 1-2). The defendant was also charged with the armed burglary of said laundromat. (R. 1-2).

A. Guilt Phase Evidence

Jerry Briggs testified that on March 11, 1989, at approximately 6:00 p.m., he went to Sparkle City Laundromat in Perrine to do laundry. (T. 608). He was accompanied by his wife, Valerie Briggs. (T. 608, 628). At approximately 9:00 p.m., as the Briggs were finishing drying and folding up their laundry, the owner of the laundromat, whom Briggs knew by her nickname, Sugar Mama, locked the front door. (T. 610).

The front door to the laundromat is made of plate glass, with windows on both sides.(T. 631, 687). The interior of the laundromat was lit. (T. 659, 688). One can look clearly through

the front door from the inside and see outside. (T. 688-89).

Mr. Briggs testified that he then saw a black male knock on the front door. (T. 610-11). The black male was wearing a brown coat and black baseball type hat with "MCM" written on it. (T. 611). Briggs heard this person asking for some change. Id.

Sugar Mama went and got her keys. She unlocked the front door. (T. 611-12). The black male then "barged" inside and immediately began hitting Sugar Mama in the face. (T. 611-12). Sugar Mama "kept backing up." (T. 613). Briggs, who was standing by the folding table, could see both Sugar Mama and the assailant who was punching her, (T. 617). The folding table is directly east and within view of the front door, at a distance of a couple of feet. (T. 696, 615-16, 630).

Sugar Mama eventually fell to the floor, and the assailant got on top, "straddling" her. (T. 618, 634). The assailant then pulled out a gun, as Briggs heard Sugar Mama say, "Oh, no." (T. 619). The victim was not carrying any weapon, (T. 624).

Upon seeing the assailant's gun, Briggs grabbed his wife, and they 'dove over by some dryers." (T. 619). Briggs laid on top of

his wife, to protect her, and heard several shots. Id. Briggs testified that he could feel, "[l]ead was hitting on my foot," during the shooting. Id.

Briggs remained on the ground until after he heard the door slam. (T. 636). When he got up, he saw Sugar Mama lying on her stomach, with a visible bullet hole in her back. (T. 627).

Briggs made an in-court identification of the defendant as the assailant he had seen, during his trial testimony. (T. 620). Briggs had also picked out the defendant's picture from a pretrial photo line-up, conducted by the police approximately three weeks after the crimes herein. (T. 621-23). During the latter out-of-court photo line-up, he had been "sure 80 percent" about the defendant's picture. (T. 623). He had not been 100 percent sure, as the defendant at the time of the crimes had been wearing a hat, and that 'knocked out twenty percent." Id.

Apart from the victim and Mr. and Mrs. Briggs, two other people had been present inside the laundromat during the shooting: Eric Bethel, the laundromat's attendant, and, Walter Hills, the victim's stepson. (T. 630, 670, 812, 1008-9). Another person, Mr. Gollan, arrived after the shooting and was present when the police

arrived at the scene. (T. 625-26, 636, 654-57, 663, 670, 771-72). Mr. Gollan had had no involvement in the shooting; he had entered the laundromat subsequent to the shooting, in order to ascertain the safety and well being of the other occupants. Id.

The police secured the scene, as fire and rescue units tended to the victim, who was still alive, "gurgling." (T. 655-57, 666, 671-72). The victim had blood around her head, running down into her face area, and a wound in the middle of her back. (T. 668, 672). The victim was transported to Jackson Memorial Hospital, where she died. (T. 674).

The medical examiner testified that the victim had a laceration on the left side of the head, in the temple region. (T. 712). The hemorrhage beneath this wound reflected that it was inflicted prior to death. (T. 714-15). This wound to the head was not a gun shot wound, and it did not cause death. (T. 713, 717).

The victim had died from a single gun shot wound. (T. 717). The bullet had entered the middle of the victim's back, approximately nine (9) inches below her shoulder area and one (1) inch to the left of the midline. (T. 714). The bullet had traveled from back to front, to the left and upward. (T. 715-17). It had

broken into several pieces, and had gone through the spinal cord, into the main artery through the heart, damaged three of the four valves of the heart, and finally penetrated the inside of the chest wall. Id. The location and angle of these injuries were consistent with the victim having been down, trying to crawl away, when the shooter had stood over her, and shot her in the back. (T. 717).

A comparison of the bullet parts recovered from the victim, with the projectile (bullet) fragments recovered from the inside of the laundromat, reflected that they were very similar and had been fired from the same weapon. (T. 735-43). A test of the markings on the projectiles reflected that the weapon utilized had been a "single action" .44 magnum revolver. Id. A single action revolver requires the shooter to grasp the hammer on the revolver and manually cock the hammer each time he fires the revolver, as opposed to a double action revolver which requires him to pull the trigger. (T. 738). The bullets utilized in the instant shooting were "the Winchester Silver tip," which is more prone to fragmentation as opposed to other brands of ammunition utilized in a .44 magnum revolver. (T. 734, 743).

The weight of the projectile fragments recovered from the victim and from around the laundromat, approximately 847.2 grams,

reflected that at least six (6) bullets had been fired from the above revolver at the time of the shooting. (T. 742-43). The bullet fired at the victim had been shot from a distance of six inches or less, as established by a chemical and visual examination of the gun powder present on the center back of the denim jacket worn by the victim at the time of being shot. (T. 745-48, 750-51, 667, 700-701). A similar examination of a towel found near the victim's body, reflected that said towel had been either tightly wound around the muzzle of the revolver, or used to hold the cylinder area of the revolver, when the victim was shot. (T. 744-49, 752-53, 700-701).

In contrast to the bullet fired at the victim, the remaining five (5) bullets had been shot across and around the laundromat, as reflected by the location of bullet holes, ricochet marks, and projectile fragments recovered from throughout the premises. There were a couple of bullet holes in the lower sides of the dryers. (T. 699). Two projectile ricochet marks were found in the floor of the laundromat, where a piece of tile had been torn off. (T. 700). A total of sixteen (16) projectile fragments, or parts of bullets, were recovered: a) from next to a video game machine against the back wall of the laundromat; b) from next to a wall near the laundromat's office and from just outside of the office; c) from

underneath the folding table directly east of the front door, and, d) from the top of the washing machines. (T. 693-99).

In addition to the above related eyewitness' testimony and physical evidence, the state presented the defendant's confessions to both the police and his own friend, Mr. Tift. Police officer Hall testified that, approximately three weeks after the crime, he had approached the defendant, late in the afternoon, as the latter had been sitting in the front porch of his residence in Liberty City. (T. 764-65). He had asked whether the defendant would talk to a couple of investigators at the police department. (T. 765). The defendant had agreed, and had been voluntarily transported to the police station, without being arrested or handcuffed. (T. 766-67). The defendant, at the homicide station, had then agreed to speak with Detective Borrego, after having been read the Miranda rights, which the defendant had understood, and voluntarily waived in writing. (T. 779-87). The defendant had not been under arrest, had not been handcuffed, had not been threatened or promised anything, and, had been offered the use of the restroom and an opportunity to eat or drink. Id.[1]

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[1] A detailed account of the sequence and events leading up to the defendant's interview, the process of Mirandizing the defendant, and the evidence establishing the voluntariness of his statements to the police, has been set forth in the Argument section herein,

Detective Borrego testified that the defendant had then first given a verbal account of his involvement in the murder herein. (T. 787). The defendant stated that he had been hired by an individual known as "G or G Man," to kill the victim, whom they had referred to as 'Sugar Mama," the owner of a 'wash house" in the West Perrine area. (T. 788). The defendant stated that he had first been approached by 'G" and offered this job, approximately one to two weeks prior to the murder. Id. There was another meeting on the day of the murder, at the defendant's residence in Liberty City. Id.

'G" had picked up the defendant and a third unknown individual, described as "a base head or crack head," after the second meeting. (T. 788-89). The trio had then driven to a street located behind the laundromat. (T. 789). The defendant stated that G had given him a gun, which he described as a large revolver. (T. 789). According to the defendant, he and G remained in the car, while the 'base head" kept exiting the car and going to the front door of the laundromat, in order to ascertain whether the victim had arrived. (T. 789). After several trips back and forth, the 'base head" finally reported that the victim had arrived at the laundromat. Id.

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at pp. 26-41.

The defendant and the "base head" then walked over to the wash house, but found that the door was locked. (T. 789). According to the defendant, the "base head" knocked on the door and asked the victim for some change to ride the bus. Id.

The defendant stated that he forced himself inside the wash house when the victim opened the door. Id. He had the gun in his hand, and chased the victim around the wash house. (T. 789-90). The defendant said, "he just started shooting and saw her fall to the ground." (T. 790). The defendant then, 'took off running back into the car where 'G' was waiting." Id. The defendant stated that G subsequently paid him $700, although not on that night. Id.

After the above verbal account, the defendant also agreed to provide a signed and sworn statement in the presence of a stenographer. (T. 790). The sworn statement was then read to the jury.[2] (T. 792-808). The statement reflected that the defendant acknowledged having been read, understood, and waived his Miranda rights, prior to the above verbal account to Borrego. (T. 792-95). It also reflected that the sworn statement itself was given "freely

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[2] This sworn statement, in accordance with the agreement with defense counsel, had been redacted to delete references to defendant's other crimes. (T. 762).

and voluntarily," and that no one had "threatened or coerced" the defendant. (T. 808).

The sworn statement was in substantial conformity with the prior account to Borrego, but added other details. The defendant stated that he had known "G" for approximately 4-5 years, when the latter had contacted him for a shooting that he wanted defendant to do. (T. 796). G had said that the victim was a drug dealer. (T. 797). G had not mentioned the victim's name, but only stated that she would be at the wash house. Id. The defendant did not know the victim. Id.

On the day of the murder, G had come to the defendant's house in the afternoon, and they had then driven to G's house. (T. 799). They had stayed at G's house until "the sun went down," and they then drove to the laundromat. Id. They "waited and waited." Id. G had given the defendant the gun when they had parked behind the laundromat. (T.800). The "base head" was on "stake out," "basically a look out for me." (T. 802). The purpose was, "to shake down the deal," which the defendant understood was, "Just get the robber, get the money, get the dope, and then she would take a fall because this would have hurt her." Id. G had told the defendant that the victim was receiving a "big load" [of drugs] that night. (T. 802-

803).

According to the defendant, the "base head" then told him that the victim was there now, and they both walked to the laundromat. (T. 804). The "base head" ran away immediately after the defendant got inside the laundromat. (T. 804). According to the defendant, immediately upon entering, he pulled out his gun and demanded money: "I said, give it up. Where the money at? Where it at?" (T. 805). "There was a lot of commotion at that time." (T. 805). "They were like running. Everybody was running around." (T. 806). The victim was behind another girl; she was running. Id. The defendant then tried to, "shoot my way out of there," but the gun "got jammed, the first time, right after it just repeatedly shot, boom, boom, boom, boom." Id. The defendant saw the victim fall. Id. He then got out of the laundromat, and went to G's car which was waiting for him. (T. 806-7). He gave the gun back to G. (T. 807). G then took him home. (T. 807). G subsequently paid him, 'say about $300 or $400." (T. 808).

Contrary to the above account of drug dealing, however, no drugs were recovered from the victim's laundromat. (T. 773-74). Three rocks of cocaine were contained in the purse belonging to Eric Bethel, the attendant. (T. 773). Eric is a transvestite and

dresses up as a woman. (T. 772). The cash on the premises, approximately $500, had not been touched. (T. 774).

Finally, the defendant's friend, Jermain Tift, testified that the defendant had also confessed to him. Mr. Tift, who is a child care worker, had known the defendant for approximately two years prior to the time of the crimes herein. (T. 840-41). He was a friend. (T. 875). In the early part of March, 1989, prior to the crimes herein, while visiting his god mother in Liberty City, he had a conversation with the defendant. (T. 842-43). The defendant had asked Mr. Tift if the latter wanted to make some money by assisting in killing someone "down south." (T. 842-43, 875).

Subsequently, again in March 1989, while visiting Liberty City, another individual called Bob, had asked Mr. Tift to find the defendant. (T. 843-44, 875). "Bob" had been driving a white Cadillac and was parked across the street from the defendant's residence. (T. 844). Mr. Tift had knocked on the defendant's door, and the defendant was not there. Id. Tift so informed "Bob," who then left. (T. 844-45).

Later that afternoon, Mr. Tift again saw "Bob," driving the same car. (T. 845-46). This time, Bob was accompanied by the

defendant and they left together. Id. Some time after midnight, still on the same day, Tift then saw the defendant get out of Bob's car. (T. 846). The defendant's 'hand was full of money." Id. The defendant told Tift he had gone "down South," to a 'wash house," and shot 'someone named Sugar Mama." (T. 846-47, 859). The defendant had told Tift that he had killed the victim, because the victim 'had something to do with the killing of Bob's brother." (T. 847). The defendant had also said that 'Bob" had paid him the money. Id.

The State rested its case after presenting the above evidence. The defense did not present any witnesses. The jury convicted the defendant of first degree murder and armed burglary, as charged. (T. 961)

B. Penalty Phase Evidence

The penalty phase evidence was presented to the advisory jury on November 13, 1991. (T. 965, et seq.). The State presented evidence as to the defendant's prior conviction for another murder for hire plot where the victim had miraculously survived, in addition to testimony from the other occupants of the laundromat at the time of the shooting herein. The defense presented background

testimony from the defendant's family members and the defendant himself.

B1. State's Case

The State first introduced a prior judgment of conviction and sentence for one count of attempted first degree murder by the defendant. (T. 973). Detective Borrego then testified that, at the time of the statements with respect to the instant case, the defendant had also spoken with him as to the above attempted homicide of victim Marshall King. (T. 975). The attempted homicide had taken place six (6) days prior to the murder herein, and within a quarter of a mile of the laundromat, on the same avenue. (T. 976-77). The defendant's written statement with respect to this prior crime was then read to the jury. (T. 977-989).

The written statement reflects that the defendant had been contacted by "G." (T. 982). The latter had said, 'he was having some problems with this guy and, you know, he wanted the guy to be shot." (T. 983). G had pointed out the victim to the defendant, and given him a gun. (T. 983-85). G had said he would pay the defendant seven hundred dollars. (T. 984). The defendant had gone up to the victim, carrying the gun in a paper bag, and, 'just walked past and shot him" (T. 984-88). The defendant shot the

victim 'about two times," once in the mouth. (T. 986). The defendant then went to "G," who was "waiting on me," gave the gun back to G, and was driven home by the latter. (T. 986-88). The defendant had not known the victim or his name. (T. 983).

The victim of the above attempted homicide, Marshall King, also testified. (T. 993). Mr. King, too, lived in West Perrine. (T. 994). He was a handyman, and took care of victim Larkins' yard and the machines in the laundromat. (T. 1000). He had known Larkins for approximately 15 years. (T. 1000).

Mr. King testified that he had seen the defendant, for the first time, several days prior to being shot, as the latter was talking to "Fred" in the neighborhood. (T. 995). Fred had then approached, and told both Mr. King and the murder victim herein, Ms. Larkins, that someone had issued a contract for King's life. (T. 996). As a result, Mr. King began carrying a gun with him. (T. 996-97). On the day of the crime, while on his way to the neighborhood grocery store, King had stopped to talk to a friend, when he saw the defendant walk towards him, carrying a paper bag. (T. 994-95). The defendant had said, "What's happening?", and went around and to the back of King. (T. 997). King turned around, and the defendant shot him in the mouth, on the right shoulder, on the

right leg, and on his finger. (T. 998-99). King did not get a chance to use his own gun. (T. 999).

Jerry Briggs' wife, Valerie, then testified and corroborated the sequence of events leading up to the Larkins' shooting at the laundromat. (T. 1000-04). When the shooting began, her husband threw her on the floor and laid on top of her. (T. 1004-05). She was feeling threatened and hoping nothing would happen to her and her husband. (T. 1005). Mrs. Briggs testified that apart from herself, her husband, the victim, and the defendant, two other persons had been present at the time of the shooting. (T. 1005). One of these persons had been standing by the door. (T. 1005-06). The other had been in the office. (T. 1006).

Walter Hills, the victim's stepson, testified that he had been present at the laundromat at the time of the shooting. (T. 1008-09). Mr. Hills stated that he was at the back of the laundromat, playing a video game, when he heard the first shot. (T. 1009). He then "ducked down" by the washing machines, and heard a few more shots. Id.

The State then rested its penalty phase case.

B2. **Defense Case**

MS. Rose Cooper, the defendant's aunt, testified that she is a manager at a fish market. (T. 1013). She is very close to the defendant. (T. 1013-14). She described him as **a** gentle, loving person. (T. 1014). The defendant, as a child, had been good; he had never been in "no trouble." (T. 1015). According to Ms. Rose, there had been no instances of violence in the defendant's past. (T. 1014). The defendant had been attached to his family and contributed to them financially, (T. 1015) . The defendant's family is very close. (T. 1015-16, 1018). The defendant's grandmother **was** a minister; the defendant was a member of her congregation, and attended church voluntarily and regularly. (T. 1015-16, 1018-19). The defendant had not had any problems with drugs or alcohol. (T. 1017). He had never had any problems with school. (T. 1017). He **was** a strong-minded and independent individual, who was always "fun-loving" and told a lot of jokes. (T. 1018).

The defendant's brother testified that the defendant contributed to the family financially, because his stepfather had a drinking problem. (T. 1021). The stepfather functioned well, despite his drinking problem. (T. 1023) . The defendant got along well with his stepfather. (T. 1023). The latter was loving and had

never physically or mentally abused the defendant or any of the other children. Id. The defendant had never been involved with drugs or alcohol, and was always joking and fun-loving. (T. 1022).

The defendant's cousins also testified that the defendant was part of a large, close, church-going family. (T. 1025-29, 1031-32). One of the cousins stated that prior to the crimes herein, in 1987 or 1988, a close friend of the defendant's had been killed. (T. 1030-32). The defendant had been "upset," but not "distressed." (T. 1032). The defendant was always a fun, jovial person. Id.

The defendant's ex-girlfriend also testified that the defendant, whom she had known for 4-5 years, **was** a loving, joking person. (T. 1034). She had never known the defendant to have any problems. (T. 1035).

The defendant's mother testified that the defendant was born in July, 1967. (T. 1036). The defendant had finished high school. (T. 1037). The defendant had never had any major accidents or head injuries involving hospitalization. (T. 1046). He had never had any problems with drugs or alcohol. (T. 1047).

When the defendant was a youngster, she had married the

defendant's stepfather. Id. The latter had been a 'father figure" and had a "good relationship" with the defendant. Id. The mother and stepfather had then separated in 1987, two years prior to the crimes herein, when the defendant was twenty (20) years old. (T. 1037, 1046). The stepfather had never abused any member of the family. (T. 1045).

The defendant's grandmother had passed away approximately a month after the crimes herein. Id. The grandmother had been disabled for a long time, and the defendant had previously helped in taking care of her. (T. 1037-38). In 1988, the defendant's uncle and a close friend had also passed away. (T. 1038). The defendant had been very close to both his uncle and the friend. (T. 1039). However, even after these deaths, the defendant was still the joking, fun-loving type of person he had always been. (t. 1044).

Finally, the defendant also testified as to his background. (T. 1050). He stated that he had been "raised in a broken home." (T. 1051). He had first seen his father at the age of 13; it had been "rough" growing up without a natural father. Id. Although he had loved his stepfather and got along with him, the latter "wasn't really a father figure" because he had a drinking problem. (T.

1051, 1055). The defendant stated that he had gone through a lot of emotional problems in his life, due to the deaths of his friend and other family members, although his family never knew about these problems. (T. 1051-59).

Being an older brother, providing a father figure for said brother, and taking care of his grandmother for three months, were also apparently difficult. (T. 1056-57, 1059). The defendant added that he had also used drugs, but again without his family's knowledge. (T. 1056).

Finally, the defendant admitted that despite the above alleged "social set backs" while growing up, he had been a member of the church choir, had played the trombone and the sax while in school, had been a sergeant-at-arms in the student council, had been a counselor in the HUD program, had completed a training program as a corporal in Georgia, and, also did well in the computer program courses which he was completing prior to the commission of the instant crimes. (T. 1062-63).

B3. Advisory sentence and the Trial Court's findings

The jury recommended a sentence of death by a majority vote of

9 to 3. (T. 1093). The sentencing hearing before the trial judge took place on December 13, 1991. (SR. 21-31).

At said hearing, the Defendant made another statement to the court. (SR. 25-6). The defendant stated that he had done "a lot of things that I regret." (SR. 25). He wanted the attorneys and the judge to see that, "I am not a menace to society or that type of threat." Id. The defendant stated that, he had made "a mistake," was asking God and man for forgiveness, and "I just want my life." Id. The trial court had previously also considered the presentence investigation report, which had been prepared following the defendant's conviction of the attempted murder of Marshall King, at the request of defense counsel. (T. 1097, R. 115). The trial judge then orally pronounced a sentence of death and some of his reasons therefore. (SR. 26-28).

The trial judge entered the written sentencing order immediately after the above pronouncement. (R. 111-17, SR. 28-9). The trial judge found the following five (5) aggravating factors: 1) the defendant had been previously convicted of a violent felony - the attempted murder of Marshall King; 2) the defendant knowingly created a great risk of death to many persons; 3) the murder was committed in a cold, calculated and premeditated manner without any

pretense of moral or legal justification; 4) the murder was committed during the commission of a burglary; and, 5) the murder was committed for pecuniary gain. (R. 111-115).[3]

The trial court also found that no statutory mitigating circumstances were supported by the evidence. (R. 115-116). The trial court accepted the family members' testimony, with respect to the defendant being a good friend and a man who cared for his family, as nonstatutory mitigation. (R. 116). The trial judge, however, found this mitigation to be, "outweighed to the point of obliteration by the aggravating circumstances." (R. 117). The trial judge concluded, "[t]his Court has searched the record and its conscience to find some reason for imposing a life sentence but has found none. This Court has come to the conclusion, and has done so with great reluctance, that the Defendant's crime requires that the ultimate penalty be imposed." Id. This appeal has ensued.

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[3] The last two factors were not merged, as the trial judge found that the purpose of killing the victim was not to rob her during the burglary. (R. 114). The court noted that the defendant had not stolen anything during the burglary; the defendant had made no effort to take several hundred dollars located at the scene. (R. 114). The trial judge found that, instead, the defendant had been hired to kill, and arranged for and received, subsequent to his task, three or four hundred dollars from "G." Id.

SUMMARY OF ARGUMENT

I. The trial court properly denied the defendant's motion to suppress. The record supports the conclusion that the defendant's statements were voluntary. The officers who obtained the statements clearly testified that there were no promises, threats, coercion or physical force. Additionally, the defendant was read his Miranda warnings and he expressly waived them. In the defendant's transcribed, sworn statement, he specifically acknowledges that there were no threats, promises or coercion, Additionally, contrary to the Appellant's argument herein, it was not necessary for the trial judge to specifically state, on the record, his finding that the statements were voluntary.

II. The Appellant's Witherspoon claim has not been properly preserved for appellate review since defense counsel did not assert the grounds now relied upon in the lower court proceedings. Furthermore, the trial court did not abuse its discretion in granting the State's challenge for cause, as the prospective juror's unequivocal statements demonstrated an inability to set aside personal beliefs in deference to the rule of law.

III. Contrary to the Appellant's claim, there was no discovery

violation in the trial court proceedings. One week prior to trial, the prosecutor reviewed the witness' prior disclosed statements with that witness; nothing new was elicited. Furthermore, a change in testimony, from the witness' pretrial statement to the witness' in-court testimony, does not constitute a discovery violation. It is a matter which the defense deals with by attempting to impeach the witness with a prior inconsistent statement.

IV. The claim regarding jurors notes is unpreserved for appellate review since defense counsel never requested any instructions to the jurors regarding the use of notes. Furthermore, any claim regarding the notes is without merit, since the jurors, with defense counsel's consent, were prohibited from using any notes during deliberations and the notes were taken away from the jurors.

V. The Appellant's claim regarding a prosecutorial comment is unpreserved for appellate review, since there was no objection to the comment in the trial court. Furthermore, a review of the pertinent portions of the closing arguments refutes the Appellant's contention that the prosecutor was attempting to comment on the Appellant's effort to "silence" witnesses. The prosecutor's comment was simply explaining the reasonableness of witness Briggs'

actions, in protecting his wife, as opposed to standing up and walking into a barrage of flying and ricocheting bullets.

VI. The trial court properly found the aggravating factor that the defendant knowingly created a great risk of death to many persons. In addition to the murder victim, four (4) other people were present in the laundromat. Apart from shooting the victim, five other bullets were fired around the laundromat in the direction of each of the other four persons, thus endangering all of the other occupants of the laundromat. Alternatively, any error in finding this aggravating factor to exist must be deemed harmless, in light of the strength of the remaining four aggravators and the minimal value of the nonstatutory mitigation presented.

ARGUMENT

I.

THE DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSION WAS PROPERLY DENIED.

The Appellant contends that his confession was not voluntary. The trial court, however, denied his motion to suppress the confession on the ground that it was involuntary, after a pretrial evidentiary hearing, The trial court's ruling was correct and supported by the preponderance of the evidence presented. &tone v. State, 382 So. 2d 1205, 1212-13 (Fla. 1980).

A. Evidence Presented At The Suppression Hearing.

The defendant had filed a motion to suppress alleging, inter alia, that his written and oral statements to the police were not freely and voluntarily given. (SR. 2). The motion to suppress was as to all three of defendant's pending homicide and attempted homicide cases.[4] Id. Prior to trial, the trial court conducted a hearing on this motion to suppress. The State presented testimony from all four (4) police officers, who had come into contact with the defendant prior to and during his statements to the police. The defendant also testified at this hearing.

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[4] The defendant was convicted and received the death sentence as to the second homicide case, which is currently pending before this Court, in Case No. 80,278. The symbol "R2. ", refers to the record on appeal in said case.

Officer Hull testified that the defendant and two other individuals, Messrs. Ison and Curgil, were arrested during the course of a drug sweep of the housing projects' area in Liberty City, on March 30, 1989. (T. 45-6). Curgil was in possession of a .357 Magnum, which was later ascertained to have been the weapon utilized in another murder by the defendant, that of Lee Arthur Lawrence in Perrine, Florida. (T. 46, 69). At the police station, Officer Hull had spoken with the defendant, but not in regard to any offenses. The latter seemed like a "nice guy", and had stated that he "only had a marijuana charge and would likely be out the next day." (T. 47).

On April 1, 1989, at approximately 6:00 p.m., Officer Hull saw the defendant sitting on the front porch of his grandmother's residence in Liberty City, eating a "hot sausage". (T. 47-8). The officer asked, 'Ronnie come here for a minute." (T. 48-9). Upon the defendant approaching, the officer stated that some homicide investigators were investigating a murder "down south", that he may have been a witness to. (T. 48). The officer asked if the defendant was willing to go to the police station to answer questions. (T. 49). The defendant responded, "okay". Id. Officer Hull testified that he had neither threatened the defendant nor made any promises to him. (T. 50).

Officer Hull then contacted his office by radio, and was informed that the homicide detectives would pick up the defendant. (T. 49). A few minutes later, two homicide detectives, dressed in plain clothes, arrived in an unmarked police vehicle to transport the defendant to the police station. (T. 49-50). Detective Smith testified that upon arrival, he saw the defendant and another suspect, Ison, standing with officer Hull. (T. 50, 61). Neither of the suspects was handcuffed or in custody, in any manner. (T. 58).

Smith, too, asked the defendant if he would speak to the detectives about a homicide investigation. (T. 59). There were no threats or promises. Id. The defendant agreed, and was accompanied by suspect Ison during the ride to the station. Id. Neither the defendant nor Ison were handcuffed, nor were they threatened or promised anything during the car ride. (T. 59-60). At the police station, detective Smith turned the defendant over to detective Borrego. (T. 59). Smith then left, driving Ison to the homicide office.

Detective Borrego testified that he met with the defendant at the team police office at approximately 6:30 p.m. (T. 70).

Borrego asked the defendant if he would talk with him at the homicide office. (T. 71). There were no threats nor any promises. Id. The defendant freely and voluntarily accompanied Borrego to the homicide office, at approximately 6:45 p.m. (T. 71)

Borrego began his interview of the defendant at approximately 7:00 p.m., after deciding with other detectives as to which investigator would interview what suspect. (T. 73). Apart from Ison, the detectives were interviewing other suspects, including Rodney Newsome, the Co-defendant in the Lee Arthur Lawrence homicide. (T. 95-6).

Borrego first obtained background information from the defendant. Id. He ascertained that the defendant was not under the influence of any drugs, medication or alcohol. (T. 74). The defendant had dropped out of school, having finished the 11th grade. Id. He was then attending a computer program school. Id. He could read English and he understood everything that the detective was asking, Id. Borrego then explained to him the purpose of the questioning, and **advised the defendant of his** Miranda rights. Immediately prior to advising the defendant of his Miranda rights, Borrego asked detective Romagni to enter the interview room and witness the reading of the Miranda rights. (T.

74, 62-66).

Borrego then showed the Miranda rights form to the defendant, told him what it was, and proceeded to read the form. (T. 74). After reading each question on the form he would stop and ask for a response. Id. The defendant affirmatively stated that he understood each question on the rights form and placed his initials next to each affirmative answer. (T. 75-6). Borrego had also asked that the defendant read one of the questions back to him, thus ensuring that the defendant could in fact read. (T. 75). The defendant, having affirmatively stated that he understood his Miranda rights, agreed to answer questions with no 'threats or promises" having been made to him. (T. 75-6). The Miranda form was signed by the defendant and witnessed by Borrego and Romagni at 7:30 p.m. (T. 76).

Detective Romagni also testified and corroborated that he had witnessed the defendant having been Mirandized. (T. 64). Romagni testified that the defendant had not been handcuffed, had not been complaining of any physical discomfort, was not under the influence of alcohol or narcotics, had not been threatened or promised anything, and, had understood his rights. (T. 65-6). A copy of the waiver form signed by the defendant in the presence of Borrego

and Romagni, at 7:30 p.m., was admitted into evidence. (T. 64-5).

Borrego testified that thereafter he had first taken a verbal statement from the defendant. (T. 76-7). The latter had then given a 46 page recorded statement, in the presence of a Steno-Reporter. Id. Borrego testified that during the course of the first verbal statement, the defendant had not been threatened or abused in any way, and, had not been promised anything. (T. 77-8). He had been able to understand Borrego's questions, and he had been coherent. Id. Borrego stated that he had provided the defendant with an opportunity to utilize the restroom and had also offered him food or drink. (T. 78-9).

The formal statement began at 1:43 a.m. and concluded at 3:45 a.m.[5] (T. 81). The defendant, however, had not been continuously questioned during these time periods. (T.78). The police were investigating the defendant's involvement in three separate homicide and attempted homicide cases,[6] and, various investigators were simultaneously questioning various other suspects, including

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[5] The daylight savings time had changed during the taking of this statement, adding an extra hour to the actual time for taking same. (T. 81).

[6] The murder herein, the murder of Lee Arthur Lawrence (Case No. 80,278), and, the attempted homicide of Marshall King (T. 80-81).

a co-defendant in one of the defendant's other murder cases. (T. 78, 80-1, 95, 98). Borrego would thus leave the interview room frequently to talk to other investigators and compare notes with them. Id. The defendant, however, had not been informed of the other suspects' statements. (T. 96, 98).

After initially denying any knowledge, the defendant had begun admitting his involvement within 10-15 minutes during the interview. (T. 94, 97). Borrego had confronted him with truthful evidence of recovery of the gun utilized in the second homicide, and that a witness in the instant case had positively identified him from a photo lineup. (T. 97). The defendant was specifically not told about information obtained from other witnesses, suspects or codefendants. (T. 99-100). If there were differences between what the defendant was stating and what other suspects had said, Borrego would try to clear up the differences by further questioning. (T. 98). The main inconsistency in the defendant's statement was as to who had hired him for the second homicide, that of Lee Arthur Lawrence. (T. 106). The defendant had maintained that "G" had hired him, whereas co-defendant Newsome had stated that it was Bobbie Lee Robinson. (T. 106-7).

At the conclusion of the formal statement, the defendant had

agreed to take the detectives to the various shooting scenes involved in the three homicide investigations, in Homestead and Perrine, approximately 1 - 1½ hours away from the police station. (T. 82, 101). The parties returned from said scenes, at approximately 6:00 a.m. The defendant then had the opportunity to review his formal statement, which had now been typed. (T. 83-4). The defendant read a copy of said statement. He was alert, found errors, and made corrections on five pages of the statement. (T. 104, 84-87).

The defendant was then taken to jail and photographed. (T. 87). The defendant was not threatened, hit or abused in any way during the above interviews, nor was he promised anything. (T. 91). Upon cross-examination by defense counsel, Borrego further, stated that the defendant had not asked to call any of his family members. (T. 104). Borrego also stated that the defendant, towards the end of his statement, had asked what Borrego could do for him. (T. 05). Borrego testified that he had simply told the defendant that, 'he was going to be charged with these crimes, and he was going to go to jail and have his day in court, and he would be tried in court." (T. 105). There was no mention of death penalty. Id.

A copy of the transcribed formal statement was admitted into evidence, and the State requested that the trial judge review same prior to ruling on the motion to suppress.[7] (T. 81). The formal statement, taken in the presence of a steno-reporter, reflects, at its commencement, that the defendant acknowledged having been previously read his Miranda rights, at 7:30 p.m., and that he had signed a waiver of those rights, at said time, 'of my own free will without any threats or promises having been made to me." (R2. 56-57, T. 794-95). The formal statement also reflects, at its conclusion, that the defendant affirmatively stated that no one had "threatened or coerced" him to give the formal statement, and that he had given same "freely and voluntarily". (T. 808, R2. 97). The photo of the defendant taken at the jail immediately after his having made corrections and signed said statement, and which depicted him being free of any injury, was also introduced into evidence.[8] (T.87-88, R2. 51).

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[7] Said statement, in its entirety, is not included in the record on appeal, despite being admitted into evidence. However, as the motion to suppress and hearing thereon were as to all of the defendant's cases, a copy of said statement is included in the record on appeal of the defendant's conviction in the accompanying homicide case, FSC No, 80,278, at R2. 52-99. The Appellee, pursuant to Fla. Stat. 90.202, requests that this court take judicial notice of its own records. A redacted version of the statement is also included in the transcripts of trial in the instant case, and referenced herein.

[8] Said photo is also included in the record on appeal in the defendant's accompanying case in this court, FSC. No. 80,278, at

As noted previously, the defendant also testified at the suppression hearing. He stated that he was approached by a uniform officer who wanted to ask some questions, but would not tell him what the questions were about. (T. 108). The defendant testified that the officer "touched me on the shoulder and the arm," that he did not want to answer questions, but that, 'since he [officer] was there, I didn't feel I had nothing to hide. I came with him." (T. 109). The defendant stated that he did not get a chance to call any members of his family, but he admitted that he had not wanted to do so either. (T. 109-10). The defendant added that upon arrival at the police station, he had been handcuffed, but that then, 'I took them off". (T. 112).

At the station, according to the defendant, he never saw the Miranda waiver form prior to or during questioning, was not informed of its contents, and did not sign it, until after the stenographer typed up his formal statement and he had made corrections and affixed his signature thereto, on the next morning. (T. 114-15). The defendant testified that even then, he couldn't "remember" the explanation of his Miranda rights, "but it wasn't clear, whatever they were telling me." (T. 115). As noted

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R2. 51. The Appellee, again pursuant to Fla. Stat. 90.202 requests that this Court take judicial notice of its own records.

previously, however, the Miranda waiver form reflecting that the defendant signed same prior to any questioning, at 7:30 p.m., in the presence of two witnesses, was admitted into evidence. (T. 64-65). Moreover, the formal statement, taken in the presence of a court reporter, also reflected that the defendant acknowledged having understood and signed a written waiver of his rights at said time, prior to any questioning:

. . .

Q: **[Detective Borrego]** Are you attending school now?

A: **[Defendant] Yes,** I am.

Q: What type of school are you attending?

A: P.S.I.

Q: What is that?

A: Institute for word processing.

Q: Can you read and write English?

A: Yes.

Q: Do you understand the way that I am talking to you right now?

A: Nuh-uh.

Q: Are you under the influence at this moment--

A: Not--

Q: --of any drugs?

A: --not at the present time.

Q: Are you under the influence of any alcohol at this time?

A: No.

Q: Are you under the influence of any medication at this time?

A: No.

Q: I'm going to Introduce into the record a form that we went over earlier today. I'm going to read the form again to you.

'Metro-Dade Police Department Miranda Warning. Before you are asked any questions, you must understand the following rights:

"1. You have a right to remain silent. You do not have to talk to me if you do not wish to do so. You do not have to answer any of my questions. Do you understand that right?" Are these you initials next to the word "Yes"?

A: uh-huh. Yes.

Q: '2. Should you talk to me, anything which you might say may be introduced into evidence in court against you. Do you understand?"

A: Yes.

Q: Are those your initials next to the word "Yes" ?

A: Yes.

Q: '3. If you want a lawyer to be present during questioning, at this time or anytime hereafter, you are entitled to

have the lawyer present. Do you understand that right?" Are those your initials next to the word "Yes"?

A: **Yes.**

Q: '4. If you cannot afford to pay for a lawyer, one will be provided for you at no cost if you want one. Do you understand that right?"

A: **Yes.**

Q: Are those your initials next to the word "Yes" ?

A: **Yes.**

Q: 'Knowing these rights, are you now willing to answer my questions without having a lawyer present?" Are those your initials next to the word 'Yes"?

A: **Yes.**

Q: This statement is signed of my own free will without any threats or promises having been made to me." Did you sign the form?

A: Yes, I signed the form.

Q: And at what date and time did you sign it?

A: 4/1/89, 7:30 p.m.

(R2. 55-57, T. 793-95) (emphasis added).

According to the defendant, however, instead of reading him his rights, the police had told him that codefendant Newsome had

implicated him, and, that if the defendant cooperated, he would not get the electric chair. (T. 111). The defendant testified that he told the police that Newsome had not implicated him, whereupon the police punched and hit him with their elbows. (T. 111-12). On cross-examination, the defendant additionally remembered that the police had also "slammed" telephone books into his body, ripped his shirt, threatened to shoot if he tried to run out of the homicide office, and bruised the outside of his nose. (T. 125-26).

The defendant admitted, however, that upon subsequent entry to jail, he had not gone to "Ward-D" (the jail medical facility). (T. 126). As noted previously, the booking photos of the defendant, taken immediately after the transcription and signing of the formal statement, depicting the defendant without any bruises or ripped clothing, were also introduced into evidence.

In any event, the defendant testified that he did not cooperate with the police after the alleged statements about the codefendant, the electric chair, and the hitting/punching. (T. 111-112). Instead, he testified that he cooperated with the police when the latter told him that there were detectives at his mother's house. (T. 112). There was no claim or testimony that Borrego or other officers had threatened the defendant's family members.

Rather, the defendant stated that he was scared, because, on a prior occasion, the police had kicked in the door to a "wrong house" and arrested his mother. Id. The defendant testified that he was therefore 'in fear for my family." Id. He stated that he had only previously come before a judge "for possession of marijuana, but never committed any crimes". Id.

The defendant testified that he had learned the information that he was giving, from 'the police report", and, from what the police were saying codefendant Newsome had told them. (T. 113). He stated that he had given the statement in the presence of the court reporter, because he did not know if the police had hurt his family. (T. 115). He also added that he was tired and "sleepy". (T. 114-15). The defendant admitted, however, that he had woken up past noon on the day of his arrest, and had also slept prior to signing the formal statement, on the way back from showing the police the crime scene. (T. 114-15). The defendant also admitted that he had been arrested and in police custody several times previously, in 1987 through 1989, for several charges of possession of drugs, burglary and grand theft. (T. 118-120). He stated that although there were many charges, he had not been scared previously, "because it was nothing serious". (T. 120). Finally, upon being confronted with the fact that the police reports he had

referred to in his direct examination were written after the date of his statement, the defendant stated that he had not been shown any police reports during his interview. (T. 122). Rather, the defendant claimed that he had said "police records" on his direct examination, and that the police had questioned witnesses at the scene of the crime prior to typing up the police reports. (T. 122-23).

B. The Parties' Arguments And The Ruling Of The Trial Court

With respect to the voluntariness of the confession, defense counsel stated that the defendant had truthfully testified that he was scared and nervous, that he had been told he could get the electric chair, that the police had given him information as to the details of the crime, that the questioning had been lengthy, and that the defendant had been deprived of sleep. (T. 130-2). The defense argued that the defendant had not understood his rights, and, due to the absence of any tape recording of the prior oral statements reflecting lack of harassment or hitting, the defendant should be given, "the benefit of the doubt,... he did not do this totally freely. This was not a voluntary statement.". (T. 133).

The State argued that the defendant was not credible and had misrepresented what had transpired, in light of the testimony from

all the officers who had come into contact with the defendant, the signed Miranda waiver form, and, the transcribed formal statement. (T. 133-5). The State argued that the "officers were telling the truth and the defendant was not." Id. The prosecutor noted that the defendant had even lied about his criminal history while testifying at the suppression hearing. (T. 135). The State also argued that any mistreatment or other allegations by the defendant could have been mentioned in the formal statement, when the court reporter was present, but were not. Id.

The trial judge, in reliance upon the recorded formal statement, specifically asked defense counsel if there was anything in said statement that would support the defense argument that, "[defendant] didn't do this voluntarily and that there is an insufficient understanding of his rights?" (T. 135). The trial judge had previously reviewed the recorded statement. (T. 91, 81). Defense counsel acknowledged that the statement did not support such claims. (T. 135). The trial judge then denied the motion to suppress, stating:

> All right.
>
> As to the motion, the motion to the confession, denied.

> This was done at the homicide office. The Miranda warning is sufficient. Nothing suggests a [lack of] waiver (sic) of the constitutional rights."[9] (T. 135).

C. Merits of the Claim

The Appellant contends that, a) the trial judge's denial of the motion to suppress **was** not supported by the preponderance of the evidence, and, b) the trial judge, in violation of McDole v. State, infra and progeny, reversibly erred in failing to make factual findings and to specifically state that the defendant's statements were "voluntary". The Appellant's contentions are without merit. The evidence clearly supports the denial of the motion to suppress, and the trial court **was** not required to expressly state that the confession was "voluntary" or to make specific factual findings, pursuant to Antone v. State, infra.

c.1. Burden Of Proof

The prosecution has the burden of proving by a "preponderance of the evidence" that a confession was freely and voluntarily given. Lego v. Twomey, 404 U.S. 447, 92 S.Ct. 619, 30 L.Ed.2d 618, (1972); McDole v. State, 283 SO. 2d 553, 554 (1973), modified on

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[9] The last statement, "[n]othing suggests a waiver . . ." is obviously **a** scrivener's error by the court reporter. The trial judge had already denied the motion to suppress and expressly stated that the Miranda warnings herein were sufficient. Neither party objected or commented in any fashion. (T. 135). The parties immediately commenced scheduling a hearing on another motion. Id.

other grounds in Antone v. State, 382 So. 2d 1208, 1212 (Fla. 1980). On appeal of the ruling of a trial court on a motion to suppress, the evidence is considered in the light most favorable to the prevailing party. Owen v. State, 560 So. 2d 207, 211 (Fla. 1990). This Court has noted that the "preponderance of the evidence" burden for a finding of voluntariness is satisfied, in a "typical case wherein the sole question is the credibility of the police and the defendants", and where, "the only evidence is the statements of the police officers that the confessions were not coerced and those of the defendants that they were". McDole at 554-5.[10]

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[10] This Court in McDole found that the preponderance of the evidence standard had not been met, where the defendants' testimony had been corroborated by physical and other reliable evidence, whereas the police officer's testimony had been impeached by the officer's own prior inconsistent sworn statements. The Defendants in McDole had testified that they confessed only after first being beaten by the police and then being told what to say in their statements. This Court noted that the defendants' testimony of coercion was corroborated by a medical doctor who had examined the defendants the day after their confessions, and reported recent injuries and bruises, consistent with the defendants' testimony of how and where they had been hit and kicked. The defendants' testimony was also corroborated by a deputy sheriff who had seen them at the time of their arrest after their confessions, and reported visible signs of injuries. A confidential informer for the State had further testified that he had seen the defendants at the police station at the time of their confession. The defendants had looked "drowsy" and "beat up". This witness had added that the police officers had later admitted to him that they had beaten the defendants into confessing. Furthermore, one of the waiver-of-Miranda-rights forms reflected that it had been signed ten minutes after the time reflected on the signed confession; there was no explanation for this discrepancy. Finally, the defense had also

The instant case involves consistent and corroborated testimony from all four police officers who had come into contact before, during and after his confessions. The testimony of said officers, detailed in section A herein at pp. 26-35, established the voluntariness of the defendant's confessions. Said testimony reflected that, a) the defendant had voluntarily accompanied the officers to the police station, b) the defendant had not been threatened, abused, or promised anything at any time prior to or during his statements, c) the defendant had been read his Miranda rights prior to any questioning, had understood said rights and waived same; d) the defendant was not continuously questioned and had been given the opportunity to eat, drink, use the restroom facilities, and sleep, and; e) the defendant had been alert **and** cooperative throughout the course of his questioning.

The Appellant, in reliance upon the defendant's testimony at

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impeached the testimony of the police officer who had denied beating the defendants, with the officer's own prior sworn statement. Under these circumstances, this Court held that the trial judge's denial of the motion to suppress, which was devoid of any factual findings or legal reasoning, was not supported by the evidence presented.

the hearing below, which was rife with inconsistencies,[11] has argued that the defendant herein: (a) was promised leniency and misled as to his true position, by allegedly being told that he could avoid the death penalty if he cooperated; (b) that he had signed his confession while not knowing about the safety of his family, and; (c) that he had been physically mistreated and threatened by the police. Brief of Appellant at pp. 37-40. All of said contentions were, however, specifically denied by police officers, as detailed in the summary of said officers' testimony at the suppression hearing, set forth in section A, pp. 26-35 herein.

All of the four police officers who had come into contact with the defendant prior to, during or after his confessions, testified that they had neither promised the defendant anything, nor threatened or otherwise abused him in any way. Officer Borrego specifically stated that there was no mention of the death penalty at any time. This officer testified that after his arrest, the

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[11] The defendant's testimony, as detailed on pp. 35-41 herein, was internally inconsistent and conflicting as to, a) whether he had voluntarily accompanied the officers to the police station, b) whether he had wanted to call his family members, c) whether he was handcuffed at any time during questioning, d) whether he had confessed as a result of alleged threats about the electric chair, e) the details and frequency of the alleged physical abuse, f) the source of the information allegedly provided him by the police, (g his prior criminal history, and, h) whether he had been sufficiently alert at the time of his statements.

defendant had asked what would happen to him. The officer had merely responded that the defendant would be charged with the instant crimes, and have his day in court.

Likewise, as to the alleged concern for the safety of his family, it should be noted that the defendant's testimony at the suppression hearing was entirely devoid of any mention that the police herein had actually threatened the safety of his family members. There was no mention or claim that the defendant had communicated any such fear of safety, which allegedly arose out of his family's prior dealings with other police officers, to any of the officers involved herein either.[12] Additionally, officer Borrego denied that the defendant had asked to call any family members.

Moreover, the defendant's own prior sworn statements corroborated the police officers' testimony, and, refuted the contentions raised herein. The defendant's transcribed statement reflected that he, in the presence of a court reporter, had stated

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[12] The state would note that to render a confession inadmissible, any alleged delusion, '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, 458 (1984).

that he had been read his Miranda rights at 7:30 p.m., prior to any questioning and prior to his oral confession, and had agreed to answer questions at that time, "of my own free will without any threats or promises having been made to me." (R2. 52, App. 5) . At the conclusion of the subsequent transcribed statement, again in the presence of the court reporter, the defendant had further stated that no one had "threatened or coerced" him to give the formal confession, and that he had given same 'freely and voluntarily." (App. 45, R2. 97). The photograph of the defendant, taken at the jail and immediately after his confessions, in addition to the defendant's own testimony at the hearing below that he had not sought nor been admitted for any medical treatment, further corroborated the officers' testimony that he had not been physically abused, mistreated, or threatened.

In light of the consistent and unimpeached testimony from the police officers herein which was corroborated by the defendant's prior sworn statements and other physical evidence, the State met its burden of proving voluntariness by a preponderance of the evidence. McDole supra.

C.2. Findings By The Trial Court-

The Appellant, as noted previously, has also argued that the

denial of the motion to suppress was erroneous because the trial court did not make any specific findings of fact and did not expressly state that the confession was voluntary. The Appellant has relied upon McDole, supra, Green v. State, 351 So. 2d 941 (Fla. 1977) and Rice v. State, 451 So. 2d 548 (Fla. 2d DCA 1984). This Court in McDole, 283 So. 2d at 554, 556, held that, prior to consideration of a confession by the jury, "a specific finding of voluntariness", and clear reasons for such a finding by the trial judge, are necessary. In Greene, supra, this Court added that absent such findings, the remedy was a new trial and not merely a remand to the trial judge for specific findings.

This Court has, however, receded from McDole and progeny as to the requirement of any specific findings. See &&one v. State, at 382 So. 2d 1212-13, wherein this Court held:

> Antone next asserts that the trial judge's naked denial of the motion to suppress these statements mandates a reversal pursuant to *McDole v. **State, 283 So.*** 2d 553 (Fla. 1973). This Court, however, has modified the strict requirement that an express finding must appear in the record. ***See Wilson v. State,*** 304 so. 2d 119 (Fla. 1974); ***Henry*** v. State, ***328 So.*** 2d 430, 431 n.1, (Fla.), ***cert. denied,*** 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976) Ideally, the trial judge should specify his conclusions concerning the voluntariness of a disputed confession or inculpatory statement. However, due process is not offended when the issue of

> voluntariness is specifically before the judge and he determines that the statements are admissible without using the magic word "voluntary." The record reflects that the only issue before the court was the voluntariness of Antone's statements. The evidence clearly supports the finding that these statements were free from coercion. The resulting denial of the motion to suppress was thus not in error.

See also Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967) (the trial judge need not make formal findings of fact or write an opinion in concluding that a confession is voluntary); Peterson v. State, 382 So. 2d 701, 702 (Fla. 1980) ("when the trial judge admits into evidence a statement or confession to which there has been an objection, on review the record must reflect with unmistakable clarity that he found that the statement of confession was, by the preponderance of the evidence, voluntary and made in accordance with Miranda. ... The trial judge can make this task easier by reciting his conclusionary findings, but the failure to do so is not fatal where the record, with unmistakable clarity, demonstrates that he understood his responsibilities and properly fulfilled them). The trial court's failure to specify his conclusion as to the voluntariness of the defendant's confession was thus not error. Antone, Peterson, supra.

Finally, the defendant's reliance upon Rice v. State, supra is

also unwarranted. In Rice, 451 So. 2d at 549, the appellate court **held that it was not,** 'unmistakably clear from the record that the trial judge's denial of the motion to suppress was predicated upon his conclusion that the confession was voluntary". The trial judge in that case, had not only failed to specifically state any conclusion, but had affirmatively stated his misunderstanding of the necessity for the court to consider and rule upon the voluntariness of the confession prior to submitting same to the jury. The trial judge, in a dialogue with the attorneys, had raised the issue of "whether or not this [voluntariness of the confession] is a jury question as opposed to the court ruling at this time," and, had denied the motion to suppress, stating, 'It is a matter which can properly go before the jury to determine the matter of voluntariness." Rice, 451 so. 2d at 550, n.1. The appellate court held that the record **was** thus unclear, as, "[t]he conclusion could well be drawn that the matter [of initial determination of voluntariness] was left to the jury. Id.

There were no such affirmative statements of misunderstanding the trial court's duty in the instant case. As detailed in Section B herein at pp. 41-43, the issue of voluntariness was squarely before the trial judge. The parties argued that the sole question before the trial judge was a determination of credibility between

the officers and the defendant. The trial judge affirmatively indicated his reliance upon the defendant's sworn and transcribed statement, which reflects the defendant's express acknowledgment that he had understood his Miranda rights and had confessed voluntarily, without any threats or promises. The trial judge then stated that the motion to suppress was 'denied". (T. 135). The record herein is thus unmistakably clear that the trial judge concluded that the confession was voluntary, and that his conclusion was supported by the preponderance of the evidence presented. Antone, supra; Peterson, supra.

11.

THE LOWER COURT DID NOT ERR IN EXCUSING POTENTIAL JUROR WILLIAMS FOR CAUSE.

The appellant contends that the trial court reversibly erred in excusing potential juror Williams for cause, as the latter had stated that, "it depends on how it goes", as to whether she would be able to consider the death penalty. Appellant's Brief at p. 44. This issue has not been preserved for review herein. Moreover, the trial court did not abuse its discretion in removing said juror, in light of her subsequent and unequivocal statements which demonstrated an inability to set aside personal beliefs in deference to the rule of law.

The contemporaneous objection rule applies to Witherspoon[13] claims in Florida. Wainwright v. Witt, 469 U.S. 412, 431, n.11, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), citing Brown v. State, 381 So. 2d 690, 693-94 (Fla. 1980); pee also Maxwell v. State, 443 So. 2d 967, 970 (Fla. 1983); Turner v. State, 645 So. 2d 444, 446 (Fla. 1994). Furthermore, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection in the lower court. Steinhorst v. Stat-e, 412 So. 2d 332 (Fla. 1982); Turner, supra.

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[13] Witherspoon v. Illinois, 391 U.S. 510 (1968).

In the instant case, the State challenged potential juror Williams on the grounds that said juror would be unable to follow the law based upon her personal beliefs: '[Williams] clearly pointed out, based upon religious grounds, that the Bible says that one shall not take a person's life. There is no question in his mind, no matter what the aggravating factors are." (T. 543). Defense counsel did not refute the prosecutor's characterization of juror Williams' position. Nor did counsel present the argument now advanced on appeal. Instead, defense counsel merely observed:

> I believe that he should say -- 1 think unfortunately the State has indicated when someone has said that specifically he will not under any circumstances follow the Courts instruction.
>
> I think that is the persons opinion one way or the other and are not grounds for throwing people off, unless they said I am not voting one way or the other, I am voting this way. I am not or I am participating this way. (T. 543).

The trial judge sustained the challenge for cause, without any further remarks by the defense. Id. The Appellee submits that in accordance with Turner and Steinhorst, supra, defense counsel's above quoted remark does not constitute a proper objection to the State's challenge or the trial court's grant thereof.

In any event, the Appellee further submits that the trial

court did not abuse its discretion in excusing the potential juror. To prevail upon a claim of erroneous exclusion, "a defendant must show that the trial court, in excusing the prospective juror for cause, abused its discretion." Hannon v. State, 638 So. 2d 39, 41 (Fla. 1994). 'The inability to be impartial about the death penalty is a valid reason to remove a prospective juror for cause." Id. Moreover, a prospective juror's views regarding capital punishment need not be made unmistakably clear. Wainwright v. Witt, 469 U.S. at 424. "[T]here will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror." Hannon, 638 So. 2d at 41, quoting Wainwrisht v. Witt, 469 U.S. at 425-26. Thus, where a prospective juror's responses are equivocal, conflicting or vacillating with respect to the ability to be impartial about the death penalty, this Court has upheld the decision of the trial judge on whether such a juror was properly excludable. See, Randolph v. State, 562 so. 2d 331, 335-37 (Fla. 1990); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990); Tavlor v. State, 638 So, 2d 30 (Fla. 1994); Hannon, supra.

In the instant case, the record reflects that juror Williams

first stated that she opposed the death penalty based upon her religious beliefs, and would not "go along with the program." (T. 502-3). Juror Williams then stated that although she would prefer not to sit as a juror and make a recommendation as to the death penalty, "[I]t depends on how it goes." (T. 583). However, upon subsequent questioning by the prosecutor, she then unequivocally stated that she would not be able to recommend the death penalty in accordance with instructions of law provided by the trial judge. (T. 504). The following colloquy had transpired between the prosecutor and juror Williams:

> [Prosecutor]: How about you Mr. Williams?
>
> **[Juror Williams]:** I prefer not.
>
> **[Prosecutor]:** You prefer not to sit as a juror and make a recommendation for the imposition of the death penalty.
>
> Is that what you are saying?
>
> **[Juror Williams]** : Right.
>
> **[Prosecutor]:** Is that based upon philosophical, religious, or moral grounds?
>
> **[Juror Williams]** : In the Bible it says, Thy [sic] shall not kill.
>
> So I don't think I would want to go along with the program.
>
> **[Prosecutor]:** So you are saying you are opposed to the imposition of the death penalty?

[Juror Williams]: Yes.

[Prosecutor]: It doesn't matter what type of **case** is presented as to aggravated and mitigating factors.

For example, if the State presented the aggravating factors that show this first degree murder is worse than other types of first degree murder cases you would not be able to consider that, and enlight [sic] of the mitigating factors impose the death penalty?

[Juror Williams]: It depends on how it goes.

[Prosecutor]: But what I am trvins to understand is what vou are saving, that you are opposed to the death senaltv because the Bible savs vou shall not take a life.

I am aivina is **a** synopsis.

That is what you are saying on one hand, but on the other hand, but I can listen to what the aggravating factors are as well as the mitisatins factors and if I think the assravatins factors outweish the mitigating factors then I can recommend the death penalty?

[Juror Williams]: I didn't say that.

I prefer not.

[Prosecutor]: What I am trying to find out for certain -- 1 am not trying to put words in your mouth, I know you prefer not to, you may prefer not to be here, you may prefer to be at work or at home.

I think you said you were retired.

The question is, maybe you prefer to be

somewhere else.

I am sure if you are selected as a juror based upon your oath you are going to judge the facts and apply the law given by His Honor and arrive at a lawful verdict.

What I need, even thoush you may prefer not to recommend the death penalty, would you be able to do so?

[Juror Williams]: No.

[Prosecutor]: You would not be?

[Juror Williams]: No.

(T. 502-4) (emphasis added).

Juror Williams did not subsequently recede from or add to the above quoted statements. Defense counsel, subsequent to the above questioning by the prosecutor, was provided an opportunity to, and did in fact, voir dire the jurors. (T. 531-40). The defense did not ask juror Williams any questions and made no attempt to rehabilitate her. Id.

It is thus abundantly clear that the trial judge did not abuse his discretion in excusing juror Williams for cause, when the latter clearly stated an inability to follow the law. Hannon, 638 So. 2d at 42 (no abuse of discretion in sustaining a challenge for cause when a potential juror answered, "No," to the prosecutor's

question that, "In an appropriate case, do you think you could recommend the imposition of a death penalty?"); Randolph, supra; Trotter, supra; Taylor, supra.

111.

THE TRIAL COURT DID NOT ERR IN FAILING TO GRANT A MOTION FOR MISTRIAL WHERE THERE WAS NO DISCOVERY VIOLATION AND NO PREJUDICE TO THE DEFENSE.

The Appellant has argued that a new trial should have been granted, because there was a discovery violation which prejudiced him, 'when a new source/instance of his identification with a hereto unknown degree of certainty was revealed to him in the midst of trial." Appellant's brief at p. 58. The Appellant's contention is without record support and devoid of merit. The record herein reflects that the prosecutor, a week prior to trial, merely reviewed a witness' prior disclosed statements with said witness. The prosecutor had not shown or elicited anything new from the witness. The trial judge properly held, in reliance upon Rush v. State, 461 So. 2d 936 (Fla. 1984), that there **was** no discovery violation.

On direct examination, by the prosecution, eyewitness Briggs gave a physical description of the defendant as he remembered from the time of the murders, and noted that the defendant had been wearing a "baseball type of hat that has MCM written all over it". (T. 611, 620). Witness Briggs then made a positive in-court

identification of the defendant. (T. 620). There were no objections at the time in the court below, or on appeal herein, that the in-court identification was in any way tainted, invalid or constituted a discovery violation.

The prosecutor, again on direct examination, also elicited that the police, prior to trial, had taken a sworn statement from witness Briggs, and showed him a "photo line up" during the course of the statement. (T. 621). Briggs testified that the police had asked him to pick out the person that he saw, without suggesting in any way who he should pick out. (T. 622). Witness Briggs stated that at that time he had picked out, 'picture number three", which was the photo of the defendant. Id. Briggs stated that at that time he had written on the back of said photo. Id. He read what he had written: "This guy that I am sure 80 percent was wearing a hat so that knocked out 20 percent." (T. 623). Because the defendant had been wearing a hat at the time of the crime, Briggs had not made a 100 percent identification; he had allowed for a 20 percent uncertainty due to the hat. Id. Briggs then stated that he was sure 'today", that the defendant was the person he had seen commit the murder. (T. 623). There was no contention in the court below nor on appeal herein, that the photo-lineup and Briggs' writing on the back of the defendant's photo had not been properly

disclosed to the defense prior to trial.

On cross examination, defense counsel asked Briggs how he had recognized the six-photograph lineup when the prosecutor had showed it to him on direct examination, as there were no markings on the face of **said** photos. (T. 636). Briggs responded that he had, 'looked at each one very carefully." Id. In response to further questioning, Briggs added that he remembered the photos in the lineup from his initial review of the lineup with the police. (T. 636-7).

Defense counsel then elicited that Briggs had met with the prosecutor a week prior to trial and had again been presented with the photo-lineup at that time. (T. 637). Defense counsel sought to establish that Briggs' certainty with respect to the photos he **had** identified on direct examination was **a** result of his having reviewed the lineup with the prosecutor, but failed to do so:

> **[Defense counsel]:** The only reason you are positive **is because** the State Attorney last week showed you these photographs and told you that these are the photographs, told you this was the guy, and believe me it is not my blonde partner. Is that correct?
>
> **[Briggs]: No sir.**

(T. 639)

On re-direct examination, the prosecutor then established that, in the course of his review with Briggs the week prior to trial, he had presented the witness with the prior photo-lineup, and asked him, "[t]o pick out the guy that I think was in the laundromat at that time." (T. 639-40). The prosecutor had not pointed to any photo, and had not allowed Briggs to view any writings on the back of any photos at that time. (T. 640). Briggs had picked out the same photo as before; that of the defendant. Id.

At the conclusion of the above testimony, defense counsel moved for a mistrial, and stated: "the prosecutor intervened in this case with an out of court identification of the defendant. This is a violation of the Richardson Rules." (T. 643). Defense counsel added that he had previously known about the first photo-lineup identification where Briggs had indicated he was '80 percent sure", but that the "re-showing" of the lineup by the prosecutor had not been disclosed. (T. 644-5). According to the defense, the defendant was prejudiced because, "Now I have two out of court identifications", and the second was more positive than the first. (T. 646).

The State argued that Briggs' testimony with respect to his

initial identification from the photo-lineup had been consistent with what had been disclosed to the defense counsel. (T. ***646-7).*** The prosecutor added that the re-showing of the photo-lineup was, 'no different than me showing him a copy of a sworn statement and his deposition that he gave," and that there was thus no discovery violation. Id.

The trial judge, in reliance upon Bush v. State, 461 So. 2d 936, 938 (Fla. 1984), ruled that there was no Richardson violation, and found, "all that transpired at the pretrial conference that [prosecutor] had was showing him the photographs and telling him to look at it". (T. 649). The trial court thus denied the motion for mistrial. (T. ***651).***

The trial judge's ruling was proper in light of the above noted testimony and argument of the parties. The record is abundantly clear that the prosecutor herein, during the course of his pretrial interview with the witness, merely reviewed and presented that which the witness had previously been presented with, and which had been disclosed to the defense. Nothing new was shown to the witness and nothing new was elicited. It is axiomatic that nothing prohibits an attorney from reviewing with a witness the latter's statements in preparation for trial. See, ***Fla. Std.***

Jury Instr. (crim.) 2.05(7), at p. 21. ('It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about his testimony.").

The Appellant's reliance upon Lowery v. State, 610 So. 2d 657, 659 (Fla. 1st DCA, 1992) is unwarranted. Lowery and Fla.R.Crim.P. 3.220 require the prosecutor to disclose any tangible papers or objects which the prosecutor intends to use at trial. This duty to disclose is continuing. In the instant case there is no dispute that the photo-lineup and Briggs' writing on the back of the defendant's photo had been properly disclosed to the defense. As nothing new was shown to the witness, during the prosecutor's review, there was nothing additional to disclose to the defense. Contrary to the defense argument, there is no duty to disclose the fact of a review such as that which occurred in the instant case. See Johnson v. State, 545 So. 2d 411 (Fla. 3d DCA 1989); (trial court is not required to conduct hearing on State's failure to disclose to defense an oral, unrecorded statement of a state witness made to prosecuting attorney, even if statement was a change from prior statements, as rules of criminal procedure do not require State to reveal such statement to defendant); see also Fla.R.Crim.P. 3.220(b) (1) (B) (a discoverable "statement" is a

"Written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording"). There was thus no error and no discovery violation in the failure to disclose prosecutor's pretrial review of the prior photo-lineup with Briggs.

Finally, Briggs' trial testimony on direct examination that, "today" he was positive that the photo in the lineup was the defendant, whereas he had previously stated he was only '80 percent sure", was not a discovery violation either. As noted by this Court in Rush v. State, 461 So. 2d at 938, which also involved a similar claim as to changed testimony with respect to the identification of the defendant:

> When testimonial discrepancies appear, the witness' trial and deposition testimony can be laid side-by-side for the jury to consider. This would serve to discredit the witness and should be favorable to the defense. Therefore, unlike failure to name a witness, changed testimony does not rise to the level of a discovery violation and will not support a motion for a ***Richardson*** inquiry.

See also Street v. State, 636 So. 2d 1297, 1302 (Fla. 1994) (same). Appellant's claim herein is thus without merit. Furthermore, in light of Briggs' in-court identification of the defendant, and the latter's confessions to both the police and his friend, Tift, the

State submits that any error herein was harmless beyond a reasonable doubt.

IV.

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL BASED UPON JURORS TAKING NOTES.

The Appellant has argued that a mistrial should have been granted, because, some jurors had been taking notes but the jury was not advised of the appropriate use of said notes in their deliberations. This claim is unpreserved and without merit, as defense counsel never requested any instructions and the notes were not utilized during any deliberations.

In the instant case, the prosecutor, on direct examination of the last State witness during the guilt phase, saw one of the jurors "possibly" taking notes,. (T. **861**). The prosecutor immediately brought the matter to the trial court's attention. Id. The trial court, with defense counsel's consent, decided not to permit the jurors to take notes, Id. The trial court thus inquired whether any jurors had taken notes on 'any of the testimony". Id. Two jurors had done so. Id. The trial court informed the jury that, 'you are not permitted to take notes." Id. The trial court then asked the jurors who had previously taken notes to surrender same to the bailiff. (T. **861-2**).

Defense counsel, 'in the abundance of caution", and to

"protect whatever [right] my client may have to this matter", then moved for a mistrial. (T. 863). There was no request by the defense for any instructions or additional inquiry as to the matter. The trial court denied the motion for mistrial. Id.

The next day, prior to closing arguments, the trial court, at the State's request, again inquired whether any jurors had taken any other notes which they had not surrendered to the bailiff on the previous day. (T. 883-4). None of the jurors had. Id. Again there was no request for instruction or further inquiry by the defense. Id.

The Appellant concedes that, whether jurors are allowed to take notes and use them in the deliberation process, is within the sound discretion of the trial judge. Kelly v. State, 486 So. 2d 578 (Fla. 1986); Myers v. State, 499 So. 2d 895 (Fla. 1st DCA, 1986); United States v. Rhodes, 631 F. 2d 43 (5th Cir. 1980). Any claim of lack of adequate instruction as to the use of such notes is, moreover, unpreserved in the absence of defense counsel requesting such instructions in the court below. Kelly, 486 So. 2d at 583 ("We reject appellant's assertion that the jury was inadequately instructed, noting that no additional or different instructions on the matter [taking notes] were proposed by the

defense below."); United States v. Rhodes, 631 F.2d at 45-6. As seen above, defense counsel herein did not request or propose any instructions with respect to taking notes. The instant claim is thus unpreserved. In any event, the claim is also without merit as the record clearly reflects that the notes were surrendered prior to deliberations, and were obviously not utilized during that process. There was thus no possible prejudice to the defendant.

V.

THE CLAIM OF IMPROPER PROSECUTORIAL COMMENT IS UNPRESERVED AND WITHOUT MERIT.

The Appellant has complained of a comment made in the prosecutor's rebuttal closing argument, which allegedly implied that the defendant had committed other crimes to silence witnesses. There was no objection to the prosecutor's comment in the court below, nor was there any request for mistrial. Furthermore, the prosecutor's comment herein did not imply any attempt to silence any witnesses. The comment was based upon the evidence presented and was a fair response to the defense counsel's prior closing argument. This claim is thus unpreserved and without merit. See Craig v. State, 510 So. 2d 857, 964 (Fla. 1987)(where objection to closing argument was "not specifically made to the trial court", same cannot be raised for the first time on appeal and will not be considered); Steinhorst v. State, **412** So. 2d **332**, 339 (Fla. 1982) (alleged error in prosecutor's comments, which inter alia, misstated evidence, not preserved when not objected to at trial); Ferguson v. State, 417 So. 2d 639, 642 (Fla. 1982) (defense counsel tactics will not be insulated from fair comment by the prosecution); Brown v. State, **367 So.** 2d 616, **625** (Fla. 1979)(having invited a prosecution response, the defense will not be granted a new trial because the State 'rose to the bait'.) .

In the instant case on direct examination, Witness Briggs testified that when the defendant entered the laundromat, he immediately began to fight with the victim and to hit her. (T. 612). Briggs stated that the victim then fell to the floor. The defendant got on top of her, and he pulled out a gun. (T. 618-19). Briggs testified that he then grabbed his wife, dove down to the floor and covered his wife. (T. 617). Briggs stated that he heard three or four shots, and could feel "[l]ead was hitting my foot". Id. It should be noted that the State also presented the defendant's confession, wherein he had admitted that he was 'trying to shoot my way out of there." (T. 806). Briggs did not get up from the floor until after the defendant left the laundromat. (T. 625).

On cross-examination of Briggs, defense counsel established that when Briggs had initially seen the defendant hitting the victim, he had not intervened nor said anything to stop the defendant. (T. 632). Briggs stated he had not done anything because, "I was just shocked...". Id. Defense counsel then established that when Briggs had seen the defendant with a gun, his first concern was for the safety of his wife. (T. 634). Defense counsel also elicited that when the shots were fired, Briggs had not looked up, because, he "didn't want to get hit". (T. 634).

At closing argument, defense counsel then sought to discredit Briggs' testimony and identification of the defendant, by stating that witness Briggs had not shown any concern for the victim:

> [Briggs] was guessing, he wasn't paying that much attention, he didn't say, what are you doing, you are hitting a woman, if in fact the defendant was hitting Sugar Mama like this.
>
> I would have thought that I would have been a Little bit more concerned. but he wasn't, it was none of his business.

(T. 891). (emphasis added), Defense counsel continued that:

> ... [Briggs'] real concern was for the safety of his wife and the safetv for him, that was the concern.
>
> This fight was none of his business. not his problem, he didn't want to be involved.

(T. 895). (emphasis added).

In response to the above comments by defense counsel, the prosecutor during his closing argument responded that Briggs' failure to help the victim was not due to a lack of concern for the latter as suggested by defense counsel, and that Briggs' taking cover to prevent harm to himself during the defendant's shoot out was reasonable:

> [Briggs] said look, I went into shock, this thing happened so unexpectedly.
>
> By the **way,** when something is happening so quickly, so unexpectedly, do you immediately jump up and run to the assistance of someone in a situation like that?

> Frankly, I think Mr. Briggs is very fortunate that he did not because he may not have been here this week to testify.

(T. 913-14). There was no objection by the defense to the above comments at any time. The defense did not request any curative instructions, and did not move for a mistrial based upon the above comments either. Moreover, in light of the above related evidence and arguments by the defense, it is abundantly clear that the prosecutor, contrary to the argument now advanced by the Appellant, was not in any way suggesting that the defendant would have committed additional crimes to 'silence" witnesses. The prosecutor was merely noting that, Briggs' attempt to protect himself had been reasonable under the circumstances herein.

Appellant's reliance upon Gleason v. State, 591 So. 2d 278 (Fla. 5th DCA 1991) is unwarranted. In that case the appellate court reversed the defendant's conviction, based upon erroneous jury instructions, inadmissible hearsay, and improper closing argument. The prosecutor had made unprovoked comments, devoid of any factual basis, that defendant 'controlled witnesses". Gleason, 591 so. 2d at 279. The prosecutor had also speculated as to whether the defendant's actions were: "[t]o commit another felony? to commit another sexual battery? Maybe he didn't get finished off... or was he going to try to lessen the chance of detection of

the felony that had already been committed." Id. The comments in the instant case, as seen above, are in no way analogous to those made in Glenn. The unobjected to comments herein, which were based upon the evidence presented and were made in direct response to the defense closing argument, did not deprive the defendant of a fair trial, especially in light of the overwhelming evidence of guilt presented in the instant case. Craig, Ferguson, Steinhorst, Brown, supra.

VI.

THE TRIAL COURT PROPERLY FOUND THAT THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO **MANY** PERSONS.

The Appellant contends that the trial court erroneously found that the defendant had knowingly created a great risk of death to many persons. This claim is without merit, as the trial court's findings were both supported by the record, and in accordance with this Court's precedents.

The above aggravating factor applies when the defendant puts at least four people, in addition to the victim, in immediate and present risk of death by firing a gun in the area or direction of said people. See, Fitzpatrick v. State, 437 So. 2d 1072 (Fla. 1983), habeas corpus granted on other grounds, 490 So. 2d 938 (Fla. 1986) (factor upheld when defendant engaged in a gun battle with two police officers, one of whom was the murder victim, in the presence of three hostages); Suarez v. State, 481 So. 2d 1201 (Fla. 1985) (firing a gun during the course of flight, in the area of four officers, defendant's accomplices, and a migrant labor camp, constitutes a great risk of death). In the instant case, the defendant fired his gun in the direction of not only the victim, but all four other people present in the laundromat. The trial court found:

B. THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

> Four people, plus Tequila Larkins, were in the laundromat when the Defendant broke in and began shooting. People were forced to hit the floor and take whatever cover was available. Sixteen bullet fragments were later found in the laundromat. In his confession, the Defendant admitted that he was at one point trying to shoot his way out. At least one witness stated that he could feel shots hitting near his feet as he lay crouched on the floor. Unquestionably, the Defendant created a great risk of death to many persons.

(R. 113).

Contrary to the Appellant's argument herein, the above findings are well supported by the record. The defendant in his confession to the instant murder, which was read to the jury during the guilt phase, acknowledged that he had tried to shoot his way out of the laundromat:

> Like the other girl, she was like in the way.[14] Sugar Mama was like behind her, she was running.
>
> I was in there like I lunge into her, right.
>
> There was so many people.
>
> I just got confused, and I was fitting to leave, and I guess I was trying to shoot my way out of there.

---

[14] As noted previously, Eric the attendant was a transvestite and dressed up as a woman.

> It got jammed, the first time, right after it just repeatedly shot, boom, boom, boom, boom.

(T. 806) (emphasis added).

Likewise, the record supports the trial court's finding that, in addition to the murder victim, Larkins, four (4) other people were present in the Laundromat at the time of the shooting: 1) Eric Bethel, the attendant; 2) Walter Hills, the victim's stepson; 3) Jerry Briggs, a customer doing laundry, and, 4) Valerie Briggs, who was Jerry Briggs' wife. (T. 630, 670, 812, 1005-6, 1008-9). The defendant had fired one bullet at the victim, from extremely close range. He had, however, fired five (5) bullets around the laundromat and in the direction of everyone of the other four (4) people, as evidenced by the bullet holes, ricochet marks, and projectile fragments recovered from the immediate vicinity of where each of said persons had been located during the shooting.

Mr. Briggs testified that he had been standing by the folding table, directly east of the front door, and tried to protect himself by diving over by the dryers. (T. 619). He had also grabbed his wife, and laid on top of her to protect her during the shooting. (T. 619, 1004-5). The attendant, Eric Bethel, had been standing by the front door. (T. 1005-6). Walter Hills testified

that he was in the back, at a video game machine, when he heard the first shot. (T. 1007). He 'ducked down" by the washing machines. Id. A couple of bullet holes were found in the lower side of the dryers. (T. 699). Two projectile ricochet marks were found in the floor of the laundromat, tearing off some tile. (T. 700). The sixteen projectile fragments, weighing more than 800 grams, were recovered from: a) next to the video game machine, against the back wall of the laundromat, b) next to the wall near the office, and just outside of the office, c) underneath the folding table, which is located directly east and within a couple of feet of the front door, and, d) on top of the washers. (T. 693-99). One of the victims testified that he could feel 'lead was hitting on my foot", as the shots were being fired. (T. 619).

The findings of the trial court herein are thus well supported by the record and in accordance with the precedents from this Court. Fitzpatrick, supra; Suarez, supra. The defendant's reliance upon Kampff v. State, 371 So. 2d 1007 (Fla. 1979), White v. State, 403 so. 2d 331 (Fla. 1980), Bello v. State, 547 So. 2d 914 (Fla. 1989), Alvin v. State, 548 So. 2d 1112 (Fla. 1989), and Lucas v. State, 490 So. 2d 943 (Fla. 1986), is unwarranted. None of said cases involved a situation such as the instant case, where there was immediate risk of harm to the murder victim, in addition to

more than three (3) other people. See, Kampff, supra (the defendant shot his wife in the presence of two other people); White, supra (the victims had each been shot at close range in the back of the head, and only two other people had been present on the premises; no shots had been fired at the direction of the latter two people); Diaz, supra (the defendant had fired a single shot in the air, towards the ceiling, and over the head of one person); Bello, 547 So. 2d at 917 (the defendant's actions, "created a high probability of death to at most only three people besides the victim." The remaining people considered by the trial court to have been put at risk were too far away, separated by several walls, or out of the line of fire.); Alvin, supra (a total of four (4) people, including the murder victim, were present in the vicinity of the shooting and in the line of fire); Lucas, supra (gun battle involved only the victim and two of her friends).

Assuming, arguendo, that the aggravator herein was erroneously found, any error was harmless beyond a reasonable doubt. The trial judge in the instant case found four (4) other aggravating factors, including a prior murder for hire plot, which had occurred only six (6) days prior to the instant homicide, where the victim had miraculously survived, although he had been repeatedly shot. The trial judge specifically stated that the minimal good-person

mitigation was "outweighed to the point of obliteration by the aggravating circumstances." (R. 117). Any error was thus harmless beyond a reasonable doubt. Conev v. State, 653 So. 2d 1009, 1015 (Fla.1995) ("there is no reasonable possibility this error [finding great risk of death] affected the death sentence where four strong aggravating factors remain and the court specifically stated in its sentencing order that 'there are more than sufficient aggravating circumstances proven beyond a reasonable doubt to justify the imposition of the death penalty.' The error was harmless.").

CONCLUSION

Based on the foregoing, the judgments of conviction and sentences should be affirmed.

Respectfully submitted,
ROBERT A. BUTTERWORTH
Attorney General

FARIBA N. KOMEILY
Assistant Attorney General
Florida Bar No. 0375934
Office of the Attorney General
Post Office Box 013241
Miami, Florida **33101**
PH. (305) 377-5441
Fax (305) 377-5655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by U.S. Postal Service, prepaid, first class mail, to JOHN H. LIPINSKI, Esq., 1455 N.W. 14th Street, Miami, Florida 33125, on this 19 day of May, 1996.

FARIBA N. KOMEILY
Assistant Attorney General

/blm