IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,604

BOBBIE LEE ROBINSON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The defendant, Bobbie Robinson, along with three (3) other codefendants, Ronnie Johnson, David Ingraham and Rodney Newsome, was indicted for the March 20, 1989, first-degree murder of Lee Arthur Lawrence, and the attempted first-degree murders of Bernard Williams and Josias Dukes. The trials were severed. The defendant and Johnson were each tried individually. Ingraham and Newsome were tried jointly. Johnson was convicted and sentenced to death at his separate trial. His direct appeal is pending in this Court, Case No, 80,278. Newsome was convicted of second degree murder, and sentenced to a term of 22 years. His conviction and sentence were affirmed on appeal. Newsome v. State, 625 So. 2d 143 (Fla. 3d DCA 1993). Ingraham was convicted as charged; the jury recommended a sentence of life and the trial court sentenced him to a term of life imprisonment. These convictions and sentences were also affirmed on appeal. Ingraham v. State, 626 So. 2d 1117 (Fla. 3d DCA 1993).

A. Guilt Phase

The victim, Mr. Lawrence, was the owner of the Lee grocery store in Perrine, Southern Dade County, Florida. The Robinson family store was next door. (T. 258). On March 20, 1989, at approximately 10:30 p.m., Mr. Lawrence was gunned down outside of his store.

One of the store's employees, Ms. Meyers, testified that she was working the 3:00 to 11:00 p.m. shift, along with another employee,

Briggs, and the victim. (T. 246-7). A customer, Bernard Williams, was also at the store. Id.

At approximately 10:30 p.m., Ms. Meyers took the trash outside. (T. 248). Both the victim and Bernard Williams were **also** outside at the time. Id. Ms. Meyers saw a person in a camouflage outfit, carrying a black Uzi, start shooting at the victim, (T. 249-50). She laid flat on the ground. She then saw a second person, also wearing an army suit but carrying a revolver, come out of the store and start shooting. (T. 249-53). The individual with the Uzi stood over the victim who had fallen on the ground, and shot him all over. (T. 254-5).

The other employee, Ms. Briggs, testified that she was the cashier at the store. (T. 524-5). Approximately a half hour before closing time, 11:00 p.m., while Meyers, Williams and the victim were outside, an individual dressed in camouflage came in to purchase a beer. (T. 525-28). Briggs was at the cash register near the front door, when she heard shots outside. (T. 528, 531). She "hit the floor", and saw the individual in camouflage go outside. She heard a lot of other shots and crawled to the back of the store through the aisles. (T. 528-33). After the shooting, she **saw** the victim laying outside the store; Bernard Williams had also been shot.

Bernard Williams testified that he had been getting his dog out of the parking lot perimeter, when he was shot in the back. He fell

to the ground. (T. 581) . Victim Lawrence had been approximately three feet in front of him at the time. (T. 582). The shooter was carrying an Uzi, and wearing a camouflage suit. This individual had run behind Williams, shooting towards the victim. (T. 582-3). Williams used his dog as a shield against stray bullets. (T. 582). He then saw the shooter stand over Mr. Lawrence and shoot repeatedly. The shooter then "sprayed" the front of the store as he was leaving. (T. 585). A second shooter had also been present, although Williams could not clearly see him. (T. 584-85). Williams had been shot in the back, stomach, and shoulder areas. (T. 586-7).

Another customer, Josiah Dukes, testified that he was using the telephone immediately outside of the store at the time of shooting. (T. 441, 446-7). Mr. Dukes saw Bernard Williams with his dog at the perimeter fence of the lot; Ms. Meyers was on the other side of the lot by the dumpster. (T. 450-1). He also saw Victim Lawrence. He said hello, heard a shot, and saw Williams get hit, (T. 451-2). Mr. Lawrence was the next person shot. (T. 453-4,

The shooter was wearing a camouflage outfit and carrying an Uzi. (T. 452). Dukes had earlier seen this individual using the phones in the game room parking lot adjacent to Lee's store. (T. 445).

Dukes then saw a second shooter come out into the parking lot area from inside the grocery store. (T. 455-63). This second person was wearing "plain green fatigues", and was carrying a dark colored

revolver. (T. 456, 466). Dukes saw the second shooter also fire at Victim Lawrence. The first shooter with the Uzi then approached Mr. Lawrence, and started shooting again. (T. 455-63). The second shooter was telling the first to, "make sure he is dead." (T.457-8).

The shooter with the Uzi then looked towards Dukes and shot in his direction. (T. 460-1). Dukes had crouched down by the phone. Id. His surrounding window, door and lights were all hit; "the bullets just went everywhere." (T. 461).

Mr. Dukes identified the Uzi in evidence as that which he had seen during the shooting. (T. 465-6). Mr. Dukes also identified codefendant Ingraham's photo, as that of the first shooter with the Uzi. (T. 467-9).

Another bystander, Johnnie Williams, testified that he was walking down the street from his mother's residence to the Lee store, which was on the same street. (T. 418-20). He saw a gold Chrysler New Yorker parked on the street. Id. One can see the Lee store from where the car was parked. Id. Williams approached the car and saw a black male in the driver's seat. Id. The witness continued walking towards the store when he heard a barrage of gunshots. (T. 421). He then saw two men wearing "army fatigues", running. (T. 421-22). The gold Chrysler pulled up to the corner of the Lee store, and these men jumped into the car. Id. The Chrysler then left, heading north. Id.

The police had secured the scene within minutes of the shooting. At least twenty casings, eight projectiles and five projectile fragments were found scattered throughout the parking lot perimeter of the store, and inside the store itself. (T. 613-625). There was bullet damage to the front double entry doors to the store. A projectile had penetrated the door causing it to shatter, and then lodged inside the front of the first aisle in the store. (T. 615, 617-18).

At least two projectiles were determined to have been fired from the .357 revolver utilized in the shooting. (T. 1148-57). The revolver had been recovered from Stephen Reynolds' possession, when he had been arrested along with co-defendant Johnson. (T. 1080-88). Mr. Reynolds testified that codefendant Johnson had given him the revolver for safe keeping immediately prior to the arrest, Id.

The twenty casings and some of the remainder projectiles and fragments were determined to have been fired from the Uzi; the rest of the projectile fragments were of no comparison value. (T. 1178-9, 1183-85). The Uzi **was** recovered from under the bed in codefendant Newsome's bedroom, in his mother's home. (T. 265-7). The mother, Mrs. Newsome, testified that after her son's arrest, the defendant came to her home, asked for her son, and was told that Newsome was in jail. (T. 295). Mrs. Newsome then took the defendant to Newsome's room and showed him where the police had taken the Uzi from. (T.

268). She had done so, because the defendant looked as if Mrs. Newsome was lying. (T. 269).

The serial numbers on the Uzi had been scratched off when it was originally found. (T. 1186-90). The firearms examiner, however, was able to chemically raise the serial numbers. Id. The custodian of records for the Garcia National Guns, Inc. testified that the Uzi had been sold to Valerie Irby (T. 1195-99). The latter is the defendant's wife. (T. 975-6).

Co-defendant Ingraham's mother testified that a few days prior to the murder, she had seen her son driving the gold colored New Yorker. (T. 1213, 1216). At the time she had written down the tag number, and called the police. (T. 1217-17). She was thus able to identify this vehicle seen by other witnesses. Id.

The medical examiner testified that victim Lawrence died of eleven (11) gunshot wounds. (T. 748-776). Said wounds had been inflicted on the back of the head, the shoulder area and arms, the mid back, hips and back of the legs. Id.

The victim was involved in the area's anti drug efforts. An officer from the local police department testified that the victim provided assistance to the police. He would allow them to utilize his store for surveillance of drug activities in the area. He would also supply identification information about the area's drug dealers. (T. 976-7, 980-1).

Witness Hauser testified that approximately a week prior to the victim's death, the defendant approached Hauser and a friend, in Liberty City, in northern Dade County. (T. 665-66). The defendant offered them a total of fourteen thousand dollars, because, he wanted someone who 'had crossed him for some dope" to be "splat." (T. 665-67). 'Splat" meant 'dead." "Crossed" meant that, "somebody told on him [the defendant] or stole his dope." Id. Hauser and his friend refused the defendant's offer. The latter gave them his beeper number and asked them to call if they changed their mind. Id.

Anthony Williams testified that, approximately two to three hours before the crimes, he saw the defendant arrive in Liberty City, where co-defendant Johnson lived. (T. 500-1, 506). The defendant had arrived in his white Porsche-l The defendant and codefendant Johnson had a conversation, after which Johnson went and got codefendant Newsome, who lived across the street. (T. 501-2). Witness Williams then stood with the defendant, and codefendants Johnson, Newsome, and Ingraham, next to the defendant's Porsche. (T. 485-8). Mr. Williams heard the defendant and codefendant Johnson conversing. (T. 487-8). "The discussion was about something down south they had to take care of." (T. 503). They were going to go to "West Perrine", to a 'store." (T. 504). Codefendant Ingraham was dressed in a camouflage suit (T. 505). Codefendant Johnson was

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[1] The white Porsche was again registered to Valerie Irby, the defendant's wife, and the defendant. (T. 1207-10).

saying that he needed his camouflage pants; he was also displaying a black .357 gun. (T. 489). Witness Williams then heard the defendant ask the codefendants to follow him. (T. 490-2). Williams then observed the codefendants in a gold colored New Yorker, following the defendant who departed in his Porsche. (T. 491-2).

Another witness, Trumaine Tift, also saw the defendant arrive, at approximately 8-9 p.m. on the night of the crimes, in a white Porsche, in front of codefendant Johnson's home in Liberty City. (T. 389-392). The defendant and codefendants were talking. Codefendants Ingraham and Johnson were in camouflage outfits. Id. Mr. Tift then saw the defendant depart in the Porsche; the codefendants were following him in the gold New Yorker. Id.

Mr. Tift added that later that evening he saw the codefendants back in Liberty City, still in the same camouflage outfits, with the New Yorker parked in front of Codefendant Johnson's house. (T. 396-8). Approximately an hour later, Tift then saw the defendant arrive; the defendant went to Codefendant Johnson's house. Id. The defendant and Johnson emerged 15 minutes later; Johnson had 'a wad of money", at this time. Id. The codefendants had not possessed any money prior to the defendant's meeting with them. (T. 407). Mr. Tift also testified that earlier on the day of the crimes, Codefendant Johnson had asked him if he wanted to make some money by, "spraying up pop and his son," "Down South." (T. 395). Mr. Tift had

declined. Id. Later that evening, Johnson told Tift that he had 'shot the grocer down in Perrine." (T. 405).

Witness Duval testified that on the night of the crimes he and the defendant were talking at the "hole" in Perrine. (T. 318-19, 345). This 'hole" is less than a mile away from the victim's grocery store. (T. 578-9). The defendant told Duval to get the Uzi, which was normally kept at the "hole," take it to his apartment, and, give it to Codefendant Johnson. (T. 333, 335-6) . Duval took the Uzi to the apartment, where he saw Codefendants Ingraham and Newsome. (T. 336-39). They stated that they were with Johnson. (T. 341). Ingraham picked up the Uzi and was playing with it. (T. 340). Duval left. Codefendant Johnson was in front of the apartment. (T. 342). The Chrysler New Yorker was also parked in front. (T. 342-3).

Witness Duval explained that the reason why the Uzi was normally kept at the "hole" was because he sold drugs at this location. (T. 347-8). During the course of this testimony, Duval stated that when he got. to know the defendant, "me and him started dealing." (T. 353). Duval added that the defendant's brother-in-law, Troy, would drop off drugs at the "hole." (T. 354-5, 361). Duval stated that he had been 'working with them," at the "hole", for approximately four (4) months prior to the murder. (T. 365). He added that, at the "hole", he would give the defendant money, "for the drugs, what I got from it I have to pay for them." (T. 366-7).

After leaving the apartment, Duval went back to the "hole" and stayed with the defendant for approximately an hour. (T. 344). After the defendant left, Duval then heard and saw ambulances and sirens. Id. The ambulances and police cars were going in the direction of the victim's store. (T. 345-6).

Derrick Edwards testified that he has known the defendant all of his life; he also knew the victim. (T. 825, 796). The victim's nickname was "Bozo." (T. 793). In 1990, while awaiting trial on burglary charges, Mr. Edwards saw the defendant in the Dade County jail, while the latter was awaiting the trial herein. (T. 789-90. Mr. Edwards testified that the defendant told him that he had "paid them fucking niggers to kill Bozo". (T. 792-3). This witness had not made any deals, nor been made any promises by the State for his testimony. (T. 795).

Another witness, Terry Jenkins, testified that he knew the defendant's deceased brother. (T. 837-8). In May, 1989, while in a holding cell with the defendant, witness Jenkins expressed sympathy for the defendant's brother's death. Id. Jenkins testified that the defendant responded that Mr. Lawrence had something to do with his brother's death; "so he had these guys from the city to come down and knock him off". (T. 838) . The defendant was referring to Mr. Lawrence having been knocked off. Id.

Finally, the defendant's statements to the police were also

presented into evidence. He had stated that he was with his wife the entire night. (T. 1080). Detective Smith testified that the defendant had also denied having known codefendants Johnson and Newsome. (T. 1082). Smith then played a tape recorded telephone conversation between the defendant and codefendant.Newsome. (T. 1081). The defendant became very agitated and upset after hearing the tape. (T. 1083).

The jury returned a verdict of guilty as charged on April 17, 1991. (T. 1524).

B. **Penalty Phase.**

The penalty phase before the jury commenced later on the same day. (T. 1578 et seq.). The State presented the certified copies of the defendant's convictions for two counts of attempted first degree murder, and rested. (T. 1579-80).

The defense presented testimony from the defendant's parents. The defendant was thirty-one (31) years old at the time of these proceedings. (T. 1584). The defendant's father and mother were not married, but had six (6) children together. (T. 1584-5). They had lived together for approximately 10 years after the defendant's birth, and then separated. (T. 1585-6). The defendant lived with his mother, but the father would regularly visit, and support the family. (T. 1586-7). The defendant had not had any physical, mental, or behavioral problems while growing up. (T. 1587, 1591) .

The defendant had finished eleventh grade. (T. 1593). He did fine in school. Id.

The defendant's mother did not believe that the defendant had gotten justice in either this case, or a prior case in Louisiana.[2] (T. 1595-6). She stated that she had a store right next to that of the victim, and that she had never had any problems with the Lawrence family. Id. The defendant's brother, Willie, had been murdered two years prior to the crimes herein. Id. This death affected the defendant because they were close. (T. 1597).

The defense then rested its case. The jury returned a recommendation of death by a vote of 10-2. (T. 1655).

The record reflects that the defendant then acquired new counsel who was appointed after the penalty phase before the jury. (T. 2526-29). In the interim, the original trial judge was placed on administrative leave. (R. 198). New counsel for the defendant requested that the substitute judge hear and consider additional mitigating evidence which had not been previously presented at the penalty phase. (T. 2531, 2455). The substitute judge agreed, and after familiarizing himself with the record, heard the witnesses in support of said mitigating evidence, prior to pronouncing sentence.

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[2] The case in Louisiana involved a 1984 conviction for possession of cocaine with intent to distribute. (T. 1608).

(T. 2455-2509).[3]

At said hearing, the defendant's wife testified that defendant was a 'wonderful" father and a "great" husband. (T. 2457). The 1987 death of the defendant's brother affected him. (T. 2458). The defendant believed that the Lawrence family had something to do with his brother's death. (T. 2458). The defendant started using "a lot" of cocaine, smoking more than 5 or 6 reefers and drinking two six-packs of beer, a day. (T. 2459). Mrs. Robinson thus threw the defendant out of the house three of four times. (T. 2460).

Dr. Merry Haber testified that, based solely upon the WAIS test, which was not administered by her, the defendant had "borderline intelligence," (T. 2472), and that, "his judgment is impaired based on this intelligence test alone." (T, 2475). The judge expressly questioned the expert as to whether her opinion was that the defendant's judgment was "substantially impaired," in accordance with the Florida statutory mitigator. (T. 2509). The expert responded that it was not, "I cannot use the word 'substantially'." Id.

The expert admitted that she had not even taken into account her own interviews with the defendant. (T. 2494). She did not conduct or consider any interviews with the family members, nor did she take into account the defendant's school records. (T. 2498, 2500). Of

[3] The substitute judge also granted and conducted an evidentiary hearing on the defendant's allegations of misconduct by his prior defense counsel, and by the prosecution. (T. 2282, 2289-2449).

course, the expert was not familiar with the record, and did not take into account the facts or circumstances of the crimes either. (T. 2494-5). In any event, the expert herself admitted that the test score she had relied upon, 'does not mean necessarily that [defendant] is impaired in the area of what someone might call street smarts or how to get along in a ghetto or the black community." (T. 2504).

Dr. Haber also testified that the defendant, during her initial interview, had told her about using marijuana. (T. 2481). Subsequently, during the fourth interview, he had detailed additional abuse of cocaine and alcohol following the death of his brother. Id.

In rebuttal, the State presented testimony from the probation officer who had conducted the presentence investigation. (T. 2510). She testified that she had specifically asked both the defendant and his wife questions as to alcohol and drug use. (T. 2511). The defendant had stated he drank beer and had used marijuana on a regular basis, since the age of 25. (T. 2512-13). He had denied using any other type of drugs. Id. The defendant's wife had stated that she was "unfamiliar" with the defendant's drug usage. Id. Moreover, the defendant's probation file, which contained a 1988 progress report, did not reflect any drug or alcohol problems. Id.

The judge imposed a sentence of death, having found the following four (4) aggravating factors: (1) prior violent felonies;

(2) knowingly created a great risk of death to many persons; (3) pecuniary gain, and (4) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R. 198-201). The judge accepted the family members' testimony, the negative effect of the defendant's brother's death, the defendant's alcohol and marijuana use, and, the below normal intelligence scores as non-statutory mitigation. (R. 201).

The judge, however, concluded that the above mitigation was "utterly overwhelmed" by the aggravating circumstances. (R. 202). The judge stated:

> This court has searched the record and its conscience to find a reason to reject the jury's advisory verdict and has found none. The fact that the Defendant is of below normal intelligence and has suffered tragedy in his life in no significant way mitigates the seriousness of his calculated procurement of Mr. Lawrence's death. This Court has come to the conclusion that the only just punishment in this case is the death penalty.

Id.

SUMMARY OF THE ARGUMENT

I. Claims regarding the constitutionality of the death penalty statute are not preserved for review and have repeatedly been rejected by this Court.

II. Evidence regarding a prior effort to solicit individuals to murder the instant victim was relevant to premeditation and motive of this crime and was thus not Williams rule evidence. Additionally, the State's portrayal of the defendant as a drug dealer was supported by sufficient evidence.

III. The argument regarding peremptory challenges is not preserved for appellate review. Moreover, the two challenges at issue were clearly supported by race-neutral reasons.

IV. Various claims alleging violations of the death penalty statute have not been preserved for review. Moreover, the jury was not misinformed as to its sentencing role. Nor were the jury's deliberations improperly interrupted. Lastly, there was no request for a new penalty phase jury.

V. The conviction for first degree murder is supported by substantial, competent evidence, including the defendant's own confessions establishing that he hired his accomplices to commit the murder. Similarly, evidence of the corpus delicti is more than amply established through the presence of the bullet-riddled body of the victim - a condition fully indicative of the commission of a murder.

VI. The burden-shifting claim, as well as many other sentencing issues, are unpreserved and the State's arguments and the pertinent instructions were all in accordance with the law. Lastly, the court's sentencing order reflects that the mitigating evidence was properly considered by the court.

VII. Claims asserting an unfair trial are unpreserved for review. There were no "attacks" on defense counsel. The allegedly 'angry" juror was properly admonished for being several hours late, and the discussions with her support the conclusion that the court acted properly and that the juror remained capable of serving without any bias towards the defendant. Evidence of the defendant's drug dealings, **was** clearly relevant to the motive for the murder of the victim, who was assisting the police in rooting drug dealers out of his neighborhood. Lastly, a statement of co-defendant Johnson was properly admitted through the co-conspirator's exception to the hearsay rule, **as** the conspiracy **was** established by evidence independent from the statement at issue.

VIII. The pecuniary gain factor was properly considered, as the defendant's motive for the murder was to protect his drug business from interference by the victim. The language in the CCP instruction was not objected to by the Appellant. Any error in the instruction was also harmless, as the factor was established under any version of the evidence. Spray shooting in the vicinity of a grocery store,

during business hours, with several patrons present, established the factor of knowing creating **a** great risk of death to many persons. Lastly, the aggravator based on prior violent felonies was established by the contemporaneous convictions for attempted murders, acts for which the defendant was fully responsible along with his accomplices.

IX. Several due process claims are without merit. The defendant was not required to be present at a suppression hearing in the separate trial of his codefendant. Second, an evidentiary hearing repudiated the claim that the prosecution harassed and persecuted the defendant's wife. Third, a demonstrative aid during closing argument was proper and of no prejudice. Fourth, the Brady claim is repudiated by the record, as the information at issue had previously been made available. Lastly, **an** evidentiary inquiry repudiated the claim that defense counsel acted improperly in his financial dealings with the defendant's family.

X. **and** XI. These claims are subsumed within the prior arguments.

ARGUMENT

I.

CLAIM OF UNCONSTITUTIONALITY OF THE CAPITAL SENTENCING STATUTE IS UNPRESERVED AND WITHOUT MERIT.

The Appellant contends that the Florida capital sentencing statute is unconstitutional based upon the following nine (9) grounds: a) that the application of the statute is not narrowed to the worst offenders; b) that electrocution imposes undue physical and psychological torture and thus constitutes cruel and unusual punishment; c) that there is no standard of proof for the determination of aggravating factors outweighing mitigating factors; d) that the aggravating factors are not sufficiently defined; e) that the statute no longer comports with the requirements of Proffit v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); f) that aggravating factors have been applied in a vague and inconsistent manner and juries receive vague instructions on said factors; g) that the sentence of death is presumed in every premeditated and felony murder; h) that a majority vote by the jury is insufficient; i) that the trial court herein interfered in the jury deliberations[4]; and, j) that the jury did not hear the same mitigation evidence which was presented to the trial court, and its

[4] This claim is devoid of any factual basis as raised in this argument. It is, however, raised and addressed in **claim** IV. B. herein, at pp. 37-40.

recommendation was unreliable.[5] None of the above grounds were presented to the court below, and the arguments herein are thus unpreserved. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) ("in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). Wuornos v. State, 644 So. 2d 1012, 1020 n.5 (Fla. 1994) (timely objection is required for preserving similar issues with respect to the constitutionality of the death penalty statute).

Moreover, this Court has previously rejected these claims and the Appellant has not advanced any new arguments in support of his contentions. Wuornos, 644 So. 2d at 1020, n.5 (grounds b, e, g, and h herein deemed to be unpreserved and without merit); Fotopoulos v. State, 608 So. 2d 784, 794, n.7 (Fla. 1992)(claims a through h herein deemed to be unpreserved and without merit); Robinson v. State, 574 so. 2d 108, 113, n. 6 & 7 (Fla. 1991); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990); Thompson v. State, 619 So. 2d 261, 267 (Fla. 1993) ("claim that Florida's death penalty is unconstitutional is without merit and has been consistently rejected by this Court [citations omitted].").

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[5] This claim too, is devoid of any factual basis as raised in this argument. It is, however, raised and addressed in claim IV. C. herein, at pp. 40-43.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE DEFENDANT'S MOTIVE AND PREMEDITATION.

A. Witness Hauser's Testimonv

The Appellant first contends that the trial court erroneously admitted witness Hauser's testimony because the State did not provide the defense with a ten-day notice of intent to rely on Williams[6] rule evidence, in violation of Fla. Stat. 90.404(2)(b). There was no error as Mr. Hauser's testimony did not concern similar fact evidence of other crimes, but rather, involved evidence of the crime charged.

Witness Hauser testified that approximately a week prior to the victim's death, the defendant approached Hauser and his friend, and offered them a total of fourteen thousand dollars because he wanted someone who "had crossed him for some dope" to be "splat." (T. 665-67). "Splat" meant "dead," and "crossed" meant that, "somebody told on him [the defendant] or stole his dope." Id. Hauser and his friend refused the defendant's offer; the latter gave them his beeper number and asked them to call if they changed their mind. Id. The Appellant contends that said testimony was evidence of **another crime,** solicitation for murder, which required notice pursuant to Fla. Stat. 90.404(2)(b). In the court below, however, it was the State's position that the defendant had in fact unsuccessfully solicited Hauser to commit the murder of the victim herein, a week prior to

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[6] Williams v. State, 110 **SO.** 2d 654 (Fla. 1959).

having successfully recruited the codefendants who actually did kill the victim. (T. 631-35; 658-61; 700; 708-712; 171; 1394-95; 1400-02).

Hauser's testimony thus involved the instant crime, and was relevant to premeditation in addition to establishing the motive for the crime - the victim's interference with the defendant's drug trade. Evidence that is "inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged" is admissible because it is relevant[7] and necessary to adequately describe the crime at issue. Hartley v. State, 21 Fla. L. Weekly S341 (Fla. 1996). Such evidence is not within the scope of Williams, supra, because it is not similar fact evidence, and it is thus not subject to the ten-day notice provision of section 90.404(2)(b), Florida Statutes. Griffin v. State, 639 So. 2d 966, 968-9 (Fla. 1994); Tumultv v. State, 489 So. 2d 150, 153 (Fla. 4th DCA, 1986). As stated in Erhardt, Florida Evidence, pp. 177-78 (1996 ed.):

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[7] "Relevant evidence is evidence tending to prove or disprove a material fact." Section 90.401, Florida Statutes. The "determination of relevancy is within the discretion of the trial court." Sims v. Brown, 574 So. 2d 131, 133 (Fla. 1994). 'To be legally relevant, evidence must pass the tests of materiality (bearing on a fact to be proved), competency (being testified to by one in a position to know), and legal relevancy (having a tendency to make the fact more or less probable)... 'Sims, 574 So. 2d at 134. Evidence of motive for the crime at issue is relevant and thus admissible. Sims v. State 21 Fla.L.Weekly S320, S321 (Fla. July 18, 1996) (evidence of drug possession which **was** utilized to establish motive for homicide, was admissible and did not constitute Williams rule evidence pursuant to Fla. Stat. 90.404); Tumultv, 489 So. 2d 150, 153, (Fla. 4th DCA, 1986); Grossman v. State, 525 So. 2d 833 (Fla. 1988) (same).

> In addition to Wigmore's logical argument, it seems that both the language of section 90.404(2)(a) and of Williams indicates that the rule applies to evidence of discrete acts other than the actions of the defendant committing the instant crime charged. Under this view, inseparable crime evidence is admissible under section 90.402 because it is relevant rather than being admitted under 90.404(2)(a). Therefore, there is no need to comply with the ten-day notice provision. Similarly, the Wigmore view has been adopted by the United States Court of Appeals for the Fifth and Eleventh Circuits.

See also Elkins v. State, 531 so. 2d 219, 220 (Fla. 3d DCA 1988)(evidence of defendant's prior unsuccessful solicitation of a friend to murder the victim was properly admitted as part of establishing the motive in having procured the actual murder); Ferrell v. State, 21 Fla. L. Weekly S388, S390 (Fla. Sept. 19, 1996) (evidence of the prior robbery of the murder victim was properly admitted to complete the story of the crime on trial and to explain motivation) .

The Appellant's contention that the State "conceded" that Hauser's testimony constituted a Williams rule violation, see brief of Appellant at p. 19, is without merit and refuted by the record. As noted previously, the State, from the commencement through the conclusion of trial, consistently maintained that this testimony was relevant to motive and premeditation, and was not Williams rule evidence which required any notice pursuant to Fla. Stat.

90.402(2)(b).[8] The record reflects that initially the State proffered that witness Hauser had, after the actual shooting, spoken to one of the codefendants, David Ingraham. The latter had told Hauser that the defendant had also asked him and the other codefendants to 'get the grocer". (T. 634-5). The prosecution proffered that Hauser would thus also state that it was "the grocer" (the victim herein) whom the defendant had asked him to kill. (T. 634-35). Defense counsel objected to this proffer of testimony, based upon, inter alia, Hauser's reliance upon the "hearsay" statements of Ingraham. (T. 636). The trial court initially sustained the defense objection, subject to additional arguments by the State. (T. 637). The next day the State presented Hauser in person, and limited its questioning and proffer to Hauser's actual conversation with the defendant, with no mention of Hauser's subsequent conversations with Ingraham. (T. 648-56; 658-63). The trial judge thus ruled that the testimony as to the actual conversation between Hauser and the defendant was relevant and admissible. (T. 663). Witness Hauser then so testified. (T. 663-67).

Thereafter, during a subsequent recess, the defense made a motion for mistrial, based upon the State's lack of compliance with the ten-day notice requirements of Fla. Stat. 90.404(2)(b). (T. 697). The prosecution, consistent with its prior position, argued:

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[8] See record citations at p. 22 herein.

"that notice requirement pertains to another crime. The State's position always has been that this evidence relates to this crime. Therefore, it is inseparable to the crime. We do not have to give notice, that is why we didn't." (T. 700). The trial judge then asked the prosecution whether, since the State did not have any advance assurances as to how either the trial judge or the Florida Supreme Court would rule on a Williams rule issue, "why wouldn't you just cover yourself [by complying with the ten-day notice rule] in the first place instead of inviting a situation that can be litigated?". (T. 709). In this context, one of the prosecutors responded, "I agree with you, it should have been done". Id. The prosecutor confirmed, however, that even if the ten-day notice was required, a Richardson[9] inquiry would reflect that there was no prejudice to the defense. Id.[10] Moreover, prior to the Richardson hearing, the prosecution again reiterated its position that no Williams rule notice was required: "Before the Richardson hearing, it is our position first that notice wasn't required because there was a continuation of the defendant's desire to kill Mr. Lawrence, and therefore, it is the same crime, it is not a similar crime and

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

[10] The prosecution also argued that pursuant to Justus v. State, 438 So. 2d 358, 365-66 (Fla. 1983) such an inquiry was timely because it would be made prior to the return of a verdict and any prejudice could be addressed by a grant of mistrial. (T. 716-17).

notice was not required." (T. 717). The State then established that it had provided the substance of Hauser's statement to the defense approximately two years prior to trial. (T. 733). Hauser's name was also on the trial witness list which had been provided to the defense in excess of six months prior to trial. (T. 734). Additionally, the state had made Hauser available for deposition, prior to his testimony, but the defense had declined the opportunity to depose him. (T. **734-35).** The only prejudice mentioned by the defense was that if it had received the ten-day notice, then it would have filed a motion to exclude the evidence. (T. **735).** The trial court found that there was no violation, that there was no prejudice to the defense, and that the evidence at issue **was** properly admitted. (T. **731, 738)** .[11]

B. Witness Duval's Testimony

The Appellant has **also** argued that the prosecution, during its

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[11] It should also be noted that the trial court additionally ordered the State to make Hauser available for deposition, with the understanding that the defense could again cross-examine Hauser before the jury, even though the witness had concluded his testimony and been previously excused. (T. **736, 781).** The trial court also offered to authorize expenses, should any matters arise out of the deposition which needed any investigation. (T. **784).** Moreover, the trial court stated that if any additional witnesses developed **as** a result of the deposition, the defense would be allowed to call them as "a court witness" (T. 785), and that the defense would not lose its position to open and close the final arguments to the jury. (T. **1321-22).** Defense counsel having taken Hauser's deposition, stated that no additional relevant witnesses had been revealed (T. 781), and declined the court's offer to reopen Hauser's testimony. (T. **1321-22).**

opening argument, erroneously depicted the defendant as a drug dealer and the victim as an anti-drug crusader, without any testimony that the defendant was in fact a drug dealer. This argument is without merit as it is refuted by the record. The Appellant has neglected to address witness Duval's testimony. In addition to Hauser's testimony that defendant was concerned about the interference with his drugs, the State presented witness Duval. The latter testified that on the night of the crimes he and the defendant were at the "hole," and that the defendant directed him to take the Uzi, which was normally kept by them at the hole, and give it to one of the codefendants herein. Duval did in fact do so. The Uzi was subsequently established to be the murder weapon herein; it was retrieved from one codefendant's residence, and established to have been registered to the defendant's wife. Witness Duval explained that the reason why the Uzi was normally kept at the "hole" was because he sold drugs at this location, a short distance away from the victim's store.

During the course of the above testimony, Duval stated that when he got to know the defendant, 'me and him started dealing." (T. 353). Duval added that the defendant's brother-in-law, Troy, would drop off drugs at the "hole." (T. 354-5, 361). Duval stated that he had been "working with them," at the 'hole," for approximately four (4) months prior to the murder. (T. 365). He added that, at the "hole," he would give the defendant money, "for the drugs, what I got

from it I have to pay for them." (T.366-7). It is thus abundantly clear that there was ample evidence of the defendant's drug dealing activities[12] and this claim is also without merit.

The state additionally notes that, at the conclusion of the State's case, the defense objected on the grounds that there was insufficient evidence of the defendant's drug dealing. (T. 1242, 1249-50). The prosecution stated that sufficient evidence had been elicited from Duval and Hauser, and, offered to reopen its case to present the "parade of witnesses" to the defendant's drug dealing. (T. 1251-2). The defense did not accept the offer. The prosecutor noted that said witnesses had not been presented in light of the defense's concerns as to this evidence becoming a "feature" of the

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[12] The State would note that prior to the above testimony before the jury, defense counsel had objected to the introduction of any evidence as to the defendant's drug dealing activities, on the grounds that same constituted Williams rule evidence of prior bad acts, and, expressed concern that it would become a feature of the trial. (T. 319, 331). There was thus a proffer of Duval's testimony as to the defendant's drug deals, outside the presence of the jury. (T. 320-30). Mr. Duval proffered that he and the defendant "used to deal together," and that he would give money to the defendant, 'because I was selling his drugs." (T. 321). The trial judge ruled that the proffered evidence of drug dealing was relevant to motive and thus admissible, but that the totality of the evidence would be considered for a determination of whether it was becoming a feature and prejudicial. (T. 330). In light of the concerns as to this evidence becoming a prejudicial feature, the prosecution did not delve into the defendant's drug dealing activities on direct examination of Duval before the jury. Duval's response that he and the defendant "started dealing" was elicited by the defense, on cross-examination of this witness, (T. 353). The remainder of the statements noted above were elicited on re-direct examination.

case. Id. The record supports said statements. For example the record reflects that the State did not present witness Hauser's statements, proffered to the court outside the presence of the jury, that the reason why the defendant frequented Liberty City in northern Dade County, was to purchase drugs at a cheaper price for resale in the southern part of the county where the murder took place. (T. 652-56). Likewise, the prosecution noted that another witness, Mr. Edwards, could have also testified that the defendant personally sold him drugs. (T. 1269-71).

Finally, there was also sufficient evidence for the prosecutor's argument that the victim herein was anti-drugs. The victim's two employees testified that if anyone used or sold drugs, the victim would make them leave or call the police to make them leave. (T. 244-5; 557). An officer from the local police department additionally testified that the victim was very cooperative with them with respect to supplying identification information about the area's drug dealers, and allowing the police to utilize his store for surveillance of drug activity in the area. (T. 976-77, 980-81). The victim's store was located less than a mile away from the drug hole operated by the defendant and Duval. (T. 578-79). In sum, the State presented sufficient and proper evidence to support its theory of the case with respect to motive and premeditation.

111.

THE CLAIM OF RACIALLY MOTIVATED PEREMPTORY CHALLENGES IS PROCEDURALLY BARRED AND WITHOUT MERIT.

The Appellant contends that the prosecution unlawfully exercised two (2) racially motivated peremptory challenges on potential juror Gibbs and potential alternate juror Bradley. These contentions are not preserved for appeal, and are without merit.

The record reflects that after the exercise of peremptory challenges on the above said jurors, jury selection continued with both parties exercising other challenges and further agreeing upon two alternate jurors. (ST. 236-47). Thereafter, the defense accepted the jury and the latter was sworn without any objections. (ST. 247-8, 256). The instant claim is thus unpreserved for appeal pursuant to Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993) (at the time of swearing of jury, defense must renew prior objections to State's peremptory challenges or accept jury subject to prior objections, in order to preserve the claim for appellate review, and in order to preclude defense from deceiving trial judge into believing that the defense was satisfied with the jury which was ultimately seated).

The State would note that with respect to potential alternate Bradley, the instant claim is further procedurally barred as the defense did not object, and did not even request an explanation for

this strike, or a ruling from the trial court. The record reflects that after the State challenged juror Bradley, the defense merely stated, "Judge, Mr. Bradley by the way, is a black juror." (ST. 244). Nothing further was added. Merely noting that Black or Hispanic potential jurors have been peremptorily excused by the State does not constitute a sufficient objection so as to preserve a Neil[13] claim. Valle v. State, 581 So. 2d 40, 43-4 (Fla. 1991); See also Melbourne v. Stat-e, 679 So. 2d 759, 764-65, n.2 (Fla. 1996) ('A simple objection and allegation of racial discrimination is sufficient [to preserve a Neil objection], e.g., "I object. The strike is racially motivated." Even when a sufficient initial objection is made, there is no error where defense counsel never requested that the court ask the State its reason for the strike.).

In any event, the record further reflects that the instant claim is also without merit. With respect to juror Gibbs, upon defense counsel's demand for an explanation of the State's peremptory challenge, the prosecutor stated the following litany of reasons:

> **THE PROSECUTOR:** First of all, he has been convicted. He served three and one half years in prison. He was on probation. He was shot at.
>
> He said he couldn't sleep all night the other night. He had problems with the capital punishment.
>
> The record was clear on capital punishment.
>
> He went back and forth. It was not enough for cause,

[13] State v. Neil 1457 So. 2d 481 (Fla. 1984).

> but he was ambivalent. The case law says ambivalence is enough for the State to allow a peremptory that does not meet the cause.

(ST. 233-4). The trial judge at this juncture noted that there were yet additional reasons, and the prosecutor added that with respect to the ability to believe a police officer's testimony, this juror had given 'a laugh and snicker like he could never believe a police officer at all." (ST. 234-5). The defense did not contest or dispute either the factual basis or the validity of any of the prosecutor's reasons at any time. The trial judge ruled, "the Court finds no racially based motive for the challenge." (ST. 235).

The State's reasons and the trial judge's ruling are well supported by the record. The record reflects that in response to defense counsel's question about "bad" experiences with law enforcement, Mr. Gibbs stated that he had "several" confrontations with the police. (T. 2001-2002). On one occasion Mr. Gibbs stated that he was beaten by the police after a high speed chase. (T. 2002-3). On another occasion, Mr. Gibbs had armed himself with a gun, while being on probation "for several things such **as** aggravated assault". He had then gone to "collect money". (T. 2037). According to Mr. Gibbs, the victim thought that Gibbs **"was** gonna physically harm him," and thus shot Gibbs in the head. Id. Mr. Gibbs spent 3 ½ years in jail as a result of the various charges from this incident. (T. 2038). The foregoing was not Mr. Gibbs' complete

criminal history; the latter noted that with respect to other convictions, "it all depends on how far back you want to go". (T. 2048).[14]

Aside from his criminal history, Mr. Gibbs had also expressed difficulty in following the law. When asked whether he was able to base his decisions upon the evidence presented at trial, Mr. Gibbs stated: 'Well, I guess so. I am not sure. . .." (T. 1775). With respect to capital punishment, Gibbs had initially stated, "It is my opinion, I don't feel like no man should be put to death by another man, by anyone.. . and, I don't think, even if I decide, I heard the whole case, even if it proved that the guy was guilty, I don't think that I would be able to -- what you say? Be impartial." (T. 1768). As to the ability to recommend the death penalty, Mr. Gibbs had added, "I thought I could. I really thought I could, but just sitting here listening, I really don't think so." (T. 1855). Upon further questioning the next day, Mr. Gibbs had stated "Well all night I couldn't sleep thinking about this situation. And after thinking about it, I am still not in favor of capital punishment,...". (T. 1924-25).

It is well established that in setting forth a race-neutral reason, the State does not have to establish grounds sufficient to

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[14] The defendant, neither in the court below nor indeed in this Court, has referred to any other potential juror with a comparable criminal background.

have the juror excused for cause. Happ v. State, 596 So. 2d 991, 996 (Fla. 1996). A prospective juror's prior involvement with the criminal judicial system is a legitimate non-racial reason for a peremptory challenge. Willacy v. Stat-e, 640 So. 2d 1079, 1082 (Fla. 1994). Likewise, inconsistent answers or equivocation on the issue of death penalty is a valid race-neutral reason. See, e.g. Randolph v. State, 562 So. 2d 331, 336-7 (Fla. 1990); Holton v. State, 573 so. 2d 284, 287 (Fla. 1990); Kramer v. State, 619 So. 2d 274, 276 (Fla. 1993); Atwater v. State, 626 So. 2d 1325, 1327 (Fla. 1993); Walls v. State, 641 So. 2d 381, 386 (Fla. 1994). In sum, the trial judge did not abuse his discretion in finding the prosecutor's reasons for challenging Mr. Gibbs to be race neutral, where said reasons are amply supported by the record and were not even contested by the defense in the court below. Happ, Melbourne, supra, Randolph, supra.

Likewise, with respect to potential alternate juror Bradley, although as previously noted there was no objection or a request for an explanation of said juror's peremptory strike, the record clearly reflects that said juror was also excused based upon race-neutral reasons. This is because the prosecution had previously challenged this juror for cause and stated its reasons for wishing to excuse Mr. Bradley. (T. 2164). The prosecutor's reasons for challenging Mr. Bradley were based upon the latter's equivocation on the death

penalty issue:

> **[PROSECUTOR]:** Judge, I would challenge Mr. Bradley on cause, because he initially told the court that he does not believe in the death penalty. He has gone back and forth through your colloquy or the State's colloquy of not believing in the death penalty to saying well, I think I can follow the law, or I will follow the law.

(T. 2165). Again the record abundantly supports the above reasons articulated by the State. Mr. Bradley at the outset and in response to the court's inquiry had said, "I don't believe in capital punishment... I do have a problem as a Christian." (T. 2147-48). Mr. Bradley added, "I think I can say that if there is a legal way to be lenient, that I would possibly lean that way more so because of my religious feelings." (T. 2152, 2154). This juror then stated that under no circumstances would he be able to vote for the death penalty. (T. 2155). upon further questioning, Mr. Bradley summarily stated that he was able "to go through the process at which the law states" (T. 2160), but added, "what I'm saying is that I will follow through the process if the evidence is overwhelming..." (T. 2161). Mr. Bradley concluded that he would do his 'utmost in order to try to get the other jurors to see my idea,..." (T. 2163). It is thus abundantly clear that the prosecution's subsequent peremptory challenge of Mr. Bradley was race-neutral as it was prompted by the latter's inconsistent answers and difficulty in setting aside his religious convictions against the death penalty. Hopp, Holton,

Kramer, Walls, supra. In sum, the instant claim is procedurally barred and without merit.

IV.

THERE WAS NO VIOLATION OF FLORIDA'S DEATH PENALTY STATUTE.

A. There Was No Misinformation About The Jury's Capital Sentencing Role.

The Appellant contends that prosecutorial and judicial comments, in conjunction with improper[15] instructions, minimized the jurors' sense of responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985) and Mann v. Dugger, 844 F.2d 1946 (11th Cir. 1988). This claim is procedurally barred as there were no objections to any prosecutorial or judicial comments, the jury was instructed in accordance with the standard jury instructions, and, the defense did not request any additional or different jury instructions. See, Combs v. State, 525 So. 2d 853, 856 (Fla. 1988); Wuornos v, State, 644 So. 2d 1000, 1010 (Fla. 1994); Hunter v. State, 660 So. 2d 244, 253 (Fla. 1995); Dugger v. Adams, 489 U.S. 401, 402, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989).

Moreover, as the instant claim is apparently based upon references to the jury's "recommendation", it is also without merit. Combs, 525 So. 2d at 857-8. Grossman v. State, 525 So. 2d 833, 846 (1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed. 2d 822

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[15] The Appellant has not specified any of the allegedly unlawful comments or instructions.

(1989); Wuornos, supra. The Appellee would further note that both the trial judge (T. 1824) and the prosecutor (T. 2157) in fact informed the prospective jurors that their recommendation would be given "great weight." The instant claim is thus procedurally barred, without merit, and refuted by the record.

B. The Claim Of Interruption Or Manipulation Of The Deliberations Process Is Procedurally Barred And Without Record Support.

The Appellant next contends that the trial judge "interrupted" the jury's deliberations and reinstructed them for the purpose of "quickly concluding the proceeding," in violation of the Sixth Amendment to the United States Constitution. The instant claim is procedurally barred, as it was not raised in the court below. Moreover, the Appellant's assertions are refuted by the record, and without merit.

The record reflects that the sentencing evidence, arguments and instructions lasted approximately an hour and a half. (T. 1577, 1641). The jury then deliberated for a little more than one hour, before sending out a note. (T. 1641-2). The note advised that although nine (9) of the jurors wished to continue, three (3) jurors were too tired. (T. 1642). The trial judge, with the consent of the parties, instructed the jury to retire for the night. Id. The next day, the jurors deliberated for approximately three (3) hours, and then sent out a note requesting another recess. (T. 1648). The note

additionally informed the court that one of the jurors was suffering a toothache. Id. The trial judge had originally intended to excuse the jurors for one hour. Id. However, the recess was extended to approximately three (3) hours, as the juror suffering the toothache was taken to her dentist. (T. 1648, 1650-3).

In the interim, after the above said juror's return but prior to the continuation of deliberations, two medications, along with the dentists instructions for taking same, were delivered to the court, (T. 1653-4). The jury thus had to return to the courtroom after their extended recess and prior to continuing deliberations, in order for the medications to be delivered and for the parties to ascertain that these medications would not adversely affect the juror. (T. 1654).

It was at this juncture that the trial court informed the parties that there "might be some problem that is not being brought to our attention", in light of the fact that no unanimity and only a majority vote is required at the penalty phase. (T. 1655). The trial judge stated that re-reading the penalty phase instructions to the jurors, at the same time as delivering the medication and conducting an inquiry of the juror taking same, might be beneficial to the jury. Id. Defense counsel consented: "All right. No objection, since they already had the instructions in there with them." (T. 1656). After rereading the instructions and conducting

the inquiry of the juror as to her medication, the trial court again asked whether the defense **was** "satisfied", and defense counsel indicated that he **was.** (T. 1663). None of the arguments now presented on appeal, as to the manner or motive for rereading the instructions, were ever presented in the court below. The jury then returned its recommendation after deliberating for another twenty (20) minutes. (T. 1665) .

As seen above, contrary to the Appellant's assertion, the trial court did not "interrupt" the jury's deliberations. They were reinstructed at the end of a recess requested by them. Furthermore, the reinstruction was made with the consent of defense counsel. There were no objections in the court below based upon unlawful motivation, nor any complaints about the manner in which the instructions were read,[16] as now argued on appeal. As such any claim of error is procedurally barred. See, Derrick v. State, 641 So. 2d 378, 379 (Fla. 1994)(claim of erroneous reinstruction, in capital sentencing proceeding, was procedurally barred when reinstruction was given without objection and with the agreement of defense counsel).

Moreover, no impropriety or prejudice has been demonstrated. A trial judge has the authority to recall the jurors, after

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[16] Indeed, the record reflects, that again with no objection from the defense, the trial judge informed the jury that he had in no way emphasized any portion of the instructions, and would be satisfied with whatever verdict was reached after careful consideration of the law and evidence presented. (T. 1663-4).

deliberations have begun, for the purpose of further instructions. See Florida Rules of Criminal Procedure 3.420, which expressly provides that, after notice to the parties, "The court may recall the jurors after they have retired to consider the verdict to give them additional instructions... ." As noted by this Court, a re-reading of the penalty phase instructions is not error; error only occurs if the trial court gives an 'Allen charge" during the penalty phase. Derrick, 641 So. 2d at 379. No semblance of an "Allen" charge was given in the instant case. The reinstruction, as noted by the defense counsel, was the same as the written instructions which were already in the possession of the jury. There was thus no prejudice. The instant claim is therefore procedurally barred and without merit.

C. The Sentencing Judcre Did Not Err In Failing To Impanel A New Jury In The Absence Of Any Reauest To Do So.

The Appellant contends that a new trial, or a sentencing hearing before a new jury was required, when a replacement judge heard additional evidence of mitigation, subsequent to the penalty phase before the original judge and jury. There is no authority for the conduct of a new trial merely because a defendant presents additional evidence after the penalty phase. The sentencing scheme provides for the parties to present additional evidence and arguments for the judge's consideration after the jury's recommendation of sentence, without requiring a new trial. See e.g. Armstrong v. State, 642 So. 2d 731 (Fla. 1994).

With respect to the conduct of a new sentencing hearing before a new jury, the State submits that there was no request for a new sentencing jury, and as such this claim is procedurally barred. In the instant case, the record reflects that the defendant acquired new counsel who was appointed after the penalty phase before the jury. (T. 2526-29). In the interim, the original trial judge was placed on administrative leave. (R. 198). New counsel for the defendant requested that the substitute judge hear and consider additional mitigating evidence which had not been previously presented at the penalty phase. (T. 2531, 2455). The substitute judge agreed, and after familiarizing himself with the record, heard the witnesses in support of said mitigating evidence, prior to pronouncing sentence. (T. 2455-2509). There was no request for impanelling a new jury. The instant claim is thus not preserved for appeal and procedurally barred. Fersuson v. Singletary, 632 So. 2d 53, 55-6 (Fla. 1993) (claim that defendant was sentenced to death by a substitute judge, without a new jury being impanelled so as to assure that both the judge and the jury hear the same evidence, was procedurally barred when it was not raised in the trial court at the time of sentencing by the substitute judge); compare, Corbett v. State, 602 So.2d 1240, 1243 (Fla. 1992) (case reversed and remanded for new jury sentencing hearing when defendant was sentenced by a substitute judge, where the defense had moved for a new penalty phase but the substitute judge

"denied Corbett's motion for a new penalty phase proceeding..."); Craig v. State, 620 So. 2d 174, 175 (Fla. 1993) (the substitute judge, by written order informed the parties that a new jury would not be impaneled); See also Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992) clarified on other grounds, Wuornos v. State, 644 So. 2d 1000, 1007-8 n.4 (Fla. 1994) ('To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review."); Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988), Cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989) (same).

Moreover, the State notes that no prejudice has been demonstrated in the instant case. At the penalty phase before the original judge and jury, the State did not present any witnesses; it merely moved into evidence the certified copies of the judgments for attempted murder from the guilt phase. (T. 1579-80). The defense presented the defendant's mother and father, who both testified that they had always provided well for the defendant, and that he had never given them any trouble. (T. 1580-1605). The mother added that the defendant's brother's death must have affected the defendant, although she didn't know how. Id. The substitute judge considered as mitigation and gave weight to the testimony that the defendant's family spoke well of him, and that he had suffered the tragic death of his brother. (R. 201). The substitute judge then in fact heard

the additional psychological evidence, and testimony from the defendant's wife as to his background. (T. 2455-2509).[17] This evidence was also considered as mitigation and given weight. (R. 201). In view of the fact that the sentencing hearing before the original judge and jury did not contain any presentation of aggravating testimony, minimal mitigating testimony was presented which was all considered and given weight, and, the substitute judge personally heard the mitigating evidence emphasized by the Appellant herein, no prejudice has been demonstrated.

V.

THERE IS OVERWHELMING EVIDENCE OF GUILT AND THE CONVICTION FOR FIRST DEGREE MURDER IS SUPPORTED BY DIRECT EVIDENCE.

The Appellant first contends that the State's proof was circumstantial and insufficient to prove premeditated murder. The Appellant, in reliance upon Golden v. State, 629 So. 2d 109 (Fla. 1993), also argues that the State failed to establish corpus delicti. These arguments are without merit as the record reflects direct and overwhelming evidence of guilt.

First, the proof in the instant case, contrary to the Appellant's argument, is based upon direct, not circumstantial

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[17] Indeed, it should be noted that the defendant's mother was present at the sentencing hearing before the substitute judge. Defense counsel declined to present her testimony on the grounds that it would be "cumulative," in light of the fact that the substitute judge had already considered her testimony. (T. 2456).

evidence, due to the defendant's own statements admitting to the murder. Two witnesses testified that the defendant confessed to them, on separate occasions, to having hired others to kill the victim, Mr. Lawrence.

Derrick Edwards testified that he has known the defendant all of his life; he also knew the victim. (T. 825, 796). The victim's nickname was "Bozo". (T. 793). In 1990, while awaiting trial on burglary charges, Mr. Edwards saw the defendant in the Dade County jail, while the latter was awaiting the trial herein. (T. 789-90). Mr. Edwards testified that the defendant told him that he had "paid them fucking niggers to kill Bozo". (T. 792-3). This witness had not made any deals nor been made any promises by the State for his testimony. (T. 795).

Another witness, Terry Jenkins, testified that he knew the defendant's deceased brother. (T. 837-8). In May, 1989, while in a holding cell with the defendant, witness Jenkins expressed sympathy for the defendant's brother's death. Id. Jenkins testified that the defendant responded Mr. Lawrence had something to do with his brother's death; "so he had these guys from the city to come down and knock him off". (T. 838). The defendant was referring to Mr. Lawrence having been knocked off. Id.

The defendant's confessions admitting to the murder constitute direct evidence of guilt. See Hardwick v. State, 1521 So. 2d 1071,

1075 (Fla.), cert. denied, 488 U.S. 71, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988) ('We disagree that the case was circumstantial, since [witnesses] testified that Hardwick had confessed to the murder or told others of his plans in advance of the killing. A confession of committing a crime is direct, not circumstantial, evidence of that crime. Dunn v. State, 454 So. 2d 641 (Fla. 5th DCA 1984). See McCormick, Handbook of the Law of Evidence. Sec. 185 (2d 3d. 1972)");[18] Walls v. State, 641 So.2 d 381, 387 (Fla. 1994) ("A confession is direct evidence in Florida.").

The State would note that the defendant's confessions were corroborated by other eyewitness testimony. Witness Anthony Williams testified that, approximately two to three hours before the crimes, he saw the defendant arrive where codefendant Johnson lived in Liberty City, in his white Porsche. (T. 500-1, 506). The defendant and codefendant Johnson had a conversation, after which Johnson went and got codefendant Newsome, who lived across the street. (T. 501-2). Witness Williams then stood with the defendant, and codefendants Johnson, Newsome, and Ingraham, next to the defendant's Porsche. (T. 485-8). Mr. Williams heard the defendant and codefendant Johnson conversing. (T. 487-8). "The discussion was about something down south they had to take care of". (T. 503). They were going to go to

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[18] As noted previously, the defendant had also announced his murder for hire plot, at least a week prior to the killing, to Witness Hauser. See point II herein, at pp. 21-22.

"West Perrine", to a 'store". (T. 504). Codefendant Ingraham was dressed in a camouflage suit (T. 505). Codefendant Johnson was saying that he needed his camouflage pants; he was also displaying a black .357 gun. (T. 489). Witness Williams then heard the defendant ask the codefendants to follow him. (T. 490-2). Williams then observed the codefendants in a gold colored New Yorker, following the defendant who departed in his Porsche. (T. 491-2) .

Another witness, Trumaine Tift corroborated the above planning. Mr. Tift too, saw the defendant arrive, at approximately 8-9 p.m. on the night of the crimes, in a white Porsche, in front of codefendant Johnson's home in Liberty City. (T. 389-392). The defendant and codefendants were talking; codefendants Ingraham and Johnson were in camouflage outfits. Id. Mr. Tift then saw the defendant depart in the Porsche; the codefendants were following him in the gold New Yorker. Id. Mr. Tift added that later that evening he saw the codefendants back in Liberty City, still in the same camouflage outfits, with the New Yorker parked in front of codefendant Johnson's house. (T. 396-8). Approximately an hour later, Tift then saw the defendant arrive; the defendant went to codefendant Johnson's house. Id. The defendant and Johnson emerged 15 minutes later; Johnson had "a wad of money", at this time. Id. The codefendants had not possessed any money prior to the defendant's meeting with them. (T. 407). Mr. Tift also testified that earlier on the day of the crimes,

codefendant Johnson had asked him if he wanted to make some money by, "spraying up pop and his son", "Down South." (T. 395). Mr. Tift had declined. Id. Later that evening, Johnson told Tift that he had 'shot the grocer down in Perrine." (T. 405).

As noted previously, witness Duval then testified that on the night of the crimes, while he was at the "hole" in Perrine, the defendant directed him to get the Uzi normally kept there, take it to his apartment, and give it to codefendant Johnson. (T. 333-6). Mr. Duval in fact took the Uzi to his apartment. He identified codefendants Ingraham and Newsome as being already present in the apartment, and 'playing" with the Uzi. (T. 336-41). Codefendant Johnson and the New Yorker were in front of the apartment. (T. 342-3).

The five (5) witnesses at the scene of the shooting all identified two gunmen who had worn camouflage outfits. One of the gunmen, positively identified as codefendant Ingraham, by witness Dukes whom he had also shot at, carried an Uzi; the other carried a .357 revolver. One witness saw the lookout in the gold New Yorker waiting for and then driving away the gunmen.

The Uzi was recovered from one codefendant's residence and was physically established to have been the murder weapon. The serial number on the Uzi established it as having been purchased by the defendant's wife. The .357 revolver was also recovered, and traced

to codefendant Johnson's possession. Witness Isom testified that Johnson had given it to him for safekeeping on the day that he was arrested. Physical testing of this weapon also established that it had been fired at the scene; bullets recovered from the body of a dog, used as a shield by one of the attempted murder victims, and from inside the store matched this revolver. Finally, the gold New Yorker was established to have been in the possession of codefendant Ingraham, by virtue of the latter's own father's testimony.

The State respectfully submits that the defendant's confessions to the murder, the eyewitness statements as to the defendant's advance planning of the murder, his supplying the codefendants with the murder weapon, and, the eyewitness testimony and physical evidence corroborating the defendant's statements, all constitute overwhelming and direct evidence of guilt. The Appellant's arguments as to the circumstantial nature of evidence of guilt and sufficiency thereof are thus without merit. Hardwick, Walls, supra.

Finally, the Appellant's reliance upon Golden v. State, supra, is also unwarranted. This Court in Golden noted that, "[t]he corpus delicti of a homicide consists of three elements, i.e. 'first, the fact of death; second, the criminal agency of another as the cause thereof; and third, the identity of the deceased person'. "[citations omitted]". Golden, 629 So. 2d at 111. The undisputed evidence in Golden reflected that the victim's cause of death was drowning.

There were no physical signs, nor any eyewitness testimony, of any violence having been inflicted upon the victim. This Court thus ruled that the victim's death could have been "an accident". Id. As such, this Court held that the State had failed to prove the second element of corpus delicti, that is death caused by the criminal agency of another. The instant case does not involve any semblance of an accidental drowning. The undisputed evidence herein establishes that Mr. Lawrence died as a result of multiple, at least eleven, gunshots from a submachine gun. One of the witnesses heard codefendant Johnson tell codefendant Ingraham to "make sure" that the victim was dead as he was being shot at. Both the physical evidence and the eyewitness testimony herein establish beyond a reasonable doubt that the victim's death was not an accident, nor was it self-inflicted. The victim herein died because the defendant hired others to kill him. The corpus delicti, that is the fact of death, criminal agency of others, and the victim's identity, were all proven beyond a reasonable doubt in the instant case.

VI.

THE SENTENCE OF DEATH WAS PROPERLY IMPOSED.

A. The Burden Shifting Claims Are Procedurally Barred And Without Merit.

The Appellant contends that the prosecution improperly argued that the defendant had the burden of proving a life recommendation, and proving that the mitigating factors outweighed the aggravating circumstances. The Appellant has added that the trial judge is also "presumed" to have followed the prosecutor's argument, and thus "unreasonably believed that only mitigating evidence that rose to the level of 'outweighing' the aggravation need to considered". Appellant's brief at p. 41. These claims are procedurally barred as there were no objections in the court below on the grounds now raised on appeal. Furthermore, these claims are without merit as they are refuted by the record.

First, any claim of burden shifting requires a contemporaneous objection in the trial court; otherwise it is deemed to be "waived". Preston v. State, 531 So. 2d 154, 160 (Fla. 1988); Wuornos v. State, 644 So. 2d 1012, 1020, n. 5 (Fla. 1994). There were no objections, on the grounds of burden shifting or any other grounds now raised on appeal, to any instructions or arguments in the court below. As such the claim is procedurally barred. Preston, Wuornos, supra.

The State would additionally note that the sentencing jury was instructed in accordance with the Standard Jury Instructions. This

Court has noted that said instructions, when viewed as a whole, do not shift the burden of proof to the defendant. Preston, 531 So. 2d at 160, citing Arango v. Stat-e, 411 So. 2d 172, 174 (Fla.), cert. denied 457 U.S. 1140, 102 S.Ct. 2973, 73 L.Ed.2d 1360 (1982); See also, Robinson v. State, 574 So. 2d 108, 113, n.6 (1991) (same); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995) (same); Bertolloti v. Dusser, 883 F. 2d 1503, 1524-5 (11th Cir. 1989) (same); Jones v. Dugger, 928 F. 2d 1020, 1029(11th Cir. 1991) (same).

Likewise, "[u]nless there is something in the record to suggest to the contrary, it may be presumed that the judge's perception of the law coincided with the manner in which the jury was instructed. Ziegler v, Dugger, 524 So. 2d 419, 420 (Fla. 1988). See also, Walton v. Arizona, 497 U.S. 639, 653, 111 L.Ed.2d. 511, 528, 110 S.Ct. 3047 (1990) ("Trial judges are presumed to know the law and to apply it in making their decisions."). Thus, contrary to the Appellant's suggestion, there is no presumption that the judge herein followed allegedly erroneous arguments as opposed to the law.

In any event, the Appellant's claims are also without merit, as they are refuted by the record. First, there were no improper burden shifting arguments by the prosecution. Indeed, the record reflects that the State only argued that the aggravating circumstances herein "far outweigh" the mitigation:

> [PROSECUTOR] : So what you have to weigh is the attempted murder of Bernard Williams and Josiah Dukes, with

> heightened premeditation, the pecuniary gain and the great risk of the many persons there, and what you heard in mitigating factors. I suggest to you the aggravating far outweighs the mitigating.
>
> . . .
>
> The brutal way that Mr. Lawrence was gunned down in his store, Bernard Williams and Jonas Dukes, the heightened premeditation, the financial, pecuniary gain and the great risk of harm to many people, far outweigh the mitigating, which I suggest to you don't exist.

(T. 1623-24). (emphasis added). Likewise, the State, in its sentencing memorandum to the trial court, again argued that the law requires the trial court 'to consider any evidence of mitigating circumstances presented by the defendant", and the mitigating circumstances in the instant case, "are clearly outweighed by the aggravating circumstances". (R. 160-1). The Appellant's contention that the prosecution erroneously argued improper burden shifting is thus also contrary to the record and without merit.

B. Claim Of Improper Use Of Non-Statutory Aggravating Evidence Is Procedurally Barred And Without Meri

The Appellant argues that the evidence of defendant's drug dealing, his prior attempt to hire others to kill the victim, his hiring of the co-defendants herein, and physical evidence from the crime scene, all of which were introduced during the guilt phase, constitute improper evidence of non-statutory aggravating circumstances at the sentencing. The State first notes that there were no objections on the grounds that said evidence constituted non-statutory aggravation at the penalty phase in the court below. As

such the instant claim is procedurally barred. Windom v. State, 656 so. 2d 432, 438 (Fla. 1995) (claim that testimony constituted non-statutory aggravation is not preserved in the absence of a specific objection on said grounds).

This claim is also without merit. The propriety of Mr. Hauser's testimony as to defendant's prior attempt to hire him to kill the victim due to the latter's interference with defendant's drug trade, and, Mr. Duval's testimony as to the defendant's drug dealing have been exhaustively detailed in point II, at pp. 22-29 herein, and are relied upon by the State. Said testimony constituted sufficient and relevant evidence to establish motive and premeditation by the defendant. The sufficiency of the evidence to establish that the defendant paid the codefendants to kill the victim, and, supplied them with the Uzi to do so, has also been extensively detailed and argued in Point V herein, at pp 43-48, and is relied upon by the State. The Appellant's final complaint, that the State linked him to the death of a dog at the crime scene, also constituted relevant evidence. The record reflects that one of the attempted murder victims, Bernard Williams, testified that after he was initially shot at by the codefendant carrying the Uzi, he heard more shots and utilized his dog as a shield. (T. 581-2, 584-5). The dog had been at the perimeter of the parking lot across from the victim's store. (T. 583). The bullet retrieved from the dog, who died in the course

of the shooting, was established to have been fired from codefendant Johnson's .357 revolver. (T. 565-72, 1087-91; 1109, 1148, 1154). This testimony thus established that at least two of the codefendants, Johnson and Ingraham, had been shooting at the scene, in accordance with the eyewitness testimony. As previously noted, the defendant had supplied the Uzi which was actually the weapon utilized to kill the victim. The defendant also knew about Johnson's revolver, as the latter had been demonstrating it in the presence of the defendant, immediately before the defendant led the codefendants to Perrine. (T. 489) . The complained of physical evidence thus linked the defendant to the attempted murder counts, as well as establishing that, the shooting was directed not only at the murder victim, but towards other bystanders in the store and the surrounding parking lot. As seen above, all of the evidence complained of herein was relevant and properly admitted at the guilt phase of trial. Such relevant and factual evidence of the circumstances of the crime does not constitute nonstatutory aggravation. Windom, supra; White v. State, 446 So. 2d 1031, 1036 (Fla. 1984).

C. **The Sentencing Judge Properly Addressed And Considered The Mitigation Proposed By The Defendant**

The Appellant argues that the sentencing judge erroneously failed to find or weigh the mitigating circumstances. The record however reflects that, contrary to the Appellant's suggestion, the sentencing judge specifically considered all mitigating evidence

presented, and utilized the proper standard in imposing the sentence of death.

The judge's sentencing order reflects that he first summarized the factual background at trial. (R. 198-99). The judge then enumerated his specific factual findings with respect to the four (4) aggravating factors argued in the instant case. (R. 199-201). The judge then summarized all of the evidence presented by defendant in mitigation, and specifically stated that he was considering said evidence as non-statutory mitigation:

> Concerning mitigating circumstances, this court has considered the testimony of the Defendant's parents before the jury during the penalty phase. They spoke well of him and told of the effect that his brother's murder had on him. At the sentencing hearing [before the judge], the Defendant's wife testified about the Defendant's substantial abuse of alcohol and marijuana which began about the time of his brother's death.
>
> In addition, this Court has also considered the testimony [presented before the judge] of Dr. Merrie Haber, a psychologist who conducted an examination of the Defendant. Dr. Haber testified that on the basis of certain tests which were given to the Defendant, his intelligence was well below normal. She concluded that the Defendant's ability to appreciate the criminality of his conduct was impaired, although not substantially impaired as would be required under Section 921.141(6)(f), Fla. Stats. (1989). Nonetheless, this Court does believe that all of this testimony as well as the testimony of the Defendant's family should be treated as a non-statutory mitigating circumstance. (R. 201). (emphasis added).

The sentencing judge then specifically concluded that the above mitigation was, "utterly overwhelmed by he asgravating circumstances". (R. 202) (emphasis added). The Appellant's claim of

failure to consider mitigation, is thus entirely devoid of merit in light of the sentencing judge's unequivocal statements to the contrary. The sentencing order in the instant case fully complies with this Court's requirements set forth in Campbell v. State, 571 so. 2d 415, 417-20 (Fla. 1990) and its progeny. See, e.g, Windom v. State, 656 So. 2d 432, 440 (Fla. 1995) (in Campbell v. State, 571 so. 2d 415 (Fla. 1990), 'we specifically mandated that the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant. The relative weight given each mitigating factor is within the judgment of the sentencing court. Id. at 420.").

The State recognizes that the Appellant has argued that the court failed to find 'statutory" and non-statutory mitigation. See Appellant's brief at p. 42. The Appellant has not identified what "statutory" mitigation should have been found. No evidence of any "statutory" mitigation was presented at any juncture in the lower court. Apart from family members' testimony as to his background, the defendant only presented testimony from a psychologist, Dr. Merry Haber, as to his mental status. This witness testified that, based solely upon the WAIS test which was not administered by her, the defendant had "borderline intelligence", (T. 2472), and that, "his judgment is impaired based on this intelligence test alone". (T. 2475). The trial judge then expressly questioned the expert as to

whether her opinion was that the defendant's judgment was "substantially impaired" in accordance with the Florida statutory mitigator. (T. 2509). The expert responded that it was not, "I cannot use the word 'substantially'." Id.

Not only was there no evidence of statutory mitigation, but the expert opinion as to low intelligence/impairment was derived exclusively from the test scores. The expert admitted that she had not even taken into account her own interviews with the defendant. (T. 2494). She did not conduct or consider any interviews with the family members, nor did she take into account the defendant's school records. (T. 2498, 2500). Of course, the expert was not familiar with the record, and did not take into account the facts or circumstances of the crimes either. (T. 2494-5). In any event, the expert herself admitted that the test score she had relied upon, "does not mean necessarily that [defendant] is impaired in the area of what someone might call street smarts or how to get along in a ghetto or the black community". (T. 2504). In light of the equivocal nature of the expert testimony and the lack of a reliable basis for same, the trial court would have been within its right to reject such mitigation. See, e.g. Thompson v. State, 619 So. 2d 261, 267 (Fla. 1993)(no error in failing to find mitigation of low intelligence notwithstanding evidence of brain damage and low I.Q.).; Walls v. State, 641 So. 2d 381, 390 (Fla. 1994) ("opinion testimony

gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for the judge and jury to resolve."), There was certainly no abuse of discretion in finding that the evidence herein was "utterly overwhelmed" by the aggravating circumstances herein. Campbell, Thompson, Walls, supra.

VII.

THE DEFENDANT RECEIVED A FAIR TRIAL BEFORE AN IMPARTIAL JUDGE AND JURY.

A. **Claim Of Attacks on Defense Counsel**

The Appellant first claims that the trial judge "repeatedly attacked the credibility of Mr. Robinson's counsel while the jury was present." Appellant's brief at p. 44. The Appellant has not provided any basis for said allegation, and the record does not reflect any such evidence nor any such allegation in the lower court. Indeed, the defendant, through counsel who was appointed subsequent to the guilt and penalty phase before the jury, and, before a substitute judge, claimed that the former trial judge had, "throughout the course of the trial, appeared to do everything in its power to protect court appointed [former] counsel, Alan Soven." (R. 148). This claim is thus without basis, devoid of merit, and procedurally barred. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).

B. **Claim Of Angry Juror**

The Appellant next claims that the trial judge "berated a juror" and thus prejudiced the defendant with 'an angry and distraught decision maker who shared her feelings with her fellow jury members." Brief of Appellant at p. 44. This argument is not supported by the record either. To the contrary, the record reflects that the complained of juror unequivocally testified that she was impartial. The defendant, after consulting with defense counsel, personally agreed that said juror should serve and not be replaced with an alternate juror.

The record reflects that after the commencement of trial, there were difficulties with some jurors being late for court. (T. 309). The trial judge thus expressly admonished all jurors **as** to the importance of being on time. (T. 315). Thereafter, on the sixth day of trial, the record reflects that one of the jurors, Ms. Williams, **was** not present at the scheduled time for trial, 10:30 **a.m.** (T. **889).** The presentation of evidence had to be halted and the remainder of the jurors had to be excused. Id. The record reflects that juror Williams telephoned the court approximately forty-five (45) minutes to an hour after the scheduled time of trial. (T. 889, 900, 905). Ms. Williams did not appear in court until 2:00 p.m., approximately three and a half (3 ½) hours after she was supposed to. (T. 901).

Upon inquiry by the trial judge, in the presence of the parties,

juror Williams stated that she had been in a traffic accident, That is, she had bumped the rear of another car, at approximately 10:35 a.m., five (5) minutes after the scheduled time of trial. (T. 901-903). Ms. Williams stated that she had gone to work that morning, left her place of employment at 10:00 a.m., and, that the accident had occurred at a location which she was uncertain about. Id.

In light of the above, the trial judge informed the juror that he was going to hold her in contempt of court, and stated that, 'if you are late for this court again, I will put you right straight in jail." (T. 906). The juror then exited the courtroom, and the state immediately expressed its concern as to whether the juror should be allowed to continue serving on the jury. (T. 906).

The trial judge then immediately recalled Ms. Williams and admonished her not to discuss the matter with the remainder of the jury. Id. Upon further inquiry, the juror stated that her understanding of the circumstances **was** that, 'if I am late again, I might go to jail." (T. 906-907). She stated that she had not shared any other information with the remainder of the jury. (T. 907).

With respect to replacing Ms. Williams with an alternate, the trial judge stated that he would do so if the parties requested it. (T. 906). The parties were then allowed to question Ms. Williams as to her impartiality in light of said events; the juror unequivocally stated that she would fulfil her duties in an impartial and fair

manner:

> **MR. BAGLEY [Prosecutor]:** Ms. William, in light of what has happened, what the judge has said to you, holding you in contempt, would that affect your ability to be fair to both sides if you are called upon to continue hearing the case and eventually going and deliberating on the verdict in this case,
>
> **JUROR WILLIAMS: No,** it wouldn't.
>
> **MR. BAGLEY: You** will be able to set aside what has happened today?
>
> **JUROR WILLIAMS: Yes.**
>
> **MR. BAGLEY:** However unfortunate it **may be to you?**
>
> **JUROR WILLIAMS: Yes.**
>
> **THE COURT:** Mr. Soven?
>
> **MR. SOVEN [defense counsel]:** No sir, I have no questions.

(T. 907-908). The court then again inquired if Ms. Williams, was, 'absolutely positive that you can reassume your jury duties in a fair and impartial **way** with regard to the litigation that is going on in front of you?" (T. 908). Ms. Williams assured the court that she would. Id. The court then again offered both parties another opportunity to question the juror, which they declined. The juror was instructed that, 'under no circumstances are you to discuss with the other jurors what we have discussed here." (T. 913).

At this juncture, juror Williams apologized to the court and stated that this was the first time she had served on **a** jury; she had not realized how important it was to be on time. (T. **914).** The court

immediately accepted this apology and unequivocally told Ms. Williams that there would be no punishment, in light of her apology and her assurances that she would be on time in the future:

THE COURT: All right.

I am going to accept your statement as an apology. It is an explanation and I will accept it.

The court is forgiving you, and there will be no punishment. Okay?

JUROR WILLIAMS: Thank you.

THE COURT: Remember, no conversations with the jury inside.

JUROR WILLIAMS: Yes, sir.

(T. 916) (emphasis added).

There was no request **at any** time that juror Williams be removed or replaced with an alternate. There was no request for mistrial, nor any argument that the trial or the jurors were in any way tainted or unfair as a result of the foregoing. Indeed, the record reflects that the state, in an abundance of caution, requested that the defendant be personally voir dired as to whether he desired Ms. Williams to remain on the jury, or be replaced with an alternate. (T. 1033-35). The trial judge thus questioned the defendant, who stated that after consulting with his attorney, he desired Ms. Williams to remain as a juror. (T. 1034-35).

As seen above, the Appellant's speculations herein are unfounded and contrary to the record. Juror Williams was initially told that

she was in contempt, but expressly stated her understanding was that, if she was late again, she would be punished. The juror repeatedly assured the court and the parties that she was able to remain fair and impartial, and that the 'contempt" admonishment by the court would not influence her in any manner. In any event, upon hearing the juror's apology, the court immediately and unequivocally informed her that there would be no punishment. Both defense counsel and the defendant then affirmatively stated to the court that the juror should remain and should not be replaced with an alternate. The State thus respectfully submits that the instant claim is waived and no prejudice has been demonstrated. See, e.g., Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993) (the defense must timely object to juror challenges in order to preserve claim for appellate review, and in order to preclude parties from deceiving the trial judge into believing that they are satisfied with the jury which is ultimately seated); Steinhorst, 412 So. 2d at 338 ("in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."); Amazon v. State, 487 So. 2d 8, 11 (Fla. 1986) (a defendant who has knowingly waived a trial right after consultation with his attorney in the lower court, "cannot be heard to complain [on appeal].").

C. **Claim Of Victim Impact Evidence**

The Appellant has then again argued the propriety and

admissibility of the testimony from witnesses Hauser and Duval. As noted previously, this claim has been exhaustively addressed in point II at pp. 21-29 herein, and is relied upon by the Appellee.

The Appellant has, however, in reliance upon Booth v. Maryland, 482 U.S. 496 (1987), additionally argued that the victim's anti-drug activities also constituted improper victim impact evidence. This claim is without merit. The record reflects that an officer from the local police department in Perrine testified that victim Lawrence assisted the police in combating drug transactions in the area. (T. 976-77, 980-81). The victim allowed the police to utilize his store for surveillance purposes, and also offered pertinent information identifying different individuals who were dealing drugs in the surrounding area. Id.[19] The drug hole operated by the defendant and Mr. Duval was less than a mile away from the victim's store. (T. 578-79). The evidence also established that the defendant was concerned about interference with his drug trade, a week prior to the murder. The trial judge admitted the testimony as to the victim's anti-drug efforts, on the grounds that said evidence was offered "to establish motive" (T. 977), and so instructed the jury. (T. 979). The

[19] In response to defense counsel's questioning, outside the presence of the jury, this officer added that the victim had personally provided assistance to said officer, and helped 'wipe out" drug dealers in the area. (T. 987).

Appellant's reliance upon Booth, supra, is thus unwarranted.[20] In Booth, the Supreme Court held that it was improper to introduce, through "victim impact' statements, factors that might be "wholly unrelated to the blameworthiness of a particular defendant." 482 U.S. at 504. The Booth opinion did not forbid the use of "victim impact" statements that "relate[d] directly to the circumstances of the crime." 482 U.S. at 507, n. 10; see also, South Carolina v. Gaithers, 109 S. Ct. 2207, 2211 (1989) (same); Windom, supra. The evidence at issue in the instant case solely concerned those activities which directly motivated the defendant's decision to kill the victim. As such, said testimony is not governed by Booth.

D. Claim Of Co-conspirator Statements

Finally, the Appellant, in reliance upon Romani v. State, 542 so. 2d 984 (Fla. 1989), argues that the trial court erroneously admitted witness Tift's testimony with respect to co-defendant Johnson's inquiry as to whether Tift wanted to make some money by "spraying up pop and his son," 'down South." (T. 394-95). Johnson's statement to Tift was admitted by the court as a statement of a co-conspirator, subject to the state's subsequent ability to independently establish the existence of a conspiracy. Id.

The Appellant's reliance upon Romani is unwarranted. This Court, in Romani, required that, "independent evidence" of a

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[20] The State notes that Booth has been partially overruled in Payne v. Tennessee, 111 S. Ct. 2597 (1990).

conspiracy and each member's participation in it, is required for the admission of a co-conspirator's hearsay statements. Romani, 542 So. 2d at 986. The co-conspirator's statement itself cannot be relied upon to prove the conspiracy. Id. Romani does not prohibit a trial court's discretion to admit the co-conspirator's statement prior to the submission of independent proof of the conspiracy, provided, of course, that the state ultimately meets its burden of furnishing the independent proof. The order of proof and early admission of same is within the trial court's discretion. Tresvant v. State, 396 So. 2d 733, 737, n.7 (Fla. 3d DCA 1981), citing, Honchell v. State, 257 So. 2d 889 (Fla. 1972); Briklod v. State, 365 So. 2d 1023 (Fla. 1978); and Boyd v. State, 389 So. 2d 642 (Fla. 2d DCA 1980).

In the instant case, the State presented ample and independent evidence of the conspiracy between the defendant and Mr. Johnson. As noted previously in point V at pp. 43-48 herein, the defendant himself admitted to having, 'paid them fucking niggers to kill Bozo [the victim]," and that, 'he had these guys from the city to come down and knock him [the victim1 off." (T. 792-93; 838). Other witnesses had testified as to having seen and heard the defendant, in Johnson's presence, conversing about going to West Perrine, to a store, to take care of business; and that all co-defendants including Johnson had then departed following the defendant. Johnson was seen wearing a camouflage outfit and displaying a .357 gun at this time;

co-defendant Ingraham was also wearing a camouflage suit. The co-defendants had departed in a gold colored New Yorker. Mr. Duval testified as to how the defendant had directed him to additionally supply Johnson with an Uzi. The eyewitnesses at the scene testified that the shooting had been accomplished by two gunmen wearing camouflage outfits, carrying an Uzi and a .357 revolver, who had departed the scene in the gold New Yorker. The Uzi and revolver were subsequently recovered, linked to codefendants Johnson's and Ingraham's possession, and established to have been the weapons utilized at the scene of the shooting. The Uzi was further established to have been bought by the defendant's wife. Mr. Tift further testified that after the commission of the crimes on the same night, he again saw the defendant, at which time the latter went to co-defendant Johnson's home. When the defendant and Johnson emerged fifteen minutes later, Johnson was holding "a wad of money." (T. 396-98). The co-defendants had not possessed any money prior to the defendant meeting with them. (T. 407). It should additionally be noted that defense counsel also elicited from witness Tift that, later on the same evening, Johnson had also admitted to having "shot the grocer down in Perrine." (T. 405). There was thus abundant evidence of the conspiracy between the defendant and Johnson to kill the victim, separate and independent of Johnson's complained of statement with respect to "spraying up pop and his son." There was

therefore no error in admitting said statement as that of a co-conspirator. Romani, supra. Moreover, in light of the overwhelming evidence of guilt, including the defendant's own confessions, any error in admitting the complained of statement is harmless beyond a reasonable doubt. State v. DiGuilio, supra.

VIII.

THE SENTENCING JURY'S CONSIDERATION OF THE AGGRAVATING CIRCUMSTANCES WAS PROPER.

A. The Jury Properly Considered The Pecuniary Gain Aggravating Factor.

The Appellant contends that the jury should not have been instructed on the pecuniary gain aggravator, as this circumstance was not applicable to him as a mater of law, The State first notes that, "the jury instructions simply give the jurors a list of arguably relevant factors." Patten v. State, 598 So. 2d 60, 63 (Fla. 1992), citing Suarez v. State, 481 So. 2d 1201, 1209 (Fla. 1985). 'To establish the pecuniary gain aggravating circumstance, the state must prove a pecuniary motivation for the murder." Allen v. State, 662 So. 2d 323, 330 (Fla. 1995). The murder must have been an "integral step in obtaining some sought-after specific gain." Hardwick v. State, 521 so. 2d 1071, 1076 (Fla. 1988).

At the request of defense counsel, the word "pecuniary" was further defined for the jury to mean, "monetary, relating to money, financial, or consisting of money, or that which can be valued in

money." (T. 1577; R. 116). As noted in point II herein, the testimony at trial from witnesses Hauser and Duval was that the defendant, a drug dealer, had complained that a person, whom Hauser was led to believe was the victim, Mr. Lawrence, was interfering with his business. The State presented evidence and argued that the defendant's motive for procuring the victim's death was to stop Mr. Lawrence from interfering with his drug trade. Thus, the murder was an integral step in continuing the defendant's drug business, which had as its ultimate goal to make money for the defendant. In light of the evidence, the sentencing judge made the following findings:

> The murder was committed for pecuniary gain. The evidence at trial showed that the defendant's motive was to eliminate Mr. Lawrence because he was interfering with the Defendant's illicit drug dealing. By doing so, Mr. Lawrence was preventing the Defendant from making more money. With Mr. Lawrence dead, the Defendant's drug business would be more profitable. Thus the Defendant's ultimate motive was pecuniary gain.

(R. 200). The above findings are well supported by the record as above noted, and in accordance with this Court's precedents. Allen, susra. The Appellant's contention that there was conflicting evidence of motive is without merit. Wuornos, 644 So. 2d at 1019 ("that the relevant evidence was conflicting does not of itself undermine a trial court's findings on aggravators and mitigators." The record is viewed "in the light most favorable to the prevailing theory.").

Finally, assuming arguendo, that there was insufficient evidence

of pecuniary gain, the State respectfully submits that any error was harmless beyond a reasonable doubt. First, as the jury was properly instructed on the law, there is no presumption of error in its findings. Sochor v. Florida, 504 U.S. 527, 538 (1992) ("Because the jury in Florida does not reveal the aggravating factors on which it relies, we cannot know whether this jury actually relied on the coldness factor. If it did not, there was no Eighth Amendment violation. , . . [A]lthough a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by the evidence."). With respect to the judge's finding of this aggravator, it should be noted that the judge found the aggravators herein "utterly overwhelmed" the mitigation. (R. 202). The judge gave great weight to the calculated procurement of the victim's death and stated, "the fact that the defendant is of below normal intelligence and has suffered tragedy in his life in no significant way mitigates the seriousness of his calculated procurement of Mr. Lawrence's death. This Court has come to the conclusion that the only just punishment in this case is the death penalty." Id. In light of said findings, there is no reasonable probability of a different outcome, even if the sentencer erroneously considered the pecuniary gain aggravator. Rogers v. State, 511 So. 2d 526 (Fla. 1987).

B. **The Claim Of Improper CCP Jury Instruction Is Procedurally Barred.**

The Appellant argues that the jury instructions regarding the cold, calculated, and premeditated (CCP) aggravator were unconstitutionally vague. The CCP instruction herein was the same as that provided in Jackson v. State, 648 So. 2d 85 (Fla. 1994). This claim is, however, procedurally barred as there was no objection to the wording of the jury instruction on constitutional grounds. Defense counsel, in the court below, merely objected to the applicability of the CCP aggravator. (T. 1567). The prosecution argued that the evidence of a contract killing was within the definition of said aggravator. Id. Defense counsel did not argue or object on the grounds of any impropriety as to the wording of the jury instruction, constitutional or otherwise. Id. Likewise, there was no request for any different instructions on this aggravator. As such, the instant claim is procedurally barred. See, Roberts v. Sing etary, 626 So. 2d 168, 169 (Fla. 1993)("The record here does not reflect any objection on the grounds of unconstitutionality or vagueness of the instruction given. Instead, defense counsel objected to the applicability of the instruction in this case. We have repeatedly held that claims are procedurally barred where there was a failure at trial to object to the instruction on the grounds of vagueness or unconstitutionality [citations omitted]."); Windom v. State, 656 So. 2d 432, 439 (Fla. 1995) (general objection to the CCP

instruction that, "I wold object to that on those grounds, constitutional grounds, basically," is insufficient); Archer v. State, 21 Fla. L. Weekly S119 (Fla. 1997) ('claims that the instructions on the cold, calculated and premeditated aggravator is unconstitutionally vague are procedurally barred unless the defendant both makes a specific objection or proposes an alternative instruction at trial and raises the issue on appeal.").

In any event, the State respectfully submits that error in the CCP instruction was harmless beyond a reasonable doubt in the instant case. This Court has repeatedly held that giving the prior CCP standard jury instruction is harmless beyond a reasonable doubt where, 'the murder could only have been cold, calculated, and premeditated, without any pretense of moral or legal justification even if the proper instruction had been given." Walls v. St-ate, 641 so. 2d 381, 387 (Fla. 1994); see also, Wunrnos v. State, 644 So. 2d 1000, 1008 (Fla. 1994) (same); Archer v. State, supra (same).

In the instant case, all of the elements of the CCP aggravator have been established beyond a reasonable doubt. First, by the defendant's own admission, this was a contract murder which, "is by its very nature cold." Archer, 21 Fla. L. Weekly at S120. Second, the facts of the murder itself prove the existence of a prearranged design to kill. The defendant herein not only hired the accomplices, he also directed them to the crime scene from the northern part to

the southern part of the county, where he then supplied them with an additional weapon. Id. Third, the defendant exhibited heightened premeditation over and above what is required for premeditated first-degree murder. The defendant first attempted his murder for hire ploy, with different accomplices, at least a week prior to the murder. The actual preparations for the successful second attempt also proceeded over a period of at least several hours. Id. Finally, the defendant's desire to terminate the victim's anti-drug efforts, in order to further his own business, clearly do not provide any pretense of moral or legal justification. Id.; cf. Hardwick, supra (CCP **aggravator** upheld where there was evidence that the victim had previously robbed the defendant of his drugs). The evidence in the instant case overwhelmingly establishes the CCP aggravator. Indeed, the State notes that defense counsel conceded the existence of this aggravator before the penalty phase jury: "Only one aggravating factor that I could see was proven, that this was, as the State indicated, something which **was** premeditated, calculated. That was proven." (T. 1633). The erroneous jury instructions on this aggravator were thus harmless beyond **a** reasonable doubt. Archer, Walls, Wuornos, supra.

C. The Finding That The Defendant Knowingly Created A Great Risk Of Death To Many Persons Was Proper,

The Appellant contends that the trial court erroneously found that the defendant had knowingly created a great risk of death to

many persons. This claim is without merit, as the findings were both supported by the record, and in accordance with Court's precedents.

The above aggravating factor applies when the defendant puts more than three people, in addition to the homicide victim, in immediate and present risk of death, such as when a gun is fired in the area or direction of said people. See Fitzpatrick v. State, 1437 so. 2d 1072 (Fla. 1983), habeas corpus granted on other grounds, 490 So. 2d 938 (Fla. 1986)(factor upheld where there was a gun battle with two police officers, one of which was the murder victim, in the presence of three hostages); Suarez v. State, 481 So. 2d 1201 (Fla. 1985) (firing a gun, during the course of flight, in the area of four officers, defendant's accomplices, and a migrant labor camp, constitutes a great risk of death).

The evidence in the instant case reflects that the defendant directed his accomplices to a grocery store during its business hours.[21] Having seen that one of the accomplices was already in possession of a .357 revolver, the defendant nonetheless supplied the accomplices with an additional weapon, a sub machine gun. The plan was "spraying up pop and son," the victims, at store. The victim's store and the surrounding parking lots were in fact sprayed up utilizing both of the said weapons which the defendant had knowledge of. The State, thus, respectfully submits that the defendant

[21] The evidence reflects that the defendant's family business was next door to that of the victim's. (T. 257).

knowingly created a great risk of harm, in light of the weapon actually supplied by him and due to his orders that the execution be carried out in a public place during its business hours.

Moreover, the physical evidence and the eyewitness testimony established that said weapons were fired at the direction of four (4) people, two (2) of the store's employees and two (2) of its customers, separate and apart from the murder victim. At least twenty casings, eight projectiles and five projectile fragments were found scattered throughout the parking lot perimeter of the store where the victim was shot, and inside the store itself. (T. 613, 625). There was bullet damage to the front double entry doors to the store. A projectile had penetrated the door causing it to shatter, and then lodged inside the base of the first aisle in the store, (T. 615, 617-18). Store employee Briggs testified that she was inside the store at the cash register near the front door when the shooting started. (T. 530-32). She crouched down and was crawling through the aisles towards the back during the shooting. Id. Customer Dukes was in the parking lot immediately in front of the store, and close to the victim during the shooting. Several rounds were fired in Duke's direction; casings were found near the telephones next to which he was standing, and the fluorescent lights above him were actually shattered. (T. 460-1; 465; 624, 626). Customer Williams actually sustained severe gunshot injuries, while retrieving his dog

at the perimeter fence of the parking lot. (T. 460, 581, 586-7). Store employee Meyers was also in the parking lot, taking out the trash. She miraculously escaped injury by lying on the ground. (T. 248-50).

In light of the above evidence, the sentencing judge made the following findings:

> The Defendant knowingly created a great risk of death to many persons. No fewer than four persons were present during the shootings. The decision to arm the killers with an automatic weapon and to send them to kill Mr. Lawrence at a time when the general public could be expected to be in the area of his grocery store was a decision made by the Defendant. It shows a callous indifference to the safety of persons who were utter strangers to the defendant and who were not the object of his murderous plot.

(R. 200).

The evidence and the sentencing judge's findings are in accordance with this Court's precedents, Fitzpatrick, Suarez, supra. The Appellant's reliance upon Lucas v. State, 490 So. 2d 943 (Fla. 1986); Johnson v. State, 393 So. 2d 1069 (Fla. 1981); Brown v. State, 381 So. 2d 690 (Fla. 1979); and, White v. State, 403 So. 2d 331 (Fla. 1981), is unwarranted. None of said cases involved a situation such as the instant case, where there was immediate risk of harm to more than three people, in addition to the murder victims. See Lucas, supra, (gun battle involving the murder victim and two of his friends); White, supra, (the murder victims had each been shot at close range in the back of the head, and only two other people had

been present on the premises, no shots had been fired at the direction of the latter two people); Johnson, supra, (the presence of three people during shooting did not satisfy the term many persons); Brown, supra, (the defendant took the sole person present in a store to the rear storage room, raped her and then shot her; no other persons were present at the time).

Likewise, the Appellant's contention that the defendant did not appreciate the criminality of his conduct and thus could not have known of any more than a mere possibility of risk, is without merit. As noted in point VI C, pp. 56-57 herein, which is relied upon by the State, the defense expert testified that the defendant's judgment is impaired, based solely upon his below average I.Q. scores. The expert admitted that she had not even taken into account her own interviews with the defendant. She did not conduct or consider any interviews with the family members, nor did she take into account the defendant's school records. Said expert was also not familiar with the record, and did not take into account the facts or circumstances of the crimes either. Most importantly, however, the expert admitted that the test scores, which was the sole evidence relied upon, 'does not mean necessarily that [defendant] is impaired in the area of what someone might call street smarts..." (T. 2504). The claim of the defendant's inability to appreciate the criminality of conduct was thus properly rejected in the court below, as the expert opinion

relied upon had no relationship to the defendant's actions and involvement in the instant crimes. Walls, supra, 641 So. 2d at 389-90.

Finally, as noted previously in section A of this claim, the sentencing judge in the instant **case** gave great weight to the cold and calculated procurement of the victim's death, and specifically found the aggravation "utterly overwhelmed" the mitigation presented, The State thus respectfully submits that any error in finding the great risk aggravator was harmless beyond a reasonable doubt. Coney v. State, 653 So. 2d 1009, 1015 (Fla. 1995) (No reasonable possibility that the erroneous finding of the great risk factor affected the death sentence, in light of the sentencing judge's findings that there were more than sufficient aggravating circumstances proven beyond a reasonable doubt to justify the imposition of the death penalty.).

D. The Trial Court's Finding Of Prior Convictions For Crimes Involving Violence To A Person Was Proper.

The Appellant claims that the Defendant was innocent. The claim of innocence has been exhaustively addressed in Point V at pp. 43-48 and relied upon herein. With respect to the attempted murders of Messrs. Williams and Dukes, the State relied upon the evidence establishing that the defendant hired and paid his accomplices, gave them an Uzi, and told them to kill someone in a public place, a store, while it was still open for business. The plan was "spraying

up pop and his son." Attempted murder victim Williams was initially shot while co-defendant Ingraham was running behind him and shooting towards the murder victim. (T. 581-83). The other victim, Mr. Dukes, was fired upon in the close vicinity of the murder victim, as the co-defendants were leaving the scene. (T. 460, 463). The State argued that the defendant was a principal, and thus responsible for the acts committed in the furtherance of his scheme. The jury was instructed in accordance with the standard jury instructions on principals. (T. 1303, 1481-2). Additionally, in accordance with defense counsel's request, the jury was instructed that, "Association with other persons and knowledge that a crime is being committed are not alone sufficient to establish that the defendant aided or abetted the crime." (T. 1307-8, 1482). The jury found the defendant guilty of the attempted murder counts as was within their province. See, Lovette v. State, 636 So. 2d 1304, 1306 (Fla. 1994) ("'one who participates with another in a common criminal scheme is guilty of all crimes committed in furtherance of that scheme regardless of whether he or she physically participates in that crime.' Jacobs v. State, 396 So. 2d 713, 716 (Fla. 1981).").

Said convictions were thus properly relied upon by the sentencing judge in finding the prior violent felony aggravator. LeCroy v. State, 533 So. 2d 750 (Fla. 1988); King v. State, 390 So. 2d 315 (Fla. 1980)(contemporaneous convictions of violent felonies

involving persons other than the victim of the first degree murder are sufficient to prove this aggravator beyond a reasonable doubt).

IX.

THE DEFENDANT WAS ACCORDED DUE PROCESS OF THE LAW.

A. There Was No Reauirement That The Defendant Be Personally Present At A Suppression Hearing During One Of The Codefendants' Sesarate Trials.

The Appellant claims that his rights to presence, privacy, and confrontation were violated because he was absent from a suppression hearing of codefendant Newsome's statement, during the latter's separate trial. This claim is without merit.

During the trial herein, and in the presence of the defendant, detective Borrego testified that codefendant Rodney Newsome, after his arrest for these crimes, had cooperated with the Metro-Dade Police Department detectives, by placing a telephone call to the defendant. The defendant had not yet been arrested and had been home at the time. (T. 990-96, 1045-51). Detective Borrego stated that he obtained Newsome's consent to having this telephone call tape recorded and monitored by Borrego. Id. Detective Borrego then testified that he had then dialed the defendant's number, and tape recorded the conversation between Newsome and the defendant. Id. Borrego then identified the tape as that made by him, and stated that it fairly and accurately depicted the telephone conversation between Newsome and the defendant, which he had monitored, Id. No

alterations, deletions, corrections, etc. had been made to the tape. Id. The defense objected to the admission of the above tape, on the basis that Newsome had to present and hand to testify as his consent was hearsay. (T. 996). The trial court stated that pursuant to Welker v. State, 536 So. 2d 1017 (Fla. 1988), the tape recording was admissible without Newsome's testimony. (T. 998). The trial court then expressed concern as to whether Newsome's consent had been voluntary. (T. 1000). The judge was reminded that he had previously found Newsome's consent to be voluntary during the latter's separate trial. Id. The defendant had not been present at Newsome's trial. (T. 1001). The trial court then again held that on the basis of Welker, and the prior hearing in Newsome's case, the predicate for the admissibility of the tape had been met. (T. 1003).

The trial court correctly ruled that Welker governed the instant case and rendered the tape admissible. In Welker, 536 So. 2d at 1020, this Court held that:

> For purposes of obtaining evidence of a criminal act, Section 934.03(2)(c) authorizes a law enforcement officer to intercept a communication electronically when one of the parties to the communication has given prior consent. There is nothing in Chapter 934 pertaining to security of communications which suggests that the consent must be proven only by the testimony of the consenting party,

This Court also agreed with the lower court's observation that, "the giving of consent is a verbal act, and therefore testimony that someone has given consent is not hearsay." Id. This Court thus

concluded:

> Proof of consent for purposes of electronic intercept shall be governed by traditional rules of evidence. As applied to the instant case, the deputy's testimony that Baggett consented to the intercept sufficed to permit the introduction of the tape recordings. Indeed, there could be little doubt that the informant consented to the recordings because the calls were made from the sheriff's office.

Id. Therefore, the issue of defendant's absence at the Newsome suppression hearing is irrelevant, since that hearing was not dispositive of the issue of the admissibility of the tape.

The Appellant's claim of violation of privacy rights is also without merit. The pertinent Florida Constitution provision governing intercepted communications is Article 1, Section 12. See State v. Hume, 512 So. 2d 185, 188 (1987) (Article I, Section 23 right-to-privacy provision does not modify applicability of Article I, Section 12, Searches and Seizures.) . Article I, Section 12, expressly provides that the right to be secure in one's home from unreasonable interception of private communications shall be construed in conformity with the Fourth Amendment of the United States Constitution, as interpreted by the United States Supreme Court. This Court has held that in light of United States Supreme Court precedent, recording a conversation between the defendant and an undercover agent in the defendant's home is not unconstitutional.[22]

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[22] The Appellant, perhaps in mistaken reliance upon the Motion for New Trial filed in the court below, has stated that the defendant was in jail at the time of the recorded conversation.

See State v. Hume, 512 so. 2d 185 (Fla. 1987).

Finally, the Appellant argues that Detective Borrego's testimony concerning Newsome's consent violated the right to confront witnesses. This argument is **also** without merit. The only witness at trial against the defendant on the issue of Newsome's consent was Detective Borrego and the defendant was able to cross-examine this witness. Had the defendant desired further to call Rodney Newsome to testify on the issue of consent, he was free to do so as he possessed subpoena powers equal to that of the State.

B. No Prosecutosial Misconduct Has Been Established.

1. The Prosecution Of The Defendant's Wife.

The Appellant first contends that the prosecution, prior to trial, 'harassed and persecuted" the defendant's wife, in order to prevent her from testifying on the defendant's behalf. The Appellant has neglected to mention that a post-trial evidentiary hearing was conducted on the basis of these allegations and, that same were found to be without merit.

The defendant obtained new counsel after the completion of the guilt and penalty phases before the jury, but prior to sentencing by the substitute judge. Through new counsel, the defendant filed an Amended Motion for New Trial (R. 138-151), where, inter alia, the

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The defense in the court below, however, subsequently conceded that it had erred, and this defendant was in his home, not in jail, at the time of the conversation at issue. (T. 2278).

allegations at issue herein were made. (R. 146). The defense requested an evidentiary hearing on the 'prosecutor's misconduct", and on the actions taken by prior court-appointed defense counsel. (T. 2282,841. The prosecution agreed to the request. Id.

At the evidentiary hearing, prior defense co-counsel, Mr. Wax, testified that he had also previously been court-appointed to represent the defendant's wife on a charge of perjury in an official proceeding. (T. 2294-5). Mrs. Robinson had entered a prior plea of no contest to a charge of battery on a police officer, and resisting arrest. (T. 2295). During that plea colloquy, in order to receive a withhold of adjudication, she placed great emphasis on the harm of an adjudication on her status ♋♦ a licensed nurse; under oath, she stated that she was an LPN. Id. Based upon said false answer, perjury charges were brought against her. Id. One of the prosecutors herein, Mr. Rosenbaum, then handled the perjury trial. (T. 2297).

Defense counsel Wax testified that he had asked the prosecutor why he was handling the perjury trial, Id. The latter had said that, 'he took perjury very, very seriously and in this case, he felt that it was appropriate that he would prosecute this charge." Id. Mr. Wax's own opinion, from other indications from the prosecutor, was that, "Valerie Robinson had purchased the murder weapon that was used to kill Lee Arthur Lawrence and he didn't want her to be able to

possess or purchase any weapons in the future. Therefore he **was** seeking an adjudication." (T. 2298). A convicted felon cannot purchase firearms. (T. 2307).

The perjury charge went to trial and a "not guilty verdict" was obtained from a jury. Id. Defense counsel testified that he had, 'told the jury that the elements of the crime had been fulfilled, and she did it, so what." (T. 2306).

Mr. Wax also testified that with respect to the defendant's trial, he and lead defense counsel had discussed the possibility of calling Mrs. Robinson as a witness, but that, "we didn't see the need to call Valerie as **a** witness." (T. 2308). Defense counsel stated that they did not think she could have anything to say as to the theory of defense. (T. 2309). There was another discussion on calling Valerie Robinson during the penalty phase before the jury. (T. 2308-9). However, counsel determined that the "issue of the weapons," in addition to her statement to the police on the night of the murder, were problematic. Id. Defense counsel made a final decision not to call her after she was deposed by the State. (T. 2309). The prosecutor, Mr. Rosenbaum, and the perjury case had nothing to do with defense counsel's decision, as the "perjury case was an acquittal and it can't be brought up." (T. 2309-10).

Lead defense counsel, Soven, added that he had decided not to call Valerie Robinson as a witness, "since her testimony would have

buried Bobbie, it would have been worse." (T. 2345). Her testimony, would have reflected that, not only did she purchase the Uzi utilized in the instant case, but that she had purchased two other Uzi's, several other hand guns, 'and it would have put a terrible light on this case." (T. 2346). The perjury charge filed against her had no bearing on the decision as to whether she should be a witness, because, "she was acquitted well before the trial." (T. 2346).

The prosecutor, Mr. Rosenbaum, testified that he had both initiated and prosecuted the perjury charge against Valerie Robinson. (T. 2372). Mr. Rosenbaum had been present in the courtroom on an unrelated homicide case, when Valerie Robinson's attorney came in and presented another prosecutor with a probation modification motion. (T. 2372-3). Mr. Rosenbaum read the motion, and told the other prosecutor that the allegations with respect to Mrs. Robinson being a licenced nurse were untrue. (T. 2372). Mr. Rosenbaum knew this as a result of his extensive investigation of the defendant's background. Id. Nonetheless, he made further investigation and verified that Valerie Robinson was not a nurse. (T. 2374). Upon further review and investigation of how Valerie Robinson had obtained a withhold of adjudication on her prior offense, based upon the representation that she was a nurse, Mr. Rosenbaum decided the elements of perjury could be proven beyond a reasonable doubt, and filed the charge. (T. 2374, 2381-2).

Mrs. Robinson also testified at the evidentiary hearing. (T. 2384-2405). She was not questioned and did not make any statement with respect to any "persecution or harassment," or being a witness at any stage during the course of the defendant's trial. On cross-examination by the State, she merely confirmed that she had been acquitted of the perjury charge. (T. 2397). Finally, it should be noted that after the presentation of all evidence at trial, the trial court had conducted a colloquy with the defendant. (T. 1323-26). The defendant **had** unequivocally testified that there were no witnesses nor any evidence that he wished to present, but which had not been presented. (T. 1326).

As is abundantly clear from the foregoing, the defense had an ample opportunity to establish its allegations of "harassment and persecution," but failed to present any evidence of same. Defense counsel did not even submit further argument as to these allegations. (T. 2440). The lower court, in denying the motion for new trial on this ground, noted that Mrs. Robinson had been acquitted of perjury, and the case did not affect the defense's ability to call her as a witness. Id. The instant claim of misconduct is thus entirely devoid of merit.

2. The Use Of A Demonstrative Aid Durinu Closing Argument.

The Appellant claims that prosecutorial misconduct **arose** from the State's use, in closing argument during the guilt phase, of an

excerpt of the transcript of the tape recorded conversation between the defendant and co-defendant Newsome. (R. 187-88; T. 1436). First, the transcript was used by the State only in its closing argument, and the jury had just been instructed by the court that closing arguments were not evidence, but rather a summary of what the attorneys believed the evidence had shown. It should also be noted that, immediately before the transcript was shown to the jury, the prosecutor advised the jury as follows:

> Mr. Rosenbaum: Now, the tape recording which was made by Rodney Newsome on April 3rd, '89 at 5:28 p.m., Detective Borrego, you heard it during the trial. I would like to play it for you again.
>
> Now, this here is our interpretation of the tape.

(T. 1340).

After this admonition, the tape, which was in evidence, itself was played for the jury. Id. After the tape **was** played, the prosecutor again reminded the jury that the transcript merely reflected the State's interpretation of the tape.

> MR. ROSENBAUM: Now, again, you take this back in the jury room, this tape recorder will be here, and you play it back. That is our interpretation of it. Right up there.
>
> Now, let me explain why it is important.
>
> THE COURT: Well, I think you had better take it down.
>
> MR. **ROSENBAUM:** I need to explain it --
>
> THE COURT: Take it down.

(T. **1341).**

As is evident, the actual time that the transcript was before the jury was extremely brief. Only the tape was admitted into evidence and available to the jury during its deliberations, The transcript was never provided to the jurors. Moreover, there was never any argument that the transcript represented anything other than the State's interpretation of the tape. Under these circumstances, it cannot be said that prosecutorial misconduct arose from the State's use of a transcript as a demonstrative aid. The prosecution's use of the transcript in this case was no different than if it had written its interpretation out on a chalkboard, or had merely announced same out loud.

Assuming, arguendo, that the use of the transcript was improper, no prejudice has been demonstrated. First, there is no claim, either in the lower court or herein, that the transcript used by the State was an inaccurate reflection of the conversation. Second, the excerpt of the phone call that was shown was extremely brief. Third, the State offered this evidence to further prove that the defendant knew Newsome and Johnson, as he had cryptically offered some assistance. (R. 187-88). This fact, however, had already been established through the testimony of Anthony Williams, Trumaine Tift, and Gary Duval, all of whom saw the defendant with his co-defendants on the day of the crimes. Thus, the transcript was cumulative of

other testimony. In light of the overwhelming evidence of guilt herein, any error was thus minimal and harmless beyond a reasonable doubt. State V. Diquilio, supra.

3. The Allegations Of Improper Withholdincr Of Evidence Are Without Record Support.

In this claim of prosecutorial misconduct, the Appellant has stated that the prosecutor improperly withheld "Brady material from Mr. Robinson regarding a jail house informant's deal with the State...", without any further elaboration. Brief of Appellant at p. 59. As noted in the preceding section, the defense was afforded a post-trial evidentiary hearing on the claim of prosecutorial misconduct. There were no allegations, let alone presentation of evidence, as to any information having been withheld from the defense, in violation of Brady V. Maryland, 373 U.S. 83, 87 (1963), or otherwise, at said hearing. (R. 138-151; T. 2289-2449).

The record reflects that the only mention of Brady was prior to trial. (T. 1703). Defense counsel inquired about witness Jenkin's statement. Id. The prosecutor responded that defense counsel, "already has it. We will.give him another copy." Id. Defense counsel did not dispute the representation. Defense counsel then stated that he had not been told of any deals or immunity for Jenkins' testimony, and if such deals existed, they were Brady material. (T. 1703-04). The prosecutor responded that the witness had been deposed by the defense, and any deals were discussed in the

depositions. (T. 1704). The prosecutor also represented that he had written a letter and had had telephone conversations with defense counsel in the previous week whereby he had informed counsel that if he had not received something or had questions, 'let's do it over the phone and I'll make sure you get what you need." (T. 1705). Defense counsel had never called. Id. Defense counsel responded that, "in preparing this week, I found that I didn't have any written letter or document of any deal, granting of immunity." Id.

The State provided the written plea agreement at the next recess that afternoon, on March 25, 1991. (T. 1736). According to defense counsel, Jenkins, "didn't tell me in his deposition that he had a written, signed, plea agreement." Defense counsel stated that he had not been provided with the written agreement at the time of Jenkins' deposition, that the agreement was "Brady material," and that he was not entitled to re-depose Jenkins on the agreement. Id. The trial court allowed counsel to re-depose Jenkins. (T. 1737). No other argument or claim was made at trial or post-trial with respect to this matter. Mr. Jenkins testified at trial, almost two weeks after the above said events, on April 9, 1991.

The record is thus abundantly clear that defense counsel had deposed Jenkins and been told of his plea agreement; that the prosecutor had previously offered to provide any documents not received by the defense, upon the latter's telephonic request; and

that the written plea and the opportunity to re-depose Jenkins were provided at least two weeks prior to this witness' testimony at trial. Moreover, there were no allegations of any prejudice during or after trial with respect to this matter. The State thus respectfully submits that no Brady violation has been demonstrated. The State did not "suppress" any information, and the defense fully cross-examined this witness with respect to the plea agreement at trial. See, e.g. Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993) ("There is no Brady violation where the information is equally accessible to the defense and prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence.") .

C. **Defense Counsel's Actions Did Not Deprive The Defendant Of A Fair And Impartial Trial.**

The Appellant claims that former defense counsel Soven requested that the defendant's family give additional funds, 'and he told them he could not do an adequate job unless he received more money." Brief of Appellant at p. 63. According to the Appellant, the defendant was prejudiced due to, "the inference that Mr. Robinson's counsels might not have worked as diligently as required without the additional money requested." Id. Once again, the Appellant has neglected to mention that there was an evidentiary hearing on these allegations, and that the lower court rejected the Appellant's factual premise in light of the evidence presented.

Prior to the evidentiary hearing, the defendant's wife had filed an affidavit stating that defense counsel, Soven, had told her he needed more money "in order to properly prepare for trial." (R. 152). Mrs. Robinson represented that she had thus given $1,000 cash to defense counsel, and had given the defendant's father $1,000 to give counsel. (R. 153). At the evidentiary hearing, however, Mrs. Robinson testified that Mr. Soven had, both before and during trial, 'said that he needed ten grand, and Bobbie would walk free." (T. 2385). According to Mrs. Robinson, Mr. Soven stated he needed the money, "so Bobbie could walk, and him and [judge] Sepe to have dinner together." Id. The amounts stated in Mrs. Robinson's affidavit also changed during the course of her testimony. She stated that Mr. Soven had collected $3,000. (T. 2386). She had personally paid him twice, $1,000 each time, although she did not remember the specifics of said occasions. (T. 2385-87). The defendant's father had also given, "money that he collected by Bobbie's friends." (T. 2386).

The defendant's father testified that prior to trial, Mr. Soven told him that, 'if he got some money, he could do more of a better job." (T. 2405). Mr. Robinson refused to give any money. Subsequently, however, he delivered $1,000, in an envelope, to Mr. Soven's office, because, "it was sent to me." (T. 2406). Mr. Robinson then added that the money, "wasn't sent, Valerie brought it," and asked him to deliver it. Id. According to this witness, Mr.

Soven had never mentioned the judge. (T. 2408).

Co-counsel Wax testified that the defendant's father came to counsel's office and handed him an envelope for Mr. Soven, who was not present at the time. (T. 2299-2300). Mr. Wax subsequently gave Mr. Soven the envelope, and was present when the latter opened it. (T. 2300, 2305). The envelope contained $1,000. (T. 2300). Mr. Soven "was surprised". Id. 'He assumed it was a gift". Id. Mr. Wax had no knowledge that Mr. Soven had asked the Robinsons for money. (T. 2302). Mr. Wax also stated that there was nothing that was not done in the case because of any lack of funds. (T. 2310).

Mr. Soven also admitted to having received the $1,000 delivered by the defendant's father. (T. 2329). Mr. Soven unequivocally denied ever having asked any of the Robinsons for any money. (T. 2329-31; 2354-5; 2433-34). He also denied having received any other monies from the defendant or his family. Id. Mr. Soven testified that he had never implied or suggested any promise that the defendant would "walk," nor had he in any way solicited any money on anybody else's behalf. (T. 2434). He stated that he was surprised when the money was delivered. (T. 2334). In response to the court's inquiry, Mr. Soven stated that he had not viewed the money as compensation, but rather as a nice **way** of the family having shown their appreciation of his hard work. (T. 2356). In terms of any effect on the defendant's representation, Mr. Soven stated that the money, "may

have made me try harder, if anything." (T. 2339). Mr. Soven added that the court had provided adequate funds, and there was never any lack of money for preparing the defense. (T. 2339-40).

With respect to the theory of defense, Mr. Soven stated that initially there was no theory due to overwhelming evidence of guilt. (T. 2316). However, subsequently two theories were developed. Id. The first theory was that the defendant "did not do it, a relative of his, a "G" man did it." Id. That defense was rejected by the defendant and his wife, since 'G' was a relative. Id. The defendant was adamant that "G" not be involved in the case; G had a child with the defendant's sister. (T. 2341). Moreover, although one of the co-defendants had implicated G, the other two co-defendants had directly implicated the defendant. (T. 2318). Mr. Soven thus testified, "we would have been killed with that defense." (T. 2342).

The second theory, that the victim's son was responsible for the murder, was presented by the defendant and his wife. (T. 2317, 2342). There was no other defense after the "G" theory was rejected by the defendant. (T. 2350). Mr. Soven thus investigated this line of defense. Id. The investigation revealed that the victim's son had a criminal history involving guns and drugs, that there was a life insurance policy of approximately 100,000, and, that the son's girlfriend was willing to testify that there had been a violent argument between the victim and his son on the day of the murder.

(T. 2319). Mr. Soven had not personally spoken to the girlfriend; his investigator had done so. (T. 2320). The friend was not "yet sold", and the investigator needed more time to get close to her. Id. The defendant and his wife had also promised to provide witnesses. (T. 2342). However, the defendant also wanted a speedy trial demand filed, and stated that if Mr. Soven did not file one then he would. (T. 2356). This defense was thus utilized at opening, as there were no other defenses available. Id. The witnesses did not materialize, and after consultation with co-counsel, Mr. Soven provided a reasonable explanation to the jury at closing argument; that he had shocked them into listening to the witnesses carefully, and holding the State to its high burden of proof. (T. 1340-42).

The substitute judge found that the $1,000 given to Mr. Soven by the defendant's father, 'was done freely." (T. 2440-41). The money was not in compensation for any services. Id. The money had not created a conflict between defendant and counsel. (T. 2449). The lower court also found that the issue had not affected the outcome. (T. 2448).

Appellant's argument that defense counsel improperly solicited funds from the defendant is thus without merit, in light of the above evidence and findings. Moreover, as in the court below, the Appellant has not shown any prejudice. See, e.g., Downs v. State, 453 So. 2d 1102 (Fla. 1984) (a contingency fee contract in a criminal

case, while improper and unethical, does not alone establish denial of effective counsel).

The defense counsel, faced with the defendant's adamant rejection of one poor defense, proceeded with the theory insisted upon by the defendant. There was no deficient conduct. Moreover, in light of the overwhelming evidence of guilt, no prejudice has been demonstrated. United States v. Teague, 953 F. 2d 1525, 1533 (11th Cir. 1992) (en banc) 'It is important to remember that while defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense."); Mulligan v. Kemp, 771 F. 2d 1436, 1442 (11th Cir. 1985) Where defense counsel is, "commanded by his client to present a certain defense, and if he does thoroughly explain the potential problems with the suggested approach, then his ultimate decision to follow the client's will may not be lightly disturbed."); Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) 'The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.").

X.

ALLEGED CUMULATIVE EFFECT OF ERRORS DID NOT DEPRIVE THE DEFENDANT OF A FAIR TRIAL.

The Appellant asserts that the alleged collective effect of

errors warrants reversal. The Appellee relies on the preceding sections, and states: 1) most matters complained of were not objected to; 2) alleged errors were not fundamental; 3) any errors, whether viewed individually or cumulatively, were relatively minimal; and 4) the defendant received a fair trial. See, Sochor v. State, 619 So. 2d 285, 289-90 (Fla. 1993).

XI.

THE CLAIM OF FAILURE TO CONDUCT A NEW PENALTY PHASE BEFORE A JURY, WHERE THERE WAS NO REQUEST TO DO SO, IS PROCEDURALLY BARRED.

This issue has been presented in the Supplemental Brief of Appellant. The Appellee has fully addressed this issue in point IV C, at pp. 40-43. Said arguments are relied upon herein.

CONCLUSION

Based on the foregoing, convictions and sentence should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by prepaid first class mail to **PAUL McKENNA, ESQ.,** and **CURT OBRONT, ESQ .,** McKenna & Obront, 2666 Tigertail Avenue, Suite 104, Coconut Grove, Florida 33133, on this 27th day of February, 1997.

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