IN THE SUPREME COURT OF FLORIDA

AUGUSTINE PEREZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 79,446

AMENDED BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

As to Issue I: The trial court did not err in excluding Perez' alibi witness after he failed to file a notice of alibi. The defendant clearly knew that he was intending to rely on Ms. Ferguson to testify that he was with her at the time of the kidnapping and, therefore, he could not have kidnapped the victim at the time and the place that the state witnesses testified. It is also apparent that the failure to file the notice was counsel's attempt to sandbag the state and that this failure to give notice to the state would have irreparably damaged the state.

As to Issue II: The detective's statement concerning the defendant's inability to explain why he parked his car where he did not constitute a comment on the defendant's right to remain silent because a defendant who voluntarily speaks after receiving Miranda warnings has not invoked his right to remain silent.

As to Issue III: Appellant contends that the trial court committed reversible error in determining that the state met its burden of establishing that Perez knowingly, intelligently and voluntarily waived his *Miranda* rights. It is the state's contention that when the challenged factors are reviewed in context and under the totality of circumstances the trial court properly denied the motion to suppress.

As to Issue IV: Appellant claims that the initial stop of the defendant was improperly based on a BOLO of an automobile not particularized as to location or time and devoid of details as to

the suspect or persons involved. The state contends that based on the totality of the circumstances, the trial court properly denied the motion to suppress.

As to Issue V: It is apparent that the actions of the officers were appropriate to the circumstances and did not raise this detention to any higher level. Again, the trial court's order denying the defendant's motion to suppress comes to this Court clothed with the presumption of correctness and the evidence should be interpreted in the light most favorable to sustain the trial court's ruling. As there was substantial evidence to support the Court's finding that this detention was reasonable, this Honorable Court should uphold that finding.

As to Issue VI: Appellant contention that the court below should have suppressed the gun box, gun case, and ammunition that Betty Ferguson turned over to the police officers because Ferguson was not aware that she could refuse to consent to the search and because the items did not belong to her is not supported by either the facts or the law.

As to Issue VII: Appellant challenges the denial of his motion to suppress the initial out of court identification and the in court identification by Paul Frost. Appellant argues that the identification procedure violated due process because it was unnecessarily suggestive. A review of the record clearly refutes this argument and therefore appellant is not entitled to relief.

As to Issue VIII: Appellant contends that the trial court erred in precluding him from presenting a certified copy of

Huffman's convictions into evidence. Appellant contends that because the witness did not know the number of prior felony convictions he had that he opened the door to questioning and that counsel should have been permitted to inquire further. As Huffman did not deny being convicted of a felony eighteen times, any evidence of those convictions would not serve to impeach his testimony. Therefore introduction of those convictions was properly denied.

As to Issue IX: While the jury's right to pardon any defendant is recognized in case law and is useful in determining the harmfulness of an error committed during a charge to the jury, it is not such an absolute right that reminding the jurors of their oath to follow the law is an infringement which invalidates the entire trial.

As to Issue X: The photographs in the instant case were relevant to establish the manner in which the murder had been committed. The photographs showed the location of the body, the manner in which she was clothed and bound and the amount of time that had passed from when the victim was murdered to when the body was found. The photographs were relevant, they were not unduly prejudicial and therefore, the trial court did not err in admitting them into evidence.

As to Issue XI: The procedure employed by the trial judge in the instant case comports with the requirement that this Honorable Court be afforded the opportunity to engage in meaningful review of the trial court's findings. Thus, where as

here it is undisputed that written findings are included in the record which comport with the oral pronouncement, the trial judge did not err.

As to Issue XII: The decision to grant or deny funds for investigation in Cuba is within the trial court's discretion and appellant has failed to show an abuse of that discretion.

As to Issue XIII: The trial court correctly rejected the life recommendation based upon a valid finding that the facts of this case suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ.

As to Issue XIV: The evidence shows that Kay Devlin was aware of her impending danger and that the crime was unnecessarily torturous and pitiless. Under similar circumstances this Court has repeatedly upheld a finding of heinous, atrocious or cruel.

As to Issue XV: The facts in the instant case clearly support the finding by the trial court that the murder was committed in an especially cold, calculated and premeditated manner.

As to Issue XVI: As the trial court properly found three substantial aggravating factors and little to no evidence of mitigation, it properly overrode the jury's recommendation of life.

As to Issue XVII: Not only is this claim meritless, but it is also procedurally barred.

As to Issue XVIII: Even if this claim was not procedurally barred, it is without merit.

As to Issue IX: In the instant case, the only victim impact evidence presented was the victim's brother Al Davey and the victim's son Robert Spencer Wishart, II who testified as to the impact that Kay Devlin's death had upon her children and grandchildren. The trial judge's order also shows that he did not rely on this evidence to support the sentence imposed. As such, this evidence clearly falls within the type of evidence approved in Payne and Hodges.

As to Issue XX: The trial judge instructed the jury that each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by the jury in arriving at their decision. This Honorable Court can assume based on a review of the order that the trial judge followed his own instructions.

As to Issue XXI: When compared to other like cases, this sentence was proportionate.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE STATE'S MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF BETTY FERGUSON REGARDING THE DEFENSE OF ALIBI WHERE THE RECORD SHOWS THAT THE DEFENDANT FAILED TO FILE A NOTICE OF ALIBI AND THAT THE STATE WAS PREJUDICED THEREBY.

Florida's notice of alibi rule is in essence a requirement that a defendant submit to a limited form of pretrial discovery to the state whenever he intends to rely on the defense of alibi. In exchange for the defendant's disclosure of the witnesses he proposes to use to establish that defense, the state in turn is required to notify the defendant of any witnesses it proposes to offer in rebuttal to that defense. Both sides are under a continuing duty to disclose the names and addresses of additional witnesses bearing on the alibi as they become available. The threatened sanction for failure to comply is exclusion at trial of the defendant's alibi evidence or, in the case of the state, the exclusion of the state's evidence offered in rebuttal of the alibi. *Florida Rules of Criminal Procedure 3.200*. The rule provides, however, that the Court may waive the requirements of the rule upon a showing of good cause for failure to comply.

The constitutionality of this rule was confirmed in Williams v. Florida, 399 U.S. 78 (1970), wherein the Court stated:

> Florida law provides for liberal discovery by the defendant against the state, and the notice of alibi rule is itself carefully headed for the reciprocal duties requiring state disclosure to the defendant. Given the

> ease with which an alibi can be fabricated, the state's interest in protecting itself against an eleventh hour defense is both obvious and legitimate. Reflecting this interest, notice of alibi provisions, dating at least from 1927, are now in existence in a substantial number of states. The adversary system of trial is hardly an end in itself; it is not yet poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida Rule, which is designed to enhance the search for truth in the criminal trial by ensuring both the defendant and the state ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Id. at 81 - 82

Subsequently, in Taylor v. Illinois, 484 U.S. 400 (1988), the United States Supreme Court upheld the provision of the rule that allows for the exclusion of the defendant's alibi witnesses. The Court stated:

> The principle that undergirds the defendant's right to present exculpatory evidence is also the source of essential limitations on the right. The arbitrary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case. The trial process would be a shambles if either party had absolute right to control the time and content of his witness' testimony. Neither may insist on the right to interrupt the opposing party's case, and obviously there is no absolute right to interrupt the deliberations of the jury to present newly discovered evidence. The state's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, although not always

> inflexible rules relating to the identification and presentation of evidence.
>
> Id. at 411.

The Court in Taylor further noted that "the state's interest in protecting itself against an eleventh hour defense is merely one component of the broader public interest in a full and truthful disclosure of critical facts." Id. at 412. The Court also rejected Taylor's argument that because there are always less drastic sanctions than precluding the witness that the rule is violative of the Sixth Amendment. Taylor had argued that prejudice to the prosecution can be minimized by granting a continuance, or a mistrial to provide time for further investigation and that further violations could be deterred by disciplinary sanctions against the defendant or defense counsel. Id. at 413. In rejecting this argument the Court noted that although alternative sanctions may be adequate and appropriate in most cases, it is clear that they would be less effective than the preclusion sanction and that there are instances in which they would perpetrate rather than limit the prejudice to the state and the harm to the adversary process. Noting that one of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony would be believed, the Court approved the exclusion sanction. Id. at 413.

However, as the Court recently explained in Michigan v. Lucas, ___ U.S. ___, 111 S. Ct. 1743, 114 L.Ed 2d 205 (1991), the trial court's discretion to preclude the introduction of alibi evidence is not unbridled:

> We did not hold in Taylor that preclusion is permissible every time a discovery rule is violated. Rather, we acknowledged that alternative sanctions would be "adequate and appropriate in most cases." Id. at 413. We stated explicitly, however that there could be circumstances in which preclusion was justified because a less severe penalty "would perpetuate rather than limit the prejudice to the state and the harm to the adversary process." Ibid. Taylor, we concluded, was such a case. The trial court found that Taylor's discovery violation amounted to "willful misconduct" and was designed to obtain "a tactical advantage." Id. at 417. Based on these findings, we determine that, "[R]egardless of whether prejudice to the prosecution could have been avoided" by a lesser penalty, "the severest sanction [wa]s appropriate." Ibid.

(emphasis added)

The trial judge in the instant case excluded the alibi witness without making an actual finding that the state was prejudiced by appellant's failure to file the requisite notice of alibi. Despite the court's failure to make that factual finding, the record shows that the result reached by the court was the correct result. It is well recognized that even if incorrect reasons are assigned to the ruling, a correct ruling of the trial court should be sustained. See Smith v. Phelps, 455 U.S. 209 (1982); Trenary v. State, 423 So. 2d 458 (Fla. 2nd DCA 1982); Stuart v. State, 360 So. 2d 406 (Fla. 1978); Hamelmann v. State, 113 So. 2d 394 (1st DCA 1959). A review of the record in the instant case clearly supports a finding that the exclusion of the witness in the instant case was the proper sanction.

The trial in the instant case lasted several days. On the last day of trial, shortly before the close of the state's case, the prosecutor represented to the court that having talked to his final witness he had a feeling that defense counsel intended to put on an alibi defense. Accordingly, the state filed a motion in limine to exclude the witness. (R 1456) A hearing was held on the motion where argument was heard from both the state and the defense. It was undisputed that defense counsel Mr. Hanson had never filed a notice of intent to claim alibi and that the state had filed a demand for notice of intention to claim alibi at the same time that Perez' demand for discovery was answered sixteen months previously. At the hearing, defense counsel Hanson noted that he did intend to have Mr. Perez' roommate/girlfriend, Mrs. Ferguson, testify that she saw Mr. Perez at her home in Tampa at 5:30 p.m. on the day of murder. Mr. Hanson argued to the court that since his client was not charged with doing anything in Tampa, that he did not have to file a notice of alibi for the Pasco County charge. (R 1456) He argued that the state should not be able to go back hours and days before the alleged incident and that whatever happened in Pasco County had to happen at least forty-five minutes to an hour after whatever happened in Tampa. He also objected to the state's being able blanket times in other counties, other areas and other times and demand a notice of alibi for those periods. Further, defense counsel argued that since they had done a deposition to perpetuate Ms. Ferguson's testimony because she had cancer, that the state was not

prejudiced as there was no surprise. (R 1457) The state responded that:

> Your Honor, first of all I gleam from what Mr. Hanson is saying that he has intentionally not filed a notice of alibi. This is not a negligent thing. This is intentional.
>
> The kidnapping statute, taken in conjunction with the venue statute, is very clear. When a kidnapping occurs in one county, the defendant can be tried in either county in which the crime occurred. We elected Pasco because a homicide occurred here. This is an agreement we reached with the Hillsborough State Attorney's Office.
>
> The motive has been known to Mr. Hanson since day one of this investigation. The abduction and the point of the abduction has been known to Mr. Hanson since day one of this investigation. And, the end of the crime, including Pasco County, had been known to Mr. Hanson since long before we did the testimony of Betty Ferguson. He has intentionally not filed a notice of alibi as Rule 3.200 requires him to do.
>
> Mr. Hanson is, as I understand it, the only lawyer in east Pasco County who is certified by the Florida Bar in criminal law. So, I suspect strongly he is well aware of the rules and the requirement of the rules. (R 1458)

The prosecutor further noted:

> This is not a negligent omission, apparently. It was intentionally done. Had we been given notice of alibi, we would have prepared an alibi defense, so to speak.
>
> Ms. Ferguson was working supposedly that day. We could have gone and gotten her work records to show whether or not she was working. She plays bingo at night, and she did that on a regular basis. We could have gone to the bingo parlor to determine whether or not she was there that night, whether or

> not she won or what time she left. She supposedly did her laundry that day, we could have gone to the laundromat to find out if they remembered her being there. There were a number of things we could have done had we known we were going to be confronted with an alibi defense.
>
> The rules of discovery, the rules of criminal procedure apply equally to the state and to the defense. We have had several objections sustained by this Court as a result of what Mr. Hanson claimed to be discovery violations. We have exceeded. We have not even asked for a Richardson hearing. But at this point in time, if he intends to present an alibi, I strongly object. He has failed intentionally to file his notice of alibi, provide me with a date and time and place where this defendant supposedly was at the time of the commission of the kidnapping or to provide me with a list of witnesses that he intends to produce to prove that alibi.
>
> I would further point out to the Court that our intention when we called Ms. Ferguson this morning, and it won't be until we finish with this witness, that our intention when we called Ms. Ferguson is to limit her to those areas that are necessary in order for us to finish up our chain of custody on evidence.
>
> She gave to us the gun rug and the box of ammunition. She gave to us the empty box of ammunition. She will describe the contents of the van. She will talk about the wig. And she will say that Mr. Perez was firing a .22 caliber, small chrome pistol on the Fourth of July, 1990. And that's the extent of what I intend for her to testify to today, and that has been our intent all along. (R 460 - 461.

Defense counsel responded that the only alibi witness he intended to call was Ms. Ferguson and that the state was aware that she said on the day of the crime that Mr. Perez was with her. The prosecutor responded that, although he agreed that Ms.

Ferguson had said that, the state did not know the defendant intended to rely on it as an alibi. He further noted that, the state, nevertheless, has the right to know what witnesses are going to be called, what they are going to say concerning the defendant's whereabouts, and to marshal evidence to fight that alibi. The state further argued:

> Now, I had given Mr. Hanson apparently too much credit. The facts in this case are clear and have been clear. The law concerning the crime of kidnapping is clear and it has been clear since before this case ever arose. And I don't deserve to be ambushed the day -- or four days after this trial has started. (R 1462)

The foregoing excerpts from the record amply support a finding that the violation was willful and that state would have been prejudiced if the witness was allowed to testify. Accordingly, the state urges this Court to find that the trial court correctly excluded the testimony of Ms. Ferguson for the defendant's failure to file a notice of alibi.

The state further contends that the following cases, which Appellant relies on to support his position that it was error to exclude Ferguson as a witness, are readily distinguishable from the instant case.

The first case relied on by appellant is Fedd v. State, 461 So. 2d 1384 (Fla. 1st DCA 1984). In Fedd the district court held that it was error for the trial court to exclude the defendant's alibi witnesses because there was no showing of possible prejudice to the state if the witnesses were permitted to testify

and because the court failed to explore reasonable alternatives to the drastic remedy of exclusion. The court also concluded that defense counsel's failure to file the notice was an inadvertent violation of the Rule. Conversely, in the instant case, the record clearly shows that the state was prejudiced beyond any relief and there is substantial evidence in the record that the failure to file the notice in the instant case was intentional. As the United States Supreme Court noted in Williams v. Florida, supra, 'the adversary system of trial is not a poker game in which the players enjoy an absolute right always to conceal their cards until played. Rather, the trial system is a search for truth and the state should have ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.' Perez' failure to file the notice certainly deprived the state of the opportunity to investigate crucial and ascertainable facts. Further, as it was the last day of trial, a continuance or mistrial would have merely compounded the prejudice to the state.

Appellant also relies on McDugle v. State, 591 So. 2d 660 (Fla. 3d DCA 1991). In McDugle, the state successfully argued that there was a willful discovery violation. The appellate court ruled that where a witness who the defense had failed to list but wished to call was already listed on the state's witness list, that it was error to limit the defendant from calling the witness without ascertaining prejudice. This finding however, was based upon the court's conclusion that there was no

discussion of the prejudice occasioned by the untimeliness of the defense's attempt to introduce the testimony and there was no inquiry into the feasibility of rectifying that prejudice by some means short of excluding the witness. Again, the record in the instant case shows how the state was prejudiced and how the fact that the state was aware of Ms. Ferguson as a witness did not put the state on notice as that the defense expected her to testify, what they expected her to testify to and how that testimony could be rebutted. The record also shows Ferguson was called as a stated witness for limited purpose of identifying evidence.

In Pellam v. State, 567 So. 2d 537 (Fla. 2d DCA 1990), the court held that a violation of notice of alibi rule is analogous to the failure to furnish witnesses under Florida Rule of Criminal Procedure 3.220 and that the matter should be treated as a rule 3.220 violation in the manner prescribed in Richardson v. State, 246 So. 2d 771 (Fla. 1971). In Pellam, and the foregoing cases, the trial court failed to conduct an inquiry as to why the notice had not been filed and as to what prejudice the state suffered. The court in the instant case clearly conducted such an inquiry. The only thing the court did not do is make a finding with regard to the prejudice aspect. As the record clearly supports such a finding this court can find harmless error.

Appellant also cites to Austin v. State, 461 So. 2d 1380 (Fla. 1st DCA 1984). This case is particularly analogous to the instant case. In Austin, four days prior to the trial, the defendant's attorney served notice upon the prosecuting attorney

of a notice of intent to claim alibi and listed three witnesses in support thereof. In excluding defense witnesses, the court in Austin expressly relied upon the defendant's failure to comply with the time requirements of Florida Rule of Criminal Procedure 3.200. The court's ruling was not based upon any finding of prejudice to the state. In fact, the court stated, "I am not going to make any determination or finding on prejudice." At the hearing on the state's motion, Austin's counsel explained he had just been informed of these witnesses only a few days earlier by the defendant and the defendant's brother who encountered difficulty in running down the witnesses, one of whom resided in another state. Counsel explained that he immediately furnished notice to the prosecutor of these witnesses. The defense counsel also advised the court that he would move for a continuance of the trial and waive speedy trial if the prosecutor felt that the state would be prejudiced by proceeding to trial with these new witnesses. The prosecutor in Austin did not oppose a continuance, but also noted that the late notice would preclude the state from an opportunity to take depositions of the witnesses and to attempt to rebut the alibi. The appellate court reversed finding that the record in Austin did not support the trial court's exclusion of the witnesses.

In the instant case, the record shows that Perez and his counsel knew about Ferguson from day one, (sixteen months prior to trial), knew they planned to call her at trial, knew the rule required filing of the notice, knew the state had long since made

a demand for notice of alibi and yet a notice of alibi was never filed. Not only did defense counsel in the instant case not file a notice of intent to rely on alibi prior to trial, he never filed a notice of alibi. It was only on the last day of trial, shortly before the close of the state's case that the state presented to the court a concern that the defendant intended to present such a defense. The defendant clearly knew that he was intending to rely on Ms. Ferguson to testify that he was with her at the time of the kidnapping and, therefore, he could not have kidnapped the victim at the time and the place that the state witnesses testified. It is also apparent that the failure to file the notice was counsel's attempt to sandbag the state. Accordingly, appellant should not be allowed to profit from this apparently intentional circumvention of the rules as the state totally complied with its procedural requirements by making a demand for notice of alibi in an attempt to prepare its case. The record clearly shows that the state would have been prejudiced and, therefore, supports the trial court's exclusion of the witness.

Alternatively, although the state strenuously argues that the hearing in the instant case was tantamount to a Richardson hearing, and that the trial court's ruling was correct, if this Court cannot determine, based on the record before it, that the trial court's failure to find prejudice was harmless, although the record shows that prejudice was all too evident, that the failure to file the notice was not inadvertent and that no other

sanctions were proper, the state would urge this Court, rather than granting the defendant a new trial, to remand the instant case for a hearing on this issue alone.

ISSUE II

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING DETECTIVE LAWLESS TO TESTIFY, OVER OBJECTION, THAT IN RESPONSE TO A QUESTION FROM DETECTIVE LAWLESS REGARDING WHY THE DEFENDANT PARKED HIS VAN WHERE HE DID, THE DEFENDANT "COULD NOT ANSWER THE QUESTION."

Appellant contends that the detective's statement concerning the defendant's inability to explain why he parked his car where he did constituted a comment on the defendant's right to remain silent. It is the state's position that the detective's response did not constitute a comment on the defendant's right to remain silent because a defendant who voluntarily speaks after receiving Miranda warnings has not invoked his right to remain silent.

In the instant case, Detective Lawless testified that after being given his Miranda warnings in Spanish, Mr. Perez agreed to speak to the officers. Lawless testified that Perez told him that, "he left his home in Tampa around 5:00 that evening heading for an unknown park in Orlando. He couldn't give the name of the park or directions to it. He said that his van began to overheat and misfire on the highway, so he turned off the interstate and got lost." The detective testified that he asked Perez how he had come to be where he was and that Perez said that he was in the process of getting lost and pulled over because his van was running very poorly. Detective Lawless testified that he asked Perez why he pulled into the driveway where he was located when it was quite an upgrade and there was a convenience store within direct sight where there is a pay telephone that could have been

utilized. Lawless stated that Perez "couldn't answer the question." (R 1193 - 1194) At that point defense counsel objected on the basis that it was improper and that it was a comment on the defendant's right to remain silent. The objection was denied. The record shows that the defendant at no time invoked his right to remain silent. Rather than being a comment on Perez' right to remain silent the statement made by the detective was aimed at pointing out the inconsistencies in the defendant's exculpatory statements.

To support his position, appellant relies on Peterson v. State, 405 So. 2d 997 (Fla. 3d DCA 1981) and Phillips v. State, 591 So. 2d 987 (Fla. 1st DCA 1991). In each of these cases the defendant in question had invoked his right to remain silent and reversal was predicated upon comments in reference to that invocation. Here the record clearly shows that the defendant had not invoked his right to remain silent. In such cases, courts of this state and the United States Supreme Court have consistently held that it is not error for a witness or the prosecutor to comment on the defendant's inability to explain a particular action.

In Watson v. State, 504 So. 2d 1267 (Fla. 1st DCA 1986), rev. denied, 506, 1043 (1987), Watson was given Miranda warnings at the scene of the crime but waived his right to remain silent by voluntarily making exculpatory statements to Officer Malloy. While at the station in the holding cell, Watson again requested to speak to Officer Malloy. After Officer Malloy reminded Watson

of his Miranda rights, Watson proceeded to make further statements. Nevertheless, Watson contended that Officer Malloy's statement at trial that when he asked the defendant if he had anything further to say and Watson indicated that he did not was an improper comment on his silence. The court held that the officer's testimony did not constitute a comment on Watson's right to remain silent where it was clear that Watson had not invoked his right to remain silent and the officer's comment was only meant to indicate that at the end of the defendant's statement to her, he communicated that he had nothing further to say. And, in State v. Godsby, 382 So. 2d 838 (Fla. 5th DCA 1980), the court held that whether a comment is improper depends upon the full context in which it was made and whether the jury could fairly conclude that it was a comment on a defendant's right to remain silent.

Clearly in the instant case, the statement by the detective did not constitute a comment on the defendant's right to remain silent, but rather was meant to point out to the jury the inconsistencies in the statements made by the defendant. See, Anderson v. Charles, 447 U.S. 404 (1980).

Further, the law is clear that the harmless error rule applies. In State v. DiGuilo, 491 So. 2d 1129 (Fla. 1986), this Court receded from the per se rule of reversal when there was trial comment on the defendant exercising the right to remain silent. Even though the comment remains constitutional error, it can be determined to be harmless error if the state proves beyond

a reasonable doubt the comment did not contribute to the guilty verdict. See, also, Jordan v. State, 546 So. 2d 48 (Fla. 4th DCA 1989). The state clearly met its burden at trial. The evidence against the defendant was overwhelming and the comment by the detective was only a minuscule part of the entire state's case. Further, as the prosecutor made no reference to the defendant's inability to explain why his car was parked where it was parked, the inadvertent comment by the detective was clearly harmless.

ISSUE III

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE DEFENDANT VOLUNTARILY WAIVED HIS RIGHTS PURSUANT TO MIRANDA AND IN FINDING THAT ANY STATEMENT OF THE DEFENDANT WAS NOT THE PRODUCT OF COERCION.

Appellant contends that the trial court committed reversible error in determining that the state met its burden of establishing that Perez knowingly, intelligently and voluntarily waived his *Miranda* rights. Appellant bases this contention on the cumulative effect of the defendant's language barrier, the deprivation of sleep and length of interrogation, and Detective Muck's statement to Perez that, "If he takes me to the girl, it will look better in my eyes." It is the state's contention that when each of these factors is reviewed under the totality of circumstances, that the trial court properly denied the motion to suppress.

The principle is well settled that a trial court's order denying a defendant's motion to suppress comes to the appellate court clothed with a presumption of correctness. Henry v. State, 586 So. 2d 1033 (Fla. 1991), DeConingh v. State, 433 So. 2d 501, 504 (Fla. 1983), cert. denied, 465 U.S. 1005 (1984), Stone v. State, 378 So. 2d 765, 769 (Fla. 1979), cert. denied, 449 U.S. 986 (1980), McNamara v. State, 357 So. 2d 410 (Fla. 1978). While the burden is upon the state to prove by a preponderance of evidence that the confession was freely and voluntarily given, a reviewing court must interpret the evidence in the light most

favorable to sustaining the trial court's ruling. State v. Riehl, 504 So. 2d 798 (Fla. 2nd DCA), review denied, 513 So. 2d 1063 (1987); Williams v. State, 441 So. 2d 653 (Fla. 3d DCA 1983). The trial court's ruling on this issue cannot be reversed unless it is clearly erroneous. The clearly erroneous standard applies with "full force" where the trial court's determination turns upon live testimony as opposed to transcripts, depositions or other documents. Thompson v. State, 548 So. 2d 198, 204, n. 5 (Fla. 1989).

In order to find that a confession is involuntary within the means of the Fourteenth Amendment, there must first be a finding that there was coercive police action. Colorado v. Connelly, 479 U.S. 157 (1986). The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained.

Initially, appellant contends that his statement should have been suppressed because of his limited understanding of the English language. In Balthazar v. State, 549 So. 2d 661 (Fla. 1989), this Court made it clear that although the state's burden of proving voluntariness may be heavier when the defendant claims language difficulties, the standard of proof remains the same. This Court in Balthazar found no difference between a language factor and other factors which might impinge upon a knowledgeable and voluntary waiver, such as limited intelligence or education, mental retardation, or other emotional stress. Accordingly, this Court found no reason why a language barrier, more than any

other, should trigger a different standard of proof. Id. at 662. See, also, State v. Parsons, 549 So. 2d 761 (Fla. 3DCA 1989) (fact that defendant does not speak English only comes into play when the individual and the police cannot communicate. No error where the Spanish-speaking officer communicated with the Spanish-speaking defendant and entry was consensual.)

In the instant case, the state produced substantial evidence that the defendant did indeed understand English. Deputy Griffin testified that when she initially stopped Perez, she ordered him away from the van in English and that he understood her commands. (R 277 - 278) She also indicated that she read Perez his constitutional rights in English and that she believed he understood these rights. (R 280) Deputy Jerkins testified that she conversed with Perez about his job and what he was doing that evening in English and it wasn't until after Detective Muck arrived at the scene that Perez acted like he could not speak English. (R 283, 287) Detective Muck testified that he read Perez his *Miranda* right in English and that Perez said he understood. (R 352) At that time, Detective Muck called for a Spanish speaking officer to make sure Perez understood. Deputy Griffin and Deputy McMillian both spoke to Perez and testified that he understood commands in English. (R 992 - 998) One of the deputies testified that she saw the defendant in jail approximately 100 times and that he understood commands in English.

Even the defendant's own witnesses admitted that he understood some English. The defendant's girlfriend, Betty Ferguson, testified that she had lived with Perez for approximately 10 or 11 years and that although he could not communicate on complicated subjects in English, he did speak broken English. (R 216) She admitted that if she spoke slow enough in English to Perez he could understand what she said. (R 223) Another defense witness, Vincent Gonzalez, testified that Perez spoke a little English. (R 371) Barbara Bostic, the defendant's boss at Jim Walter Corporation, testified that Perez was an excellent worker and that he could speak a few words of English. It was only when she told Perez that he needed to do something besides his main job that Perez had difficulty understanding. (R 375)

After hearing the testimony as presented at the evidentiary hearing, the trial court made a specific finding that the defendant could understand English. (R 229) This factual finding by the trial court comes to this Court clothed with the presumption of correctness. As there is substantial competent evidence to support the trial court's ruling, this Court should affirm this finding.

Appellant also contends that Detective Muck's statement to the defendant to the effect that "If he takes me to the girl, it will look better in my eyes", was an implicit promise on the part of Detective Muck to Perez which vitiates any voluntariness on the part of Perez. Even if this statement on the part of

Detective Muck constituted a promise as that found in Fillinger v. State, 349 So. 2d 714 (Fla. 2d DCA 1977), a proposition with which the state adamantly disagrees, the fact remains that the statement did not induce Perez to make any statements.

Detective Muck testified at trial that after he had advised Perez of his Miranda rights, he was concerned that one of two things had happened: (1) there was a female tied up out to a tree somewhere or (2) that she was already dead and that there was a body out there. Detective Muck testified that he took Perez aside thinking Perez didn't want to talk in front of everybody and asked him to please, "if she is tied up out there, tell me where at, you know." He also said, that "please, if she is tell me where she's at that way maybe her family can identify her, you know, before she gets all blowed up and everything." (R 1270) In response to these statements by Detective Muck, Perez stated in English, "There has been no woman in my car."

Accordingly, not only did Detective Muck testify that he did not make any promises to Perez that such cooperation would help him, but the fact remains that Perez himself did not make any admissions based on this statement. See, Edmond v. State, 559 So. 2d 85 (Fla. 3d DCA 1990) (murder defendant's confession was voluntarily given where defendant stated that he did not "fall" for officer's alleged trick) Clearly, appellant bears the burden of showing he was induced to waive his Miranda rights based upon this statement. As he made no inculpatory statements in response to the urging of Detective Muck to locate the body, there is no showing of a violation.

Further, even in such cases where the officers have used the 'Christian Burial Technique', this Court has repeatedly found that although it is a blatantly coercive and deceptive ploy, that it does not necessarily constitute reversible error. Hudson v. State, 538 So. 2d 829, 830 (Fla. 1989); Roman v. State, 475 So. 2d 1228, 1232 (Fla. 1985), cert. denied, 475 U.S. 1090 (1986).

And, finally, appellant alleges the statements he made were the result of coercion in that he was interrogated for nine hours. This Court in Harris v. State, 438 So. 2d 787 (Fla. 1983), held that even though questioning the defendant for six hours in a small room at a police station while he was handcuffed elbow to wrist and was not given any food or drink could have destroyed the admissibility of defendant's confession, that where there was substantial competent evidence the defendant's confession was voluntary, the trial court properly denied the motion to suppress. In the instant case, the record shows that although Perez was initially handcuffed, he was then taken to the station and made comfortable. The questioning was intermittent and although there was evidence that he was tired, there was no evidence that any statement the defendant made was involuntary. Again the most striking evidence of the knowing, voluntary, intelligent waiver by Perez is the fact that the defendant did not confess to the crime. The defendant repeatedly gave exculpatory statements. The statements made by Perez during the questioning consisted solely of Perez saying that he was on his way to Orlando to return VCR tapes, that he worked in a cigar

factory, that there had been no woman in his car, that he had rope in his van to hang clothes when he did laundry and that he didn't own a gun. (R 1066, 1270, 1271, 1272, 1155, 1141, 1278, 1175, 1164) The only tacit admission was in the nature of a sarcastic remark where he stated that if there was blood and hair in his car that could be matched to the victim then either he killed her or somebody who had the van before him did. At no time did the defendant confess to the crime. Accordingly, when taken in the light most favorable to support the trial court's ruling, this Court should affirm the order of the Court denying the motion to suppress. Even if this Honorable Court should find that the statements should have been suppressed, however, the admission of these statements is clearly harmless.

ISSUE IV

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN RULING THAT THERE WAS NO STOP OF THE DEFENDANT IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS.

Appellant claims that the initial stop of the defendant was improperly based on a BOLO of an automobile not particularized as to location or time and devoid of details as to the suspect or persons involved. The state contends that based on the totality of the circumstances, the trial court properly denied the motion to suppress.

At the hearing on the motion to suppress, crime scene technician Brian McMillian testified that on July 14, 1990, he received a call to go to the area of Wesley Chapel and Emory Drive in Pasco County, which was the scene of the aggravated assault between the defendant and Paul and Chad Frost. McMillian testified that he had a Sheriff's vehicle and while he was in route to the scene he heard a BOLO for a white, Ford Aerostar Van, late model with gold running boards. (R 294 - 295) McMillian testified that he was on State Road 577 coming out of the San Antonio area when he spotted the van. (R 295) The van was heading north, into San Antonio on State Road 577. At that time, McMillian got a hold of communications and asked them to update him on the BOLO. They did, and he advised them that he had spotted a similar vehicle and that he was turning around. (R 2096) When he started his turn he looked in his rear view mirror. He could see the van accelerating. By the time he

completed the turn, he had lost visual contact with the van. McMillian's vehicle was a Dodge Ram, a full sized van that was green and white and clearly marked with the Pasco County Sheriff's Office Crime Scene Unit on it. (R 2097) McMillian was heading back into San Antonio on SR 577 when he was advised by Deputy Griffin that she did not see the van come straight across State Road 52 into San Antonio. When McMillian reached the intersection of State Road 52 and County Road 577, he looked west toward the interstate and did not see any vehicles in that direction. He then took a right on State Road 52 and headed in the direction of St. Leo College. When he got in front of Holy Name Priory on State Road 52, he saw the van heading back into San Antonio, which was the direction he had just come from. (R 2098) McMillian then turned around again. After making the turn, he saw the van pull up into the driveway of a private residence. He pulled up along side the van in the driveway. At about that same time, Deputy Griffin arrived on the scene. McMillian testified that as a crime scene technician, he was not armed and he was aware of the fact that the van was occupied by a person who had a gun. (R 2099) After Deputy Griffin exited with her weapon out, McMillian followed her. There was a person standing in front of the van and she ordered that person to come around to the drivers' side in English. She told him to lie face down on the ground with his hands behind his back. He laid down, put his hands behind his head and at that time Deputy Goth walked up and handcuffed him. (R 2100) Mr. Frost was then brought to

the area in an attempt to identify the person that had assaulted him. An identification was made. (R 2101)

Based on the foregoing facts, the trial court found that there was no stop of the van as the van had already stopped at the time the officers approached, and that the detention was proper. (R 2221) Thus, while appellant characterizes this as merely a stop based upon a BOLO, it is clear based upon the foregoing facts that the van was already stopped when the officers approached, and the suspicious actions of the driver of the van in making several U-turns and accelerating at the sight of a police officer coupled with the BOLO, and the knowledge that the driver of the van was probably armed, clearly supports the trial court's finding.

In Blanco v. State, 452 So. 2d 520 (Fla. 1984), cert. denied, 469 U.S. 1181 (1984), this Honorable Court upheld a stop and arrest based upon a similar set of circumstances. In Blanco a BOLO was dispatched describing the suspect as a Latin male about 5'10" in height with dark complexion, black curly hair, some kind of mustache, wearing a gray or light green jogging suit and running in an easterly direction. A half an hour later, police officers saw Blanco riding a white bicycle on the sidewalk, south bound on A-1-A and determined that Blanco fit the description on the BOLO except for his pants which at first appeared to be a heavy corduroy and he also had facial hair. The officer requested more information and followed the appellant for approximately one tenth of a mile. Blanco was stopped and when a

backup unit arrived, the officers handcuffed him and took him to the murder scene where he was identified by one of the witnesses as having the same profile and jogging suit. This Court found that there was probable cause for the arrest. The description furnished Officer Price over the BOLO, coupled with the proximity and time and place of the scene of the crime furnished reasonable grounds for the officers' belief that appellant had committed the murder and rendered the arrest legal.

In the instant case, it was not necessary for the Court to find that the BOLO provided probable cause for arrest as an arrest was not effectuated until after the victim had been brought to the scene and identified Perez as his assailant. Further, in support of the court's finding that there was a reasonable basis for detaining appellant until such time as the witness could be brought to the scene, in addition to the information as provided on the BOLO, the officer had his own observations of the suspicious movements of the defendant. In State v. Wise, 17 F.L.W. D1771 (Fla. 2d DCA July 24, 1992), the Second District Court of Appeal stated:

> In reaching a well-founded suspicion to stop a vehicle pursuant to a BOLO, a police officer should consider several factors, including: (1) the length of the time since the offense, (2) the distance from the offense, (3) the route of flight, (4) the specificity of the description of the vehicle and its occupants, and (5) the source of the BOLO information.

Id. at 1771

As in Wise, the source of the information in the instant case was well-known. The length, distance and route were all reasonably consistent with the offense and the specificity of the description, a white, late model Aerostar with gold running boards, is certainly adequate to justify a stop.

It must be remembered, however, that the van in the instant case was not stopped by the police officers, but rather had already been stopped and the defendant had already exited the vehicle at the time the officers approached. In such a case, it is entirely proper for the officers to attempt to maintain the status quo while seeking to identify the defendant. Thus, even if the BOLO was not sufficient in its particularity to provide a constitutional basis for effecting an arrest, it was sufficient to provide a basis for detaining the defendant.

> In spite of the BOLO's lack of specificity, however, it did provide Wittis with sufficient information to formulate a reasonable suspicion that Chapel and his companion may have committed the armed robbery and that at least one of them was potentially dangerous. Knowledge of that kind and degree is articulable and sufficient to permit a protective search of the areas in an automobile where weapons can be hidden or readily reached in circumstances involving a routine traffic stop. New York v. Belton, 453 U.S. 454 (1981)

State v. Chapel, 510 So. 2d 1138, 1140 (Fla. 2d DCA 1987).

Accordingly, considering the evidence in the light most favorable to sustaining the trial court's ruling, appellant is not entitled to a reversal of that ruling.

ISSUE V

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OF HIS STATEMENTS BASED UPON THE DETENTION OF THE DEFENDANT.

Appellant contends that because probable cause did not exist to arrest Perez at the initial detainment and because he was handcuffed and held at gunpoint until such time as the witness could be brought to the scene, that the seizure was unduly intrusive given the totality of the circumstances.

This Honorable Court, in Reynolds v. State, 592 So. 2d 1082 (Fla. 1992), in response to a certified question from the First District Court of Appeal held that the police may properly handcuff a person whom they are temporarily detaining. Noting that the United States Supreme Court has refused to apply a bright line test for determining what police action is permissible in an investigatory stop, this Court noted that the appropriate question in each case was whether the action was reasonable under the circumstances. This requires a twofold inquiry -- whether the action was justified at its inception and whether it was reasonably related in the scope of the circumstances which justified the interference in the first place. This Court further noted that courts have generally upheld the use of handcuffs in the context of a Terry stop where it is reasonably necessary to protect the officer's safety or to thwart a suspect's attempt to flee. Id. at 1084. Accordingly, this Court found that Terry and its progeny do not prohibit

placing a suspect in handcuffs during the course of an investigative detention where the circumstances reasonably warrant such action. If an officer reasonably believes that an investigative stop can be carried out only in such a manner, it is not a court's place to substitute its judgment for that of the officer.

> "We find that the initial handcuffing of Reynolds was within the bounds of a permissible Terry-stop and search for weapons. The information provided to the officers by the informant reasonably led them to suspect that a crime involving distribution of crack cocaine had occurred. The officers had used this informant before and he had proved reliable. The suspected crime was more than a simple street purchase of drugs. Officers reasonably believed that the woman in the car was supplying street vendors with crack cocaine, and Reynolds was driving the car. The suspected felony occurred at night in a neighborhood known for high incidents of cocaine trafficking and use. One of the officers testified that in cocaine cases, we experience on a regular basis very intense violent resistance and many times immediately upon contact in a restraining or apprehension situation."
>
> "Another officer testified that she had been hurt in such a situation. Based on their knowledge and personal experience with this type of crime, the officers concluded that there was reason to believe that the persons in the vehicle carrying the suspect might be armed or could react irrationally when confronted with the police. Police officers are not required to ignore their experience in determining what action is appropriate." Id. at 1085 - 1086

In the instant case, Deputy Griffin had information that the defendant was involved in a possible kidnapping with a weapon. (R 2104) When she arrived on the scene, Perez was out of his van

and around the front. As this Court found in Reynolds, the action was justified at its inception because it was reasonably necessary to protect the officers' safety and to thwart the suspect's attempt to flee. At the time Deputy Griffin pulled the gun and handcuffed the defendant, he was known to be armed and known to be fleeing. Accordingly, her actions were entirely appropriate under the dictates of Terry v. Ohio, 392 U.S. 1 (1968). As such, the trial court correctly denied the motion to suppress based upon the use of handcuffs.

Appellant further argues, however, that even though this Court in Reynolds approved the use of handcuffs, that they are restricted in such a situation to no longer than necessary to verify and dispel that the suspect may be armed and dangerous. First, in the instant case unlike Reynolds, the officers had information that the defendant was indeed armed. Further, as previously noted, the defendant was in the course of fleeing when he was stopped. As such, the use of handcuffs would have been entirely appropriate until such time as an arrest was either effectuated or he was released. Further, however, Deputy Griffin testified that after she had handcuffed him and they had checked the house and the van that he was then unhandcuffed and stood by the van. (R 2106 - 2109) Deputy Griffin testified that he was not handcuffed when they had him standing up by the van. (R 2110) Thus, it is apparent that the actions of the officers were appropriate to the circumstances and did not raise this detention to any higher level. Further, there is no evidence that the

defendant was detained for any longer than was necessary to bring the witness to the scene to identify Perez as his assailant. Again, the trial court's order denying the defendant's motion to suppress comes to this Court clothed with the presumption of correctness and the evidence should be interpreted in the light most favorable to sustain the trial court's ruling. As there was substantial evidence to support the Court's finding that this detention was reasonable, this Honorable Court should uphold that finding.

ISSUE VI

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING DEFENDANT'S MOTION TO SUPPRESS ITEMS TAKEN FROM THE DEFENDANT'S RESIDENCE BY THE POLICE WHERE THE EVIDENCE SHOWS THE DEFENDANT'S GIRLFRIEND AND ROOMMATE GAVE THE ITEMS TO THE POLICE OFFICER VOLUNTARILY.

As appellant concedes, co-occupants may consent to a search of their premises. United States v. Matlock, 415 U.S. 164 (1974); Preston v. State, 444 So. 2d 949 (Fla. 1984); Silva v. State, 344 So. 2d 559 (Fla. 1977); Saavedra v. State, 576 So. 2d 953 (Fla. 1st DCA 1991); Brown v. State, 561 So. 2d 1309 (Fla. 3d DCA 1990). Nevertheless, appellant contends that the court below should have suppressed the gun box, gun case, and ammunition that Betty Ferguson turned over to the police officers because Ferguson was not aware that she could refuse to consent to the search and because the items did not belong to her. It is the state's contention that appellant's position is not supported by either the facts or the law.

First, the record is clearly devoid of any evidence that the officers conducted a search or seized any property. To the contrary, the record shows that in response to the officers' question if Perez had a gun she voluntarily went to the dresser drawer, got the gun box, gun case and ammunition and gave it to the officer. Under similar circumstances the First District Court of Appeals in State v. Dees, 280 So. 2d 51 (Fla. 1st DCA 1973), held that there was no evidence of a search nor a seizure.

The court in Dees noted:

> Nor was there a seizure within the meaning of the Constitution. To seize means "to take possession or forcibly, to grasp, to snatch, or to put in possession." Hardy v. State, 140 Tex. Cr. Rptr. 368, 144 (S.W. 2nd 571). In People v. Alvarez, 236 Cal. at App. 2nd 106, 45 Cal. Rptr. 721 (1965), the court held that where an officer was invited into a home and the occupant wife of the defendant voluntarily gave and permitted him to remove stolen property, such property was admissible as evidence. In those circumstances, the court held that there was neither a search nor a seizure. State v. Ashby, 245 So. 2d 225 (Fla. 1971). Id. at 52.

Thus, in the instant case, where the evidence shows that Ferguson gave the officers the items and where no search was conducted, that there is neither a search nor a seizure within the meaning of the constitution.

Further, even if the officers' actions constituted a search and seizure, the trial court clearly found that Betty Ferguson consented to a search. The issue of voluntariness and consent to search is a question of fact to be determined from all the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Voluntariness of the consent and search must be established by a preponderance of the evidence, under ordinary circumstances. Denehy v. State, 400 So. 2d 1216 (Fla. 1980); Brown, supra. The trial court's findings on a motion to suppress come to the appellate court with a presumption of correctness, and a reviewing court should not substitute its judgment for that of the trial court. Brown, supra; Perez v. State, 536 So. 2d 359 (Fla. 3d DCA 1988).

Appellant's contention that Ferguson's consent was invalid because she did not know she had the right to refuse to consent is unsupported by the law. It is well settled that the police need not advise a person that he or she has the right to refuse consent to a search, State v. Parsons, 549 So. 2d 761 (Fla. 3d DCA 1989), citing, Schneckloth v. Bustamonte, supra, nor must it be shown that the person independently had knowledge of the right to refuse to consent. State v. Parsons, supra; Finney v. State, 420 So. 2d 639 (Fla. 3d DCA 1982). See also Hurtado v. State, 533 So. 2d 304, 305 (Fla. 1st DCA 1988) (appellant's allegation that he was not informed of his right to refuse a search is not dispositive of issue as there is no per se requirement that a defendant must be informed of that right). The test remains one of voluntariness under the totality of circumstances. Schneckloth, 412 U.S. at 249 - 50. As the record shows that Ferguson voluntarily went to the dresser, retrieved the items and gave them to the officers in response to the question about a gun, there is no evidence that her actions were not voluntary and her claim that she did not know she could refuse to give the items is not dispositive of this issue.

Appellant further contends that Ferguson did not have the right to turn over the items as there was no showing of ownership. As the previous cases make clear, where a third party has equal access to the items in question, the courts will find that there is no reasonable expectation of privacy in those items and, therefore, the third party may give permission to the

officers to retrieve such items. See Preston v. State, 444 So. 2d 939, 943 (Fla. 1984). As the items in question were contained in a dresser drawer to which Ferguson testified that she had equal access and that Perez had never limited her access to these items, she clearly had the authority to retrieve the items from the dresser drawer and give them to the officers.

Based upon the foregoing, the state submits that when the evidence is taken in the light most favorable to support the trial court's ruling the denial of the motion to suppress should be affirmed.

ISSUE VII

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING DEFENDANT'S MOTION TO SUPPRESS IDENTIFICATION OF DEFENDANT AS UNDULY SUGGESTIVE AND IN PERMITTING PAUL FROST TO MAKE AN IN COURT IDENTIFICATION OF DEFENDANT AT TRIAL.

Appellant challenges the denial of his motion to suppress the initial out of court identification and the in court identification by Paul Frost. Appellant argues that the identification procedure violated due process because it was unnecessarily suggestive. A review of the record clearly refutes this argument and therefore appellant is not entitled to relief.

Appellant claims that identification was unnecessarily suggestive as a one man "show up" because prior to the show up Paul Frost was told the police had a van stopped and that he needed to I.D. someone, and because when Frost and Detective Muck arrived, Perez was sitting on the ground, handcuffed, with his knees up, by the van with five or six police officers standing around. It is the state's position that procedure employed in the instant case was not unnecessarily suggestive but rather was used in order to limit the amount of time that the officers had to detain Perez.[1] In the instant case, a police officer, as quickly as possible, got the witness to the scene of the crime in order to allow Frost to identify Perez as his assailant or to

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[1] Interestingly enough, Perez also complains about the length of time he was detained at the scene of the crime and that the police should have employed less intrusive methods.

allow the release of Perez. To violate due process, an identification procedure used by the police must be unnecessarily suggestive and create a substantial risk of misidentification. Neil v. Biggers, 409 U.S. 188 (1972). And although show ups are widely condemned, immediate confrontations allow identification before the suspect has altered his appearance and while the witness' memory is fresh and permit the quick release of innocent persons. Johnson v. Dugger, 817 F.2d 726 (11th Cir. 1987). Therefore, show ups are not necessarily suggestive unless the police aggravate the suggestiveness of the confrontation.

This Court has also upheld the use of show up identification procedures as not being violative of defendant's rights. Blanco v. State, 452 So. 2d 520 (Fla. 1984), cert. denied, 469 U.S. 1181 (1985); Grant v. State, 390 So. 2d 341 (Fla. 1980).

Further, even if the procedure used in this case was somewhat suggestive, suppression is not required unless the totality of the circumstances gave rise to a substantial likelihood of irreparable misidentification. Blanco, supra; Grant, supra. Consideration of the five factors enumerated in Grant, demonstrates a reliability of identification in the instant case.

The first factor is the opportunity of the witness to observe the defendant. Appellant argues that although it was daylight and Frost stated that he had a clear view of the defendant, that Frost's attention was undoubtedly focused on making contact with his son and that he was only in the

defendant's presence for a minute. However, Frost himself testified that he had a clear view of the defendant and that it was broad daylight and that he saw him clearly for a minute or two. (R 2071) He testified that he was eight to ten feet from the defendant and was able to give a very accurate description of him. (R 2076)

As to the second factor, the witness' degree of attention, Frost testified that after the victim fell out of the van and Frost got out of his truck and she jumped into the drivers' seat. At that point the defendant came around the van and pointed a gun at Frost. The defendant then ran around to the passenger's side of Frost's truck. Frost testified that he had a clear view of the defendant and he was standing within eight to ten feet of him and that he had no trouble identifying him. (R 2063, 2064, 2067, 2087) Considering that the defendant was standing eight to ten feet from Paul Frost and pointing a gun at him, it is clear that Frost's attention was clearly centered on the defendant.

As to the third factor, the witness' prior description of the criminal, Detective Muck testified that he was the first to question Frost and that Paul Frost told him that the defendant was wearing a wig, jeans and a jacket. Frost also clearly identified the van and the victim in the instant case. (R 2162 - 2166) While appellant criticizes the limited description given to the officers, it should be noted that the description given was sufficient for its purpose, to enable the officers to stop the fleeing van.

The fourth factor for consideration was the level of certainty demonstrated at the identification. Frost testified that when he walked up to the defendant he immediately recognized him and that there was no doubt in his mind. (R 2086 - 2087) Frost also denied saying that he wasn't sure of the defendant's identity. (R 2089)

Finally, the length of time between the crime and the confrontation obviously weighs heavily towards supporting the trial court's finding of reliability. Perez was stopped shortly after his assault on the Frosts. And Mr. Frost was immediately taken to Perez for identification purposes. It is well settled that identification shortly after the crime is "inherently more reliable" than a later, in court identification, and many cases courts have recognized the significant probative value of an identification made when the witness' memory is still fresh. State v. Freber, 366 So. 2d 426 (Fla. 1978); State v. Cromartie, 419 So. 2d 757 (Fla. 1st DCA), pet. for rev. dismissed, 422 So. 2d 842 (Fla. 1982).

In further support of the court's finding of reliability, the evidence shows that not only was Paul Frost certain of his identification of the defendant, he was also able to identify him out of a photopack the next day. (R 2069) Also Paul Frost's son Chad, who had not been taken to the scene of the defendant's arrest, was able to independently select the defendant's photograph from the photopack. Further, both Paul and Chad Frost were able to select the victim's photo from the photopack. (R

2069, 2154, 2157, 2160, 2166) Thus, despite appellant's challenge to the witness' degree of attention, the evidence clearly shows that the witness' identification was reliable and that both parties were able to identify the defendant from a photopack as well as the victim in the instant case. Further, as appellant has noted, another van was brought to Paul Frost for identification and Frost, without any hesitation said that it was not the right van or the right people. (R 280) Additionally, Paul Frost testified that he did not see handcuffs on the defendant and despite the fact that Perez had removed some of his clothing, he had no doubt in his mind that Perez was his assailant. (R 280 - 287)

As the record in the instant case amply supports the trial court's finding that the out-of-court identification was reliable and consistent with due process, this Court should affirm the denial of the motion to suppress a prior identification as well as the subsequent in court identification.

ISSUE VIII

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING INTRODUCTION OF RECORDS OF CONVICTION OFFERED TO IMPEACH A TESTIMONY OF STATE WITNESS TARY LYNN HUFFMAN.

Tary Lynn Huffman testified as a witness for the state. On direct examination Huffman admitted to felony convictions but stated that off hand he did not have any idea how many felony convictions he had. (R 1349 - 50) On cross examination the following colloquy occurred:

> "Q. And you say that you didn't know how many felonies you have been convicted of?
>
> A. No, sir, I don't.
>
> Q. More than ten?
>
> A. Yes, sir.
>
> Q. More than twenty?
>
> A. That would be a guesstimation.
>
> MR. HANSON: I don't have any other questions, Judge. I would move --
>
> Q. (By Mr. Hanson) Tary Lynn Huffman, is that you?
>
> A. Yes, sir.
>
> Q. And all of your charges have been in Pasco County?
>
> A. No, sir.
>
> Q. You had other charges outside of Pasco County?
>
> A. Yes, I was born in Toledo and raised in Detroit.

(R 1354)

At that point defense counsel moved to introduce certified copies of judgments and sentences of Tary Lynn Huffman's felony convictions. The state objected that it was not impeachment in that Huffman had admitted having so many convictions he couldn't remember them. On that basis, the court granted the objection. (R 1355)

Now on appeal, appellant contends that the trial court erred in precluding him from presenting a certified copy of Huffman's convictions into evidence. Appellant contends that because the witness did not know the number of prior felony convictions he had that he opened the door to questioning and that counsel should have been permitted to inquire further.

Generally, when a witness in a criminal case takes the stand, counsel is permitted to attack the witness' credibility by asking whether the witness has ever been convicted of a felony or a crime involving dishonesty or false statement, and how many times. *Section 90.610, Fla. Stat. (1989).* If the witness admits the number of prior convictions, counsel is not permitted to ask further questions regarding prior convictions, nor question the witness as to the nature of the crimes. If, however, the witness denies a conviction, counsel can then impeach him by introducing a certified record of the conviction. Gavins v. State, 587 So. 2d 487 (Fla. 1st DCA 1981); Cummings v. State, 412 So. 2d 436 (4th DCA 1982).

In the instant case, Huffman did not deny the number of convictions. Counsel asked him if it was more than ten, he said,

"Yes" and when counsel said more than twenty, he said, "It would be a guesstimation". Counsel produced evidence in a proffer that defendant had been convicted of a crime eighteen times. As Huffman did not deny being convicted of a felony eighteen times, any evidence of those convictions would not serve to impeach his testimony. Therefore, introduction of those convictions was properly excluded.

For example, in Gavins, supra, Gavins in response to a question as to whether he had five prior felonies stated, "To the best of my knowledge its only about -- yeah about that." On cross examination, the prosecutor asked Gavins, "Do you have five prior felony convictions or about five prior felony convictions?", and Gavins responded, "About five." The prosecutor then asked, "You don't have five exactly?" And Gavins responded, "To my knowledge, to the best of my knowledge, I do not know." The prosecutor then asked Gavins whether he was convicted of escape in 1985, another escape in 1985, and whether he was convicted of grand theft, burglary of a structure, and aggravated assault in 1989. On appeal, the court held that it was error for the circuit court to allow the prosecutor to question Gavins about his prior criminal convictions after Gavins had correctly admitted that he had five prior felony convictions. The court also noted that the prosecutor offered no proof that Gavins had more than five prior felony convictions.

In the instant case, defense counsel presented evidence of eighteen felony convictions. When he asked Huffman if it was

more than twenty, he said it was a "guesstimation". He did not deny that it was more than twenty. At no time was he asked if he had eighteen and he did not deny having eighteen convictions. Therefore, on that basis the trial court properly denied the admission of evidence concerning the eighteen convictions.

Further, even if it was error for the trial court to exclude the evidence of the convictions, the exclusion was clearly harmless in the instant case, because Huffman admitted to having a large number of convictions and the state freely admitted that he was a thief and a criminal. Therefore, the evidence as to the specific number of convictions that the defendant had was clearly not of such import as to make the exclusion of the evidence harmful.

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY IN A CAPITAL CASE, IN PART THAT "IF YOU RETURN A VERDICT OF GUILTY, IT SHOULD BE FOR THE HIGHEST OFFENSE WHICH HAS BEEN PROVED BEYOND A REASONABLE DOUBT".

Appellant also challenges an instruction given by the court below to his jury regarding its consideration of the lesser included offense. The instruction given by the trial court during the guilt phase of the trial read as follows: "If you return a verdict of guilty, it should be for the highest offense which has been proved beyond a reasonable doubt. If you find that no offense has been proved beyond a reasonable doubt then of course your verdict must be not guilty." (R 447) Appellant argues that this instruction by the court deprived his jury of the opportunity to exercise it's pardon power.

Appellant does not cite any case that has examined the propriety of the instruction given below. Rather, he relies on cases where the trial courts have failed to give or have given erroneous definitions of lesser included offenses and the appellate court held that the error was harmful because it prevented the jury from exercising its pardon power. In the instant case, of course, the jury was completely and correctly instructed on the charged offenses as well as all necessary included offenses. None of the appellant's cases suggest that it would be improper to remind the jurors of their oath to follow the law and convict the defendant of the most serious crime proven by the state.

Appellant apparently believes that all juries should be instructed that they have the power to pardon any defendant and, if they don't agree with the law as enacted by the legislature, they are free to ignore and convict the defendant of any offense defined by the court. Such a position exalts the notion of jury pardons to a level beyond justification and reason. Further growth of the jury's pardon powers should not be encouraged because it conflicts with the jury's basic duty to decide a case in accordance with the law and the evidence and to disregard the consequences of its verdict. See, Mosely v. State, 482 So. 2d 530 (Fla. 1st DCA 1986), aff'd, 492 So. 2d 1073 (Fla. 1986).

The standard jury instructions clearly point out that a defendant should be convicted of a lesser included offense only when the state has failed to prove the main accusation beyond a reasonable doubt. *Florida Standard Jury Instructions* §*2.02(a)*. Thus while the jury's right to pardon any defendant is recognized in case law and is useful in determining the harmfulness of an error committed during a charge to the jury, it is not such an absolute right that reminding the jurors of their oath to follow the law is an infringement which invalidates the entire trial.

The giving of any particular instruction to the jury is a matter clearly within the discretion of the trial court. Since the appellant has failed to demonstrate an abuse of discretion in the charge given below, he is not entitled to a new trial. However, even if the trial court erred in giving the instruction, the error was harmless in the instant case.

ISSUE X

WHETHER THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO INTRODUCE INTO EVIDENCE PHOTOGRAPHS OF THE VICTIM'S PARTIALLY DECOMPOSED BODY.

Appellant contends that, even though photographs of the victim were relevant to prove identity and cause of death they should have not have been admitted because each of these factors was susceptible of proof by other means. He also argues that any relevancy was outweighed by the prejudice of showing the jury photographs of the victim's body.

The test of admissibility of photographs in a situation such as this is relevancy and not necessity. This Court has repeatedly stated:

> "The current position of this court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in the case. Relevancy is to be determined in a normal manner, that is, without regard to any special characterization of proffered evidence. Under this conception, the issues of 'whether cumulative', or 'whether photographed away from the scene,' are routine issues basic to a determination of relevancy, and not issues arising from any 'exceptional nature' of the proffered evidence."

State v. Wright, 265 So. 2d 361, 362 (Fla. 1972). See also Henninger v. State, 251 So. 2d 862, 864 (Fla. 1971); Meeks v. State, 339 So. 2d 186 (Fla. 1976).

In Williams v. State, 228 So. 2d 377 (Fla. 1969), this Court noted that gruesome photographs depicted a view which was "neither gory nor inflammatory beyond the simple fact that no

photograph of a dead body is pleasant." Id. at 379. And, in Henderson v. State, 463 So. 2d 196 (Fla. 1985), Henderson argued that the trial court erred by allowing into evidence gruesome photographs which he claimed were irrelevant and repetitive. This Court found that the photographs, which were of the victim's partially decomposed body, were relevant.

> "Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Those whose work products are murder of human beings should expect to be confronted by photographs of their accomplishments. The photographs are relevant to show the location of the victims' bodies, the amount of time that had passed from when the victims were murdered to when the bodies were found, and the manner in which they were clothed, bound and gagged."
>
> Id. at 200

This Court further held that it is not to be presumed that gruesome photographs so inflamed the jury that they would find the accused guilty in the absence of evidence of guilt. This Court presumed that jurors are guided by logic and thus, that pictures of the murder victims do not alone prove the guilt of the accused. Id. at 200.

In Gore v. State, 475 So. 2d 1205 (Fla.) cert. denied, 475 U.S. 1031 (1985), this Court disagreed with Gore's contention that the trial court reversibly erred in allowing into evidence two prejudicial photographs, one depicting the victim in the trunk of Gore's mother's car and the other showing the hands of the victim behind her back. This Court held that the photographs

placed the victim in Gore's mother's car, showed the condition of the body when first discovered by police, and showed the considerable pain inflicted by Gore binding the victim and, met the test of relevancy and were not so shocking in nature as to defeat their relevancy. Id., at 1208. The law is well established that the admission of photographic evidence is within the trial court's discretion and that a court's ruling will not be disturbed on appeal unless there is a clear showing of abuse. Wilson v. State, 436 So. 2d 908 (Fla. 1983). Appellant has failed to show an abuse of that discretion.

The photographs in the instant case were relevant to establish the manner in which the murder had been committed. The photographs showed the location of the body, the manner in which she was clothed and bound and the amount of time that had passed from when the victim was murdered to when the body was found. Cf. Henderson, supra. While it is true, that most, if not all of the evidence presented by way of the photographs could have been established by other means, this is not the test of admissibility. The photographs were relevant, they were not unduly prejudicial and, therefore, the trial court did not err in admitting them into evidence.

Appellant relies on Czubak v. State, 570 So. 2d 925 (Fla. 1990), to support his contention that the photographs were so gruesome as to create such undue prejudice that they should have been excluded. As appellant concedes, however, in Czubak the record showed the photographs of the victim did not represent the

victim as she was when the defendant left her. But, rather, the evidence showed that the position of the body had been changed by dogs and portions of the body had been mauled and eaten by the dogs. In the instant case, to the contrary, the record shows that the victim's body was as Perez left it. The photographs were relevant to show how he had tied the body to the ground in order to keep the body from being discovered, the manner of death and consciousness of guilt. Accordingly, any prejudicial value was clearly outweighed by the probative value and it was within the trial court's discretion to admit the photographs.

Additionally, given the substantial evidence of guilt presented by the state, the introduction of these photographs was harmless beyond a reasonable doubt.

ISSUE XI

WHETHER THE TRIAL COURT'S ORAL PRONOUNCEMENT OF THE DEATH SENTENCE WITH INSTRUCTIONS TO THE CLERK TO TRANSCRIBE AND SUBMIT TO THE COURT FOR INCLUSION IN THE COURT FILE MANDATES A REMAND FOR THE IMPOSITION OF A LIFE SENTENCE.

In Van Royal v. State, 497 So. 2d 625, 628 (Fla. 1986), this Court held as follows:

> . . . We appreciate that the press of trial judge duties that written sentencing orders are often entered into the record after oral sentence has been pronounced. Provided this is done on a timely basis before the trial court loses jurisdiction, we see no problem. (emphasis supplied)

Subsequently, in Grossman v. State, 525 So. 2d 833 (Fla. 1988), this Court held that, henceforth, the written order should be filed concurrently with the pronouncement of sentence. The trial judge in the instant case orally pronounced a thorough and well thought-out order after directing the court reporter to reduce them to writing at that time.

Albeit in a different context, i.e., the sentencing guidelines, this Honorable Court has held that although written reasons for departure are required of the judge, that requirement is satisfied by a notation upon the scoresheet written by the clerk at the trial court's direction. Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988). The written findings of the trial court sub judice were made contemporaneously with the oral pronouncement and are included in the record. The procedure employed by the trial judge in the instant case comports with the

requirement that this Honorable Court be afforded the opportunity to engage in meaningful review of the trial court's findings. Cf. Rhodes v. State, 457 So. 2d 1201 (Fla. 1989). The trial court's order clearly sets forth as his basis for the finding of the aggravating factors and his consideration and rejection of any mitigating evidence. Thus, where as here, it is undisputed that written findings are included in the record which comport with the oral pronouncement, the trial judge did not err.

Appellant also contends that the court reporter's failure to include the separate written order in the record also requires the imposition of a life sentence.

Unfortunately, the Court reporter failed to include many hearings and orders in the original record. Surely appellant would not contend that the court reporter's error would preclude him from being able to challenge the court's ruling on his motion for funds to travel to Cuba because it was not included in the original record. It is neither fair to the defense nor the state to find error based on the reporter's actions.

ISSUE XII

WHETHER THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR FUNDS FOR INVESTIGATION OF THE ACCUSED'S BACKGROUND DEPRIVED PEREZ OF HIS CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE IN MITIGATION.

Prior to trial, counsel for the defendant filed a motion for funds to travel to Cuba to investigate his background for guilt and possible penalty phase. (R 2032 - 2034) On February 21, 1991, a hearing was held on the defendant's motion for funding for a psychological and physical exam, as well as the motion for funds to travel to Cuba. After granting the motion allowing the defendant two additional experts on the issue of his sanity, the trial court heard argument on the request for funds to go to Cuba. (R 2032) Defense counsel represented to the court that the funds were needed to go to Cuba to do a background investigation. Counsel represented that Perez was born in Cuba and that he was up there ten years ago when until he was twenty-eight years old. Perez claimed to have a mother, five brothers and four sisters in Cuba. He went to school there and he was allegedly seen by one psychiatrist over there. Counsel represented that he had written the family and had not received a response. He also represented that there may be relevant information in terms of the school or the prior psychiatric consultation. (R 2033) The motion was denied . (R 2034)

Now on appeal appellant contends that the trial court's refusal to fund the trip to Cuba precluded him from presenting relevant mitigating evidence and, therefore, the death sentence

should be reversed and the life sentence imposed. It is the state's position that the decision to grant funds for investigation is within the trial court's discretion and that appellant has failed to show an abuse of that discretion.

In Espinosa v. State, 589 So. 2d 887 (Fla. 1991), reversed on other grounds, 505 U.S. ___ (1992). Espinosa claimed that he was denied the time and money necessary to present mitigating evidence by flying in several of Espinosa's family members from Central America to testify to a history of mental and physical child abuse. Counsel claimed that he did not make the motion to bring them to the United States until the beginning of penalty phase because Espinosa had been embarrassed to tell him about the abuse until the penalty phase was imminent. This Honorable Court held that the granting or denial of the motion was within the discretion of the trial court and that the trial judge did not abuse his discretion. Id. at 893. Similarly, in Martin v. State, 455 So. 2d 370 (Fla. 1984), this Court made it clear that the appointment of experts is discretionary. *Section 90.14.06, Fla. Stat. (1983).* This Court noted that the test for overturning a trial court ruling on appointing an expert is whether there has been an abuse of discretion and that Martin had failed to show an abuse of discretion.

> "Martin's claim that the appointed expert would have completely undermined the neurologist's finding and the testimony based on those findings is purely speculative. At best this expert's testimony would have given the jury and the judge one more bit of information to be considered and weighed

> along with the other expert's testimony and the proof that Martin was, at best, a murderer and rapist who committed the instant crime while on parole. The trial judge was liberal in appointing and approving physicians for Martin, and our review convinces us that Martin suffered no undue prejudice from, and that the trial court committed no abuse of discretion by, denying the appointment of this expert." Id. at 372

Similarly, in Quince v. State, 477 So. 2d 535 (Fla. 1985), this Court rejected Quince's argument that he was denied a full and fair evidentiary hearing because the trial court refused to appoint certain experts and investigators. This Court found that the trial court did not abuse its discretion in refusing to appoint the experts.

Appellant's request to the trial court for funds to go to Cuba was based on mere speculation that information might be found. There was no allegation as to any specific information that they were looking for or that might have proved helpful to the defendant in presenting his mitigating evidence. The defendant was found to be sane and competent to stand trial. Thus, if there was any truly mitigating evidence to be found in Cuba, the defendant should have been aware of it enough to provide counsel with specific information that needed to be substantiated. Further, as the prosecutor conceded, the laws concerning presentation of evidence during the penalty phase would have clearly allowed the defendant to present any such evidence by way of hearsay. Therefore, either the defendant or Ferguson could have testified as to any relevant information that

could have been obtained from Cuba. (R 1658) As Perez did not attempt to do so, it is the state's position that he has failed to show that he was prejudiced by the Court's refusal or that the court abused its discretion.

Appellant predicates his claim for relief on two cases where trial counsel's failure to travel to Cuba to obtain mitigating evidence was advanced as a basis for ineffective assistance of counsel claim; Medina v. State, 573 So. 2d 293 (Fla. 1990); Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987). In Medina, this Court found that counsel was not ineffective for failing to present testimony of the victim's two daughters and mother who lived in Cuba and by failing to obtain experts who would testify as to nonstatutory mental health mitigating evidence, because the daughters' testimony would not have affected the outcome of the proceeding and because counsel testified that she wanted to de-emphasize Medina's coming to this county in the Mariel boat lift. Conversely, in Blanco v. Wainwright, although this Court also rejected Blanco's claim, the Eleventh Circuit overturned this Court's ruling in Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). The federal court found upon reviewing the evidence that counsel's failure to investigate Cuba was not a tactical decision, but rather was a result of counsel's eagerness to latch onto Blanco's statements that he did not want any witnesses called.

Nevertheless, it is clear from a review of Blanco that the evidence Blanco's counsel failed to present was truly

mitigating.[2] Whereas, in the instant case, appellant wholly failed to present any claim beyond mere speculation as to what may have been found in Cuba. Accordingly, appellant has failed to show that the trial court abused its discretion in denying the motion.

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[2] The evidence not presented by Blanco's counsel was that Blanco came from a good family, he was nonviolent and he had a grandmother who suffered fits of mental derangement and himself suffered as a child from such fits.

ISSUE XIII

WHETHER THE IMPOSITION OF THE DEATH PENALTY OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT COMPLIES WITH THE STANDARD ENUNCIATED IN TEDDER.

This Court in Tedder v. State, 322 So. 2d 908 (Fla. 1974) and the multitude of cases following that decision, has set out a standard for jury override decisions in which the court may impose the death penalty. The standard is very clear. "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder, supra at page 910. This Court has gone on to explain that "where the jury recommendation is not based on some valid mitigating factor discernible from the record, the Tedder standard for a jury override is met." Thomas v. State, 456 So. 2d 454 (Fla. 1984).

Although a jury recommendation of life in a capital case is to be given great weight, the trial court must ultimately make the decision on which sentence is appropriate and which sentence is the correct legal sentence. Thomas, 456 So. 2d 460. The trial court below found that death was the appropriate sentence and opined that the jury's recommendation was based on the fact that the victim was a prostitute. Whatever the reasons for the jury's vote, it is clear that it was in contradiction to the evidence presented in the penalty phase of the trial. "Where a sentence of death is otherwise appropriate and it appears that

some matter not reasonably related to a valid ground of mitigation has swayed the jury to recommend life . . . it is proper for the judge to overrule the jury's recommendation." Francis v. State, 473 So. 2d 672 and 676 (Fla. 1985).

The trial court correctly rejected the life recommendation based upon a valid finding that the facts of this case suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ.

In the instant case, the trial court found that three aggravating factors had been established beyond a reasonable doubt: (1) that the homicide occurred during the course of a kidnapping, (2) that the homicide was heinous, atrocious or cruel and, (3) that the homicide was cold, calculated and premeditated. The court's order clearly sets forth the factual basis for each of these findings and each of these findings is well supported by the evidence. (R 2275 - 2280) Conversely, the court, after reviewing all of the mitigating evidence, found that none of the evidence as presented mitigated the instant case. The court did, however, thoroughly consider the jury's recommendation of life:

> The biggest mitigating circumstance of all, the most important circumstance of all is the recommendation by a majority of the jury. I am required to give the jury's recommendation great weight and I have done so. And this is the only recommendation, this is the only circumstance which troubles me more than all the other basis I have considered.
>
> I have long felt that no one person, be he judge or otherwise, should be allowed to set himself up above the decision of twelve other persons. I may be a judge, but that does not

mean that I have any greater moral or ethical sense than other citizens of the community who sat on the jury. My personal feeling is that a judge should never return a recommendation by a jury on a question -- on a question of life. But my personal recommendation, my personal feeling of necessity must bow to the will of the legislature.

I think it is clear to me that the legislature has directed that a jury's recommendation must be overturned if that jury's recommendation is not reasonable and not based on a reasonable survey of the evidence before it. And its the surveying circumstances in this case and the facts of this case that I must and do find that the jury's recommendation is unreasonable.

I think the jury's recommendation, though I say this with extreme reluctance, I think the jury's recommendation was based upon a societal reason which is unacceptable today, and that is that a prostitute is entitled to less protection than any other citizen. I am reminded of the words of Justice Harold in a somewhat [sic] case many years ago which he wrote for the Florida Supreme Court, a prostitute can be raped. A prostitute can be murdered and her murder is entitled to the same weight of the law as that of any other person.

I can find no basis for the jury's recommendation other than the nature of the victim's occupation. I can find no other basis for it.

In viewing all the aggravating circumstances, in viewing and comparing them with all of the possible mitigating circumstances, it is clear to this court that the mitigating circumstances are few, primarily they is no significant history and that you are a good worker. And that the aggravating circumstances are many and compelling.[3]

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[3] Perez waived the mitigating factor of "no significant history" so as to preclude the state from presenting evidence of other

(R 2285 - 87)

This order by the trial court clearly comports with the standards set forth by this Honorable Court in Tedder and with its progeny. Accordingly, the jury override should be upheld.

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crimes in rebuttal. (R 1669)

ISSUE XIV

WHETHER THE TRIAL COURT IMPROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

Appellant contends that the trial court's finding of heinous, atrocious or cruel is unsupported by the record and the law. Appellant relies on this Court's holding in Bundy v. State, 471 So. 2d 9 (Fla. 1985), wherein this Court rejected the heinous, atrocious or cruel finding as the evidence did not show that Kimberly Leach struggled with her abductor, experienced extreme fear and apprehension or was sexually assaulted before her death.

Clearly, this case is distinguishable from the Leach murder. The record shows that the victim Kay Devlin was kidnapped by the appellant on the afternoon of July 14 around 2:00 p.m. (R 880, 861 - 862) Several hours later the victim managed to escape from the defendant's van and ran screaming to the vehicle of Paul Frost and his son Chad Frost. (R 929) Kay Devlin told the Frosts that Perez was trying to kidnap her. (R 909) The defendant then jumped out of his van, ran back to the Frosts, pulled a revolver on both of the Frosts. (R 937) After the Frosts ran away, the defendant again forced Kay Devlin at gunpoint into his van. Approximately two hours later the defendant was arrested after murdering the victim Kay Devlin. Clearly the evidence shows that Kay Devlin was aware of her impending danger and that the crime was unnecessarily torturous and pitiless.

Under similar circumstances this Court has repeatedly upheld a finding of heinous, atrocious or cruel. See Preston v. State, 17 F.L.W. S252 (Fla. 1992) (killing is heinous, atrocious or cruel where victim was abducted from a store where she worked, taken to a remote location, made to walk at knife point through a dark field, disrobed and stabbed to death. The fact that victim must have suffered great fear during the incident is sufficient to support the factor even where death itself was almost instantaneous); Sochor v. State, 580 So. 2d 595 (Fla. 1991) (fear and emotional strain contribute to the heinousness of a murder). Koon v. State, 513 So. 2d 1253 (Fla. 1787) (court properly finds that killing was heinous, atrocious or cruel when victim was subjected to hours of terror before killing, even though the death itself was quick); Bryan v. State, 533 So. 2d 744 (Fla. 1988) cert. den. 490 U.S. 1028 (1989) (evidence supports finding that murder was heinous, atrocious or cruel when victim was kidnapped, held under duress in fear of life for four hours, transported to an isolated area, marched to a creek bank, where defendant struck victim in the head and killed victim with a shotgun blast to the face); Scott v. State, 494 So. 2d 1134 (1986) (evidence that victim became aware of the likelihood of death is sufficient to support finding that killing was heinous, atrocious or cruel); Cooper v. State, 492 So. 2d 1059 (Fla. 1986) (where victim is acutely aware of impending death, based on evidence that they were bound and rendered helpless, evidence is sufficient to support finding that murder was heinous, atrocious

or cruel). Garcia v. State, 492 So. 2d 360 (Fla. 1986) (judge may consider fear and emotional strain in deciding whether murder is heinous, atrocious or cruel).

While appellant takes exception to the court's characterization of the facts supporting this finding, it is clear that the facts as set forth by the trial court are well supported by the record. For example, appellant contends that there is no evidence that the victim remained in the vehicle for many hours. The evidence clearly shows that the victim was abducted around 2:00 p.m. in the afternoon and that she was held by the defendant until after 6:00 p.m. that afternoon. Whether she was held in the vehicle itself or elsewhere does not undermine the fact that the victim was held in fear for the entire time. Defendant also takes exception to the court's finding that the length of time served no purpose other than to cause maximum pain to the victim claiming that there was no evidence that the victim was subject to pain before she was shot. This characterization of the word "pain" is purely literal. It is clear that the trial court meant mental suffering as well as physical suffering. Appellant also contends that there was no evidence of torture, therefore, the court's characterization of the vehicle as a torture vehicle was inappropriate. The facts show that Kay Devlin was bound in the van, that she repeatedly attempted to escape and that there were ropes tied from one end of the van to the other which were identified as the same rope which was found on the body. Again the court's characterization was entirely appropriate.

The court's finding is clearly supported by the facts and the law. Accordingly, the finding of heinous, atrocious or cruel should be upheld.

ISSUE XV

WHETHER THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE OF "COLD, CALCULATED AND PREMEDITATED."

This Court has consistently held that cold, calculated and premeditated is established where the evidence shows that the murder was undertaken after reflection and calculation. Harvey v. State, 529 So. 2d 1083 (Fla. 1988); Rogers v. State, 511 So. 2d 526 (Fla. 1987). The facts in the instant case clearly support the finding by the trial court that the murder was committed in an especially cold, calculated and premeditated manner. As the trial court found, the evidence shows that Perez, after being rebuffed by the victim earlier in the day and after having ample time to cool down and reflect on his actions, returned several hours later and kidnapped the victim. After reflection Perez removed the gun from his dresser at home, obtained ropes and stakes and a wig. This evidence of preplanning supports the finding of cold, calculated and premeditated. The evidence also shows that after having driven the victim around for several hours, she was taken to a very remote area which the court found could only be designated as an appropriate place to kill someone and dispose of their body. (R 2278) Further, the short period of time that lapsed between the victim escaping from the van and the defendant being arrested, is evidence that he had a plan as the disposal of the body was well thought out and time consuming to complete. The evidence showed the defendant took stakes and a rope and had to dive at least

four or five times into five feet of water in order to dispose of and hide the body. Under similar circumstances, this Court has also consistently upheld a finding of cold, calculated and premeditated. Cf. Shere v. State, 579 So. 2d 86 (Fla. 1991) (The court properly finds murder cold, calculated and premeditated when defendant talked about murdering the victim before the killing and bought a shovel to be used to bury the body after the killing and took the victim to an isolated area to kill him); Brown v. State, 565 So. 2d 304 (Fla. 1990) (where defendant took a gun with him to see victim who had been "telling lies about him", and evidence showed that the defendant planned to kill the victim if she made any noise, the evidence is sufficient to show cold, calculated and premeditated); Mendyk v. State, 545 So. 2d 846 (Fla. 1989) (where evidence shows that defendant planned the murder of the victim and calculated the plan when he returned to place where he had left her bound to a tree, the court properly found this murder to be cold, calculated and premeditated);

Where, as in the instant case, the evidence shows that there was heightened premeditation, accompanied by cold calculation and prearrangement, the trial court properly found the aggravating factor of cold, calculated and premeditated.

ISSUE XVI

WHETHER THERE WAS A REASONABLE BASIS FOR THE JURY'S LIFE RECOMMENDATION.

This claim was thoroughly addressed under Issue XIII. In short, however, the trial court properly found that there was no reasonable basis for the jury's recommendation as none of the evidence presented during the penalty phase mitigated the enormity of this crime. This Court has consistently held that it is permissible for a trial court to override a jury recommendation where the mitigation presented does not provide a reasonable basis for a jury's recommendation. Robinson v. State, 17 Fla. Law Weekly S309 (Fla. June 25, 1992) and, as this Court found in Zeigler v. State, 580 So. 2d 127 (Fla. 1991), it is not improper for a court to override a jury recommendation of life simply because the defendant can point to evidence of mitigation when such mitigating evidence is minuscule in comparison to the enormity of the crime. As the trial court properly found three substantial aggravating factors and little to no evidence of mitigation, it properly overrode the jury's recommendation of life.

ISSUE XVII

WHETHER THE AGGRAVATING CIRCUMSTANCE THAT THE KILLING WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL IS UNCONSTITUTIONALLY VAGUE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS, BOTH IN ITS OVERALL EFFECT AND IN ITS APPLICATION TO PEREZ.

Appellant's penalty phase jury was instructed with regard to the heinous, atrocious or cruel aggravating factor:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. The kind of crime intended to be included in heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was consciousless or pitiless and was unnecessarily torturous to the victim. (R 1772)

Counsel objected to the expanded jury instruction as vague and ambiguous. (R 1729) Now on appeal, Perez contends that the statute itself is unconstitutionally vague. Appellant is not attacking the actual jury instruction, but rather the statute. This issue has not been preserved for appeal. Undersigned counsel has thoroughly combed this record and has been unable to find at any point where there was an objection to the statute as being unconstitutionally vague and appellant has cited to no objection in his brief.

Even if this claim was not procedurally barred, it is without merit. As appellant concedes, this Honorable Court in Smalley v. State, 546 So. 2d 720 (Fla. 1989) upheld the

constitutionality of the statute. Perez attempts to distinguish Smalley, however, claiming that Smalley's attack was on the jury instruction, whereas, he, Perez, is only attacking the statute itself. This Court's decision in Smalley refers to both the jury instruction and the constitutionality of the statute. Further, this Honorable Court has recently reaffirmed its holding in Smalley with regard to the constitutionality of the statute in Lucas v. State, 18 Fla. Law Weekly S15 (Fla. Dec. 24, 1992). In Lucas, this Court upheld the expanded instruction that was given in the instant case and found that the aggravating factor of heinous, atrocious or cruel was itself not vague.

Accordingly, not only is this claim meritless, but it is also procedurally barred.

ISSUE XVIII

WHETHER SECTION 921.141(3), FLORIDA STATUTES, IS UNCONSTITUTIONAL IN ITS APPLICATION BECAUSE IT ALLOWS THE TRIAL JUDGE TO CAPRICIOUSLY AND DISCRIMINATORILY OVERRIDE A JURY RECOMMENDATION OF LIFE.

Again, appellant is raising an issue which was not presented to the court below. Accordingly, this claim is procedurally barred.

Even if this claim was not procedurally barred, it is without merit. The United States Supreme Court in Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), upheld Florida's sentencing scheme which allowed a trial judge to override jury life recommendation. The Court noted that although some states do not allow a judge to override a life recommendation, the fact that a majority of jurisdictions have adopted a different practice, does not establish that contemporary standards of decency are offended by the jury override. Id. at 464.

ISSUE XIX

WHETHER THE TRIAL COURT ADMITTED NONSTATUTORY, VICTIM RELATED TESTIMONY THAT REQUIRES THE JUDICIAL OVERRIDE OF THE LIFE SENTENCE TO BE REVERSED.

Appellant contends that the trial court erroneously considered nonstatutory victim related testimony in overriding the life sentence. In Hodges v. State, 595 So. 2d 929, 933 (Fla. 1992) rev'd on other grounds, ___ U.S. ___ (1992), this Honorable Court acknowledged Booth v. Maryland, 482 U.S. 496 (1987), was overruled by the United States Supreme Court in Payne v. Tennessee, 111 S.Ct. 2597 (1991). This Court in Hodges acknowledged that the only part of Booth not overruled by Payne is "that the admission of a victim's family members characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." Because the victim evidence in Hodges concerned only the victim herself, this Court found that the comments and testimony Hodges complained about were properly admitted. See, also, Burns v. State, 18 Fla. Law Weekly S35 (Fla. December 24, 1992). In the instant case, the only victim impact evidence presented was the victim's brother Al Davey and the victim's son Robert Spencer Wishart II, who testified as to the impact that Kay Devlin's death had upon her children and grandchildren. (R 1863 - 1870) As such, this evidence clearly falls within that evidence approved in Payne and Hodges. Additionally, a review of the trial court's order does not reveal any reliance on any

nonstatutory, victim related testimony. In fact, the trial court made it clear that while he felt he was required to listen to the victim impact evidence he is obliged to consider only those aggravating circumstances which are spelled out in §921.141 and he would not consider any victim impact evidence as aggravating. (R 1861 - 62) Thus, even if the presentation of this evidence was improper, it was clearly harmless. Accordingly, not only did this evidence not have any impact on the trial court's final sentence, it was also appropriate testimony under Hodges and Payne.

ISSUE XX

WHETHER THE COURT FAILED TO FOLLOW THE CORRECT STANDARD APPROVED FOR DETERMINING THE EXISTENCE OF THE AGGRAVATING FACTORS.

Appellant claims that the trial court used the incorrect standard approved in determining the aggravating factors. To support this contention appellant takes out of context a statement made by the trial court in his fourteen page order. In addition to setting forth a very thorough analysis of the factual findings with regard to the mitigating and aggravating factors, the trial court simply stated:

> I have seen many murders. I have been at many homicides. Few of them I have seen taken as long, as well thought out as this plan. The Court feels and finds that these three aggravating circumstances have been substantially shown by the evidence and under no condition anything to show to the contrary.
>
> The Court will specifically find no reasonable person could possibly find that these three aggravating circumstances did not exist in this manner. (R 1930, 2280)

In the instant case, the trial judge correctly instructed the jury that each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by the jury in arriving at their decision. As in Henry v. State, 586 So. 2d 1033 (Fla. 1991). As in Henry, this Honorable Court can assume based on a review of the order that the trial judge followed his own instructions.

Further, it should be noted that this issue has not been preserved for appeal in light of defense counsel's failure to

object to the reference used by the trial court in entering this order. This order was orally pronounced during the sentencing hearing. If defense counsel had felt the trial court's findings were not based upon a reasonable doubt standard, at that time it was incumbent upon him to object. This Court has consistently held that for an issue to be preserved for appellate review, an objection must be raised with specificity to the court below. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).

ISSUE XXI

WHETHER THE IMPOSITION OF THE DEATH SENTENCE FOR PEREZ IS JUSTIFIED ON PROPORTIONALITY GROUNDS.

Appellant contends that his sentence is not proportionate when compared to similar cases. Appellant cites to two cases Douglas v. State, 575 So. 2d 165 (Fla. 1991) and Barclay v. State, 470 So. 2d 691 (Fla. 1985), to support his contention that the sentence in the instant case was not proportionate. Both of these cases are clearly distinguishable from the instant case. Both Douglas and Barclay were reversed because this Honorable Court found a rational basis for the jury recommendation of life. Neither case was reversed based on a proportionality review.

In general, proportionality review considers the totality of circumstances in a case and compares it with other capital cases. Tillman v. State, 591 So. 2d 167 (Fla. 1991). The facts in the instant case show that the defendant became angry with the victim because she refused to refund his money. He left only to return several hours later and kidnap her at gunpoint. After holding the victim against her will for several hours, the defendant then drove her out to a secluded spot where he shot her twice and then based on a preconceived plan tied her body under water in order to hide it.

In similar cases, this Court has upheld death sentences as proportionate. In Sochor v. State, 580 So. 2d 595 (Fla. 1991), remanded on other grounds, 112 S. Ct. 2114, this Court upheld the sentence as proportionate where the evidence showed the defendant

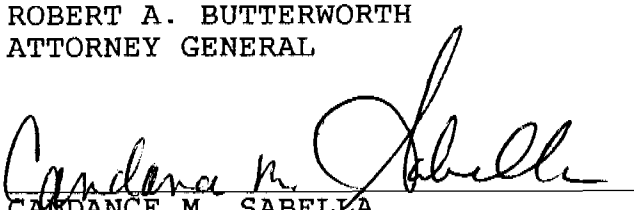
kidnapped the victim and took her to a secluded spot, attacked and killed her. In Sochor, the trial court found three aggravating factors with no mitigating factors. Based upon this record, this Court found that the sentence was proportionate. This Court also upheld the sentence in Occhicone v. State, 570 So. 2d 902 (Fla. 1990), where the defendant had a quarrel with his girlfriend, left and got a gun and returned to kill her parents. Similarly, in Young v. State, 579 So. 2d 721 (Fla. 1991), this Court upheld a sentence as proportionate where the record showed there were two aggravating factors and weak mitigation. And, also, in Asay v. State, 580 So. 2d 610 (Fla. 1991), cert. den. 112 S.Ct. 265 (1992) this Court found the sentence proportionate where the evidence showed the defendant murdered the victims because he was cheated out of ten dollars and where there were three aggravating and only one mitigating factor. In the instant case, in addition to the facts as previously noted, the trial court found three aggravating factors and little mitigation. Accordingly, when compared to other like cases, this sentence was proportionate.

CONCLUSION

Based upon the foregoing arguments and citations to authority, the state respectfully urges this Court to affirm the judgment and sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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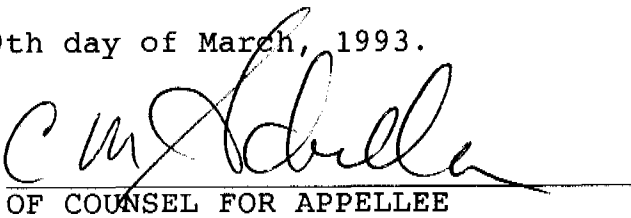
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to T. Philip Hanson, Jr., Esq., 103 North Third Street, Dade City, Florida 33525, (904) 567-0411, this 19th day of March, 1993.



OF COUNSEL FOR APPELLEE